



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

Law Library
Univ. of Calif.
Berkeley

COPY 3

THE
ATLANTIC REPORTER,
VOLUME 37,

CONTAINING ALL THE DECISIONS OF THE

Supreme Courts of MAINE, NEW HAMPSHIRE, VERMONT, RHODE ISLAND,
CONNECTICUT, and PENNSYLVANIA; Court of Errors and Appeals,
Court of Chancery, and Supreme and Prerogative Courts
of NEW JERSEY; Court of Errors and Appeals and
Court of Chancery of DELAWARE; and
Court of Appeals of MARYLAND.

PERMANENT EDITION.

MAY 5—AUGUST 25, 1897.

WITH TABLES OF ATLANTIC CASES PUBLISHED IN VOLS. 68, CONNECTICUT REPORTS; 89, MAINE REPORTS; 84, MARYLAND REPORTS; 54, NEW JERSEY EQUITY REPORTS; 58, NEW JERSEY LAW REPORTS; 179 AND 180, PENNSYLVANIA STATE REPORTS.

A TABLE OF STATUTES CONSTRUED IS GIVEN
IN THE INDEX.

ST. PAUL:
WEST PUBLISHING CO.
1897.

Law Library

COPYRIGHT, 1897,

BY

WEST PUBLISHING COMPANY.

JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

CONNECTICUT—Supreme Court of Errors.

CHARLES B. ANDREWS, CHIEF JUSTICE.

ASSOCIATE JUDGES.

DAVID TORRANCE.
AUGUSTUS H. FENN.

SIMEON E. BALDWIN.
WILLIAM HAMERSLEY.

DELAWARE—Court of Errors and Appeals.¹

JOHN R. NICHOLSON, CHANCELLOR.²

CHARLES B. LORE, CHIEF JUSTICE.³

ASSOCIATE JUSTICES.

IGNATIUS C. GRUBB.⁴
CHARLES M. CULLEN.⁵
WILLIAM C. SPRUANCE.⁶

DAVID T. MARVEL.⁷
WILLIAM H. BOYCE.⁸
JAMES PENNEWILL.⁹

Court of Chancery.

JOHN R. NICHOLSON, CHANCELLOR.

MAINE—Supreme Judicial Court.

JOHN A. PETERS, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

CHARLES W. WALTON.¹⁰
LUCILIUS A. EMERY.
ENOCH FOSTER.
SEWALL C. STROUT.

THOMAS H. HASKELL.
WM. PENN WHITEHOUSE.
ANDREW P. WISWELL.
ALBERT R. SAVAGE.¹¹

MARYLAND—Court of Appeals.

JAMES MCSHERRY, CHIEF JUDGE.

ASSOCIATE JUDGES.

WILLIAM SHEPARD BRYAN. DAVID FOWLER.
JOHN P. BRISCOE. CHARLES B. ROBERTS.
GEORGE M. RUSSUM. HENRY PAGE.
A. HUNTER BOYD.

NEW HAMPSHIRE—Supreme Court.

CHARLES DOE, CHIEF JUSTICE.¹²

ASSOCIATE JUSTICES.

ISAAC W. SMITH.¹³
LEWIS W. CLARK.
ISAAC N. BLODGETT.

ALONZO P. CARPENTER.
WILLIAM M. CHASE.
ROBERT M. WALLACE.

FRANK N. PARSONS.¹⁴

¹Term of all judges expired June 10, 1897, under new constitution.

²Reappointed June 10, 1897.

³Reappointed June 12, 1897.

⁴Reappointed June 12, 1897.

⁵Not reappointed.

⁶Appointed June 11, 1897.

⁷Not reappointed.

⁸Appointed June 17, 1897.

⁹Appointed June 14, 1897.

¹⁰Term expired May 15, 1897.

¹¹Appointed May 15, 1897.

¹²Deceased March 9, 1896.

¹³Retired May, 1895.

¹⁴Appointed May 21, 1893.

NEW JERSEY—Court of Errors and Appeals.

ALEXANDER T. MCGILL, CHANCELLOR.

MERCER BEASLEY, CHIEF JUSTICE.¹WILLIAM J. MAGIE, CHIEF JUSTICE.²

JUSTICES.

DAVID A. DEPUE.

BENNETT VAN SYCKEL.

JONATHAN DIXON.

WILLIAM J. MAGIE.³

CHARLES G. GARRISON.

JOB H. LIPPINCOTT.

WILLIAM G. GUMMERE.

GEORGE C. LUDLOW.

GILBERT COLLINS.⁴

JUDGES.

H. H. BROWN.

GOTTFRIED KRUEGER.

JOHN W. BOGERT.

CLIFFORD S. SIMS.

GEORGE F. SMITH.

ALBERT R. TALMAN.

CHARLES E. HENDRICKSON.

WILLIAM L. DAYTON.

JOHN S. BARKALOW.⁵

JAMES H. NIXON.

FREDERIC ADAMS.⁶**Court of Chancery.**

ALEXANDER T. MCGILL, CHANCELLOR.

VICE-CHANCELLORS.

JOHN T. BIRD.⁷

HENRY C. PITNEY.

JOHN R. EMERY.

ALFRED REED.

FREDERIC W. STEVENS.

MARTIN P. GREY.

Supreme Court.MERCER BEASLEY, CHIEF JUSTICE.⁸WILLIAM J. MAGIE, CHIEF JUSTICE.⁹

ASSOCIATE JUSTICES.

DAVID A. DEPUE.

BENNETT VAN SYCKEL.

WILLIAM J. MAGIE.¹⁰

JOB H. LIPPINCOTT.

JONATHAN DIXON.

CHARLES G. GARRISON.

WILLIAM S. GUMMERE.

GEORGE C. LUDLOW.

GILBERT COLLINS.¹¹**Prerogative Court.**

ALEXANDER T. MCGILL, ORDINARY.

VICE-ORDINARY.

JOHN T. BIRD.

ALFRED REED.¹²**PENNSYLVANIA—Supreme Court.**

JAMES P. STERRETT, CHIEF JUSTICE.

JUSTICES.

HENRY GREEN.

HENRY W. WILLIAMS.

J. BREWSTER MCCOLLUM.

JAMES T. MITCHELL.

JOHN DEAN.

D. NEWLIN FELL.

RHODE ISLAND—Supreme Court.

CHARLES MATTESON, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

JOHN H. STINESS.

PARDON E. TILLINGHAST.

WILLIAM W. DOUGLAS.

GEORGE A. WILBUR.

HORATIO ROGERS.

BENJAMIN M. BOSWORTH.¹³**VERMONT—Supreme Court.**

JONATHAN ROSS, CHIEF JUDGE.

ASSISTANT JUDGES.

RUSSELL S. TAFT.

JOHN W. ROWELL.

JAMES M. TYLER.

LOVELAND MUNSON.

HENRY R. START.

LAFOREST H. THOMPSON.

¹ Deceased.² Appointed March 1, 1897.³ Promoted to Chief Justiceship.⁴ Appointed March 8, 1897.⁵ Resigned March 23, 1897.⁶ Appointed March 29, 1897.⁷ Term expired April 14, 1896.⁸ Deceased.⁹ Appointed March 1, 1897.¹⁰ Promoted to Chief Justiceship.¹¹ Appointed March 8, 1897.¹² Appointed January 2, 1897.¹³ Appointed May, 1897.

CASES REPORTED.

	Page		Page
Abbott, West Jersey R. Co. v. (N. J. Err. & App.)	1104	Bateman, Polhemus v. (N. J. Err. & App.)	1015
Abraham v. Mercantile Trust & Deposit Co. of Baltimore (Md.)	646	Batory, Hobbs v. (Md.)	713
Acme Manuf'g Co. v. Reed (Pa.)	552	Battersby v. Castor (Pa.)	572
Aetna Life Ins. Co., Real Estate Title Insurance & Trust Co. of Philadelphia v. (Pa.)	639	Beane, Gregg v. (Vt.)	248
Alderson, Kelly v. (R. I.)	12	Beatty, Appeal of (Pa.)	582
Allegheny County, Edwards v. (Pa.)	337	Beaver v. Slear (Pa.)	991
Allen v. Borough of Du Bois (Pa.)	195	Beberdick, Crevier v. (N. J. Sup.)	939
Allen, Carroll v. (R. I.)	704	Beckwith, Hanson v. (R. I.)	702
Allen, Runstead v. (Md.)	15	Behanna, O'Neil v. (Pa.)	843
Allen, Warwick & Coventry Water Co. v. (R. I.)	1119	Behr, Consolidated Traction Co. v. (N. J. Err. & App.)	142
Alling v. Forbes (Conn.)	390	Belden v. Sedgwick (Conn.)	417
Altona & P. Connecting R. Co., Smith v. (Pa.)	930	Bell v. Samuels (N. J. Sup.)	613
Alva Glass Manuf'g Co., Mingin v. (N. J. Ch.)	450	Bell v. Wood (Pa.)	201
American Carbon-Black Co., Boyd v. (Pa.)	937	Bender v. Streabich (Pa.)	853
American Fire Ins. Co., Pennsylvania Company for Insurance on Lives and Granting Annuities v. (Pa.)	1119	Bennett v. Davis (Me.)	864
American Ship-Windlass Co., Pardey v. (R. I.)	706	Bennett, Read v. (N. J. Err. & App.)	75
Annan v. Hays (Md.)	20	Bennett, Trenton Pass. R. Co., Consolidated, v. (N. J. Err. & App.)	730
Appleby v. Mowry (R. I.)	306	Bentley, Moran v. (Conn.)	1092
Appleton, Garretson v. (N. J. Err. & App.)	150	Bentz v. Maryland Bible Soc. (Md.)	708
Arnold, Talcott v. (N. J. Err. & App.)	891	Berger v. Bullock (Md.)	368
Ashborne v. Town of Waterbury (Conn.)	498	Beringer v. Lutz (Pa.)	640
Ashhurst, Potter v. (N. J. Err. & App.)	1117	Berking, Guimaraes v. (N. J. Ch.)	1117
Atkins' Estate v. Atkins' Estate (Vt.)	746	Beverwyck Brewing Co. v. Oliver (Vt.)	1110
Atkinson, Patterson v. (R. I.)	532	Biddle, McKean v. (Pa.)	528
Atlantic Highlands, R. B. & L. B. Electric R. Co., New York & L. B. R. Co. v. (N. J. Err. & App.)	736	Bigelow v. Cross (Vt.)	969
Augustine, Wolf v. (Pa.)	574	Bindernagle v. State (N. J. Sup.)	619
Bacon v. Casco Bay Steamboat Co. (Me.)	328	Birbeck Investment, Savings & Loan Co. of America v. Gardner (N. J. Ch.)	767
Bacon v. Devinney (N. J. Ch.)	144	Black, Rich v. (Pa.)	401
Badger v. State (Vt.)	286	Board of Chosen Freeholders of County of Camden v. Collins (N. J. Sup.)	623
Badger, State v. (Vt.)	293	Board of Chosen Freeholders of County of Camden, Troth v. (N. J. Err. & App.)	1017
Bagley v. Mason (Vt.)	287	Board of Chosen Freeholders of Hudson County, Clayton v., two cases (N. J. Sup.)	725
Bailey, New England Granite Works v. (Vt.)	1043	Board of Chosen Freeholders of Mercer County, Willits Manuf'g Co. v. (N. J. Sup.)	609
Bailey, Sowles v. (Vt.)	751	Board of Public Works of City of Camden, West Jersey Traction Co. v. (N. J. Sup.)	578
Baker v. Hedrich (Md.)	363	Bogue v. Town of Montville (Conn.)	1078
Baker v. Pennsylvania R. Co. (Pa.)	933	Booraem's Estate, In re (N. J. Prerog.)	727
Baker, Stanbery v. (N. J. Ch.)	351	Booth Brothers & Hurricane Isle Granite Co., Donnelly v. (Me.)	874
Baldwin v. Fair Haven & W. R. Co. (Conn.)	418	Boothby, Tillinghast v. (R. I.)	344
Baldwin v. Trimble (Md.)	176	Borie v. Satterthwaite (Pa.)	102
Baldwin Memorial Methodist Episcopal Church v. Rice (Md.)	1115	Borough of Brigantine v. Holland Trust Co., two cases (N. J. Ch.)	438
Ball Electric Light Co. v. Child (Conn.)	391	Borough of Brigantine, Philadelphia & B. R. Co. v. (N. J. Sup.)	437
Ballmer, Appeal of (Pa.)	999	Borough of Carlstadt v. Committee of Township of Bergen (N. J. Sup.)	612
Baltimore Belt R. Co., McColgan v. (Md.)	716	Borough of Du Bois, Allen v. (Pa.)	195
Baltimore City Pass. R. Co., Hooper v. (Md.)	359	Borough of Glen Ridge, Inhabitants of Township of Bloomfield v. (N. J. Err. & App.)	63
Baltimore & Y. Turnpike Co. v. Green (Md.)	642	Borough of Glen Ridge, Inhabitants of Township of Bloomfield v. (N. J. Err. & App.)	1117
Bamberger v. Johnson (Md.)	900	Borough of Olyphant, Gallagher v. (Pa.)	258
Baughart, Iliff v. (N. J. Sup.)	894	Borough of Vineland, Landis v. (N. J. Sup.)	625
Bannister, Miller v. (N. J. Err. & App.)	1117	Borough of Vineland, Landis v. (N. J. Sup.)	1099
Barabasz v. Kabat (Md.)	720	Bossa, Fessenden v. (Conn.)	977
Barber, Butterfield v. (R. I.)	532	Botsford v. Wallace (Conn.)	902
Barber, Gunner v. (Pa.)	848	Bourne v. Bourne (Vt.)	1049
Barclay Tp., Haines v. (Pa.)	560	Bouton v. Doty (Conn.)	1064
Barnaby v. Bradley & Currier Co. (N. J. Err. & App.)	764	Bowles, Faith v. (Md.)	711
Barr v. Voorhees (N. J. Err. & App.)	134		
Barry, Thresher v. (Conn.)	1064		

	Page		Page
Boyd v. American Carbon-Black Co. (Pa.)	937	Chatterton v. Mason (Md.)	960
Boyle v. McWilliams (Conn.)	501	Chelsea Paper Manuf'g Co., Ryan v. (Conn.)	1062
Braddock Trust Co. v. Guarantee Trust & Safe-Deposit Co. of Philadelphia (Pa.)	101	Chester County, West Chester & W. Plank-Road Co. v. (Pa.)	905
Bradford v. Stone (R. I.)	532	Chick, Hargraves v. (N. H.)	672
Bradley & Currier Co., Barnaby v. (N. J. Err. & App.)	764	Chick, Rochester Sav. Bank v. (N. H.)	672
Bradneck, State v. (Conn.)	492	Chick, Somersworth Nat. Bank v. (N. H.)	672
Bradshaw v. Parker (N. J. Sup.)	444	Chick, Somersworth Sav. Bank v. (N. H.)	672
Brady v. Eliot (Pa.)	343	Chick, Tucker v., two cases (N. H.)	672
Brafman, Warth v. (Md.)	792	Child, Ball Electric Light Co. v. (Conn.)	391
Brand, De Baun v. (N. J. Sup.)	726	Christenson v. Carleton (Vt.)	226
Bray v. Ocean City R. Co. (N. J. Ch.)	604	Christian Building & Loan Ass'n v. Walton (Pa.)	261
Bray, City of Pawtucket v. (R. I.)	1	Citizens' Traction Co., Thompson v. (Pa.)	205
Breneman, Potts v. (Pa.)	1002	City of Ansonia, Walsh v. (Conn.)	1096
Brennan, Kelly v. (N. J. Ch.)	137	City of Atlantic City, Young & McShea Amusement Co. v. (N. J. Sup.)	444
Bridgeport Traction Co., Laufer v. (Conn.)	379	City of Auburn v. Union Water-Power Co. (Me.)	335
Briggs Assignees, First Nat. Bank of Brandon v. (Vt.)	231	City of Auburn, Union Water-Power Co. v. (Me.)	331
Brinton, Scull v. (N. J. Err. & App.)	740	City of Baltimore v. Broumel (Md.)	648
Bristow v. Nichols (R. I.)	1033	City of Baltimore v. Coates (Md.)	18
Brodie v. Mitchell (Md.)	169	City of Barre, Gilley v. (Vt.)	1111
Broumel, City of Baltimore v. (Md.)	648	City of Bayonne, Vreeland v. (N. J. Err. & App.)	737
Brown v. Town of Swanton (Vt.)	280	City of Bridgeport, Town of New Haven v. (Conn.)	397
Brown, Longstreet v. (N. J. Ch.)	56	City of Cape May v. Cape May, D. B. & S. P. R. Co. (N. J. Err. & App.)	892
Browne, Phillips v. (R. I.)	490	City of Chester v. Eyre (Pa.)	837
Browning v. O'Donnell (N. J. Sup.)	613	City of Danbury, Hoyt v. (Conn.)	1051
Brown's Ex'r v. Hitchcock (Vt.)	292	City of Hagerstown v. Witmer (Md.)	965
Brown University, Lyon v. (R. I.)	309	City of Hartford, Fisk v. (Conn.)	983
Bruce, State v. (Vt.)	238	City of Hoboken v. Laverty (N. J. Sup.)	437
Bruch v. City of Philadelphia (Pa.)	818	City of Hoboken, Tallon v. (N. J. Err. & App.)	895
Bryant, Landon v. (Vt.)	297	City of Jersey City v. Tallman (N. J. Err. & App.)	1026
Buchanan, Lord v. (Vt.)	1048	City of Jersey City, Erwin v. (N. J. Err. & App.)	732
Bucknam, Merritt v. (Me.)	885	City of Lancaster, Owens v. (Pa.)	858
Budd v. Meriden Electric R. Co. (Conn.)	683	City of Newark, Delaware, L. & W. R. Co. v. (N. J. Sup.)	629
Bull v. Mathews (R. I.)	536	City of Pawtucket v. Bray (R. I.)	1
Bullock, Berger v. (Md.)	368	City of Pawtucket, O'Brien v. (R. I.)	302
Bullock, Murphy v. (R. I.)	348	City of Pawtucket, O'Brien v. (R. I.)	530
Bunnell, Chatfield v. (Conn.)	1074	City of Perth Amboy v. Ramsay (N. J. Sup.)	446
Burk, Seeds v. (Pa.)	511	City of Philadelphia, Bruch v. (Pa.)	818
Burnett v. State (N. J. Sup.)	622	City of Philadelphia, Filbert v. (Pa.)	545
Burnham v. Courser (Vt.)	288	City of Philadelphia, Pepper v. (Pa.)	579
Burns v. Smith (Pa.)	105	City of Philadelphia, Ridge Ave. Pass. R. Co. v. (Pa.)	910
Butterfield v. Barber (R. I.)	532	City of Philadelphia, Rodgers v. (Pa.)	330
		City of Waterbury, La Barre v. (Conn.)	1068
Cabot v. Kent (R. I.)	945	City of Wilmington, English v. (Del. Err. & App.)	158
Caledonia Fire Ins. Co. of Scotland v. Traub (Md.)	782	Clad v. Paist (Pa.)	194
Camden, G. & W. R. Co., Young v. (N. J. Err. & App.)	1013	Claghorn, Shum v. (Vt.)	236
Camden & A. R. Co., Williams v. (N. J. Sup.)	1107	Claghorn's Estate, In re (Pa.)	918
Camp v. Ward (Vt.)	747	Claghorn's Estate, In re (Pa.)	921
Camp, Campbell v. (Vt.)	238	Clark, Lewis v. (Md.)	1035
Campbell, Appeal of (Pa.)	181	Clark, Mooney v. (Conn.)	506, 1080
Campbell, Appeal of (Pa.)	204	Clark, Ohio Brass Co. v. (Md.)	890
Campbell v. Camp (Vt.)	238	Clark Co., Clark Thread Co. v. (N. J. Ch.)	590
Canadian Pac. R. Co., Leavitt v. (Me.)	886	Clarke, State v. (Conn.)	975
Cape May, D. B. & S. P. R. Co., City of Cape May v. (N. J. Err. & App.)	892	Clark Thread Co. v. William Clark Co. (N. J. Ch.)	599
Carkin, State v. (Me.)	378	Clayton v. Board of Chosen Freeholders of Hudson County, two cases (N. J. Sup.)	725
Carle, In re (N. J. Sup.)	608	Cleaver v. Lenhart (Pa.)	811
Carleton, Christenson v. (Vt.)	226	Clement, Darling v. (Vt.)	779
Carlisle Gas & Water Co. v. Carlisle Water Co. (Pa.)	821	Clendenin v. Maryland Const. Co. of Baltimore City (Md.)	709
Carlisle Water Co., Carlisle Gas & Water Co. v. (Pa.)	821	Clifford v. State (N. J. Sup.)	1101
Carr, Hertz v. (N. J. Err. & App.)	1117	Coates v. Wilson (R. I.)	537
Carroll v. Allen (R. I.)	704	Coates, City of Baltimore v. (Md.)	18
Casco Bay Steamboat Co., Bacon v. (Me.)	328	Cockey v. Plempel (Md.)	792
Case v. Central R. Co. of New Jersey (N. J. Err. & App.)	65	Colchester Mills, Hayes v. (Vt.)	260
Castor, Battersby v. (Pa.)	572	Coleman v. Reynolds (Pa.)	543
Central R. Co. of New Jersey, Case v. (N. J. Err. & App.)	65	Coles v. Coles (N. J. Ch.)	1025
Central R. Co. of New Jersey, Goldsboro v. (N. J. Sup.)	433	Coll v. Easton Transit Co. (Pa.)	89
Central Wharf Steam Towboat Co., Inhabitants of Cumberland County v. (Me.)	867	Collins, Board of Chosen Freeholders of County of Camden v. (N. J. Sup.)	623
Chambers, Wilkinson v. (Pa.)	569		
Chandler v. Mills (N. J. Prerog.)	603		
Charles E. Hires Co. v. Hires (Pa.)	1117		
Charles Warner Co., Ford v. (Del. Super.)	39		
Chase v. Chase (R. I.)	804		
Chassaing v. Durand (Md.)	362		
Chatfield v. Bunnell (Conn.)	1074		

	Page		Page
Colt v. Sears Commercial Co. (R. I.)	311	Dorris, Appeal of (Pa.)	1000
Commercial Nat. Bank, Appeal of (Pa.)	921	Doty, Bouton v. (Conn.)	1064
Committee of Township of Bergen, Borough of Christadt v. (N. J. Sup.)	612	Dougherty, Haverford Loan & Building Ass'n of Philadelphia v. (Pa.)	179
Commonwealth v. Eisenhower (Pa.)	521	Downing, Kelley v. (Vt.)	968
Commonwealth v. Jongrass (Pa.)	207	Drew, McKindley v. (Vt.)	285
Commonwealth v. Pittsburg Illuminating Co. (Pa.)	107	Drovers' & Mechanics' Nat. Bank v. Roller (Md.)	30
Commonwealth v. Sturtevant (Pa.)	916	Dube, New England Steam Brick Co. v. (R. I.)	14
Commonwealth v. Valsalka (Pa.)	405	Dubois v. Sherry (R. I.)	344
Commonwealth v. Zacharias (Pa.)	185	Duffy v. Kelly (N. J. Ch.)	597
Conshohocken Tube Co. v. Philadelphia & R. R. Co. (Pa.)	190	Dugan, Parlett v. (Md.)	36
Consolidated Gas Co. of Baltimore City State v. (Md.)	263	Dunham, Doremus v. (N. J. Err. & App.)	62
Consolidated Traction Co. v. Behr (N. J. Err. & App.)	142	Dunklee v. Hooper (Vt.)	225
Consolidated Traction Co. v. Glynn (N. J. Err. & App.)	66	Dunlap's Appeal, In re (Pa.)	928
Consolidated Traction Co. v. Haight (N. J. Err. & App.)	135	Dunn v. McNamee (N. J. Err. & App.)	61
Consolidated Traction Co. v. Thalheimer (N. J. Err. & App.)	132	Dunwoodie, Rowell v. (Vt.)	227
Consolidated Traction Co. v. Whelan (N. J. Err. & App.)	1106	Durand, Chassaing v. (Md.)	362
Contested Election of Cardin, In re (Pa.)	1118	Duryee v. United States Credit System Co. (N. J. Ch.)	155
Contested Election of Flynn, In re (Pa.)	523	Dutton's Estate, In re (Pa.)	582
Contested Election of Lawlor, In re (Pa.)	92	Dwelling House Ins. Co., Snyder v. (N. J. Err. & App.)	1022
Conway's Estate, In re (Pa.)	204	Dyer v. Cranston Print Works Co. (R. I.)	632
Cooney v. Lincoln (R. I.)	1031	Dyer v. Dean (Vt.)	1113
Cooper, Isham v. (N. J. Ch.)	462	Dyer, Thresher v. (Conn.)	979
Cooper, Trenton Pass. R. Co., Consolidated, v. (N. J. Err. & App.)	730	East Greenwich Inst. for Savings v. Kenyon (R. I.)	632
Corey v. Howard (R. I.)	946	Easton Transit Co., Coll v. (Pa.)	89
Cosgrove v. Merz (R. I.)	704	Eaton, Harris v. (R. I.)	308
Cottrell, State v. (R. I.)	947	Edmunds, Swain v. (N. J. Err. & App.)	1117
Courser, Burnham v. (Vt.)	288	Edwards v. Allegheny County (Pa.)	337
Coxe's Estate, In re (Pa.)	517	Eisenhower, Commonwealth v. (Pa.)	521
Coyle, In re (Pa.)	1118	Eiserman v. Schneider (N. J. Sup.)	623
Cranston Print Works Co., Dyer v. (R. I.)	632	Electric Traction Co., Kline v. (Pa.)	522
Crevier v. Beberdick (N. J. Sup.)	959	Elliott, Brady v. (Pa.)	343
Cross, Bigelow v. (Vt.)	969	Elliott v. Jenkins (Vt.)	272
Cumberland Val. R. Co., Hoffman v. (Md.)	214	Ellison v. Gray (N. J. Err. & App.)	1018
Currie v. Lehigh Valley Terminal R. Co. (N. J. Err. & App.)	1117	Embley v. Embley (N. J. Ch.)	46
Cutler v. Skeels (Vt.)	228	English v. City of Wilmington (Del. Err. & App.)	158
C. & C. Electric Co. v. St. Clair (Pa.)	814	Enright, In re (Vt.)	1046
Daley, Appeal of (Pa.)	261	Enslin v. Enslin (N. J. Ch.)	442
Dalton, State v. (R. I.)	673	Equitable Life Assur. Soc. of the United States, Planer v. (N. J. Ch.)	668
Daneck v. Pennsylvania R. Co. (N. J. Err. & App.)	59	Erie Electric Motor Co., Woeckner v. (Pa.)	936
Darling v. Clement (Vt.)	779	Erie & W. V. R. Co., Welsh v. (Pa.)	513
Davis, Bennett v. (Me.)	864	Erwin v. City of Jersey City (N. J. Err. & App.)	732
Davis, Russell v. (Vt.)	746	Essex County Electric Co. v. Kelly (N. J. Sup.)	619
Dean, Dyer v. (Vt.)	1113	Etchison, Ritter v. (Md.)	795
De Baun v. Brand (N. J. Sup.)	726	Executive Ass'n of Wholesale Grocers of New England, Midwood v. (R. I.)	946
Decker v. Lehigh Val. R. Co. (Pa.)	570	Eyre, City of Chester v. (Pa.)	837
Delaware, L. & W. R. Co. v. City of Newark (N. J. Sup.)	629	Fair Haven Marble & Marbleized Slate Co. v. Owens (Vt.)	749
Delaware & H. Canal Co. v. Scranton Traction Co. (Pa.)	1118	Fair Haven & W. R. Co., Baldwin v. (Conn.)	418
Delaware & H. Canal Co. v. Scranton & P. Traction Co. (Pa.)	122	Faith v. Bowles (Md.)	711
Delaware & H. Canal Co., Manley v. (Vt.)	278	Fallon, Healy v. (Conn.)	495
Demuth v. Old Town Bank of Baltimore (Md.)	266	Farmers' Bank of Springville, N. Y., v. Shippey (Pa.)	844
Deni v. Pennsylvania R. Co. (Pa.)	558	Farnen, Hooper v. (Md.)	430
Denny, Diggs v. (Md.)	1037	Farrington v. Putnam (Me.)	652
Derby v. State (N. J. Sup.)	614	Fehrenbach, Peninsular Lumber Co. v. (Del. Super.)	38
Devaney, Bacon v. (N. J. Ch.)	144	Ferguson, Schutz v. (Md.)	211
Devlin v. Phoenix Iron Co. (Pa.)	927	Fessenden v. Bossa (Conn.)	977
De Wolf's Estate, In re (Pa.)	262	Fetherman's Estate, In re (Pa.)	516
Dice's Estate, In re (Pa.)	117	Field v. Hubbard (Vt.)	250
Dickhaut v. State (Md.)	21	Field, Tate v. (N. J. Ch.)	440
Diggs v. Denny (Md.)	1037	Filbert v. City of Philadelphia (Pa.)	545
Dodge, Ritt v. (R. I.)	810	Fineburg v. Second & Third Streets Pass. R. Co. (Pa.)	925
Dolby v. Hearn (Del. Super.)	45	Fink, National Bldg. & Sav. Ass'n v. (Pa.)	1009
Donahue v. Kelly (Pa.)	186	First Nat. Bank of Brandon v. Briggs' Assignees (Vt.)	231
Donnelly v. Booth Brothers & Hurricane Isle Granite Co. (Me.)	874	First Nat. Fire Ins. Co., Mascott v. (Vt.)	255
Donnelly v. McNally (R. I.)	810	Fishell v. Gray (N. J. Sup.)	606
Doremus v. Dunham (N. J. Err. & App.)	62	Fisk v. City of Hartford (Conn.)	983
Dorrance v. Dorranceton Borough (Pa.)	200		
Dorranceton Borough, Dorrance v. (Pa.)	200		

	Page		Page
Flanagan v. Philadelphia, W. & B. R. Co. (Pa.)	341	Grimm's Estate, In re (Pa.)	403
Fletcher, Sprague v. (Vt.)	239	Groman, Lawall v. (Pa.)	98
Flint, Grosvenor v. (R. I.)	304	Grosvenor v. Flint (R. I.)	304
Folk v. Schaeffer (Pa.)	104	Guarantee Trust & Safe-Deposit Co. of Philadelphia, Braddock Trust Co. v. (Pa.)	101
Folwell v. Providence Journal Co. (R. I.)	6	Guarantors' Liability Indemnity Co., Trenton Pass. R. Co. v. (N. J. Sup.)	609
Forbes v. Morse (Vt.)	295	Guarantors' Liability Indemnity Co. of Pennsylvania, Hey v. (Pa.)	402
Forbes, Alling v. (Conn.)	390	Guimaraes v. Berking (N. J. Ch.)	1117
Ford v. Charles Warner Co. (Del. Super.)	39	Gumaer v. Barber (Pa.)	848
Ford v. State (Md.)	172	Gunster v. Scranton Illuminating Heat & Power Co. (Pa.)	550
Forney, Krall v. (Pa.)	846	Gusdorff v. Schleisner (Md.)	170
Forrest, Price v. (N. J. Err. & App.)	1117		
Fowler v. Webster (Pa.)	102	Haight, Consolidated Traction Co. v. (N. J. Err. & App.)	135
Fowler, Mott v. (Md.)	717	Haines v. Barclay Tp. (Pa.)	560
Francis v. Francis (Pa.)	120	Hall v. Home Bldg. Co. (N. J. Ch.)	1019
Franklin Bank of Baltimore, Stockbridge v. (Md.)	645	Hall v. West Chester Pub. Co. (Pa.)	106
Franklin Fire Ins. Co., Pennsylvania Co. for Insurances on Lives & Granting Annuities v. (Pa.)	191	Hall, Smith v. (R. I.)	698
Fredericks v. Huber (Pa.)	90	Hamill v. Inventors' Manuf'g Co. (N. J. Ch.)	773
Freedman v. Providence-Washington Ins. Co. (Pa.)	909	Hammond v. Hammond (R. I.)	14
Freeman, Appeal of (Conn.)	420	Handley's Estate, In re (Pa.)	587
Freeman's Estate, In re (Pa.)	591	Handy v. Maddox (Md.)	222
Frick, Lake Roland El. R. Co. v. (Md.)	650	Handy's Estate, In re (Pa.)	854
Froehlich, Sharp v. (N. J. Sup.)	1024	Hanlon v. Philadelphia & W. C. Turnpike-Road Co. (Pa.)	943
Fullam v. Rose (Pa.)	197	Hanson v. Beckwith (R. I.)	702
Fussell, Hartranft v. (Pa.)	1118	Hargraves v. Chick (N. H.)	672
		Harris v. Eaton (R. I.)	308
Gallagher v. Borough of Olyphant (Pa.)	258	Harris v. Krause (N. J. Sup.)	439
Gallagher, Van Baman v. (Pa.)	832	Harris, Gleim v. (Pa.)	515
Galvin, Island Sav. Bank v. (R. I.)	809	Harris, Hartman v. (Pa.)	942
Galvin, National Exch. Bank v. (R. I.)	811	Harris, Rhode Island Hospital Trust Co. v. (R. I.)	701
Gano, Tomlinson v. (N. J. Sup.)	434	Hartford School Dist. v. School Dist. No. 13 in Hartford (Vt.)	252
Gardner v. Keihl (Pa.)	829	Hartman v. Harris (Pa.)	942
Gardner, Birbeck Investment, Savings & Loan Co. of America v. (N. J. Ch.)	767	Hartranft v. Fussell (Pa.)	1118
Garratt Ford Co. v. Vermont Manuf'g Co. (R. I.)	948	Harvey's Estate, In re (Pa.)	261
Garretson v. Appleton (N. J. Err. & App.)	150	Hasson v. Klee (Pa.)	184
Garrison v. Technic Electrical Works (N. J. Ch.)	741	Haugh, Kelly v. (N. J. Sup.)	435
Gay, Wyman v. (Me.)	325	Haverford Loan & Building Ass'n of Philadelphia v. Dougherty (Pa.)	179
Geer, Little v. (Conn.)	1056	Hayes v. Colchester Mills (Vt.)	269
Geuz v. State (N. J. Err. & App.)	69	Hays, Annan v. (Md.)	20
German Hospital, Mott v. (N. J. Ch.)	757	Haywood, Town of Newcastle v. (N. H.)	1040
Getty, State v. (Conn.)	687	Hazard, Providence Steam Carpet Beating Co. v. (R. I.)	635
Gibson, Stevens v. (Vt.)	244	Healy v. Fallon (Conn.)	495
Gilbert v. Kolb (Md.)	423	Healy v. New York, N. H. & H. R. Co. (R. I.)	676
Gilday v. Warren (Conn.)	494	Hearn, Dolhy v. (Del. Super.)	45
Gillette v. Goodspeed (Conn.)	973	Hedrich, Baker v. (Md.)	363
Gilley v. City of Barre (Vt.)	1111	Heilman v. Lebanon & A. St. R. Co. (Pa.)	119
Gilsey, Tarlton v. (N. J. Ch.)	467	Heimgaertner v. Stewart (Pa.)	93
Ginkinger, Schwab v. (Pa.)	125	Heindel, Lennon v. (N. J. Ch.)	147
Gittings, Miller v. (Md.)	372	Heisey v. Rapho Tp. (Pa.)	1118
Glazier v. New Jersey & N. Y. R. Co. (N. J. Sup.)	614	Heller, Appeal of (Pa.)	111
Gleim v. Harris (Pa.)	515	Henry v. Town of Haverhill (N. H.)	1039
Glynn, Consolidated Traction Co. v. (N. J. Err. & App.)	66	Henry Christian Building & Loan Ass'n v. Walton (Pa.)	261
Goat & Sheep Skin Import Co. v. Paschall (N. J. Sup.)	454	Hertz v. Carr (N. J. Err. & App.)	1117
Goff v. Hosmer (R. I.)	533	Hess v. Williamsport & N. B. R. Co. (Pa.)	568
Goldrick v. Union R. Co. (R. I.)	635	Hewitt v. Hewitt (N. J. Ch.)	1011
Goldsboro v. Central R. Co. of New Jersey (N. J. Sup.)	433	Hey v. Guarantors' Liability Indemnity Co. of Pennsylvania (Pa.)	402
Goodspeed, Gillette v. (Conn.)	973	Heyward v. Sanner (Md.)	798
Goodwin v. Goodwin (Me.)	352	Hill's Estate, In re (N. J. Prerog.)	952
Gorton, Hunt v. (R. I.)	706	Himmelreich v. Shaffer (Pa.)	1007
Goudy, Huston v. (Me.)	881	Hine, In re (Conn.)	384
Granger, Taylor v. (R. I.)	13	Hinkson v. Lees (Pa.)	338
Granite State Brick Co., Ladd v. (N. H.)	1041	Hires Co. v. Hires (Pa.)	1117
Granite State Fire Ins. Co., Jones v. (Me.)	326	Hires, Charles E. Hires Co. v. (Pa.)	1117
Grant, Johnson v. (R. I.)	707	Hitchcock, Brown's Ex'r v. (Vt.)	292
Gray v. Reynolds (N. J. Err. & App.)	461	Hobbs v. Batory (Md.)	713
Gray, Ellison v. (N. J. Err. & App.)	1018	Hoffman v. Cumberland Val. R. Co. (Md.)	214
Gray, Fishell v. (N. J. Sup.)	606	Hogan's Estate, In re (Pa.)	548
Gray, Lauer v. (N. J. Err. & App.)	53	Holland Trust Co., Borough of Brigantine v., two cases (N. J. Ch.)	438
Green v. McCrane (N. J. Ch.)	318	Holway v. Proprietors of Machias Boom, two cases (Me.)	882
Green, Kelsey v. (Conn.)	679	Home Ben. Soc. of New York, National Mut. Ins. Co. v. (Pa.)	519
Green, President, etc., of Baltimore & Y. Turnpike Road v. (Md.)	642	Home Bldg. Co., Hall v. (N. J. Ch.)	1019
Greene, Sprague v. (R. I.)	699		
Gregg v. Beane (Vt.)	248		
Griffin, McGowan v. (Vt.)	298		

	Page		Page
Hommer v. State (Md.)	26	Kehoe, Western Maryland R. Co. v. (Md.)	799
Hooker v. Hooker (N. J. Ch.)	773	Keihl, Gardner v. (Pa.)	829
Hooper v. Baltimore City Pass. R. Co. (Md.)	359	Keller, Appeal of (Pa.)	918
Hooper v. Farnen (Md.)	430	Kelley v. Downing (Vt.)	968
Hooper v. New (Md.)	424	Kelley v. Kelley (Pa.)	830
Hooper, Dunklee v. (Vt.)	225	Kelly v. Alderson (R. I.)	12
Hoos v. O'Donnell (N. J. Sup.)	72	Kelly v. Breunman (N. J. Ch.)	137
Hoos v. O'Donnell (N. J. Sup.)	447	Kelly v. Haugh (N. J. Sup.)	435
Hopkins v. Hopkins (Md.)	371	Kelly, Donahue v. (Pa.)	186
Hopkins v. Twigg (Md.)	24	Kelly, Duffy v. (N. J. Ch.)	597
Hornor, Royston v. (Md.)	718	Kelly, Essex County Electric Co. v. (N. J. Sup.)	619
Horton v. Simmons (R. I.)	1119	Kelsey v. Green (Conn.)	679
Hosmer, Goff v. (R. I.)	533	Kelso's Estate, In re (Vt.)	747
Hustetter, Wolf v. (Pa.)	988	Kendall v. McClure Coke Co. (Pa.)	823
Hotchkiss v. Roehm (Pa.)	119	Kennedy, State v. (Conn.)	503
Howard, Corey v. (R. I.)	940	Kenny v. Howard (Vt.)	1044
Howard, Kenny v. (Vt.)	1044	Kenny v. Hudspeth (N. J. Err. & App.)	67
Howell's Estate, In re (Pa.)	181	Kent v. Miles (Vt.)	1115
Hoyt v. City of Danbury (Conn.)	1051	Kent, Cabot v. (R. I.)	945
Hubbard, Field v. (Vt.)	250	Kenyon, East Greenwich Inst. for Savings v. (R. I.)	632
Huber, Fredericks v. (Pa.)	90	Kerr v. Urie (Md.)	789
Hubert's Estate, In re (Pa.)	576	Kerswell, Paul v. (N. J. Sup.)	1102
Hubschmidt Building & Wood-Working Co., Lee v. (N. J. Ch.)	769	Ketline v. State (N. J. Sup.)	133
Hudson County Electric Co., Meyers v. (N. J. Sup.)	618	Kistner, Hummel v. (Pa.)	815
Hudspeth, Kenny v. (N. J. Err. & App.)	67	Kistner, Hummel v. (Pa.)	1118
Hummel v. Kistner (Pa.)	815	Klee, Hasson v. (Pa.)	184
Hummel v. Kistner (Pa.)	1118	Klie v. Von Broock (N. J. Ch.)	469
Hunt v. Gorton (R. I.)	706	Kline v. Electric Traction Co. (Pa.)	522
Hunter, Appeal of (Pa.)	121	Kohl v. State (N. J. Err. & App.)	73
Huntsinger v. Trexler (Pa.)	574	Kolb, Gilbert v. (Md.)	423
Husted v. Stone (Vt.)	253	Krall v. Forney (Pa.)	846
Huston v. Goudy (Me.)	881	Krause, Harris v. (N. J. Sup.)	430
Hutchings v. Inhabitants of Sullivan (Me.)	883	Kulp v. March (Pa.)	913
Iliff v. Banghart (N. J. Sup.)	894	La Barre v. City of Waterbury (Conn.)	1068
Imperial Council of the Order of United Friends, Lubrano v. (R. I.)	345	La Bar's Estate, In re (Pa.)	111
Incurring of State Debts, In re (R. I.)	14	Lackey's Estate, In re (Pa.)	813
Industrial Land Development Co. v. Post (N. J. Err. & App.)	892	Ladd v. Granite State Brick Co. (N. H.)	1041
Inhabitants of Cumberland County v. Central Wharf Steam Towboat Co. (Me.)	867	Lafferty's Estate, In re (Pa.)	113
Inhabitants of Sullivan, Hutchings v. (Me.)	883	Laib v. Pennsylvania R. Co. (Pa.)	96
Inhabitants of Township of Bloomfield v. Borough of Glen Ridge (N. J. Err. & App.)	63	Lake v. Weaver (R. I.)	302
Inhabitants of Township of Bloomfield v. Borough of Glen Ridge (N. J. Err. & App.)	1117	Lake Roland El. R. Co. v. Frick (Md.)	650
Imman, McNeal Pipe & Foundry Co. v. (Vt.)	284	Lake Roland El. R. Co. v. Weir (Md.)	714
Innes, Appeal of (Pa.)	262	Lancaster Gas Light & Fuel Co., Malone v. (Pa.)	932
Inventors' Manuf'g Co., Hamill v. (N. J. Ch.)	773	Landis v. Borough of Vineland (N. J. Sup.)	625
Isham v. Cooper (N. J. Ch.)	462	Landis v. Borough of Vineland (N. J. Sup.)	1099
Island Sav. Bank v. Galvin (R. I.)	809	Landon v. Bryant (Vt.)	297
Jackson v. Philadelphia Traction Co. (Pa.)	827	Larned, Appeal of (Pa.)	854
Jackson, Stewart v. (Pa.)	518	Lauer v. Gray (N. J. Err. & App.)	53
Jartman v. Pacific Fire Ins. Co. (Conn.)	970	Lauer v. Lauer Brewing Co. (Pa.)	87
Jenkins, Elliott v. (Vt.)	272	Lauer Brewing Co., Lauer v. (Pa.)	87
Jerry, Town of Barre v. (Vt.)	230	Laufer v. Bridgeport Traction Co. (Conn.)	379
Johnson, In re (R. I.)	531	Lavery, City of Hoboken v. (N. J. Sup.)	437
Johnson v. Grant (R. I.)	707	Lawall v. Groman (Pa.)	98
Johnson v. State (N. J. Err. & App.)	949	Lawrence, Trader v. (Pa.)	812
Johnson, Bamberger v. (Md.)	900	Lazelle v. Town of Newfane (Vt.)	1045
Jones, In re (Pa.)	1118	Leavitt v. Canadian Pac. R. Co. (Me.)	886
Jones v. Granite State Fire Ins. Co. (Me.)	326	Lebanon & A. St. R. Co., Heilman v. (Pa.)	119
Jones v. Munroe (Md.)	964	Lee v. Hubschmidt Building & Wood-Working Co. (N. J. Ch.)	769
Jones v. New York, N. H. & H. R. Co. (R. I.)	1033	Lee, State v. (Conn.)	75
Jones v. Vinal Haven Steamboat Co. (Me.)	879	Lees, Hinkson v. (Pa.)	338
Jongrass, Commonwealth v. (Pa.)	207	Lehigh Coal & Navigation Co., Spring Brook R. Co. v. (Pa.)	525
Jordan, Keating v. (Pa.)	199	Lehigh County, Miller v. (Pa.)	824
Jordan, Wright v. (Pa.)	196	Lehigh Val. R. Co., Decker v. (Pa.)	570
Kabat, Barabasz v. (Md.)	720	Lehigh Valley Terminal R. Co., Currie v. (N. J. Err. & App.)	1117
Kane v. People's Pass. R. Co. (Pa.)	110	Lejee's Estate, In re (Pa.)	554
Keating v. Jordan (Pa.)	190	Lenhart, Cleaver v. (Pa.)	811
Keefe v. Sholl (Pa.)	116	Lennon v. Heindel (N. J. Ch.)	147
Keenan v. Keenan (R. I.)	632	Leonard v. Medford (Md.)	365
Keenan v. Waters (Pa.)	342	Leonard, Village of Chester v. (Conn.)	397
Keene, Scottish Union & National Ins. Co. of Edinburgh, Scotland, v. (Md.)	83	Lewis v. Clark (Md.)	1035
		Libby, Parks v. (Me.)	357
		Lilly's Estate, In re (Pa.)	557
		Lincoln, Cooney v. (R. I.)	1031
		Lincoln Park & Steamboat Consolidated Co., McElowan v. (Pa.)	1119
		Linde, Appeal of (Pa.)	113
		Little v. Geer (Conn.)	1050
		Little, Murphy v. (Vt.)	968

	Page		Page
Livingston's Will, In re (N. J. Prerog.)	770	Mingin v. Alva Glass Manuf'g Co. (N. J. Ch.)	450
Lockwood, Appeal of (Pa.)	589	Mitchell, Brodie v. (Md.)	169
Long, New York, N. H. & H. R. Co. v. (Conn.)	1070	Monle v. Smith (Md.)	370
Longdon, State v. (Conn.)	383	Moneyenny's Estate, In re (Pa.)	589
Longley, Manufacturers' Outlet Co. v. (R. I.)	535	Monmouth Park Ass'n v. State Board of Assessors (N. J. Sup.)	729
Longstreet v. Brown (N. J. Ch.)	56	Monroe, Appeal of (Pa.)	403
Lord v. Buchanan (Vt.)	1048	Mooney v. Clark (Conn.)	506, 1080
Lowell v. Washington County R. Co. (Me.)	869	Moore, O'Keefe v. (N. J. Sup.)	453
Lubrano v. Imperial Council of the Order of United Friends (R. I.)	345	Moran v. Bentley (Conn.)	1092
Lumis v. Philadelphia Traction Co. (Pa.)	414	Morris, Palmore v. (Pa.)	385
Lutz, Beringer v. (Pa.)	640	Morrow v. State (Del. Err. & App.)	43
Lyman v. Morse (Vt.)	1047	Morse, Forbes v. (Vt.)	295
Lyon v. Brown University (R. I.)	309	Morse, Lyman v. (Vt.)	1047
Lyon, McNamara v. (Conn.)	981	Mott v. Fowler (Md.)	717
		Mott v. German Hospital (N. J. Ch.)	757
McCaffrey, State v. (Vt.)	234	Mountain Lake Park Ass'n of Garrett County, Shartzler v. (Md.)	786
McCaughy, White v. (R. I.)	350	Mowry v. Mowry (R. I.)	306
McClure Coke Co., Kendall v. (Pa.)	823	Mowry v. Slatersville Mills (R. I.)	538
McColgan v. Baltimore Belt R. Co. (Md.)	716	Mowry, Appleby v. (R. I.)	306
McCormack v. Standard Oil Co. (N. J. Sup.)	617	Muehling, Appeal of (Pa.)	527
McCrane, Green v. (N. J. Ch.)	318	Mullen v. Union Cent. Life Ins. Co. (Pa.)	988
McCubbin v. Stanford (Md.)	214	Mulley v. Shoemaker (Pa.)	94
McEvoy, Macgill v. (Md.)	218	Munroe v. Whitehouse (Me.)	866
Macgill v. McEvoy (Md.)	218	Munroe, Jones v. (Md.)	964
McGowan v. Griffin (Vt.)	298	Murphy v. Bullock (R. I.)	348
McGowan v. Lincoln Park & Steamboat Consolidated Co. (Pa.)	1119	Murphy v. Little (Vt.)	968
McKean v. Biddle (Pa.)	528	Murray, Thomson-Houston Electric Co. v. (N. J. Sup.)	443
McKean County Com'rs, Appeal of (Pa.)	514	Murray, White v. (R. I.)	350
McKeough, McKeough's Estate v. (Vt.)	275		
McKeough's Estate v. McKeough (Vt.)	275	National Bldg. & Sav. Ass'n v. Fink (Pa.)	1009
McKindley v. Drew (Vt.)	285	National Exch. Bank v. Galvin (R. I.)	811
McManigal v. South Side Pass. R. Co. (Pa.)	516	National Mut. Ins. Co. v. Home Ben. Soc. of New York (Pa.)	519
McMillan, State v. (Vt.)	278	Nauman v. Weldman (Pa.)	843
McNamara v. Lyon (Conn.)	981	Neidhammer, Sheeley v. (Pa.)	939
McNamee, Dunn v. (N. J. Err. & App.)	61	Nelson, Pictorial League v. (Vt.)	247
McNanly, Donnelly v. (R. I.)	810	New, Hooper v. (Md.)	424
McNeal v. State (Md.)	1116	New England Granite Works v. Bailey (Vt.)	1043
McNeal Pipe & Foundry Co. v. Inman (Vt.)	284	New England Knitting Co., Sherwood v. (Conn.)	388
McWilliams, Boyle v. (Conn.)	501	New England Steam Brick Co. v. Dube (R. I.)	14
Madden v. Penn Electric Light Co. (Pa.)	817	New Jersey Electric R. Co., New York & G. L. R. Co. v. (N. J. Sup.)	627
Maddox, Hendy v. (Md.)	222	New Jersey Zinc & Iron Co., Meredith v. (N. J. Ch.)	539
Maher v. Philadelphia Traction Co. (Pa.)	571	New Jersey & N. Y. R. Co., Glazier v. (N. J. Sup.)	614
Main, State v. (Conn.)	80	New London Water Board v. Ferry (Conn.)	1059
Malone v. Lancaster Gas Light & Fuel Co. (Pa.)	932	Newport Cemetery Ass'n, Village of West Derby v. (Vt.)	239
Manley v. Delaware & H. Canal Co. (Vt.)	279	New Statehouse, In re (R. I.)	2
Manley v. Mickle (N. J. Err. & App.)	738	Newton v. Speare Laundering Co. (R. I.)	11
Manton v. Robinson (R. I.)	8	New York, N. H. & H. R. Co. v. Long (Conn.)	1070
Manufacturers' Outlet Co. v. Longley (R. I.)	535	New York, N. H. & H. R. Co. v. Smith (R. I.)	636
March, Kulp v. (Pa.)	913	New York, N. H. & H. R. Co., Healy v. (R. I.)	676
Marshall v. Perkins (R. I.)	301	New York, N. H. & H. R. Co., Jones v. (R. I.)	1033
Martin v. Rider (Pa.)	403	New York, N. H. & H. R. Co., Rathbun v. (R. I.)	300
Martin's Estate, In re (Pa.)	561	New York, N. H. & H. R. Co., Read v. (R. I.)	947
Maryland Bible Soc., Bentz v. (Md.)	708	New York & G. L. R. Co. v. New Jersey Electric R. Co. (N. J. Sup.)	627
Maryland Const. Co. of Baltimore City, Clendenin v. (Md.)	709	New York & L. B. R. Co. v. Atlantic Highlands, R. B. & L. B. Electric R. Co. (N. J. Err. & App.)	736
Mascott v. First Nat. Fire Ins. Co. (Vt.)	255	Nichols, In re (Pa.)	95
Mason, Bagley v. (Vt.)	287	Nichols, Bristow v. (R. I.)	1033
Mason, Chatterton v. (Md.)	960	Niles v. Phinney (Me.)	880
Mason, Thieves v. (N. J. Ch.)	455	Noble's Estate, In re (Pa.)	852
Mathews, Bull v. (R. I.)	536	Noe v. Town Council of West Hoboken (N. J. Sup.)	439
Medairy, Northern Cent. R. Co. v. (Md.)	796	Northern Cent. R. Co. v. Medairy (Md.)	796
Medford, Leonard v. (Md.)	365	Norwalk St. R. Co., Appeal of (Conn.)	1080
Mercantile Trust & Deposit Co. of Baltimore, Abraham v. (Md.)	646	Nugent v. Philadelphia Traction Co. (Pa.)	206
Meredith v. New Jersey Zinc & Iron Co. (N. J. Ch.)	539		
Meriden Electric R. Co., Budd v. (Conn.)	683		
Merritt v. Bucknam (Me.)	885		
Merz, Cosgrove v. (R. I.)	704		
Meyers v. Hudson County Electric Co. (N. J. Sup.)	618		
Mickle, Manley v. (N. J. Err. & App.)	738		
Middleton v. Middleton (N. J. Err. & App.)	1106		
Midwood v. Executive Ass'n of Wholesale Grocers of New England (R. I.)	946		
Miles, Kent v. (Vt.)	1115		
Miller v. Bannister (N. J. Err. & App.)	1117		
Miller v. Gittings (Md.)	372		
Miller v. Lehigh County (Pa.)	824		
Miller's Estate, In re (Pa.)	1000		
Mills, Chandler v. (N. J. Prerog.)	603		

	Page		Page
O'Brien v. City of Pawtucket (R. I.).....	302	Philadelphia & W. C. Turnpike-Road Co.,	
O'Brien v. City of Pawtucket (R. I.).....	530	Hanlon v. (Pa.).....	943
Ocean City R. Co. v. Bray (N. J. Ch.).....	604	Phillips v. Browne (R. I.).....	490
Ocean City R. Co., Thompson v. (N. J. Ch.).....	129	Phinney, Niles v. (Me.).....	880
O'Connor v. O'Connor (R. I.).....	634	Phoenix Brewing Co. v. Rumbarger (Pa.)..	340
O'Connor v. Town of Waterbury (Conn.)..	499	Phoenix Iron Co., Devlin v. (Pa.).....	927
O'Donnell, Browning v. (N. J. Sup.).....	613	Pictorial League v. Nelson (Vt.).....	247
O'Donnell, Hoos v. (N. J. Sup.).....	72	Pittsburg Illuminating Co., Commonwealth	
O'Donnell, Hoos v. (N. J. Sup.).....	447	v. (Pa.).....	107
Ohio Brass Co. v. Clark (Md.).....	899	Planer v. Equitable Life Assur. Soc. of	
O'Keefe v. Moore (N. J. Sup.).....	453	the United States (N. J. Ch.).....	668
Old Town Bank of Baltimore, Demuth v. (Md.).....	266	Plempel, Cockey v. (Md.).....	792
Oliver, Beverwyck Brewing Co. v. (Vt.).....	1110	Polhemus v. Bateman (N. J. Err. & App.)..	1015
O'Neil v. Behanna (Pa.).....	843	Pomeroy v. Pomeroy (N. J. Err. & App.)..	754
Osborn, State v. (Conn.).....	491	Porter v. Post Pub. Co. (R. I.).....	535
Overseers of Poor of Borough of Montrose,		Porterfield v. Porterfield (Md.).....	358
Overseers of Poor of Borough of Tunk-		Portland Marine Soc., Woodbury v. (Me.)..	323
hannock v. (Pa.).....	100	Post, Industrial Land Development Co. v.	
Overseers of Poor of Borough of Tunkhan-		(N. J. Err. & App.).....	892
nock v. Overseers of Poor of Borough of		Post Pub. Co., Porter v. (R. I.).....	535
Montrose (Pa.).....	100	Potter v. Ashhurst (N. J. Err. & App.)..	1117
Owens v. City of Lancaster (Pa.).....	858	Potts v. Breneman (Pa.).....	1002
Owens, Fair Haven Marble & Marbleized		Powell v. Wilson (Md.).....	216
Slate Co. v. (Vt.).....	749	Powell, Yearance v. (N. J. Err. & App.)..	735
Pacific Fire Ins. Co., Jartman v. (Conn.)..	970	Pratt & Whitney Co., Woodbridge v.	
Paist, Clad v. (Pa.).....	194	(Conn.).....	688
Palestine Bldg. Ass'n of Hudson County,		President, etc., of Baltimore & Y. Turn-	
Spengeman v. (N. J. Sup.).....	723	pike Road v. Green (Md.).....	642
Palmer, Appeal of (Pa.).....	587	Price v. Forrest (N. J. Err. & App.).....	1117
Palmore v. Morris (Pa.).....	995	Price, Woolley v. (Md.).....	644
Parley v. American Ship-Windlass Co. (R. I.).....	706	Proprietors of Machias Boom, Holway v.,	
Parker v. Parker (Vt.).....	1112	two cases (Me.).....	882
Parker, Bradshaw v. (N. J. Sup.).....	444	Providence Journal Co., Folwell v. (R. I.)..	6
Parks v. Libby (Me.).....	357	Providence Journal Co., Reid v. (R. I.)..	637
Parlett v. Dugan (Md.).....	36	Providence Steam Carpet Beating Co. v.	
Parsons v. Tilley (R. I.).....	800	Hazard (R. I.).....	635
Paschall, Goat & Sheep Skin Import Co. v. (N. J. Sup.).....	454	Providence-Washington Ins. Co., Freedman	
Patterson v. Atkinson (R. I.).....	532	v. (Pa.).....	909
Paul v. Kerswell (N. J. Sup.).....	1102	Putnam, Farrington v. (Me.).....	652
Peabody v. Westerly Waterworks (R. I.)..	807	Ramsay, City of Perth Amboy v. (N. J. Sup.).....	446
Peninsular Lumber Co. v. Fehrenbach (Del. Super.).....	38	Randall v. Randall (Md.).....	209
Penn Electric Light Co., Madden v. (Pa.)..	817	Ranstead v. Allen (Md.).....	15
Pennsylvania Co. for Insurance on Lives & Granting Annuities, Appeal of (Pa.)..	554	Rapho Tp., Heisey v. (Ph.).....	1118
Pennsylvania Company for Insurance on Lives and Granting Annuities v. American Fire Ins. Co. (Pa.).....	1119	Rathbun v. New York, N. H. & H. R. Co. (R. I.).....	300
Pennsylvania Co. for Insurances on Lives & Granting Annuities v. Franklin Fire Ins. Co. (Pa.).....	191	Rauth v. Ward (Md.).....	898
Pennsylvania R. Co. v. Pfuelb (N. J. Sup.)..	1100	Raymond v. Schoonover (Pa.).....	524
Pennsylvania R. Co., Baker v. (Pa.).....	933	Read v. Bennett (N. J. Err. & App.).....	75
Pennsylvania R. Co., Daneck v. (N. J. Err. & App.).....	59	Read v. New York, N. H. & H. R. Co. (R. I.).....	947
Pennsylvania R. Co., Deni v. (Pa.).....	558	Real Estate Title Insurance & Trust Co. of Philadelphia v. Aetna Life Ins. Co. (Pa.)	630
Pennsylvania R. Co., Laib v. (Pa.).....	96	Reed v. Starkey (Vt.).....	297
Pennsylvania R. Co., Stricker v. (N. J. Err. & App.).....	776	Reed, Acme Manuf'g Co. v. (Pa.).....	552
People's Pass. R. Co., Kane v. (Pa.).....	110	Reid v. Providence Journal Co. (R. I.).....	637
Pepper v. City of Philadelphia (Pa.).....	579	Reilly v. Shannon (Pa.).....	95
Pepper, Schuylkill County v. (Pa.).....	835	Reynolds, Coleman v. (Pa.).....	543
Perkins, Marshall v. (R. I.).....	301	Reynolds, Gray v. (N. J. Err. & App.).....	461
Perry, New London Water Board v. (Conn.).....	1059	Rhode Island Hospital Trust Co. v. Harris (R. I.).....	701
Pfuelb, Pennsylvania R. Co. v. (N. J. Sup.)..	1100	Rice, Baldwin Memorial Methodist Episcopal Church v. (Md.).....	1115
Philadelphia Traction Co., Jackson v. (Pa.)	827	Rich v. Black (Pa.).....	401
Philadelphia Traction Co., Lumis v. (Pa.)..	414	Rider, Martin v. (Pa.).....	403
Philadelphia Traction Co., Maher v. (Pa.)..	571	Ridge Ave. Pass. R. Co. v. City of Philadel-	
Philadelphia Traction Co., Nugent v. (Pa.)	206	phia (Pa.).....	910
Philadelphia Traction Co., Wolf v. (Pa.)...	555	Ritt v. Dodge (R. I.).....	810
Philadelphia Trust, Safe-Deposit & Insurance Co., Appeal of (Pa.).....	121	Ritter v. Etchison (Md.).....	795
Philadelphia, W. & B. R. Co., Flanagan v. (Pa.).....	341	Road in Otto Tp., In re (Pa.).....	514
Philadelphia & B. R. Co. v. Borough of Brigantine (N. J. Sup.).....	437	Robbins, Seltzer v. (Pa.).....	567
Philadelphia & R. R. Co., Conshohocken Tube Co. v. (Pa.).....	190	Robertson, Wilkinson v. (Md.).....	208
		Robins' Estate, In re (Pa.).....	121
		Robinson, Manton v. (R. I.).....	8
		Rochester Sav. Bank v. Chick (N. H.).....	672
		Rodgers v. City of Philadelphia (Pa.).....	330
		Roehm, Hotchkiss v. (Pa.).....	119
		Roller, Drovers' & Mechanics' Nat. Bank v. (Md.).....	30
		Rose, Fullam v. (Pa.).....	197
		Rose, Tourgee v. (R. I.).....	9
		Rosenbaum, United States Credit System Co. v. (N. J. Sup.).....	595
		Rossi, Starace v. (Vt.).....	1109

	Page		Page
Rother v. Trustees of Sharp St. Station of Methodist Episcopal Church in the City of Baltimore (Md.)	24	South Baltimore Harbor & Improvement Co. of Anne Arundel County v. Smith (Md.)	27
Rowell v. Dunwoodie (Vt.)	227	South Side Pass. R. Co., McManigal v. (Pa.)	516
Royston v. Horner (Md.)	718	Sowles v. Bailey (Vt.)	751
Rumbarger, Phoenix Brewing Co. v. (Pa.)	340	Speare Laundering Co., Newton v. (R. I.)	11
Russell v. Davis (Vt.)	746	Spengeman v. Palestine Bldg. Ass'n of Hudson County (N. J. Sup.)	723
Ryan v. Chelsea Paper Manuf'g Co. (Conn.)	1062	Sprague v. Fletcher (Vt.)	239
Ryan, State v. (Conn.)	377	Sprague v. Greene (R. I.)	689
St. Clair, C. & C. Electric Co. v. (Pa.)	814	Spring Brook R. Co. v. Lehigh Coal & Navigation Co. (Pa.)	525
Samuels, Bell v. (N. J. Sup.)	613	Stanbery v. Baker (N. J. Ch.)	351
Sanner v. State (Md.)	165	Standard Oil Co., McCormack v. (N. J. Sup.)	617
Sanner, Heyward v. (Md.)	798	Stanford, McCubbin v. (Md.)	214
Satterthwaite, Borie v. (Pa.)	102	Starace v. Rossi (Vt.)	1109
Schaeffer, Folk v. (Pa.)	104	Starkey v. Waite (Vt.)	292
Schenck v. State (N. J. Sup.)	724	Starkey, Reed v. (Vt.)	297
Schier, Appeal of (Pa.)	557	Starr, Starr Cash & Package Car Co. v. (Conn.)	1057
Schleisner, Gusdorff v. (Md.)	170	Starr Cash & Package Car Co. v. Starr (Conn.)	1057
Schmid's Estate, In re (Pa.)	928	State v. Badger (Vt.)	293
Schneider, Eiserman v. (N. J. Sup.)	623	State v. Bradneck (Conn.)	492
School Dist. No. 5 in Barre, Town of Barre v. (Vt.)	1111	State v. Bruce (Vt.)	238
School Dist. No. 13 in Hartford, Hartford School Dist. v. (Vt.)	252	State v. Carlin (Me.)	878
Schoonover, Raymond v. (Pa.)	524	State v. Clarke (Conn.)	975
Schutz v. Ferguson (Md.)	211	State v. Consolidated Gas Co. of Baltimore City (Md.)	263
Schuykill County v. Pepper (Pa.)	835	State v. Cottrell (R. I.)	947
Schwab v. Ginkinger (Pa.)	125	State v. Dalton (R. I.)	673
Scottish Union & National Ins. Co. of Edinburgh, Scotland, v. Keene (Md.)	33	State v. Getty (Conn.)	687
Scranton Illuminating, Heat & Power Co., Gunster v. (Pa.)	550	State v. Kennedy (Conn.)	503
Scranton Traction Co., Delaware & H. Canal Co. v. (Pa.)	1118	State v. Lee (Conn.)	75
Scranton & P. Traction Co. v. Delaware & H. Canal Co. (Pa.)	122	State v. Longdon (Conn.)	383
Scully v. Brinton (N. J. Err. & App.)	740	State v. McCaffrey (Vt.)	234
Sears Commercial Co., Colt v. (R. I.)	311	State v. McMillan (Vt.)	278
Second & Third Streets Pass. R. Co., Fineburg v. (Pa.)	925	State v. Main (Conn.)	80
Sedgwick, Belden v. (Conn.)	417	State v. Osborn (Conn.)	491
Seeds v. Burk (Pa.)	511	State v. Ryan (Conn.)	377
Sell, Steller v. (N. J. Err. & App.)	1010	State v. Smith (Md.)	1117
Seltzer v. Robbins (Pa.)	567	State v. Warner (Vt.)	246
Shaffer v. Shafer (Md.)	167	State v. Webber (Me.)	877
Shaffer, Himmelreich v. (Pa.)	1007	State v. Whitten (Me.)	331
Shannon, Reilly v. (Pa.)	95	State, Badger v. (Vt.)	286
Sharp v. Froehlich (N. J. Sup.)	1024	State, Bindernagle v. (N. J. Sup.)	619
Shartz v. Mountain Lake Park Ass'n of Garrett County (Md.)	786	State Board of Assessors, Monmouth Park Ass'n v. (N. J. Sup.)	729
Sheeley v. Neidhammer (Pa.)	939	State, Barnett v. (N. J. Sup.)	622
Sherlock v. State (N. J. Sup.)	435	State, Clifford v. (N. J. Sup.)	1101
Sherry, Dubois v. (R. I.)	344	State, Derby v. (N. J. Sup.)	614
Sherwood v. New England Knitting Co. (Conn.)	388	State, Dickhaut v. (Md.)	21
Shippey, Farmers' Bank of Springville, N. Y., v. (Pa.)	844	State, Ford v. (Md.)	172
Shoemaker, Mulley v. (Pa.)	94	State, Genz v. (N. J. Err. & App.)	60
Sholl, Keefe v. (Pa.)	116	State, Hommer v. (Md.)	26
Shum v. Claghorn (Vt.)	236	State, Johnson v. (N. J. Err. & App.)	949
Sibbald, Terhune v. (N. J. Ch.)	454	State, Keltine v. (N. J. Sup.)	133
Simmons, Horton v. (R. I.)	1119	State, Kohl v. (N. J. Err. & App.)	73
Skeels, Cutler v. (Vt.)	223	State, McNeal v. (Md.)	1116
Slatersville Mills, Mowry v. (R. I.)	538	State, Morrow v. (Del. Err. & App.)	43
Slear, Beaver v. (Pa.)	991	State, Sanner v. (Md.)	165
Smith, Appeal of (Pa.)	852	State, Schenck v. (N. J. Sup.)	724
Smith v. Altoona & P. Connecting R. Co. (Pa.)	930	State, Sherlock v. (N. J. Sup.)	435
Smith v. Hall (R. I.)	698	State, Von der Leith v. (N. J. Sup.)	436
Smith v. Smith (N. J. Ch.)	49	State, Weber v. (N. J. Err. & App.)	133
Smith, Burns v. (Pa.)	105	State, Wilson v. (N. J. Err. & App.)	954
Smith, Moale v. (Md.)	370	Steller v. Sell (N. J. Err. & App.)	1010
Smith, New York, N. H. & H. R. Co. v. (R. I.)	636	Stevens v. Gibson (Vt.)	244
Smith, South Baltimore Harbor & Improvement Co. of Anne Arundel County v. (Md.)	27	Stewart v. Jackson (Pa.)	518
Smith, State v. (Md.)	1117	Stewart, Heimgaertner v. (Pa.)	93
Smith's Estate, In re (Pa.)	114	Stockbridge v. Franklin Bank of Baltimore (Md.)	645
Snyder v. Dwelling House Ins. Co. (N. J. Err. & App.)	1022	Stockton, Warwick v. (N. J. Ch.)	458
Somersworth Nat. Bank v. Chick (N. H.)	672	Stone, Bradford v. (R. I.)	532
Somersworth Sav. Bank v. Chick (N. H.)	672	Stone, Husted v. (Vt.)	253
		Streabich, Bender v. (Pa.)	853
		Stricker v. Pennsylvania R. Co. (N. J. Err. & App.)	776
		Strickler's Estate, In re (Pa.)	990
		Strong's Appeal, In re (Conn.)	395
		Sturtevant, Commonwealth v. (Pa.)	916
		Swain v. Edmunds (N. J. Err. & App.)	1117
		Talcott v. Arnold (N. J. Err. & App.)	801

	Page		Page
Tallman, City of Jersey City v. (N. J. Err. & App.)	1026	Union Water-Power Co., City of Auburn v. (Me.)	335
Tallon v. City of Hoboken (N. J. Err. & App.)	895	United States Credit System Co. v. Rosenbaum (N. J. Sup.)	595
Tariton v. Gilsey (N. J. Ch.)	467	United States Credit-System Co., Duryee v. (N. J. Ch.)	155
Tasker's Estate, In re (Pa.)	924	Urie, Kerr v. (Md.)	789
Tate v. Field (N. J. Ch.)	440		
Taylor v. Granger (R. I.)	13	Valsalka, Commonwealth v. (Pa.)	405
Taylor v. Wands (N. J. Err. & App.)	315	Van Baman v. Gallagher (Pa.)	832
Technic Electrical Works, Garrison v. (N. J. Ch.)	741	Vermont Manuf'g Co., Garratt Ford Co. v. (R. I.)	948
Terhune v. Sibbald (N. J. Ch.)	454	Village of Chester v. Leonard (Conn.)	397
Terryberry v. Woods (Vt.)	246	Village of West Derby v. Newport Cemetery Ass'n (Vt.)	239
Thalheimer, Consolidated Traction Co. v. (N. J. Err. & App.)	132	Vinal Haven Steamboat Co., Jones v. (Me.)	879
Thayer, In re (Vt.)	1042	Von Broock, Klie v. (N. J. Ch.)	469
Thiefes v. Mason (N. J. Ch.)	455	Von Der Leith v. State (N. J. Sup.)	436
Thompson v. Citizens' Traction Co. (Pa.)	205	Voorhees, Barr v. (N. J. Err. & App.)	134
Thompson v. Ocean City R. Co. (N. J. Ch.)	129	Voter's Certificate, In re (R. I.)	810
Thompson's Estate, In re (Pa.)	940	Vreeland v. City of Bayonne (N. J. Err. & App.)	737
Thomson-Houston Electric Co. v. Murray (N. J. Sup.)	443		
Thouron's Estate, In re (Pa.)	861	Waite, Starkey v. (Vt.)	292
Thresher v. Barry (Conn.)	1044	Walker, Appeal of (Pa.)	114
Thresher v. Dyer (Conn.)	979	Walker v. Winkler (N. J. Sup.)	445
Tiepe v. Times Pub. Co. (R. I.)	1031	Wallace, Botsford v. (Conn.)	902
Tilley, Parsons v. (R. I.)	800	Walls v. Walls (Pa.)	859
Tillinghast v. Boothby (R. I.)	344	Walsh v. City of Ansonia (Conn.)	1096
Times Pub. Co., Tiepe v. (R. I.)	1031	Walton, Henry Christian Building & Loan Ass'n v. (Pa.)	261
Tobler, Wiltbank v. (Pa.)	188	Wands, Taylor v. (N. J. Err. & App.)	315
Todd v. Todd (N. J. Ch.)	766	Ward, Camp v. (Vt.)	747
Tomlinson v. Gano (N. J. Sup.)	434	Ward, Rauth v. (Md.)	808
Tourgee v. Rose (R. I.)	9	Warner, State v. (Vt.)	246
Town Council of West Hoboken, Noë v. (N. J. Sup.)	439	Warner Co., Ford v. (Del. Super.)	39
Town of Barre v. Jerry (Vt.)	230	Warren, Gilday v. (Conn.)	404
Town of Barre v. School Dist. No. 5 in Barre (Vt.)	1111	Warth v. Brafman (Md.)	792
Town of Granville v. Town of Hancock (Vt.)	294	Warwick v. Stockton (N. J. Ch.)	458
Town of Hancock, Town of Granville v. (Vt.)	294	Warwick & Coventry Water Co. v. Allen (R. I.)	1119
Town of Hartford, Town of Simsbury v. (Conn.)	678	Washington County R. Co., Lowell v. (Me.)	869
Town of Haverhill, Henry v. (N. H.)	1039	Waters, Keenan v. (Pa.)	342
Town of Montville, Bogue v. (Conn.)	1078	Watson v. Treasurer of City of Plainfield (N. J. Sup.)	615
Town of Newcastle v. Haywood (N. H.)	1040	Watson, Wood v. (R. I.)	1030
Town of Newfane, Lazelle v. (Vt.)	1045	Weaver, Lake v. (R. I.)	302
Town of New Haven v. City of Bridgeport (Conn.)	397	Webber, State v. (Me.)	877
Town of Simsbury v. Town of Hartford (Conn.)	678	Weber v. State (N. J. Err. & App.)	133
Town of Swanton, Brown v. (Vt.)	280	Webster, Fowler v. (Pa.)	102
Town of Waterbury, Ashborne v. (Conn.)	498	Weidman, Nauman v. (Pa.)	863
Town of Waterbury, O'Connor v. (Conn.)	499	Weinburgh v. Union Street-Railway Advertising Co. (N. J. Ch.)	1026
Trader v. Lawrence (Pa.)	812	Weir, Lake Roland El. R. Co. v. (Md.)	714
Traub, Caledonia Fire Ins. Co. of Scotland v. (Md.)	782	Welch's Will, In re (Vt.)	250
Treasurer of City of Plainfield, Watson v. (N. J. Sup.)	615	Welsh v. Erie & W. V. R. Co. (Pa.)	513
Trenton Pass. R. Co. v. Guarantors' Liability Indemnity Co. (N. J. Sup.)	609	West Chester Pub. Co., Hall v. (Pa.)	106
Trenton Pass. R. Co. v. Wilson (N. J. Ch.)	476	West Chester & W. Plank-Road Co. v. Chester County (Pa.)	905
Trenton Pass. R. Co., Consolidated, v. Bennett (N. J. Err. & App.)	730	Westerly Waterworks, Peabody v. (R. I.)	807
Trenton Pass. R. Co., Consolidated, v. Cooper (N. J. Err. & App.)	730	Western Maryland R. Co. v. Kehoe (Md.)	799
Trexler, Huntsinger v. (Pa.)	574	West Jersey R. Co. v. Abbott (N. J. Err. & App.)	1104
Trimble, Baldwin v. (Md.)	176	West Jersey Traction Co. v. Board of Public Works of City of Camden (N. J. Sup.)	578
Troth v. Board of Chosen Freeholders of County of Camden (N. J. Err. & App.)	1017	Whelan, Consolidated Traction Co. v. (N. J. Err. & App.)	1106
Trustees of Sharp St. Station of Methodist Episcopal Church in the City of Baltimore, Rother v. (Md.)	24	White v. McCaughey (R. I.)	350
Tucker v. Chick, two cases (N. H.)	672	White v. Murray (R. I.)	350
Twigg v. Hopkins (Md.)	24	Whitehouse, Munroe v. (Me.)	866
		White's Estate v. White's Estate (Vt.)	1114
Ueberroth v. Unangst (Pa.)	935	Whitten, State v. (Me.)	331
Ulrich v. Ulrich (Conn.)	393	Widmeyer, Appeal of (Pa.)	576
Unangst, Ueberroth v. (Pa.)	935	Wilbor, In re (R. I.)	634
Union Cent. Life Ins. Co., Mullen v. (Pa.)	988	Wilhelm's Estate, In re (Pa.)	819
Union R. Co., Goldrick v. (R. I.)	635	Wilkinson v. Chambers (Pa.)	569
Union Street-Railway Advertising Co., Weinburgh v. (N. J. Ch.)	1026	Wilkinson v. Robertson (Md.)	208
Union Water-Power Co. v. City of Auburn (Me.)	331	William Clark Co., Clark Thread Co. v. (N. J. Ch.)	599
		Williams v. Camden & A. R. Co. (N. J. Sup.)	1107
		Williamsport & N. B. R. Co., Hess v. (Pa.)	568
		Willits Manuf'g Co. v. Board of Chosen Freeholders of Mercer County (N. J. Sup.)	609
		Wilson v. Wilson-Rogers (Pa.)	117
		Wilson v. State (N. J. Err. & App.)	954

	Page		Page
Wilson, Coates v. (R. I.).....	537	Woodbury v. Portland Marine Soc. (Me.)..	323
Wilson, Powell v. (Md.).....	216	Woods, Terryberry v. (Vt.).....	246
Wilson, Trenton Pass. R. Co. v. (N. J. Ch.)	478	Woolley v. Price (Md.).....	644
Wilson-Rogers, Wilson v. (Pa.).....	117	Wright v. Jordan (Pa.).....	196
Wiltbank v. Tobler (Pa.).....	188	Wyman v. Gay (Me.).....	325
Winkler, Walker v. (N. J. Sup.).....	445		
Wise's Estate, In re (Pa.).....	936	Yearance v. Powell (N. J. Err. & App.)....	735
Witmer, City of Hagerstown v. (Md.)....	965	York v. York Market Co. (N. H.).....	1038
Woeckner v. Erie Electric Motor Co. (Pa.)	936	York Market Co., York v. (N. H.).....	1038
Wolf v. Augustine (Pa.).....	574	Young v. Camden, G. & W. R. Co. (N. J.	
Wolf v. Hostetter (Pa.).....	988	Err. & App.)	1013
Wolf v. Philadelphia Traction Co. (Pa.)...	555	Young & McShea Amusement Co. v. City	
Wood v. Watson (R. I.).....	1030	of Atlantic City (N. J. Sup.).....	444
Wood, Bell v. (Pa.).....	201		
Woodbridge v. Pratt & Whitney Co.		Zacharias, Commonwealth v. (Pa.).....	185
(Conn.)	688		

See End of Index for Tables of Atlantic Cases in State Reports.

†

THE
ATLANTIC REPORTER.
VOLUME 37.

CITY OF PAWTUCKET v. BRAY et al.

(Supreme Court of Rhode Island. April 9, 1897.)

**MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS
—ACTION OVER AGAINST ABUTTING
OWNER—RES JUDICATA.**

1. Where the owner of a building is notified by a city to appear and defend a suit against it for injuries caused by an opening made by him in the sidewalk, in an action over against him by the city for the amount of the judgment recovered against it the city need not show that he was negligent in the use of the opening, though it was not of itself a nuisance.

2. The owner of a building is bound by a judgment against a city for injuries caused by an opening in the sidewalk, made and left unguarded by him, rendered in an action which he was notified by the city to defend, though he did not appear or defend, and was not a party to the action.

Action by the city of Pawtucket against A. F. & F. Bray. Judgment for plaintiff.

James L. Jenks, for plaintiff. Arnold Green, for defendants.

STINESS, J. The defendants are the proprietors of a store on Main street in the city of Pawtucket, from the cellar of which they operate a freight elevator to the sidewalk in front of the store. The elevator well is covered by an iron grating, opening from the center in two parts on hinges at the sides, at right angles from the front of the building. On the 26th of November, 1889, while they were using the elevator, Mrs. Julia Major, who was passing along the sidewalk about dusk, stepping sidewise, fell into the opening, and was injured. She brought a suit against the city of Pawtucket, and the defendants were notified to appear and defend it, as the city would look to them for any judgment which might be recovered. The case was tried. The defendants did not appear, and judgment was obtained against the city for the sum of \$3,400, which has been paid. This suit is for reimbursement by reason of the ultimate liability of the defendants.

The right to reimbursement is recognized in *Bennett v. Fifield*, 13 R. I. 139, where the court says that, if the town is forced to pay for the injury, it will have an action over

against the party who placed the obstruction in the highway. The case of *Hill v. Bain*, 15 R. I. 75, 23 Atl. 44, is a practical recognition of the same thing, because one reason assigned for overruling the demurrer to the town's plea of former judgment against the plaintiff in favor of the alleged wrongdoer was that, if the wrongdoer should be notified to come in to defend the suit, and should do so, he would be entitled to the benefit of his former judgment. But the only ground upon which he could assume the defense of the suit against the town is the right of the town to call upon him for reimbursement. See, also, the recent case of *Washington Gas-light Co. v. District of Columbia*, 161 U. S. 316, 16 Sup. Ct. 564, and *Dill. Mun. Corp.* (4th Ed.) § 1035, and cases cited. We do not understand the defendants to deny that this rule is established by the decided weight of authority, but they claim that under the decision of this court in *Adams v. Fletcher*, 17 R. I. 137, 20 Atl. 263, the fact of an opening in the sidewalk is not of itself a nuisance, and that the court must find that the defendants were negligent in the use of it. We agree with the decision in that case that an opening in the sidewalk, if properly constructed, is not a nuisance; and in that case, as well as in this, so far as appears, such was the fact. But the case of *Adams v. Fletcher* was an action against the owner of a building who had leased it to a tenant who was in occupation, and it was by the negligence of the tenant, or those who were serving him with coal, that the cover was left off at the time of the injury. There was no negligence on the defendant's part. But in this present suit the cause of the injury was the negligence of the servants of these defendants, and we see nothing in *Adams v. Fletcher* which excuses them. The party injured could have sued originally either these defendants for their negligence, or the city of Pawtucket, or both. *Bennett v. Fifield*, 13 R. I. 139. Having sued the city, it has its action over against the party primarily responsible for the injury by reason of negligence in the use of an opening, not in itself a nuisance. This being so, we think it follows, from the cases cited above, that the defendants, who were duly notified to defend the original suit, are bound

by the judgment in that suit. In this case the plaintiff has also introduced evidence to show that the proximate and sole cause of the injury was the negligence of the defendants' servants. They had been notified that the opening was dangerous, and that it should be protected. One of the defendants testified that it was customary to protect it by a board in front when the doors were open, the doors themselves being a sufficient protection for the sides, where they stood up nearly perpendicular. The precaution of putting up the board was omitted on the occasion of this accident. The only precaution taken was that the two men shouted "Elevator!" as they came up on it. At the time of day—about 5 o'clock in the afternoon in November—this can hardly be called a precaution, especially to a woman like Mrs. Major, who was deaf. This testimony is properly introduced to show that the negligence of the defendants was the proximate cause of the injury, and so that there is a right of recovery over in this case.

The defendants claim that under the case of *Central Baptist Church & Society v. Manchester*, 17 R. I. 492, 23 Atl. 30, the defendants are not bound by the judgment against the city. The cases are quite different. To an action in ejectment Manchester pleaded that he had brought a suit, and recovered judgment against a person who claimed to be the agent of the Central Baptist Church, and that the church was thereby estopped from prosecuting its action. The decision was that the plaintiff was not bound by the former judgment, because there was no such relation between the parties as to make the plaintiff privy to the judgment, and also because the plaintiff had not made itself privy in fact by assuming the defense of the former suit. This position was supported by citing *Black*, Judgm. § 540, and by remarks of the court. The court said: "To bind one, not a party of record, by a former judgment, it is essential that he should have openly intervened in the former suit, assuming its direction and control, to the knowledge of the opposite party, for the prosecution or defense of some interest in the subject of the suit, or to avert a liability he may be under to indemnify the defendant against an adverse judgment." The defendants claim that this language exempts them from liability on the judgment. A comparison of the words of the court with the citation shows that it was intended to be a restatement of the section from *Black* on Judgments. That section relates to cases, as shown by those cited, where one party sought to hold the other party, not related to the cause of action, by a former judgment, because he had taken some part in the case. And so it is stated broadly that, to have this effect, such a party must have assumed control of one side of the case, openly and to the knowledge of the other side, upon the principle that estoppels must be mutual. But the case at bar, as we have shown, does not

depend upon an estoppel from the defendants' intervention in the former suit, but upon their liability over to the plaintiff by reason of their negligence, which was the proximate cause of the injury for which the recovery against the plaintiff was had. "It is a well-established rule, and one which has been recognized and enforced in a number of noteworthy cases, that a judgment recovered against a municipal corporation for injuries caused by a defect or obstruction in the highway is conclusive evidence of its necessary facts and conditions in a subsequent action by the municipality against a third person, the author of the defect or nuisance who is liable over, and who was notified of the first suit." *Black*, Judgm. § 575. Under this rule the defendants are liable in this action, and the plaintiff is entitled to judgment for the amount claimed.

IN RE NEW STATEHOUSE.

(Supreme Court of Rhode Island. April 8, 1897.)

ERECTION OF STATEHOUSE—POWERS OF GENERAL ASSEMBLY—BOARD OF COMMISSIONERS—POWER TO CONTRACT IN EXCESS OF APPROPRIATION.

1. A proposition, adopted by a vote of the people of the state, authorizing and directing the general assembly to provide for the issue of state bonds in an amount not to exceed \$1,500,000,—“so much of said sum as may be necessary to be applied to the purchase of a site for, and the erection and completion of, a new statehouse,”—does not restrict the general assembly to a maximum expenditure of \$1,500,000 in the purchase of a site and the erection and completion of a statehouse, but it may, under its general powers, which are only restricted by the constitutional provision that it shall not incur a state debt exceeding \$50,000 without the express consent of the people, apply the fund arising from the sale of such bonds towards the purpose for which it was created, and may provide for the completion of the building by taxation, or any other authorized means.

2. Commissioners appointed by the general assembly, and charged with the expenditure of a fund created for the building of a statehouse, are not trustees, in a legal sense, but are officials of the state, and agents of the general assembly, to which they are accountable.

3. The board of statehouse commissioners created by Pub. Laws, c. 1201, and authorized to select and acquire a site, and to “erect thereon a new statehouse, substantially in accordance with the plan accompanying the report of the statehouse commission made to the general assembly,” which report did not fix any limit of cost, and to make all contracts therefor, and to meet whose contracts the fund created by the sale of state bonds authorized for the purpose was appropriated, may legally make contracts for the purchase of a site and the erection of a building which will together cost more than the amount of such fund, provided the building conforms substantially to the plan referred to in the act, and any contracts made in excess of the fund appropriated shall only be payable when there are unexpended funds available for their payment.

Reply to communication from the governor requesting an opinion on certain questions relating to the erection of a new statehouse.

To his Excellency, Charles Warren Lippitt, Governor of the State of Rhode Island and Providence Plantations:

We have received from your excellency a communication requesting our opinion upon the following questions: "(1) Can said statehouse fund legally be utilized to acquire a site for a statehouse, and to erect thereon a portion, as one-half or three-fourths, of a statehouse. (2) Are the commissioners created by chapter 1201 of the Public Laws of Rhode Island (1893) trustees of said statehouse fund? (3) If said commissioners are trustees of said statehouse fund, can they legally contract for a statehouse on a site which, together with said statehouse, will cost a sum much greater than said trust fund? (4) If said commissioners are not trustees of said fund, can they legally contract as specified in question 3?"

By the term "statehouse fund," we understand is meant the sum authorized to be raised by loan by a vote of the people adopting the proposition for the issue of state bonds, and which proposition, contained in Pub. Laws R. I. c. 1093, passed May 19, 1892, reads as follows: "Shall the general assembly be authorized and directed to provide for the issue of state bonds in an amount not to exceed the sum of \$1,500,000, so much of said sum as may be necessary to be applied to the purchase of a site for, and the erection and completion of, a new statehouse?" The first question calls for a construction of the language used in said proposition only, and for a definition of the limitations and conditions applicable to the use of said statehouse fund by the general assembly, or by any officers or agents acting under its authority, be they called "statehouse commissioners," or otherwise howsoever. The last three questions apply solely to the statehouse commissioners; and their scope, briefly stated, we apprehend to be as follows: Can the statehouse commissioners, under their present authority, legally contract for the erection of a statehouse, which, when completed, together with the site, will have cost more than \$1,500,000?

The first question is much broader than the other questions, inasmuch as it applies both to the general assembly, the creator, so to speak, and to the statehouse commissioners, its creatures. The statehouse commissioners can only exercise the authority given them by the general assembly which appointed them, and the general assembly can only confer such authority as it is constitutionally authorized to confer. The general assembly is constitutionally competent, through the agency of a commission by it appointed, to build a statehouse, at such cost as it sees fit, provided it does not thereby assume to incur a state debt, without the express consent of the people, to an amount exceeding \$50,000. It could therefore build a statehouse out of the funds of the state raised by

taxation, or however otherwise legally derived, but it could not for that purpose constitutionally incur a state debt to an amount exceeding \$50,000 without the express consent of the people (Const. R. I. art. 14, § 13); and it could be years about it, just as it might be convenient to raise the money and make successive appropriations. The general assembly has seen fit, in building a statehouse, to resort—in part, at least—to a state loan authorized by the express consent of the people; and the amount of the loan so authorized, the object to which the proceeds thereof are to be applied, and such other conditions, if any, imposed upon the authority to borrow on the state's credit, are contained in the proposition hereinbefore referred to and set forth. We have already said, in reply to a former inquiry whether this fund could legally and properly be used to pay the general expenses of the state for a period, at the termination of which it would be replaced, that it was "analogous to a trust fund, and cannot be legally applied to any other purpose than that for which it was created, except by the consent of the people by whom it was created." In re Statehouse Bonds, 19 R. I. 216, 219, 33 Atl. 870, 871. What, then, is the meaning of the words, as used in said proposition, "so much of said sum as may be necessary to be applied to the purchase of a site for, and the erection and completion of, a new statehouse"? In our opinion, they have not such a definite and precise meaning as to operate as words of limitation upon the amount to be expended by the general assembly upon the purchase of a site and the erection thereon of a statehouse, but are merely indicative of the purpose for which said loan was authorized, and serve as a limitation only upon the use of the fund itself; that is to say, no part of said statehouse fund shall be used for any other purpose than for the purchase of a site, and the erection thereon of a new statehouse, until, at least, said statehouse shall have been completed. If said statehouse fund is not sufficient to finish the new statehouse, then the general assembly can apply towards its erection such other sums as are legally available for such purpose, derived either through taxation, other authorized loans, or otherwise howsoever, as it may see fit. If the people had intended to impose as a condition upon the use of the proceeds of the state bonds by the general assembly, its officers or agents, that no portion thereof should be applied towards the erection of a statehouse unless said \$1,500,000 would suffice to entirely finish and complete the same, it is only reasonable to presume they would have used more definite, precise, and unambiguous terms than those employed, to express an intent so easy to be expressed in apt and meet phraseology. Our answer to the first question, therefore, is that, in our opinion, said

statehouse fund can legally be utilized in acquiring a site, and erecting thereon such portion of a new statehouse as the same may be sufficient to pay for, whether it be one-half or three-fourths, or any other proportion.

The question whether the statehouse commissioners are "trustees," in the legal sense of the word, must be answered in the negative. They are intrusted with the disposition of a fund which is devoted by law to certain purposes, which we have said is "analogous" to a trust fund; but so are other officials who could not be called trustees. The governor, for instance, has at his disposal a certain fund, which he may expend, in his discretion, for the apprehension of criminals. This does not make him a trustee, and subject his administration of the fund to the supervision of a court of equity. In the case of a real trust, if the trustee is guilty of misconduct he may be summoned to account, at suit of the beneficiary; and he may be removed and a successor may be appointed, or the court may direct him how to administer the fund, or assume the disposition of it through a receiver or a master in chancery. These commissioners are officials of the state, agents of the general assembly, and accountable to the legislature for their official acts. If public office is a public trust, it is so in a moral sense, not in legal intentment.

As the third question submitted to us is predicated upon an affirmative answer to the second, no further consideration of it is called for.

We now come to the last question. The authority of the statehouse commissioners, so far as erecting a statehouse is concerned, is defined in Pub. Laws R. I. c. 1201, of May 24, 1893, which provides, *inter alia*, that certain persons (naming them) shall constitute a board of statehouse commissioners, who shall perform the duties specified in said chapter; shall hold office for a sufficient time to accomplish the purposes of said act, and serve without compensation; shall at once proceed to select and acquire a site for a new statehouse, in the name of the state of Rhode Island; and shall, in the exact language of section 2 of said act, "erect thereon a new statehouse substantially in accordance with the plan accompanying the report of the statehouse commission made to the general assembly at its January session, 1892, and recommended by said commission." Section 3 is as follows: "Said board is hereby authorized to make, on behalf of the state, all contracts for the construction of said statehouse and the furnishing thereof, and for the grading and putting into suitable condition the grounds surrounding the same, provided that all portions of said work exceeding in cost the sum of five hundred dollars shall be done by contract, and that proposals for all work or material exceeding one thousand dollars in value shall be adver-

tised for." Said chapter 1201 also authorized and directed said board to employ a competent architect or architects, and authorized it, if it deemed it advisable, to employ a superintendent, a secretary, and other assistants, and to fix the compensation of all persons so employed; also, to hire offices necessary for the proper carrying on of its labors. To meet the expenses incurred under said act, registered bonds, to an amount not exceeding \$1,500,000, to be designated "The Statehouse Construction Loan," were authorized to be issued from time to time, at such times and in such installments as the said board shall determine, to the highest bidder, but at not less than the par value thereof; and the amount received from the sale of said bonds, less any premium received over the par value, or so much thereof as might be necessary, was thereby, in the exact language of the act contained in section 9, "appropriated for the payment of bills audited by said board, or by a committee thereof duly constituted for that purpose." The statehouse commissioners were likewise required to submit a report annually to the general assembly as to the progress of the work, and what contracts had been entered into by them since the last preceding report. The statehouse commissioners must act strictly within their authority. If they were authorized to erect a building, the cost of which, together with the site, was not to exceed \$1,500,000, then their power was limited to the expenditure of the restricted sum. *Turney v. Town of Bridgeport*, 55 Conn. 412, 12 Atl. 520. And they must keep within their authority in all other respects. *Boston Electric Co. v. City of Cambridge*, 163 Mass. 64, 68, 39 N. E. 787, and cases cited. In brief, they were authorized, first, to select and acquire a site in the name of the state of Rhode Island. It will be noted that no limitation was put upon the location, nor the size of the site, nor the price to be paid. Nothing is said in chapter 1201 whether it was to be merely large enough to accommodate the building, as is practically the case in Massachusetts, or whether it was to be a park, as in the case of Connecticut and some other states; nor whether it was to be located in the city of Providence, the city of Newport, or elsewhere within the state. The site having been acquired, they were authorized, secondly, to quote the words of the act, "to erect thereon a new statehouse substantially in accordance with the plan accompanying the report of the statehouse commission made to the general assembly at its January session, 1892, and recommended by said commission." It will be observed that the statehouse commission last above referred to is not the present board of statehouse commissioners appointed in chapter 1201, though a large majority of the present board were members of the former commission. The duty of the present board, then, was to erect a state-

house substantially in accordance with said plan; but the report accompanying the plan nowhere fixed a limit of cost of the building, although one of the conditions prescribed for competing architects, contained in said report, stated that the designs submitted should be of a fireproof building, and one that could be completed at a cost not exceeding \$1,000,000, on a good average foundation; and three bids by one contractor for erecting a statehouse according to the plan recommended by the commission, and referred to in chapter 1201, were given, varying in amount—the highest from the lowest—nearly \$200,000, according to the material used; and two of said bids exceeded \$1,000,000,—one by \$83,000, and the other by \$175,000. The sum appropriated under said chapter 1201 for the payment of bills audited by said board amounted to \$1,500,000. In our opinion, said references to sums of money do not operate as a limitation upon the cost of the building and its site; for we think the amounts named by the former commission in its report were but expressions of opinion. *Shea v. Milford*, 145 Mass. 528, 529, 531, 14 N. E. 764. And the general assembly apparently so regarded them, as in chapter 1201 it appropriated a much larger sum than either of the bids given in said report, although, of course, the cost of a site was problematical, as was also the cost of furnishing the statehouse after it was constructed, and of grading and putting the statehouse grounds into suitable condition, as provided for in section 3. If a limit to an exact sum was intended, it was a simple matter for the legislature to have added, to the description of or reference to the building to be constructed the words, "not exceeding in cost the sum of \$1,500,000," or any other figure it saw fit, or to have used other apt words to express its intention. Limitations upon the cost of public buildings were not unknown in this state, as the original act for building the Providence county courthouse provided for a commission, in the language of the act, "for the purpose of building a courthouse on said lot at a cost not exceeding \$150,000"; and by later legislation in regard to the same subject the courthouse commissioners were, to quote again, "empowered to build a new courthouse upon the lot in said act designated, substantially according to the plans submitted to the general assembly; and said commissioners are hereby empowered to advertise for proposals, and to make contracts for the construction of said new courthouse and to superintend the same until completed; provided, however, that said commissioners shall not make contracts for the expenditure of a greater sum than \$200,000, without further authority from the general assembly." Though the courthouse commissioners were authorized to contract to the amount of \$200,000, yet but \$100,000 was then appropriated for carrying out the purpose of their employ-

ment, other appropriations being made later; the total of the appropriations finally authorized and made being \$225,000, the cost of the completed structure being slightly less than said last-mentioned sum. *R. I. Acts & Res.* Jan. 1875, pp. 169, 312; Jan. Sess. 1876, p. 238; Jan. Sess. 1877, p. 212. The only limitation as to cost placed upon the present statehouse commissioners is that the building shall be substantially in accordance with the plan hereinbefore referred to, and that is far from definite. It is evident that very broad authority was given, but that was the concern of the general assembly, as it could constitutionally confer such authority as it saw fit, provided it did not assume to incur a state debt of more than \$50,000 without the express consent of the people. In *Shea v. Milford*, supra, where a contractor sued the town for work done and material furnished in erecting the Memorial Hall in Milford, the defense being that the committee intrusted with doing the work had exceeded its authority, Mr. Justice William Allen, in delivering the opinion of the supreme court of Massachusetts, used this language: "It is further argued that the committee could not make any contract which involved an expenditure in excess of the whole amount appropriated by the town, \$22,000. The vote does not expressly prohibit the committee from incurring liabilities beyond the amount of the appropriation, and we do not think that such prohibition can be implied. While it was probably intended to make an appropriation large enough to cover the contract price and such 'extra work' as would be likely to be required, there seems to be no prohibition against contracting for 'extra work' beyond the amount of the appropriation, if circumstances should justify and require it." Should the statehouse commissioners make contracts for more than \$1,500,000, their action would be void, in so far as it involved a violation of the constitutional restriction in regard to incurring debt; and then, too, there is an evident purpose manifested in section 9 of chapter 1201 that, whatever the cost of the statehouse and site may be, the state shall only be compelled to pay as fast as the general assembly shall see fit to provide funds and appropriate the money. In reply to the last question, we are of the opinion that the statehouse commissioners can legally contract for a statehouse which, together with the site, will cost a sum as much greater than said statehouse fund as is necessary to enable them to erect a statehouse substantially in accordance with the plan referred to in said section 2 of chapter 1201: provided, however, that all contracts made by them in excess of said statehouse fund shall stipulate that no money shall be required to be paid thereon whenever and so long as there shall be no unexpended appropriation applicable to the payment of bills audited by said board of statehouse commissioners. Owing to the ab-

sence of Mr. Chief Justice MATTESON from the state, we have been unable to confer with him.

JOHN H. STINESS.
P. E. TILLINGHAST.
GEORGE A. WILBUR.
HORATIO ROGERS.
WM. W. DOUGLAS.

FOLWELL v. PROVIDENCE JOURNAL CO.

(Supreme Court of Rhode Island. July 16, 1896.)

NEWSPAPER LIBEL—EVIDENCE—SOURCE OF INFORMATION—MITIGATION OF DAMAGES—HASTY PUBLICATION—JUDGMENT IN OTHER ACTIONS—REPUTATION OF PLAINTIFF.

1. In an action for newspaper libel, where defendant does not plead a justification, evidence that no investigation as to the truth of the matter was made before publication, because the source from which the information came had been found by experience to be reliable, is admissible to mitigate damages.

2. Evidence that the great haste necessary to prepare for publication libelous matter received in a press association dispatch prevented any investigation as to the truth of the matter is not admissible to mitigate the damages.

3. Evidence that the same libelous article was published in other papers on the same day, and that judgments had been rendered against them in other actions, is inadmissible, since each paper is liable for the consequences of its own publication.

4. Evidence of particular instances of misconduct on the part of plaintiff in an action for libel is not admissible, in the absence of evidence that his general reputation was bad.

Action by Frederick S. Folwell against the Providence Journal Company for libel. Plaintiff had judgment, and defendant moves for a new trial. Granted.

This was an action for libel for printing in the defendant's newspaper the following article: "Defrauded His Employer. A Lenox Gardener a Defaulter in the Sum of About \$7,000. Pittsfield, Mass., April 5. Considerable of a sensation was caused here and in Lenox by the disclosure to-day that Frederick S. Folwell, until recently head gardener for Anson Phelps Stokes, at the latter's place in Lenox, was a defaulter to the amount of \$6,000 of [or] \$7,000 at the time of leaving. Folwell was formerly employed by William Russell Allen of this city, but a few years ago secured the position of head gardener for Mr. Stokes, and in time became superintendent of his extensive estate at Lenox. A few months ago Mr. Stokes, who is an enthusiastic botanist, discovered that Folwell's knowledge of the subject was very superficial, and had him discharged. He secured a place with Pierre Lorillard at Newport, and left for that place. Soon after his departure Mr. Stokes began to receive bills for which he had already given checks. An investigation showed that Folwell had incurred many bills in his employer's name, and had appropriated checks given him with which to pay them. It cannot be stated just what the amount of Mr. Stokes' loss is, but the

sum named is approximately right. When the shortage was discovered, word was sent to Newport with the idea of having Folwell come here and explain, but he was not there, and had not been since leaving Lenox, and no trace of him has been found. His wife and child are in this city."

Samuel R. Honey and Frank F. Nolan, for plaintiff. Richard B. Comstock and Rathbone Gardner, for defendant.

STINESS, J. The defendant is sued for printing a libel upon the plaintiff in its newspaper, the Providence Daily Journal. The case was tried to a jury, and damages were assessed against the defendant in the sum of \$2,300. The defendant set up no justification for the libel, but offered evidence in mitigation of damages simply, and it now petitions for a new trial on the grounds of erroneous rulings and excessive damages. It appeared in testimony that the defendant was a member of an association called the "New England Associated Press," an agency to collect items of news, and to send them to its members, publishers of newspapers in New England and other places. At the trial the plaintiff disclaimed express malice on the part of the defendant, but, relying upon the implication of malice from the falsity of the article, and showing no special damage, he rested his claim for damages, chiefly, upon the gross carelessness of the defendant. Several questions were put by the defendant's counsel for the purpose of showing that it acted with reasonable precaution and in good faith, which were ruled out, and the rulings now come before us on exceptions. The first two exceptions now pressed by the defendant relate to the exclusion of testimony to show that there was no investigation of the matter at the time because the source from which the information came had been found by experience to be reliable. The plaintiff replies that evidence of this kind cannot be offered unless the name of the informant be given at the time of publication.

The doctrine that a slander could be justified by giving the name of the author originated in Northampton's Case, 12 Coke, 134. But this rule related to a justification simply. It was but a dictum, published after the death of Lord Coke, which for a time was followed with some hesitation; but it has long since ceased to be regarded as law. Odger, *Sland.* & L. *162; Starkie, *Sland.* & L. (Wendell's Ed. 1852) c. 14, and note. Numerous cases, in which the question has arisen, hold that the giving of the name of an informant is no justification, but that the publisher of a libel or a slander is liable, even though he is not the author of it. He may do as much damage in spreading it as if he had started it. When, therefore, there is a plea of justification, evidence of the origin of the slander is not admissible for any purpose, because it

is not a justification in itself, and a plea of the truth of the words spoken or written is such a reaffirmation of them as to make their origin immaterial in the measure of damages. In view of this development of the law, it is but natural that expressions are to be found which may be taken to imply that the name of the author must be given at the time of the publication. They are generally used in opposition to the doctrine of Northampton's Case; as in *Dole v. Lyon*, 10 Johns. 447, Kent, C. J., says: "It is not sufficient that the printer, by naming the author, gives the party aggrieved an action against him." This is intended to apply to the exculpation of the defendant. In *Talbutt v. Clark*, 2 Moody & R. 312, there was a plea of the truth of the words. In *Hamilton v. Eno*, 81 N. Y. 116, there was a claim of privilege. Of *Sheckell v. Jackson*, 10 Cush. 25, we only know that Shaw, C. J., said that the answers about information could have no tendency to prove the truth of the words charged. In *Rice v. Cottrell*, 5 R. I. 340, the name of the author was given at the time, and the defendant urged that the onus was on the plaintiff to show that he was not thus informed; and the language of the court, which implies that the defendant may prove in mitigation of damages that the slander originated with another, if the author is named at the time, must be read in view of the facts of the case. But, where no justification is claimed, we know of no case which expressly holds that the fact of information from another cannot be shown, for what it is worth, upon the question of damages. Indeed, there seems to be a common agreement, starting with the idea of a full justification, that one who inadvertently repeats a slander is not equally liable with one who maliciously invents it, unless he reaffirms it by a plea of its truth. The object of giving the name at the time, that it might appear in exculpation that one was not stating a fact as from himself, has passed away, as also the notion that it was for the purpose of letting the plaintiff know who the author was, so that he could sue him, since all who take part in spreading a slander are liable. The source and character of the information, however, are of consequence in considering a defendant's conduct. Everybody knows that telegraphic items in a newspaper are not composed in the office of the paper. It is as plain as though it was so written that they come from some person in another place. This much may be taken for granted.

Damages for defamation must be a matter of estimate, in most cases, and exemplary or punitive damages will always enter into the verdict when it appears that there was actual malice or a recklessness equivalent thereto. 3 Suth. Dam. § 1216. Hence, to guard against excess in the latter, a defendant should be allowed to show the precautions which he took, the circumstances under which the publication was made, or

other things relating to it which may affect his culpability. *Easterwood v. Quin*, 2 Brev. 64; *Smith v. Harrison*, 1 Fost. & F. 565; *Saunders v. Mills*, 6 Bing. 213; *Swift v. Dickerman*, 31 Conn. 285; *Parker v. McQueen*, 8 B. Mon. 16; *Hewitt v. Pioneer Press Co.*, 23 Minn. 178; *Edwards v. Kansas City Times Co.*, 32 Fed. 813; *Scripps v. Foster*, 41 Mich. 742, 3 N. W. 216; 13 Am. & Eng. Enc. Law, pp. 440, 441, and cases cited. A very good summary of the law of libel, with citations of authority, may be found in 42 Cent. Law J. (June 5, 1896) No. 23, p. 475.

In this case the editor of the paper was allowed to state that the article was received through the press association, and that he knew its methods of collecting news. But, with nothing more, as the defendant's counsel pertinently suggests, the jury were in the dark as to the character of the source of the information, and were free to infer that the defendant had been guilty of the gross carelessness charged by the plaintiff. We think that the defendant was entitled to put in testimony tending to show its exercise of due care and good faith, to be considered in the assessment of damages. Such a course seems to be both just and reasonable, and one which cannot harm a plaintiff who is to have compensatory damages in any event. If a defendant can show that, acting with reasonable precaution, he had been misled, and so had unintentionally done wrong to the plaintiff, he ought to be allowed to do so. If, however, his evidence does not amount to this, but shows a reckless or wholly unwarrantable meddling with the plaintiff's reputation, the jury will doubtless take the fact into consideration.

It is urged that, as no investigation of the truth of this article was made by the defendant, evidence to show precaution or good faith was irrelevant. We think this is going too far. Experience is a teacher in the affairs of life. The very fact that one has been found trustworthy takes the place of an investigation into his reports, and naturally leads to a reliance upon them, so that a special inquiry in each case would be needless. This fact enters into and becomes a part of the act itself, and as such should receive consideration. The question relating to the printed instructions given to agents of the press association was properly ruled out. The section quoted seems to be quite immaterial. It is not specific as to any duty, except that correspondents should post themselves on the law of libel. If the article did not otherwise conform to the instructions, it could have been seen at once. Another question properly ruled out is this: "Is it possible to make investigation to ascertain the falsehood of dispatches, coming as this did, and still publish them, in time for the newspaper going to press?" There is no duty on the part of a newspaper to print articles which may injure the reputation of a person, and it would be most absurd to say that the

haste of a publisher to get this sort of stuff out to the public could in any way tend to mitigate damages. If publishers will spread this kind of so-called "news," they do so at their peril. One may properly say that he was misled by what he supposed to be reliable authority, but to say that he was in such a hurry to print what might be a libel that he could not wait to find out about it is quite another thing. The defendant's offer to show that the same article was published by other papers on the same day, for which other suits had been brought, was properly refused. The acts of other publishers are independent acts, which could in no way affect the defendant. In *Saunders v. Mills*, supra, a defendant having been allowed to show at the trial that he had copied an article from another paper, but not allowed to show that it had appeared concurrently in other papers, the motion for a new trial upon this ground was denied. The admissibility of the testimony is urged both to show the jury that whatever injury the plaintiff has sustained to his reputation was not caused by the defendant alone, and that he has received from others an amount which would go to compensate him for his injury. We are aware that it is possible for a plaintiff in a case like this, where many parties are liable for practically the same libel, to recover sums which, in their total amount, may exceed a fair compensation for his injury. But this is a possibility which cannot be avoided in cases where there is no pecuniary standard for the assessment of damages, and where the matter must be left to the discretion of a jury. Moreover, an adoption of the defendant's view would be open to the equally serious objection that a jury might consider the amount recovered of others to be so large that its verdict would be made smaller than it otherwise would be, and so other parties might be made to pay for an injury for which a defendant was equally, or even more largely, responsible. The evidence offered must have been intended to produce this result, or else it could have been of no benefit to the defendant. The rule is unquestionable that each defendant is responsible for the injury which is the natural result of his own wrong, and for nothing more or less than that, except as the wrong may have been aggravated by his conduct. Whatever may be the opinion of a court or a jury as to the total amount of judgments, we are bound to assume that the damages in each case have been assessed in accordance with the well-settled rules of law. We do not see, therefore, how the evidence of judgments in other cases can be admitted. And so it was held in *Harrison v. Pearce*, 1 *Fost. & F.* 567; *Creery v. Carr*, 7 *Car. & P.* 64. See, also, *Colledge v. Pike*, 56 *Law T.* 124.

The remaining exception relates to an offer to show bad conduct on the part of the plaintiff in two particular cases, but not that the plaintiff's general reputation was bad,

which was excluded. The ruling was correct. Undoubtedly a defendant is entitled to show the plaintiff's bad reputation, because it is for injury to his good name that he sues. But the inquiry must be confined to general character or reputation. "Particular acts or instances of misconduct cannot be proved; nor rumors and reports, unless they are so common and prevalent that they have affected the general character." 3 *Suth. Dam.* § 1226; 13 *Am. & Eng. Enc. Law*, pp. 443, 444, and cases cited. As the result of this opinion is the granting of the petition for a new trial, we need not consider the question of excessive damages.

MANTON v. ROBINSON.

(Supreme Court of Rhode Island. March 18, 1896.)

INSURANCE—SURRENDER BY PLEDGEE.

1. The surrender before maturity of an endowment policy, by one to whom it was assigned as security for a demand note, is unauthorized, and the assignee will be required to account for the proceeds, where the assignment did not provide for a surrender or sale, and no demand was made for payment of the note, and no notice given to the assignee of the intention to surrender.

2. Such a surrender is not justified because made at the request of the holder of a prior assignment of the policy, to enable him to realize thereon, since equity would not have compelled the second assignee to join in the surrender without protecting the rights of the assignor.

Bill by Joseph P. Manton, trustee, against Louis E. Robinson, administrator, for an account. Heard on pleadings and proof. Account ordered.

Edmund S. Hopkins, for complainant. Richard B. Comstock and Rathbone Gardner, for respondent.

MATTESON, C. J. This is a bill for an account. The case shows the following facts: The complainant was the holder of a policy of insurance for \$10,000, issued on his life by the Mutual Life Insurance Company of New York. The policy was a 20-year endowment, maturing January 1, 1886, the premiums on which were payable quarterly and in full during the first 10 years of the policy. The last premium was due on October 1, 1876. On March 6, 1873, the complainant assigned the policy to John T. Mauran, formerly of Providence, deceased, as collateral security for his indorsement of Manton's note for \$3,000, payable in four months. On August 20, 1875, Mauran, having received other securities from Manton for other indebtedness, gave to Manton a receipt reciting that he held this policy as security for his indorsement of Manton's notes for \$3,000. On August 6, 1876, the complainant assigned the policy, subject to the prior assignment to Mauran, to Martin C. Stokes, defendant's intestate, as collateral security for a note for \$3,212.07

made by Manton, payable to the order of Stokes on demand. Neither of these assignments contained any provision authorizing a surrender or sale of the policy. The policy was delivered by Manton to Mauran at the time of its assignment to him, on March 6, 1873, and remained in his possession until it passed into the hands of his guardian. Manton continued to pay the premiums on the policy until April 1, 1876, and the three remaining premiums were paid by Mauran, though the complainant claims that one at least of these was subsequently repaid by him to Mauran. The note for the indorsement of which the assignment to Mauran was given was made prior to the assignment to Mauran, and, by an agreement between Manton and Mauran, was to be renewed until January 1, 1878. But the last renewal was made February 22, 1876, and the note given on that renewal became due June 25, 1876, after Manton had ceased to pay the premiums on the policy, and was taken up by Mauran. On July 9, 1878, Henry C. Cranston was appointed guardian of Mauran, and the policy and the overdue note came into his hands as guardian. Cranston, as guardian, in 1881, proposed to the company to surrender the policy for its cash value, but was met by the objection that notice of the assignment to Stokes had been given to the company, and the assignment to him entered on the books of the company, before the assignment to Mauran; and consequently the company could not pay the value of the policy to him unless Stokes should release his claim or join in the receipt. Cranston applied to Stokes to sign the receipt, which Stokes did. The full surrender value of the policy, \$8,079.50, was thereupon, to wit, on May 18, 1881, paid to Cranston, as guardian, who, after deducting from it the premiums paid by Mauran, amounting, with interest, to \$772.35, paid to Stokes \$3,771.43 of the residue on account of the note held by him, and retained for himself, as guardian, on account of the note taken up by Mauran, \$3,535.72. No demand by Stokes for the payment of the note held by him had been made on Manton prior to the surrender of the policy. Nor was any notice given to Manton, either by Cranston as guardian or by Stokes, of an intention to surrender the policy, and Manton was not apprised of the surrender until about six months later, when he heard of it from the company.

The surrender of the policy to the company for its cash value was equivalent to a sale of it to the company. Without raising any objection to it on any other ground, we are of the opinion that the action was unauthorized, because no notice of an intention to surrender was given to Manton by either Cranston or Stokes, so that he might have a reasonable opportunity to redeem the policy; and, further, so far as Stokes was concerned, Manton was in no default, no demand on him for the payment of Stokes' note having been

made. *Dewey v. Bowman*, 8 Cal. 145; *Robinson v. Hurley*, 11 Iowa, 410.

This suit is against the administrator on the estate of Stokes alone, and the point is taken that the bill ought not to be maintained, because Stokes, in signing the receipt, did nothing more than he might have been compelled to do by Cranston as guardian, since the assignment to Stokes was subject to the prior assignment to Mauran. We do not think the point is tenable. It is by no means clear that the court would have felt warranted in decreeing a surrender of the policy, for at the time of the surrender all the premiums had been paid, so that it was in fact a paid-up policy, having less than five years to run. Neither of the assignments authorized a surrender or sale of the policy, and it was adequate security for the premiums which Mauran had paid, and for the indebtedness for which it was pledged. *Whitaker v. Gas Co.*, 16 W. Va. 717. But, however this might be, Manton would have been a necessary party to any suit undertaken by Cranston as guardian to enforce his claim against the policy; and the court, whatever its decree, would have protected the rights of Manton. We are of the opinion that the complainant is entitled to an account.

TOURGEE v. ROSE.

(Supreme Court of Rhode Island. Jan. 10, 1896.)

SEDUCTION—EVIDENCE.

1. Plaintiff, under an order to make complaint for seduction more specific, furnished a statement of the month, year, general location, and approximate time of day of the commission of the offense. *Held* that, having thus particularized the charge, he could not show other distinct acts, subsequent to the time set out in the bill of particulars, in corroboration thereof.

2. Evidence, in an action for seduction of plaintiff's daughter, that plaintiff's wife was absent for a year, and that plaintiff and his two daughters lived together, that plaintiff was away during the day, and that young men lodged at the house, and that another daughter of plaintiff was seduced during such time, was inadmissible to show negligence of the plaintiff.

Action by Joseph H. Tourgee against Benjamin Rose. Verdict for defendant. Petition for new trial granted.

Albert B. Crafts, for plaintiff. Clarence A. Aldrich, for defendant.

TILLINGHAST, J. The first question presented for decision in this case is whether the ruling of the common pleas division, by which the plaintiff was limited in his proof of seduction to the bill of particulars which he had furnished, was correct. We think it was. The motion of the defendant, which was granted by the court, was that the plaintiff be required to furnish a bill of particulars, which should specify the date, place, and time of day of the alleged seduction. In compliance with the order, the plaintiff furnished a statement in

two paragraphs, the first giving the month, year, general location, and approximate time of day of the commission of the offense, and the second stating that the daughter was gotten with child by defendant on or about the 21st day of August, 1893, at a specified place in South Kingstown. The plaintiff having thus particularized as to the charge of seduction contained in his declaration, the defendant had the right to presume that no other acts than such as could be shown to have taken place within the time and at the places therein named could properly be shown against him in evidence, and therefore he was not called upon to be prepared to meet or disprove any allegations beyond those specified. But the plaintiff contends that defendant's motion only called for a limited bill of particulars, and hence that the court erred in excluding certain corroboratory evidence offered by the plaintiff, concerning which no bill of particulars had been asked. Or, to be more specific, the plaintiff offered evidence of distinct acts of intercourse which occurred subsequent to the times set out in the declaration and bill of particulars, in corroboration of the testimony of the daughter as to her seduction in June previous, which, being objected to by defendant's counsel on the ground that such acts were not specified in the bill of particulars, and that he was not, therefore, prepared to meet them, the court ruled out. We fail to see that the mere fact that the evidence offered was corroboratory makes any difference; for, such subsequent intercourse being a distinct and separate act, the defendant was as much entitled to be apprised of it in the bill of particulars as though it had been the one relied on in the declaration. And therefore notwithstanding the law may be, and probably is, as contended by counsel for plaintiff, that corroboratory evidence of the kind offered is admissible in cases of this sort (21 Am. & Eng. Enc. Law, pp. 1029, 1030, and cases in note 1 on page 1030; note to *Weaver v. Bachert*, 44 Am. Dec. 172, 173; *Conway v. Nicol*, 34 Iowa, 533; *Thompson v. Clendening*, 1 Head, 287; *Sherwood v. Titman*, 55 Pa. St. 77; *Threadgool v. Litogot*, 22 Mich. 271), still the plaintiff cannot avail himself thereof where a bill of particulars has been ordered, unless the acts proposed to be shown are included therein. Such a bill is not only proper by way of limiting the plaintiff in his proof to the specific charges alleged therein, but is essential also to enable the defendant fully to prepare for his defense, and to guard him against surprise; and it is appropriate in all kinds of actions where the circumstances are such that justice demands that a defendant should be apprised of the matters for which he is to be put on trial with greater particularity than is required by the rules of pleading. *Brown v. Calvert*, 4 Dana, 219; *Harding v. Griffin*, 7 Blackf. 462; *Tilton v. Beecher*, 59 N. Y. 176; *Com. v. Giles*, 1 Gray, 466, 469; *Hall v. Sewell*, 9 Gill, 146.

The second question presented for decision

is whether the common pleas division erred in allowing the defendant's counsel, in cross-examination of Mary E. Holland, to ask her when she was married, and how long after her marriage before she gave birth to a child. Said Mary E. Holland was the wife of James H. Holland, and an elder sister of Catherine C. Tourgee, the latter being the daughter of plaintiff for whose seduction the action was brought. The court ruled that the questions were not proper as cross-examination, or to impeach the credibility of the witness, but were admissible to show negligence on the part of the plaintiff. The witness testified that she had a child three months after her marriage to said James H. Holland. The record sets out that it had appeared in evidence that the plaintiff's wife was absent from home a year before January, 1891; that the plaintiff and his two daughters were living together; that he was a farm laborer, and away during the day; that certain young men lodged and visited at the house while the mother was away; and that witness' husband was one of said men. The jury returned a verdict in favor of the defendant. The counsel for defendant contends that this evidence was properly admitted for the purpose of showing that plaintiff was negligent in the care of his minor daughter, and hence that, even if entitled to recover, the damages should be mitigated by reason of such negligence. We do not think the evidence was admissible. The fact that the plaintiff's elder daughter, three years previous to the commission of the offense charged against the defendant, had been seduced, presumably, perhaps, by the man who subsequently married her, does not show, or tend to show, that the plaintiff was chargeable with careless indifference in affording opportunities for criminal intercourse between his younger daughter and the defendant; that is to say, of practically conniving at the offense. Indeed, it is not readily observable, from the above statement of the evidence, how it can be said that the plaintiff was chargeable with such careless indifference regarding the misfortune of his elder daughter. Said statement shows: (1) That the plaintiff's wife was absent from home a year before January, 1891, and that plaintiff and his two daughters were living together. No legitimate inference of such carelessness on the part of plaintiff can be drawn from these facts. It is to be presumed that his wife was properly away during the time mentioned, and that he was properly living with his two daughters. (2) Said statement shows that plaintiff was a farm laborer, and absent during the day. This fact certainly fails to prove such carelessness. Most men are away from home during the day, and necessarily so in attending to their business. (3) Said statement also shows that certain young men lodged and visited at the house; that the said daughter Mary married one of these men, and gave birth to a child in three months afterwards. We fail to see that any careless indifference or connivance in

connection with this event, on the part of the plaintiff, can properly be inferred from these facts. It is to be presumed that the men who visited and lodged at his house were decent and respectable persons, until the contrary is made to appear, and that they were rightfully and properly permitted to visit and lodge there. The only thing which appears against them is that one of their number may have seduced the plaintiff's elder daughter, which was, indeed, a grave offense, but for which he apparently sought to make amends, as far as possible, by subsequently marrying her. But the mere fact that he committed said offense, if he did commit it, does not show that there was anything in his previous conduct or character which should have put the plaintiff on his guard in permitting him to visit and lodge at his house. It is a matter of common knowledge, as well as of common regret, that cases of seduction do happen in families where parental diligence and care are of the highest order. And while it is doubtless very rare that two daughters of the same family should meet with such a serious misfortune, yet we fail to see how it can be legitimately inferred that because one daughter had previously been seduced, in the circumstances aforesaid, the father in any way connived at or contributed to the seduction of the other. If the plaintiff's conduct in connection with the seduction of his elder daughter was not open to the charge of careless indifference or connivance,—as we think it was not,—a fortiori it cannot be said to be open to said charge in connection with the seduction of his younger daughter. Of course, no question is made as to the admissibility, in mitigation of damages, of evidence of the bad character or chastity of the person seduced, in cases of this sort, or that the father is a man of profligate character and dissolute habits, or even guilty of careless indifference, which practically amounts to connivance, in affording opportunities for criminal intercourse between his daughter and the defendant. See cases cited in note 6 to *Weaver v. Bachert*, 44 Am. Dec. 172; *Seagar v. Sligerland*, 2 Caines, 219; *Zerfing v. Mourer*, 2 G. Greene, 520; 21 Am. & Eng. Enc. Law, 1035-1037, and cases cited; *Webb*, Pol. Torts, "Damages," 281, note; 2 Greenl. Ev. (14th Ed.) § 579. But the defendant's counsel contends that, whether the testimony objected to in this case was admissible or not, the admission thereof did not prejudice the plaintiff, because the jury found for the defendant on the question of liability, and hence did not consider the question of damages at all. It is doubtless true that the admission of improper testimony which it appears could not have influenced the verdict is no ground for a new trial. *Ames v. Potter*, 7 R. I. 265. But we cannot say that the evidence objected to in this case was of that sort. On the other hand, we think it was such as would be likely to prejudice the jury against the plaintiff. See *Graham v. Coupe*, 9 R. I. 478; *King v. Colvin*, 11 R. I. 582. Petition for new trial granted.

NEWTON v. SPEARE LAUNDERING CO.

(Supreme Court of Rhode Island. July 11, 1896.)

LEASE OF LAUNDRY PLANT—LIABILITY OF TENANT —SURRENDER OF LEASE.

1. Lessees of a laundry plant consisting of both real and personal estate, at an agreed rental, are not liable to the purchaser of the realty under a mortgage on it alone for such amount after such purchase, where the personal property remained the property of the lessors after the foreclosure, in the absence of an attornment by the lessees to such purchaser, or an agreement to pay him such sum.

2. All that the purchasers can recover as rental is the value of the use of the land.

3. The mere sending of the key to leased premises to the owner is not such surrender and acceptance as will discharge the tenant's liability for rent.

Action by Edward Newton against the Speare Laundering Company to recover rent, in which there was a verdict directed by the court in favor of plaintiff. Defendants petition for a new trial. Granted.

William P. Sheffield, Jr., for plaintiff Charles Acton Ives, for defendants.

STINESS, J. The defendants hired of the Newport Laundry Company a laundry plant, comprising both real and personal estate, May 14, 1894, at \$125 per month. The testimony shows that a lease was talked about and drawn up, but it was not signed by all of the lessors, nor by the defendants, and the only defendant who testified denied that it was agreed to. The judge who tried the case treated the hiring as one from month to month, and we think he was correct. The real estate was subject to a mortgage, under which it was sold at auction September 8, 1894; and the plaintiff, being the purchaser, brings this action to recover the rent due from September 14, 1894, to May 14, 1895, the time when he took possession of the property. Upon these facts, the judge directed a verdict for the plaintiff for the amount claimed, and the defendants ask for a new trial upon exceptions to such ruling.

We think that the direction was erroneous. The defendants' agreement to pay \$125 per month was for the use of the real estate, together with the machinery and other personal property needed in the business. The testimony does not show an attornment by them to the plaintiff, nor an agreement with him as to the amount which he should receive for the real estate alone. According to the record and the ruling of the judge, the personal property remained the property of the Newport Laundry Company after the foreclosure of the mortgage. Taking the case as it is presented, the most that the plaintiff can demand is what the use of the real estate was worth, distinct from what the use of the machinery was worth. The previous agreement, as an entirety, came to an end when the mortgage was foreclosed. It is

for the jury to assess this sum according to the proof, as in ordinary cases, for use and occupation. *Buffum v. Deane*, 4 Gray, 383.

The ruling of the court seems to have rested upon two points: First, that the defendants had acknowledged that they were liable at the rate of \$125 per month; and, second, that if Mr. Horgan, one of the original lessors, sat by and saw the plaintiff claim the rent, he could not collect it again.

As to the first point, it appears that the plaintiff did so state; but from his whole testimony it is clear that he meant only to say that they admitted that the rent was so much per month, but denied that they were liable to him, and some of these statements were in the course of an attempt to compromise. An admission that the rent was originally \$125 per month is not an admission that the defendants were liable to the plaintiff for that sum for the real estate alone.

As to the second point, whether the original lessors would be estopped or not by the plaintiff's recovery of the full amount then agreed upon, it is also clear that the plaintiff had no right, against the objection of the defendants, to recover more than the use of the land was worth, and that they had the right to have his judgment limited to that sum. The assessment of the plaintiff's claim should have been left to the jury, and therefore a new trial must be granted.

Another question is made, which should be disposed of for the purposes of another trial. The defendants claim to have abandoned the property February 14, 1895, to have sent the key to the plaintiff, and that they are not liable for the rent after that time. The plaintiff admits that the key was sent to his office, but he denies that he took any possession of the property until May 14, 1895. The judge correctly ruled that, if the defendants were tenants from month to month, they were liable for the rent until they terminated the tenancy by proper notice, or until a surrender and acceptance of the premises by the owner. Sending a key to the owner, without more, is not such a surrender and acceptance as will discharge a tenant's liability for rent. *Townsend v. Albers*, 3 E. D. Smith, 560; *Withers v. Larabee*, 48 Me. 570; *Pier v. Carr*, 69 Pa. St. 326.

Other questions were raised, as to the payment of some rent from attachments, and as to storage of wagons, but the testimony is not sufficiently clear to enable us to pass upon them. As frequently happens, counsel asked questions with reference to writs and papers which they held in their hands, which are not filed with the papers, and do not come to us. We have therefore no means of knowing what the answers relate to. Some of the questions in this case are confused in that way. We think that the declaration is defective in its lack of a count for use and occupation, but this defect can be cured by amendment.

KELLY v. ALDERSON.

(Supreme Court of Rhode Island. July 11, 1896.)

INJURY BY DOG—EVIDENCE.

1. Under Gen. Laws, c. 111, § 3, allowing recovery for injuries by the bite of a dog, and providing that it shall not be necessary to prove that the owner knew that the dog was accustomed to do such damage, evidence that the dog was peaceable was properly excluded.

2. Testimony as to character of a dog was inadmissible to show that he probably would not have bitten plaintiff had he not been assaulted by him.

3. Evidence of the peaceable character of the dog is inadmissible in mitigation of damages.

Action by Matthew Kelly against James Alderson. Verdict for plaintiff. Petition for new trial denied.

Patrick J. Galvin, for plaintiff. Charles Acton Ives, for defendant.

STINESS, J. This is an action for damages from a bite by the defendant's dog. The injury took place while the plaintiff was walking on a public highway in Jamestown, in the evening of August 30, 1895. By the Public Laws of Rhode Island of April 26, 1889 (chapter 749) it was provided that the owner or keeper of a dog should be liable to the person injured for the damages sustained, and that it should not be necessary, in order to sustain an action, "to prove that the owner or keeper knew that such dog was accustomed to do such damage." At the trial before the jury, the defendant offered testimony to show that the plaintiff had previously stoned the dog; that the dog was peaceable, and had not been known to attack any person except the plaintiff; and it is alleged that such testimony was excluded, and that exception was taken. The evident purpose of the statute is to give a remedy to a person who is bitten by a dog upon a highway, without reference to the defendant's knowledge of the viciousness of the dog. In other words, if the dog gets upon the highway, the owner is liable for whatever damage he may do. It is the risk which he takes from the fact that the dog is on the highway. The statute plainly extends the liability of an owner beyond his liability at common law, which was only for habits of which he had reason to know. Testimony, therefore, that the dog had not

1 Section 1: "If any dog shall have killed or assisted in killing, wounding or worrying any sheep, lamb, swine, cattle, or other domestic animal, or that shall assault or bite, or otherwise injure any person while traveling the highway or out of the enclosure of the owner or keeper of such dog, such owner or keeper shall be liable to the owner of such property or person injured for all damages sustained, to be recovered in an action of trespass, or on the case, and it shall not be necessary in order to sustain an action to prove that the owner or keeper knew that such dog was accustomed to do such damage or mischief." See Gen. Laws R. I. c. 111, § 3.

been known to bite before, was no defense to the action, and was not admissible upon this ground. It is argued that no new liability is imposed by the statute, but only a rule of evidence which excuses the plaintiff from proving the scienter. But, if the defendant can set up in defense the fact that he did not know of the bad habits of the dog, the plaintiff must meet the testimony in rebuttal by proving that he did, which is the very thing that the statute says he need not do. The provision is not that he need not prove the fact in the first instance. He need not prove it at all. Clearly, then, testimony relating to the scienter is not admissible as a defense. This is the opinion, under laws of the same purport, in *Woolf v. Chalker*, 31 Conn. 121; *Pressey v. Wirth*, 3 Allen, 191; and *Galvin v. Parker*, 154 Mass. 346, 28 N. E. 244.

As to the fact that the plaintiff had previously stoned the dog, the record shows that it fully appeared in cross-examination of the plaintiff. He said that the dog chased him in May, and that he threw stones to keep him away. There is therefore no need to consider this exception.

It is further argued that testimony as to the character of the dog was admissible to show that it was improbable that the dog would have attacked the plaintiff without being first assaulted by the plaintiff himself. This would set up the character of the dog against the plaintiff's oath. We think that the inference of probability is too remote and inconclusive. Dogs have often bitten persons when they have not been known to bite before, and the statute takes account of this fact by giving a remedy in such a case, if it be upon a highway.

The only remaining question upon this point is whether the testimony offered was admissible in mitigation of damages. We think not. In *Woolf v. Chalker*, supra, it is stated in the headnote to be admissible for this purpose; but this statement is not warranted by the opinion of the court, which has no reference to damages whatever. Our statute gives an action "for all damages sustained." This clearly means compensatory damages only, and these could not have been lessened by the testimony offered. Upon all grounds, the testimony was rightly excluded.

An exception is taken to the charge to the jury that if a man should tread upon a dog in the highway, and the dog should bite, the action would lie, under the statute. While it may be doubted whether it was the intent of the statute to give an action for a bite which was the result of a willful provocation by a plaintiff, it is a question which does not arise in this case. There was no evidence of this kind, and the judge so stated to the jury when his attention was called to it, and told them to disregard that part of the charge. It was not a statement that could prejudice the defendant in any way, and, as

it was finally left, there was no error. The exceptions are overruled, and the petition for a new trial denied.

TAYLOR v. GRANGER, City Treasurer of City of Providence.

(Supreme Court of Rhode Island. March 21, 1896.)

ACTION ON THE CASE—WHEN LIES.

Action on the case is the proper remedy for damage done by pigeons negligently permitted to fly abroad.

Case certified from common pleas division, Providence county.

Trespass on the case for negligence, by Martha O. Taylor against Daniel L. D. Granger, city treasurer of the city of Providence. Certified from the common pleas division on demurrer to the declaration. Demurrer overruled.

The declaration alleged, in effect, that the city of Providence negligently permitted pigeons which it kept at Roger Williams Park to fly abroad, and frequent the plaintiff's premises daily and every day from early morning until evening, whereby they disturbed the plaintiff and her tenants by their continual noise, and defiled and otherwise injured her house and grounds.

Nathan W. Littlefield, Walter R. Stiness, and Edward C. Stiness, for plaintiff. Francis Colwell, City Sol., and Albert A. Baker, Asst. City Sol., for defendant.

MATTESON, C. J. The only question raised by the demurrer is whether an action on the case can be sustained. The defendant contends that, because of the propensity of pigeons to fly and to commit the grievances complained of, the proper action is trespass, and not case. Assuming that an action of some sort can be sustained, as in the present state of the pleadings we must, we are of the opinion that case will lie, since the grievances complained of are merely consequential results of permitting the pigeons to fly at large, rather than results of force directly applied. We think, however, though case is the proper remedy, it proceeds not so much on the principle of negligence in permitting the pigeons to fly abroad as on the principle embodied in the maxim, "Sic utere tuo ut alienum non lædas." Dictum of Pollock, B., in *Farrer v. Nelson*, 15 Q. B. Div. 253. The standard of duty which one owes to another, for breach of which negligence may be predicated, is what persons of ordinary prudence would deem essential to be done in the particular circumstances of the case. Unless, therefore, the plaintiff can show that those who keep pigeons have deemed it necessary to restrain them from flying, in order to keep them from annoying their neighbors, it would seem to be very doubtful whether neg-

ligence can be made out. Demurrer overruled, and case remitted to the common pleas division.

NEW ENGLAND STEAM BRICK CO. v. DUBE.

(Supreme Court of Rhode Island. Dec. 23, 1895.)

AFFIDAVIT OF DEFENSE.

An affidavit of defendant that he has a good defense to a part of plaintiff's claim; that said defense consists in this: "that the account rendered is incorrect, and charges for material furnished are higher than agreed," and "I make this affidavit from my best knowledge and belief," is sufficient, under the amendments to judiciary act (section 59), requiring an affidavit that, in defendant's opinion, there is a good and valid defense, and of what it consists.

Action by the New England Steam Brick Company against Israel Dube. Motion for judgment for want of sufficient evidence. Denied.

Hayes & Hayes, for plaintiff. T. H. Crowley, for defendant.

MATTESON, C. J. Section 59 of the amendments to the judiciary act requires that a defendant, to entitle himself to defend, shall make an affidavit only "that, in his opinion, there is a good and valid defense, and in what said defense consists." The defendant's affidavit in the present suit is a substantial compliance with this provision. Motion for judgment for want of sufficient affidavit denied.

HAMMOND v. HAMMOND et al.

(Supreme Court of Rhode Island. March 4, 1896.)

ASSIGNMENT OF DOWER—CONCLUSIVENESS.

Where dower is assigned, and the parties waive their right to appeal from it, the assignment is final on its entry, under Gen. Laws, c. 264, § 23.

The municipal court of the city of Providence, May 21, 1895, assigned to Clara E. Hammond dower, by metes and bounds; and all parties interested waived their right to appeal, in writing. October 11, 1895, the court made a decree setting out dower to said Clara E. Hammond in the same lands, in a special manner, by assignment to her of a fixed rental, to be paid to her at stated periods, and she appeals. Reversed.

Van Slyck & Mumford, for appellant. Edwards & Angell and J. S. G. Cobb, for appellees.

PER CURIAM. We think that the municipal court had no jurisdiction to make the decree appealed from. The former decree determined the manner in which dower should be assigned, and, the parties having

waived their right to appeal from it, it became final on its entry. Gen. Laws R. I. c. 264, § 23. The revocation of its action by a probate court, under Id. c. 209, § 11, is to be made before the time for taking an appeal has expired.

In re INCURRING OF STATE DEBTS.

(Supreme Court of Rhode Island. May 25, 1896.)

STATES—INCURRING DEBTS—CONSENT OF PEOPLE.

1. No executive officer can incur a state debt except by acts authorized by law, and hence such a debt cannot be incurred by overdrawing the state's bank account, no law authorizing such overdrafts.

2. Const. art. 4, § 13, providing that the general assembly shall have no power, without the express consent of the people, "to incur state debts to an amount exceeding fifty thousand dollars," except in certain exigencies, does not limit the expenditure of money raised or to be raised during the year by taxation, but forbids the incurring of debts exceeding by more than \$50,000, the income of the state for the current year.

3. The term "people," in Const. art. 4, § 13, requiring the consent of "the people" to the incurring of state debts over a certain amount, is not limited by article 7, § 1, amending article 2, § 2, providing that only taxpayers may vote on a proposition "to impose a tax or for the expenditure of money in any town or city," and includes all electors, the term being used in the constitution in most instances in its broadest sense.

Application by the governor to the judges of the supreme court for an opinion, pursuant to Const. art. 10, § 3.

Const. R. I. art. 4, § 13, is as follows: "Sec. 13. The general assembly shall have no power, hereafter, without the express consent of the people, to incur state debts to an amount exceeding fifty thousand dollars, except in time of war, or in case of an insurrection or invasion; nor shall they in any case, without such consent, pledge the faith of the state for the payment of the obligations of others. This section shall not be construed to refer to any money that may be deposited with the state by the government of the United States."

In response to the communication from the governor, the judges of the supreme court gave the following opinion, May 25, 1896:

To His Excellency, Charles Warren Lippitt, Governor of the State of Rhode Island and Providence Plantations.

We have received from your excellency communications asking our opinion on certain questions stated below:

1. In view of the provision of section 13 of article 4 of the constitution, has the general treasurer or any of the executive officers of the state the power to incur state debts by overdrawing the bank account of the state, or in any other form, without any action of the general assembly? We think it is clear that neither the general treasurer nor any executive officer of the state can incur any

debt which will bind the state, and so become a state debt, except in so far as his action creating it is authorized by law. We know of no existing law which authorizes an overdraft of the bank account of the state by the general treasurer or any other executive officer of the state, and we therefore answer so much of the question in the negative. Whether either of such officers may incur a debt in any other form which will bind the state depends, as we have said, on whether he is authorized to do so by law. In the absence of such authority, he cannot incur such a debt without the action of the general assembly giving the authority.

2. In view of said article and section, can the general assembly, in time of peace, and when insurrection or invasion does not exist, incur state debts or borrow money in any form in behalf of the state to an amount exceeding \$50,000, without first obtaining the consent of the people? The section expressly provides that "the general assembly shall have no power, hereafter, without the express consent of the people, to incur state debts to an amount exceeding fifty thousand dollars, except in time of war or in case of insurrection or invasion." We are of the opinion, therefore, that the question must be answered in the negative. But, in thus answering, we do not mean to be understood that the general assembly may not make appropriations or authorize the expenditure of money to an amount exceeding the sum named. The power of taxation resides in the general assembly, and therefore it has power to raise by taxation such sums as it may deem necessary for the expenses of the state and the public benefit; and it may appropriate or authorize expenditure of the moneys so raised for the purposes for which they are raised, and even, as we think, in anticipation of their actual payment into the state treasury. What we do mean to say is that, in our opinion, the general assembly cannot at any time, except in the exigencies specified, borrow money or authorize the expenditure of money, or, in the language of the section, incur state debts, to an amount exceeding by more than \$50,000 the income of the state for the current year derived from taxes or other sources.

3. Does the word "people," as used in said section, mean the taxpayers and the registry voters,—in other words, all the electors,—or does it mean the taxpayers alone, in accordance with the proviso at the end of article 7, § 1, in amendment of article 2, § 2, to wit, that "no person shall at any time be allowed to vote * * * upon any proposition to impose a tax or for the expenditure of money, in any town or city, unless he shall within the year next preceding have paid a tax assessed upon his property therein valued at least at one hundred and thirty four dollars." The constitution, in its preamble, starts out, "We, the people of the state," etc. In article 1, § 2, it is declared that all govern-

ments are instituted for the protection, safety, and happiness of the people. In the same article (section 6) it is further declared that the right of the people to be secure in their persons, papers, and possessions against unreasonable searches and seizures shall not be violated. And again, in section 17: "The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of the state," etc. These illustrations (and others might be given) show that the term "people," as used in the constitution, is broad and comprehensive, comprising in most instances all the inhabitants of the state. Article 2, as amended by article 7, however, defines the qualifications necessary for electors; and, inasmuch as the constitution provides no mode for obtaining the consent of the people except by the expression of it through the votes of the electors, we think that the consent of the people mentioned in article 4, § 13, means the consent of the electors manifested by the majority of their votes. We find nothing to warrant its restriction to such of the electors as are taxpayers, and we are of the opinion, therefore, that the word "people," in the section under consideration, is to be construed to include registry voters, as well as taxpayers. Moreover, the proviso at the end of article 7, § 2, seems to restrict the right of voting to taxpayers only upon a proposition to impose a tax or for the expenditure of money in a town or city, and so does not in terms extend to a proposition to authorize the general assembly to incur a state debt in excess of \$50,000.

CHARLES MATTESON.
JOHN H. STINESS.
P. E. TILLINGHAST.
GEORGE A. WILBUR.
HORATIO ROGERS.
WM. W. DOUGLAS.

RANSTEAD v. ALLEN.

(Court of Appeals of Maryland. April 1, 1897.)

CANCELLATION OF INSTRUMENTS—MISREPRESENTATION—EVIDENCE.

In a suit to cancel a wharf lease because of false representations that there was 17 feet of water there, and that the city guaranteed that depth, plaintiff testified that he told defendant he "couldn't do with less than 12 feet," and that defendant said "it was a guaranteed depth of 17 feet." Another witness testified to the same statement by defendant, while a third thought the statement was that "there was 17 feet of water there"; and it appeared that the city had contracted to maintain a depth of 16 feet at low tide. Two months later plaintiff took the lease, without attempting to ascertain the depth of the water; and, while there was some trouble in getting boats to the wharf, it did not appear that plaintiff was put to additional expense thereby. Held insufficient to warrant a cancellation of the lease.

Appeal from circuit court of Baltimore city.
Bill by John H. Allen against Lyman T. Ranstead to cancel a lease, and to enjoin

from collecting rent thereunder. From a decree for complainant, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, PAGE, RUSSUM, and BOYD, JJ.

J. Alex. Preston and Alex. Preston, for appellant. Joseph B. Seth, for appellee.

BOYD, J. The appellee filed a bill against the appellant in the circuit court of Baltimore city to have a lease therein referred to canceled, and to enjoin the defendant from prosecuting any suits or proceedings to collect rent claimed to be due under the lease. It is admitted that it was duly executed, and by it the appellant leased to the appellee, for the period of three years from April 1, 1895, a wharf property in the city of Baltimore, on Bush street dock, at a rental of \$600 per annum, payable in monthly installments, which the lessee covenanted to pay. The bill alleges that the plaintiff told the defendant he desired to engage in the lumber, coal, and wood business, and his attention had been directed to this property; that he "asked said Lyman T. Ranstead what depth of water there was at said wharf; that said Lyman T. Ranstead replied that there was seventeen feet of water, and that the city guaranteed seventeen feet; that your orator then said that fourteen feet would be sufficient for him and his purposes, but he did not want less; that upon the assurance of said Lyman T. Ranstead that there was seventeen feet of water at said wharf, and that your orator could rely upon that depth, your orator agreed to lease the said property." It also charges that the plaintiff was induced to make the lease by the fraudulent representations of the defendant as to the depth of the water, and that there was less than 14 feet; that about the last of April he ordered two vessels loaded with wood and lumber to unload, but they were unable to get to the wharf, although drawing not over 6½ feet of water; and he was finally compelled to abandon the property, as it was unfit for his business. An injunction was issued, and, after the defendant answered, denying that he had made the representations relied on, testimony was taken, and the injunction made perpetual by the decree of the court below. From that decree the appeal was taken.

The conversation in which the alleged misrepresentations were made occurred in the month of January, 1895. The appellee testified that at the suggestion of C. B. Riggin he went to the property, where he met Mr. Ranstead's manager or agent, who showed them around the wharf. After looking over the place, he, in company with Mr. Riggin and Mr. Gorsuch, went to Mr. Ranstead's office, and what there occurred is stated by him as follows: "After stating for what purpose I wanted to rent the property, I stated to Mr. Ranstead that I thought the place would suit me if there was a proper depth of water, and,

inquiring of Mr. Ranstead the depth of water in the stream or dock (I don't know what you call it), he told me it was a guaranteed depth of 17 feet." He said he told Mr. Ranstead that he "couldn't do on less than twelve feet of water." In that interview he did not say whether he would take the property or not, but in March he moved to Baltimore from Virginia, his former home, and called on Mr. Ranstead again about the property, and it resulted in the execution of the lease of April 1, 1895. Mr. Riggin said he introduced Mr. Allen to Mr. Ranstead, and "then they entered into conversation in regard to the wharf and mill, etc., and, if my recollection serves me right, Mr. Ranstead said there was a guaranty of 17 feet of water at that dock. That is as far as I can recollect." Mr. Gorsuch said he was present "when Mr. Allen went to rent the wharf, or the wood yard, as they called it. Mr. Ranstead told him there was 17 feet of water there. That's about the most of it that I know or that I remember." These were all the witnesses that the plaintiff produced to prove what the defendant said on that occasion. Mr. Ranstead himself denied that anything was said about the depth of the water, but in a letter from him to the plaintiff, dated May 16, 1895, in answer to one requesting him to release the plaintiff from the contract, he says, "And, further, as I advised you (in the presence of a third party) before you made the lease, the city of Baltimore is under special contract to dredge and maintain 17 feet of water in the entire Bush street dock," which shows that something must have been said about it in the interview above mentioned. That was the only time the depth of water was referred to between the parties. If the testimony of the appellee and Mr. Riggin be accepted as correct as to what was said on the subject, there is a manifest discrepancy between it and the allegations of the bill, which allege that Mr. Ranstead said "there was seventeen feet of water, and that the city guaranteed seventeen feet." It is true, Mr. Gorsuch testified that Mr. Ranstead said "there was 17 feet of water there," but that is not what the plaintiff and Mr. Riggin said, and their statements are in accord with the letter of the defendant, which the plaintiff offered in evidence. It is contended that the evidence of the three witnesses is, in substance, to the same effect; but, when tested in the light of the actual facts, there is a material difference. There is in the record an agreement between Lyman T. Ranstead and others of the one part, and the mayor and city council of Baltimore of the other part, wherein the city agreed, in consideration of the right of way for a sewer on Bush street, and the right to discharge said sewer into the Bush street dock, "that after the construction of said sewer it will dredge, and at all times thereafter keep dredged out, said dock, so that the depth of water in all portions thereof at low tide shall be at least sixteen feet." This sew-

er was constructed, and caused trouble in the summer of 1895, according to the evidence of Mr. Fahey, who was in possession of a wharf adjoining the one leased to Mr. Allen, and the city authorities dredged the dock in July of that year, a few months after the appellee abandoned the contract. The appellant denies that he ever said there was 17 feet of water in the dock, and further said that he never knew 17 feet to be in it. As the appellee swears that he told him he could not do with less than 12 feet of water, and stated in his bill that he told the defendant that 14 feet would be sufficient for his purposes, it is not probable that the appellant intended to guaranty 17 feet to induce the appellee to take the property, as it was 5 feet more than he required. If the appellant did say there was a guarantied depth of 17 feet, the only error that he made was in saying 17 instead of 16, for it will be seen above that the city had covenanted to keep the dock dredged out at all times after the sewer was constructed so that the depth of water in all portions thereof at low tide should be at least 16 feet. Just when the city sewer was completed is not clear, but it must have been in the early part of 1895. In the letter of May 16, 1895, the appellant wrote to the appellee that he had been informed by the city authorities that the money had been appropriated and the contract given out to dredge the dock, and it was dredged in July. Mr. Fahey, who occupied the wharf nearest the mouth of the sewer, said it was commenced about two years before he testified (May, 1896), and the depth in front of his wharf was very much lessened during the construction of the sewer, but the trouble in getting vessels to his wharf did not exist until the summer of 1895. As to the difference between 16 and 17 feet, that might be accounted for by the fact that the contract with the city called for a depth of 16 feet at low tide, which in ordinary water would be more; but it is not pretended that the appellee suffered by reason of the difference of that foot, but, on the contrary, his testimony showed that he only wanted about 12 feet. From the evidence, we cannot feel assured that there was any representation as to the depth of the water beyond the reference to the covenant, or guaranty, as the witnesses may have called it, of the city. It is not of the character of testimony that would justify a court of equity in undoing that which was done, by parties perfectly competent to act for themselves, in one of the most solemn ways known to our laws,—contracting under their hands and seals. It is an exercise of power fraught with much danger, unless guarded with an ever-zealous care to see that there is no uncertainty about the evidence relied on. This court has in several cases adopted the language of the supreme court of the United States in the case of *De laune Co. v. James*, 94 U. S. 207, on this subject, "that canceling an executed contract is an exertion of the most extraordinary power

of a court of equity. The power ought not to be exercised except in a clear case, and never for alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured thereby." The evidence in this case falls far short of that standard. While it is true that there was not a depth of 17 feet, it cannot be said with certainty there was not a depth of 12 or more feet when the conversation took place between the parties in January. It is conceded that nothing was said about the depth of water after that interview, when the appellee left without renting the property; and the contract now sought to be canceled was not made for two months or more afterwards. If the appellee required more water than other people engaged in the same business on that dock did, it is somewhat remarkable that he would rely on such a statement as he attributes to the appellant instead of making inquiries of other people who were using the dock, or by satisfying himself of the depth, which the evidence shows could have been done by measurement in a few minutes. When he was first at the property, the agent of the appellant was with him, as well as Mr. Riggin, who commanded a sailing vessel, but no effort seems to have been made by him to ascertain the depth of the water then, or at any time before the lease was made. If so much depended on the depth of water, and if that was the inducement leading him to rent the property, it is strange he did not take the precaution to have the guaranty put in the lease. But he not only did not do that, but apparently did not even mention the subject at or about the time the lease was made. His total failure to ascertain the facts about the water, which were so easily accessible to him, and his apparent disregard of his own interests, do not appeal very strongly to a court of equity to help him out of what he went into, not hastily, but after ample time for mature deliberation and full inquiry. If it be true that this wharf was unsuited to his business, it is, of course, unfortunate; but he might have easily guarded against any loss on that account by taking the property for a month or some short time, as he had the opportunity to do, or by a suitable clause in the lease. The evidence is conflicting as to the difficulty in getting the vessels to the wharf which the appellee did unload. There were only four of them, two in April and two in May. Messrs. Lewis & Pearson, in charge of a tug boat, testified that they towed the four boats to the wharf, and had no unusual difficulty in doing so. They are confirmed by Mr. Christian, the agent of the appellant. The captains of the boats claim they did have considerable trouble in getting them close to the wharf, and the evidence of some other witnesses tends to confirm their statements; but it is not pretended that the appellee was put to any additional expense thereby. When he

complained to the appellant, he wrote to him what the city officials had informed him about dredging the dock, and offered to give him the use of a water front further down the dock, to land large vessels on, free of extra charge, until the city completed the work. But the appellee abandoned the property, and refused to pay the rent. Such conduct did not indicate any great desire on his part to abide by the terms of the contract, but rather betrayed some anxiety to get rid of it. While those facts of themselves would not prevent his having relief, if he was otherwise entitled to it, it is proper, in cases of this character, for the court to scrutinize carefully the acts and conduct of a party seeking to have a contract canceled. Being of the opinion that the evidence does not clearly and satisfactorily show that there was any misrepresentation made by the appellant which induced the appellee to enter into the lease, we must reverse the decree of the court below, and dismiss the bill. Decree reversed, and bill dismissed, with costs.

MAYOR, ETC., OF CITY OF BALTIMORE v. COATES et al.

(Court of Appeals of Maryland. April 1, 1897.)

ADVERSE POSSESSION—HIGHWAYS—INJUNCTION—
COLLECTION OF ASSESSMENT—PLEADINGS.

1. An allegation that plaintiff and those under whom she claims have had, for over 20 years, "the uninterrupted, exclusive, and adverse use and enjoyment" of a part of the street which defendant city had condemned without awarding compensation for the fee, is insufficient to establish plaintiff's title, since it fails to show any privity between her and her predecessors, or that the street had not been dedicated to public use before their possession began.

2. A bill to restrain a city from enforcing an assessment against plaintiff's property for grading a street alleged that said street had been condemned without awarding plaintiff or his predecessor any compensation for the fee; that said predecessor appealed to the city court, but that no interest was considered except his easement for certain tracks; and plaintiff prayed that the award and proceedings thereunder be considered a part of the bill, but did not file a copy thereof. *Hdd*, that no relief could be given in the absence of the records showing what was done in said condemnation proceedings.

3. Plaintiff's omission to file copies of the ordinances under which the condemnation proceedings were instituted, and which were referred to by number and date, did not render the bill defective; said ordinances being cited merely to show the foundation of the proceedings.

Appeal from circuit court of Baltimore city.

Bill by Anna H. Coates and another for an injunction against the mayor and city council of the city of Baltimore. From an order granting a preliminary injunction, defendant appeals. Remanded.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, RUS-SUM, and BOYD, JJ.

Thomas G. Hayes and Thomas I. Elliott, for appellant. Frank P. Clark, for appellees.

BOYD, J. A bill was filed by the appellees to enjoin the appellant from interfering with the buildings on the property belonging to Anna H. Coates, one of the plaintiffs, and described in the bill, and from selling the property. It alleges that proceedings were instituted by the appellant to condemn and open Andre street between Fort avenue and Marriott street, and Beason street from Andre street to Stewart street, under two ordinances, which are referred to by their numbers and dates; that Andre street, between Beason and Cuba streets (except a strip thereof on the west side about 10 feet wide), as laid out on Poppleton's plat, had for more than 20 years been used and occupied by the plaintiff Anna H. Coates, and those under whom she claims and derives title to said land and premises, as a rolling mill and tin-plate mill, and that during that time they have had "the uninterrupted, exclusive, and adverse use and enjoyment of the same." The third and fourth paragraphs of the bill, which are the important ones, under the view we take of the case, are as follows: "Third. That, under the proceedings condemning the bed of Andre street, * * * nothing was awarded to your orator or to her grantor, or to any of those through whom she claims, for the fee of the said street. The award, as the same appears in the proceedings to open the said street, is of record in the office of the city comptroller, and to which, for greater particularity, your orator refers; being two naughts (00), and being as follows: 'To the public, or to such person or persons as may be legally entitled thereto, for damages for the fee-simple interest in all that lot of ground described as follows,'—the said description embracing the land and premises of your orator hereinbefore described; and your orator prays that the said award and proceedings thereunder be regarded as a part of this bill. Fourth. That L. Roberts Coates, who owned the said land and premises at the time aforementioned condemnation proceedings took place, and through whom your orator claims, appealed to the city court of Baltimore city from the same, but no interest was considered by the court except the easement for certain railway tracks then in use by your orator on Andre street, between Cuba and Marriott streets; the language of the inquisition (a copy of which is herewith filed, marked 'Complainant's Exhibit A') being as follows: Assessing 'damages to appellant's property as described on the condemnation plat by the letter B, being his easement for railway tracks thereon.'" It is then alleged that the defendant was about to take possession of the said land and premises, "the property of your orator," and has declared its purpose to grade and pave the same, and has advertised for sale the plaintiff's property for the purpose of enforcing an assessment made against her for such grading and paving, and for the grading and paving of Beason street, as ap-

pears by copy of advertisement filed, "and that without any compensation being made or tendered to your orator." A preliminary injunction was issued by the order of the court, and the appellant, having filed a general demurrer to the whole bill, entered an appeal to this court, and we are therefore called upon to determine whether the bill made out such a case as authorized the issuing of an injunction. In order to justify the application of such a summary remedy, it is necessary that the bill and the exhibits filed with it clearly present every material fact upon which the plaintiff relies for relief. The court should not be left in doubt, or required to supply by inference what the plaintiff can either furnish or account for the absence of, if impossible to obtain. In applying that rule to govern us, we find the bill defective in several respects. It is nowhere directly alleged that the fee of the bed in Andre street is or ever was in the plaintiff Mrs. Coates. If that can be inferred, it is only by reason of the fact that she and those under whom she claims have used and occupied it for more than 20 years, and have had during that time the uninterrupted, exclusive, and adverse use and enjoyment of it. The bill is silent as to how she derived title. In order to enable her to tack her possession onto that of those under whom she claims, there must be some privity between them *Hanson v. Johnson*, 62 Md. 25; *Armstrong v. Ristean's Lessee*, 5 Md. 256; and whether Mrs. Coates inherited this property from one previously in possession, or whether her title papers, if she holds by deed or will, include this possession, we have no means of knowing by the bill and the exhibits filed with it. But, if that defect did not exist, we are not informed whether this street was dedicated to the public use prior to the time that the plaintiff, or those under whom she claims, took possession. Although the authorities are not fully in accord on that question, it has been determined in this state that an individual cannot acquire title by adverse possession to a part of a highway. *Mayor, etc., of Baltimore v. Frick*, 82 Md. 77, 33 Atl. 435; *Ulman v. Charles St. Ave. Co.*, 83 Md. 130, 34 Atl. 366. The bill speaks of Andre street as laid out on Poppleton's plat, and, as the plaintiff relies on adverse possession for her right to a part of the street, she should have alleged in the bill such facts as would show the court that she could properly make that claim, and not require it to assume that the street referred to had not been dedicated or granted to the public. As the fact is shown in the bill that there was such a street as Andre street laid out on Poppleton's plat, a part of which the plaintiff claims by adverse possession, and in no other way, so far as alleged in the bill, in seeking to prevent the city authorities from taking possession of that, which they would ordinarily have the right to do,—one of the streets of the city,—it was the duty of the

plaintiff, on applying for an injunction, to make such allegations as would negative the right of the city to the use of the street.

But the bill is lacking in another important particular. It is alleged that proceedings were instituted under an ordinance approved April 7, 1887, to condemn and open Andre street; and it is not intimated that the ordinance was invalid, but the cause of complaint is that, under the proceedings, nothing was awarded to the plaintiff or to her grantor, or to any of those through whom she claims, for the fee of the street. The paragraph of the bill making that allegation concludes with, "Your orator prays that the said award and proceedings thereunder be regarded as part of this bill"; but a copy is not filed, or any explanation of its absence made. It is clear that neither the court below nor this court can go outside of the record to find the award and proceedings thereunder, and the importance of having them before the court seems equally clear to us. They might inform the court why nothing was awarded to L. Roberts Coates, who is alleged to have been the owner at that time. If it was determined that he did not have any interest in the fee of the bed of the street, by reason of the fact that the street had been dedicated to the city by a previous owner of the land, or for other cause, why should he have been awarded damages? The bill does not state when the proceedings were completed under the ordinance of 1887, but it may be that there was not then even a claim of adverse possession, as it is not alleged that at that time the parties under whom the plaintiff claims had been in possession for 20 years. Then, again, the fourth paragraph alleges that L. Roberts Coates appealed to the city court of Baltimore city from the award, "but no interest was considered by the court except the easement for certain railway tracks then in use by your orator." Whether that means that the court refused to allow Mr. Coates for anything but the easement, or whether nothing else was brought to its attention, or why any other interest was not considered, is not stated; but the necessity for having the record of the proceedings before the court, so it can determine what was actually done, is apparent. Mr. Coates had the right to have his appeal heard by the city court on all questions connected with those proceedings which he was interested in. If he felt aggrieved by the action of the commissioners for opening streets, he had the right to appeal, and, having done so, we do not understand upon what ground a court of equity can now give him relief, as his remedy was in the city court, or in this court on appeal from its action; but it certainly cannot do so without being more fully informed as to what was done in that proceeding. The records of the city court or of the city should, and we presume do, show what was done. If such record can be obtained, it should be produced, and if, for any reason, it cannot be, its absence should be accounted for by proper allegations in the bill.

We do not think the omission to file copies of the ordinances referred to in the first paragraph rendered the bill fatally defective. They are not attacked or relied on by the plaintiffs, but they were merely cited to show under what the proceedings which are objected to were instituted. Nor is the point made by the learned solicitor for the appellees, that there is a material error in the advertisement, which entitles them to an injunction, tenable. There is no allegation in the bill that the ordinance improperly recited the portion of Beason street to be graded, etc.; and we cannot see how the error in the first part of the advertisement could prejudice the plaintiffs. If it was misleading, the objection could have been made, in the event of a sale, in the court to which the sale was reported.

The description of the property in the copy of the advertisement filed seems to indicate that the city authorities considered the title to a part of Andre street to be in L. B. Coates & Co., as it includes in the property to be sold a strip of that street 4 feet wide and 107½ feet long. It may be possible, therefore, that the bill can be so amended as to entitle the plaintiffs to some relief, and we will therefore neither reverse nor affirm the order of the court granting the preliminary injunction, but will remand the cause, with leave to the plaintiffs to amend the bill, if they see proper to do so, within 30 days from the time the record is received in the court below; the costs in this court be paid by the appellees, and those below to abide the final result of the cause. Cause remanded, without affirming or reversing the order granting the injunction; costs in this court to be paid by the appellees, and those below to abide the final result of the cause.

ANNAN et al. v. HAYS.

(Court of Appeals of Maryland. April 1, 1897.)

MARSHALING OF SECURITIES—RELEASE OF SECURITY—NOTICE OF JUDGMENT LIENS.

A mortgagee is not chargeable with constructive notice of subsequently recorded judgments against the mortgagor which are liens on the mortgaged property, and his lien will not be postponed to that of the judgments because he permitted the debtor to divert personal property on which he also had a lien, where at the time he had no actual knowledge of the existence of the judgments.

Appeal from circuit court, Frederick county, in equity.

Appeal by Isaac Annan and Oliver A. Horner, as surviving members of the firm of Annan, Horner & Co., from an order distributing the proceeds of real estate of Joseph Byers, sold under a power of sale in a mortgage to James T. Hays. Affirmed.

Argued before BRYAN, BRISCOE, RUS-SUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Eugene L. Rowe, for appellants. John C. Motter and Vincent Sebold, for appellees.

PAGE, J. This appeal is from the order of the court below confirming the report of the auditor distributing the proceeds of the sale of certain real estate made under a power of sale contained in a mortgage. James T. Hays was the holder and owner of two mortgages on the real estate of Joseph Byers,—one, a first mortgage to secure a debt of \$2,500; another, bearing date the 8th day of June, 1878, junior to the first, to secure the payment of a promissory note of the same date for \$1,050. On the 23d day of July, 1894, Byers executed and delivered to Hays a chattel mortgage, as additional security for the payment of the \$1,050, due on the above-mentioned promissory note, and also for the further sum of \$605.61 due to Hays on another promissory note. It may be observed that the last-mentioned sum included an amount of \$520.82, due on a judgment against Byers in favor of John C. Motter and Robert Biggs, who had agreed to assign the same, with all its rights and liens (none of which were waived), to Hays, on receipt from him of the amount due thereon. The appellants are the holders of three judgments rendered by a justice of the peace against Byers, amounting in the aggregate to \$153.06. They were recorded in the office of the clerk of the circuit court of Frederick county, on the 30th of August, 1894, and so became liens, subsequent to both the Hays mortgages on the realty of Byers, but, no executions having ever issued thereon, they constituted no lien on the personalty. On the 12th of March, 1895, Byers "as agent," to satisfy the claim of Hays of \$605.81 (secured only by the chattel mortgage), and also a claim due by him to his wife, advertised and sold the personalty, realizing therefrom about \$800. Though the notes at this sale were taken in Hays' name, the proof shows that Hays did not authorize him to act as his agent, or to take the notes in that form, nor did he ratify the sale in any other wise than by accepting notes sufficient in amount to pay the note of \$605.61. The residue of the proceeds of sale went as a credit on claims held and owned by Byers' wife. On the 10th of April, 1895, under the power contained in the mortgage, the mortgagee made sale of the realty. After it had been ratified by the court, the proceedings were referred to the auditor, who, after allowing costs and expenses of sale, awarded the balance to the payment of the first and second mortgages, and the residue in part payment of the judgments of the appellants. The ground of objection to this disposition of the fund is that Hays having two liens for the payment of the promissory note for \$1,050, one on the real estate, the other on the personalty, and the appellant having a lien only on the land, the familiar doctrine of marshaling applies, and therefore, Hays having acted in disregard of duty, by permitting the chattels to be diverted from their liability to the payment of his debt, can now take

nothing on account of his second mortgage from the realty, until he has credited the amount derived from the sales of the chattels. Without pausing to inquire whether there may be found in the special facts of this case more than one reply to this contention, we deem it necessary to consider but one phase of the questions presented by the record.

The doctrine of marshaling of assets is founded upon those considerations of natural justice whereby one is not permitted, from wantonness or caprice or rashness, to do an injury to another, but is required to so use his own rights as not to injure, if possible, the rights of another. The equity exists also against the debtor, so that he shall not retain the singly charged estate, but as between him and the primary creditor there is nothing in the principles of natural or conventional justice that ought to restrain the latter from resorting to any property of which the debtor may be possessed. As long as both funds are in existence, the principle of marshaling may, in proper cases, be enforced by means of substitution; but when the singly-charged fund has been put beyond the reach of the primary creditor by his own act, committed in willful disregard of the rights of the other creditor, the former ought not to be permitted to take anything from the other fund, until the other creditor has had made good to him the loss he has incurred by the destruction of the singly-charged fund. But this ensues from the obligation of the primary creditor not to willfully do any act that will injure any one else, and therefore, if he act without knowledge of the rights of the other creditor in good faith and with proper intention, there cannot result therefrom anything that will defeat his right to resort to the remaining fund. In *Cheeseborough v. Millard*, 1 Johns. Ch. 414, Chancellor Kent said: "As this rule of substitution rests upon the basis of mere equity and benevolence, the creditor who has thus disabled himself from making it is not to be injured thereby, provided he acted without knowledge of the others' rights, and with good faith and just intention, which is all that equity in such a case requires." The mortgagee, Hays, in the collection of his demands, was not required to shape his action with reference to the claims of the subsequent judgment creditors, unless he had notice of the existence of such judgments. If he knew of them, and yet willfully acted so as to occasion loss to the appellants in disregard of their rights, he ought to bear such loss, rather than impose upon others the consequences of his own wrong; but, if he acted without knowledge of their rights, it would be contrary to every principle of equity and common fairness to deprive him, in consequence thereof, of any rights he may have to resort to the remaining fund. These views, so consonant with sound reasoning and common sense, are

amply sustained by authority. *Sheld. Subr.* § 81; *George v. Wood*, 9 Allen, 80; *Ross v. Duggan*, 5 Colo. 85; *Taylor's Ex'rs v. Maris*, 5 Rawle, 50; *Uniontown Bldg. & Loan Ass'n's Appeal*, 92 Pa. St. 200; *Vanorden v. Johnson*, 14 N. J. Eq. 377.

We have carefully examined the record, and find no proof that, up to the time of the sale of the personalty, Hays had any knowledge of the existence of the appellants' judgments. It was contended in argument that, as the judgments were of record, Hays should be charged with constructive notice. But it is difficult to perceive why the record of a subsequent magistrate's judgment should be tantamount to actual notice to a creditor holding a prior lien. Unless there was a duty on the part of Hays to search the records for subsequent incumbrances, why should he be charged with actual notice of what might there be found? He had no interest in the appellants' judgments, and was not therefore bound to search for them. In *Cheeseborough v. Millard*, above cited, where it was contended the mortgagees were chargeable with notice of subsequently recorded judgments, Chancellor Kent said: "They were not bound to search for the judgment, and the record was no constructive notice to them." *Horning's Ex'rs' Appeal*, 90 Pa. St. 392; *Stuyvesant v. Hone*, 1 Sandf. Ch. 419; *Taylor's Ex'rs v. Maris*, supra; *Hosmer v. Campbell*, 98 Ill. 578; *Birnie v. Main*, 29 Ark. 301; *George v. Wood*, supra. Order affirmed, with costs.

DICKHAUT v. STATE.

(Court of Appeals of Maryland. April 1, 1897.)
GAME — UNLAWFUL POSSESSION — SUFFICIENCY OF INDICTMENT.

1. Code, art. 90, § 13, as amended by Acts 1894, c. 404, providing that "no person shall shoot or in any manner catch, kill or have in his possession," any rabbit between dates named, does not prohibit possession between such dates of rabbits lawfully killed in another state.

2. An indictment which charged that defendant on October 26, 1894, had in his possession 96 rabbits, contrary to the form, etc., was good, under Code, art. 90, § 13, as amended by Acts 1894, c. 404, providing that no person shall catch, kill, or have in his possession any rabbit between December 24th and November 1st next ensuing.

Appeal from criminal court of Baltimore city.

Conrad Dickhaut was convicted of having rabbits in his possession contrary to law, and appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, BOYD, RUSSUM, and FOWLER, JJ.

W. Pinkney Whyte, for appellant. Atty. Gen. Clabaugh and Henry Duffy, for the State.

FOWLER, J. The defendant was indicted in the criminal court of Baltimore city on the charge of having violated section 13 of article 90 of the Code, as amended by the act of 1894.

The only allegation in the indictment is that the defendant on the 24th October, 1896,—being a time within the prohibition of the statute,—had in his possession 96 rabbits, contrary to the form of the act of assembly, etc. To this indictment the defendant demurred, and his demurrer was overruled. He then filed a motion to quash the indictment, based upon the grounds—First, that the statute is intended to apply only to persons who shall shoot or in any manner catch or kill any rabbit in the state of Maryland, or have in possession any rabbit so killed, etc., in this state within the prohibited time; and, second, that the indictment is defective because it does not so describe the defendant as to bring him within the class of persons to which the statute applies. This motion having also been overruled, the defendant pleaded non cul., was tried before the court without a jury, convicted, and sentenced. During the course of the trial the defendant proved that the rabbits found in his possession were shipped here from the state of West Virginia, where there is no law prohibiting the killing or catching of rabbits at any period of the year. But, under the construction of the statute adopted by the learned court below, this proof did not avail the defendant; for, no matter when or where the game was killed, under that construction he was guilty, it having been held that proof of possession was conclusive proof of guilt. The record is before us on writ of error on the petition of the defendant. The question presented under the facts in this case, and especially upon the admitted fact that the rabbits found in the possession of the defendant were lawfully killed in West Virginia, and were brought here, is whether the defendant is guilty of any offense in having them in his possession at the time and place alleged. The answer to this question depends upon the construction of the provisions of the Code, art. 99, § 13. As amended by the act of 1894, c. 404, it thus reads: "No person shall shoot or in any manner catch, kill or have in possession * * * any rabbit between the 24 December and the first of November next ensuing." It is such a plain proposition that, when the legislature prohibited the catching and killing of rabbits, it meant rabbits in this state, that no argument is necessary to establish it. If it was intended that the statute should operate beyond the limits of the state, it was simply void to that extent. It would seem also to be clear that, if the prohibition as to catching and killing was necessarily limited to rabbits caught and killed in this state, the prohibition against having any rabbits in possession would relate only to rabbits caught and killed here; for we are not to assume that the legislature intended to do what it had no power to do,—that is, to prohibit the killing of game in other states,—unless such intention can be clearly gathered from the act itself. But, so far from any such intention having been expressed, the

most casual reading will demonstrate that all the prohibitions relate to the same limited class. If, as we have said, the prohibition as to shooting and killing necessarily relates only to rabbits caught and killed in this state, the statute would read, "No person shall shoot or in any manner catch, kill or have in possession any rabbits between the 24 December and the first of November ensuing, killed in this state between said days." But if the construction of the state be correct, and if we assume, as we must from the collocation of the words and the arrangement of the clauses of the sentence, that the same class of rabbits is referred to in each prohibition, the statute would read thus: "No person shall shoot or kill between the 24 December and the first of November ensuing in this or in any state any rabbit or have in his possession during said time any rabbit killed in this or any other state at any time." But, as we have said, a prohibition as to killing game in other states is clearly inoperative and void, and therefore we cannot impute to the legislature an intention to enact such a prohibition. It follows, we think, that the prohibition as to possession relates to the same class that the prohibition as to killing embraces, namely, rabbits killed, etc., in this state between the days named.

Statutes similar to ours exist in both Pennsylvania and Massachusetts, and the supreme court of each of those states has held that it is no offense to have in possession, within the prohibited time, game lawfully killed in and shipped from other states. Thus, in the case of *Com. v. Wilkinson*, 139 Pa. St. 298, 21 Atl. 14, the opinion of the court was delivered by the former Chief Justice Paxson. The statute construed is as follows: "No person shall kill or expose for sale or have in his possession after the same has been killed, any quail," between certain days. "The manifest object of this act," says the chief justice, "was the preservation of game within this commonwealth. We cannot assume that it was intended to preserve game elsewhere, and it would be a forced construction to hold that it was intended to exclude from our markets quail and other game killed in other states, where by the law of those states the killing of them is lawful. The law was not intended to have any extra-territorial force, and, if so, it would be nugatory. The construction claimed for the act by the commonwealth would render any one a criminal who lawfully killed quail in another state and brought it here for his own use. It would be prima facie evidence of a violation of the act, and if he could not show as a defense that he killed them outside the commonwealth, he would have no defense at all. The matter is too plain to require elaboration." And in the case of *Com. v. Hall*, 128 Mass. 412, a similar statute was construed in the same way. In delivering the opinion of the court Chief Justice Gray said

that the object of the statute was to protect the birds in Massachusetts. "The mode in which the statute seeks to attain this object is by punishing the taking or killing of such birds in this commonwealth, during the time specified, or the buying or selling or having in possession in this commonwealth during such times such birds so taken and killed, and by enacting that the possession in this commonwealth at such times of any birds of the kind specified shall be prima facie evidence to convict; leaving it for the defendant to prove, if he can, that the birds found in his possession were not taken or killed in this commonwealth at a prohibited time. So construed, the statute is reasonably adapted to carry out its object, and is free from all constitutional difficulty." It was conceded in the Massachusetts case just cited, as it is in this case, that the game found in the defendant's possession was killed in another state; and for this reason it was held he was wrongly convicted, and the judgment was reversed. And finally the same view has been adopted by the supreme court of Oregon, in a clear and well-reasoned opinion by Chief Justice Lord, in the case of *State v. McGuire*, 24 Or. 367, 33 Pac. 666. The statute before the court for construction is like ours, and we will quote only that part of it which relates to and prohibits the having in possession: "It shall be unlawful for any person or persons to receive or have in his possession during the close seasons named in this act any of" certain varieties of fish. In the lower court it was held that under this act the fact of possession was conclusive proof of guilt, but the chief justice says, in delivering the opinion of the court: "The effect of this construction is to declare that, in order to protect salmon in this state, it was the intention of the statute to punish * * * the having in possession salmon during the prohibited season, whether caught within or without the state; in a word, that it was the intention of the legislature to punish the mere possession of salmon which had been lawfully caught or taken. It ought to require plain, unambiguous, and mandatory language to justify any court in declaring fish and game lawfully caught or taken to be the subject of an offense by the simple possession of it. A construction leading to such injustice ought to be avoided, if it can be reasonably done." It was therefore held by the supreme court of Oregon, after citing and reviewing many of the leading cases,—those sustaining as well as those opposed to the views it announced,—that, properly construed, the Oregon statute does not relate to or embrace fish or game lawfully taken in another state, and found in possession of any person in Oregon during the close season. There is much conflict of opinion upon this

question, and we shall not undertake to review or harmonize the numerous cases involving questions of construction and the constitutionality of the game laws of the various states. The cases have been collected by the learned annotator in the notes to the case of *State v. McGuire* (Or.) 21 Lawy. Rep. Ann. 478 (s. c. 33 Pac. 666). See, also, *State v. Geer* (Conn.) 22 Atl. 1012; *State v. Swett* (Me.) 32 Atl. 806. In a recent number of the *American Law Register* (Oct., 1896; vol. 35 [N. S.] 649) will also be found some brief notes, and a full collection of recent decisions. But the question of the constitutionality of our statute, because of its alleged conflict with the interstate commerce clause of the United States (article 1, § 8), we need not consider here; for, as we have already said, it is clear that, when properly construed, it has no relation whatever to game lawfully killed out of this state, and brought here for use or for sale.

It was contended that the indictment is defective because it did not sufficiently describe the defendant, and failed to allege that he had in his possession game shot, etc., in this state during the close season. It is well settled, as a general rule, that, in an indictment for an offense created by statute, it is sufficient to describe the offense in the words of the statute. *Parkinson v. State*, 14 Md. 184; *Cearfoss v. State*, 42 Md. 403; *Mincher v. State*, 66 Md. 227, 7 Atl. 451. The pleader has followed this rule in this case, and hence the objection is not a valid one. There was also a motion to quash the indictment upon the same ground, and this was also properly overruled.

But, as has been seen from what we have already said, we are not able to agree with the learned judge below in the construction of the provision of the Code under which the defendant was indicted. As we construe it, possession in this state, during the close season, of game killed in another state, is not an offense. And, this being so, it follows that whenever any person is charged with a violation of the law by having in his possession game during the prohibited time, simple justice demands that, when the state has offered proof of the charge, he must have the right and the opportunity to show that the game found in his possession is not such game as is contemplated by the statute. As was said in *State v. McGuire*, supra, only the plainest and most mandatory language of the lawmakers would justify any court in holding that the mere possession of game lawfully killed could constitute an offense. It follows from what we have said that the facts proved by the defendant, if believed by the court sitting as a jury, constituted a good defense, and the defendant should have been acquitted. Judgment reversed, and a new trial awarded.

ROTHER v. TRUSTEES OF SHARP ST. STATION OF METHODIST EPISCOPAL CHURCH IN THE CITY OF BALTIMORE.

(Court of Appeals of Maryland. April 1, 1897.)

MARKETABLE TITLE—ADVERSE POSSESSION.

Where a church corporation, organized in 1832, by its articles of incorporation filed, asserted title in the corporation to certain real estate then held by trustees, and ever since said time has continued in the uninterrupted possession and use of the property under such claim, its title thereto is marketable.

Appeal from circuit court of Baltimore city.

Bill by the trustees of Sharp Street Station of the Methodist Episcopal Church in the City of Baltimore against Robert M. Rother and others for the specific enforcement of a contract to make a loan on real estate. Decree for complainants, and defendant Rother appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, RUSSUM, and PAGE, JJ.

A. S. Niles and Oscar Wolff, for appellant. John P. Poe, George G. Carey, and W. A. Hawkins, for appellees.

PAGE, J. The bill in this case was filed by the appellees to obtain a declaration that the title to the property in question is good and marketable, and to require the appellant to specifically execute his contract. The same matter has been before this court once before. Its decision will be found in 83 Md. 289, 84 Atl. 843. The relief asked for then and now was refused in that case for the reasons: First, the heirs of John Sinclair, the grantor in the deeds of the 30th of May, 1811, and of the 30th of August, 1833, and the heirs of James Carey, the grantor in the deed of the 15th of May, 1802, were not made parties to the proceeding; and, second, upon the evidence disclosed by the record, the character of the appellees' possession of the premises was not sufficiently made to appear.

It is contended here that both of these objections are now fully met. The appellant admits in his answer "that, if the proof herein taken shall show that all the parties having any interest in the determination of the question of the title are parties," and if this court shall determine the appellees' title to be good and marketable, he is ready to make the loan. The bill shows that John Sinclair has long since departed this life, being at the time a nonresident of the state; and that his heirs are unknown to the appellees, although they have used the "utmost diligence to discover them." Notice by publication was made as to them, in pursuance of an order of the court. It is quite sufficient to say, concerning the heirs of James Carey, they have all been made parties, and are now before the court, by actual notice, by summons, or by order of publication. There is in this case proof other than that contained in the first, and the only question that

now remains for us to determine is, does all the evidence, as we now have it, establish a clear title in fee in the appellees by adverse possession? The appellees were incorporated in 1832. On the 18th July of that year, at a meeting of the male members of the church, held in pursuance of the act of assembly, the corporation was organized, and a certificate thereof filed for record. By that it appears certain trustees were appointed, and it was declared that "all the lands and tenements" and "all other property of the said churches was vested in the corporation, with full power in the latter, with the consent of two-thirds of the male members, to sell, lease, convey, or otherwise dispose of it." The evidence shows that declaration is applicable to the property affected by these proceedings, and amounts to an emphatic statement of a claim and intention to hold the same hostile to and clear of all the trusts contained in the several deeds of Carey and Sinclair; and ever since that date the trustees have so held it. Without the leave, license, or permission of any one, but claiming in their own right, the trustees mentioned in the certificate, and their successors, duly appointed, have continuously maintained an open, notorious, and exclusive possession, and used and enjoyed it for any and every purpose to which they saw fit to devote it, within the powers conferred on the corporation which they represent. Such a possession, having continued uninterruptedly for more than 20 years, is quite sufficient to afford the presumption of a deed conferring upon the appellees a title in fee, good and marketable. *Sadtler v. Peabody Heights Co.*, 66 Md. 4, 10 Atl. 599. Decree affirmed.

TWIGG v. HOPKINS et al.

HOPKINS et al, v. TWIGG.

(Court of Appeals of Maryland. March 31, 1897.)

JUDGMENT BY DEFAULT—EQUITABLE RELIEF—INJUNCTION.

An injunction against the enforcement of a judgment by default should not be granted to allow defendant a set-off or diminution of the damages allowed in the action, on grounds which could have been raised therein, if it is not shown that the judgment plaintiff is insolvent, and no sufficient reason appears why a defense was not made.

Cross appeals from circuit court, Allegany county, in equity.

Suit by Richard F. Twigg against William S. Hopkins and others for an injunction. From a decree dissolving the writ as to part of the relief claimed, and making it perpetual as to the residue, both parties appeal. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, and BOYD, JJ.

Ferd. Williams, for plaintiff. J. W. S. Cochran, for defendants.

BRYAN, J. William Hopkins and Thomas Hopkins, doing business as Hopkins & Son, obtained a judgment by default against Robert Twigg. In due course the judgment was made final, and the damages were assessed at \$865. Twigg filed a bill in equity against the plaintiffs in the suit at law, and obtained a preliminary injunction restraining the collection of the judgment. It was alleged that Twigg was prevented from making a successful defense to the lawsuit by the fraudulent conduct of the elder Hopkins in promising to dismiss it. At the hearing in the court below it appeared that this allegation was not sustained by the evidence. The cause of action on which the judgment was rendered was a written contract whereby Hopkins & Son agreed to sink an artesian well on the land of Twigg for the sum of \$250 a foot, and also to furnish casing and a windmill pump in consideration of the contract price. And Twigg agreed to pay for the work as it was performed, and to haul the engine which was to be used from Cumberland to the place where the work was to be done and back again for the sum of five dollars, and to furnish coal and water for the working of it. Hopkins & Son alleged that they had bored to the depth of 150 feet, and that they were prevented from the further prosecution of the work by the failure of Twigg to make the stipulated payments. There is a slight difference between the parties as to the depth to which the well was sunk, Twigg alleging that it was only 146 feet deep; but there is no doubt whatever that Twigg was considerably behind in his payments. In his bill he claims a credit of only \$48. He had every possible opportunity to appear and defend the suit, but he saw fit to neglect to do so. The contention on the part of Hopkins was that he was entitled to recover the full contract price in consequence of the failure of Twigg to furnish him with the money necessary for the continuance of the work. Twigg might have contested this view of the controversy, but he voluntarily neglected to give any attention to the matter, and therefore must blame himself if the result is unsatisfactory to him. In *Green v. Hamilton*, 16 Md. 317, a judgment by default had been rendered and made final in the absence of the defendant, and it was attempted to set it aside on the ground of fraud, deceit, surprise, and irregularity. The allegation of fact was that the judgment was rendered for \$1,000, when the plaintiff's own evidence appearing in the record showed that the amount due was not more than about \$200. The court said that the facts alleged showed only a reason for a new trial on the ground that the jury had found against the evidence in the cause, and that they did not support the charge of fraud, deceit, surprise, or irregularity; and that it could not go into the circumstances of the case, and perform the office of jurors, and that the judge who tried the cause might,

in the exercise of his legal discretion, have afforded relief. It was furthermore said that it was the defendant's own laches that he was not present at the trial, and that the plaintiff ought not to suffer for it. The court pointedly refused to reverse the maxim, "*Vigilantibus non dormientibus leges subveniunt.*" It is well settled that a court of equity will not interfere with the execution of a judgment at law, unless the defendant, without any negligence or default on his own part, has been prevented by accident, or the act or fraud of the opposite party, from availing himself of a just defense. Of course, we do not now speak of reasons of a purely equitable character, which are not cognizable at law. It is unnecessary in this place to refer to the many authorities which have followed and approved *Gott v. Carr*, 6 Gill & J. 312. The court below dissolved the injunction except as to the sum of \$64, which it found was the amount of the credits to which Twigg was entitled, and in respect to this sum the injunction was made perpetual. Both parties appealed.

In our opinion, the injunction ought to have been entirely dissolved, and the bill dismissed. The court had not the power to open the case, retry it, and adjust the account between the parties. It regarded the excess in the judgment as in the nature of a set-off to which Twigg was entitled, and held that Hopkins & Son were insolvent, and that, as the amount could not be collected from them, it ought to be deducted from the judgment. Where there are mutual claims between the judgment creditor and the judgment debtor, and the judgment creditor is insolvent, a court of equity will require him to deduct from his judgment the amount which he owes to the judgment debtor. *Levy v. Steinbach*, 43 Md. 217. The insolvency of the creditor makes it impossible to satisfy the debtor's claim in any other way. But where there is no insolvency the reason for equitable interference does not exist. In *Cook v. Murphy*, 7 Gill & J. 282, a judgment at law had been rendered, and the defendant sought relief in equity on the allegation that the judgment was for a much larger sum than was really due, and that, in consequence of the absence of a witness, the defendant had been unable at the trial at law to prove a considerable set-off. The court said there was no ground for equitable relief, and that the complainant's remedy was at law. In the present case it is not alleged in the bill of complaint that the Hopkinses are insolvent, and the proof does not show it, although their pecuniary means are evidently quite small. Nor has Twigg any counterclaim against them which he could maintain in another suit, except for a small amount, below the jurisdiction of a court of equity. The remainder of his demand is for a diminution of the damages assessed in the suit at law, and it depends upon and grows out of the contract on which that suit was

brought. It was a proper subject of inquiry therein, and was settled by the judgment then rendered. *Brooke v. Quynn*, 13 Md. 390. In *Annan v. Houck*, 4 Gill, 331, it is said: A set-off means a "cross claim, for which an action might be maintained against the plaintiff, and is very different from a mere right to a deduction from, or reduction of, his demand, on account of some matter connected therewith." Upon the whole, we think that we may apply to this case the doctrine stated in *Gott v. Carr*, 6 Gill & J. 312: "The well-settled general rule being that a court of equity will not relieve against a recovery in a trial at law unless the justice of the verdict can be impeached by facts or on grounds of which the party seeking the aid of chancery could not have availed himself at law, or was prevented from doing it by fraud or accident, or the act of the opposite party, unmixed with any negligence or fault on his own part. And chancery will only sustain a bill invoking its aid upon some new matter of equity not arising in the former case, or seeking some relief to which the powers of the court of law were not fully adequate. It is a sound and useful rule in the administration of justice, for the prevention of negligence, and harassing and protracted litigation, and the consequent burdensome accumulation of costs, a material departure from or relaxation of which would prove vexatious in practice, and be felt as a public grievance, by the great delays, and sometimes abuse, of justice, to which it would lead." The decree below must be reversed, and a decree entered in this court dismissing the bill, with costs in both courts. Reversed, and bill dismissed.

HOMMER v. STATE.

(Court of Appeals of Maryland. April 8, 1897.)
HOMICIDE—TRIAL—RECEIVING VERDICT IN ABSENCE OF COUNSEL.—RIGHT TO POLL JURY.

1. The right of a defendant on trial for murder to a poll of the jury is waived if no demand therefor is made before the verdict is recorded.
2. A verdict in a homicide case rendered at a regular term of court may be received in the absence of defendant's counsel if defendant himself is present.

Appeal from circuit court, Allegany county.
Simon Hommer was convicted of murder, and appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Jas. A. McHenry and John G. Wilson, for appellant. Atty. Gen. Clabaugh and Geo. A. Pearre, for the State.

BRISCOE, J. The question in this case is a narrow one, and arises upon a motion to strike out a judgment on an indictment for murder. The prisoner was tried before a jury in the circuit court for Allegany county, found guilty of murder in the first degree, and sen-

tenced to be hanged. The motion was overruled, and hence this appeal. Briefly stated, the ground for the motion is that the verdict of the jury was taken in the absence of the prisoner's counsel from the courtroom, whereby it is claimed that the prisoner was deprived of the right to a poll of the jury. It is conceded that the trial was regular in every other respect, and the conviction was in due form of law. The record contains none of the evidence bearing upon the guilt or innocence of the prisoner, and, as this was a matter entirely for the court and jury that tried the case, we are confined to the single question raised by the record. The principal facts are contained in an agreement of counsel to be found in the record. It is this: "It is agreed as a fact in this case that, immediately after the jury had retired to deliberate upon their verdict, the attorneys for the prisoner left the courthouse, and did not ask to be sent for upon the return of the jury into court, or leave any word as to where they or either of them would be found. It is further agreed as a fact in the case that Mr. McHenry, one of the prisoner's counsel, upon the retiring of the jury, went to dinner at his residence, located on the same street, and within 100 yards of the courthouse, and well known to the court, clerk, and court officials as the residence of said McHenry; that said McHenry remained at his residence all the time after leaving the courthouse and the taking of the verdict, and could have reached the courtroom within a few minutes after being sent for or notice given; but that no such word or notice was given him, and that he did not know of the return of the jury until after the jury had been discharged." We have no doubt as to the question in this case, and are of opinion that the ruling of the court below was correct. The prevailing practice in the courts of this state, when a jury has agreed upon their verdict, the prisoner being present in court, is to direct the verdict to be taken in the usual form, and, if there is no request for a poll of the jury, to require the verdict thus taken to be recorded. The manifest object of a poll of the jury is to call on each juror to answer for himself and in his own language. In *Ford v. State*, 12 Md. 514, it is said "that when the jury be asked if they have agreed on their verdict, and they respond that they have, and that their foreman shall say for them, and the foreman, speaking for the whole panel, find a proper verdict, and the same be recorded, the whole panel being called upon to hearken to it as the court hath recorded it, and no objection being made, either by any of the jury or the counsel for the state or prisoner, then such proper verdict, as given through the foreman, is the verdict of the whole panel, and it is too late, after the record of it, under such circumstances, for any of them to alter or amend it. It is then too late to poll the panel." While it is true that a prisoner is entitled, as a matter of right, to a poll of the jury, yet it is a right that can be waived; and a failure to make

the demand at the proper time—that is, before the verdict has been recorded—is equivalent to a waiver. This has been the uniform practice in the courts of the state, and it is supported by both reason and authority. In this case the circuit court for Allegany county was in regular session, and the prisoner was present at the time the verdict was received, and could have demanded a poll of the jury.

But it is insisted that there was error in receiving the verdict in the absence of the prisoner's counsel. This question has been distinctly ruled upon in some of the states. In *Martin v. State*, 79 Wis. 175, 48 N. W. 119, it was held there was no error in receiving the verdict in the absence of the attorney for the defendant. The verdict was received while the court was regularly in session, and, if the counsel for the defendant desired to be present when the verdict was received, there was nothing to hinder his being present, and it was not the duty of the court to send for him. It was sufficient if the defendant himself was present when the verdict was received, and there is no complaint in that respect. Approved in *Barnard v. State*, 88 Wis. 659, 60 N. W. 1058. In the case of *O'Bannon v. State*, 76 Ga. 32, the question is also passed upon, and the court said: "There was no error in receiving the verdict in the absence of prisoner's counsel, the prisoner being present." And the same ruling was made in the cases of *Baker v. State*, 58 Ark. 513, 25 S. W. 603, and *Huffman v. State*, 28 Tex. App. 174, 12 S. W. 588. In this state the rule has never prevailed that a prisoner is entitled, as a matter of absolute right, to have counsel present when the verdict is rendered. If such a rule was established, it would lead to serious inconvenience in the trial of criminal cases, and might often result in a mistrial of the case. There was therefore no reversible error in overruling the motion in this case. As far as the record discloses, the prisoner enjoyed every right and privilege guaranteed by our laws and constitution to persons accused of crime; and, as there is no error such as the prisoner has a right to complain of, the judgment will be affirmed. Judgment affirmed, with costs.

SOUTH BALTIMORE HARBOR & IMPROVEMENT CO. OF ANNE ARUNDEL COUNTY v. SMITH et al.

(Court of Appeals of Maryland. April 1, 1897.)

DEDICATION—FILING OF PLAT—RECORDING ACT.

1. Where, by an agreement duly executed and recorded, the owner of land has agreed to sell an interest in it, the subsequent filing of a plat by the vendor alone, on which such land is shown as a public square, will not operate as a dedication of it to public use.

2. Under Laws 1831, c. 205, § 3, providing that "all writings obligatory or contracts for conveyances of lands, or of any interest or estate of, in, or relating to lands," may be recorded if duly executed or acknowledged, a contract, properly executed and acknowledged, by

which one party agrees to sell and the other to buy real estate on certain conditions, is entitled to record, and the record is constructive notice of its provisions.

Appeal from circuit court, Anne Arundel county, in equity.

Bill by Henry Smith and others against the South Baltimore Harbor & Improvement Company of Anne Arundel County and others to enjoin defendant from taking possession of and using certain land, on the ground that it had been dedicated to the public. From a decree for complainants, defendants appeal. Reversed.

Argued before McSHERRY, C. J., and PAGE, RUSSUM, BRISCOE, ROBERTS, and FOWLER, JJ.

Isidor Rayner and John F. Williams, for appellants. Daniel R. Magruder and Ellhu S. Riley, for appellees.

FOWLER, J. The Patapsco Company was incorporated by the legislature of Maryland in the year 1853. It was authorized by its charter to buy, sell, and improve land in Anne Arundel county. In the exercise of the power thus conferred, it became the owner and entered into the possession of a large tract of land in said county opposite the city of Baltimore. Part of this land was laid out in town lots, and a plat thereof was made, showing thereon certain streets and avenues and a public square, which square contained about 15 acres, which the plaintiffs claim was dedicated to public use, and especially for the use of themselves, as owners of lots, and their successors in title. The name of the proposed town, as appears by the map, was to be "Brooklyn." It was also spoken of as the "City of Brooklyn," but, except in name, it never became either a town or city, and the project of the Patapsco Company appears to have utterly failed. The map in question, however, was recorded among the land records of Anne Arundel county by the secretary of the Patapsco Company some time after the recording of the agreement presently to be mentioned. The bill alleges that in the deeds from time to time executed by said company reference is made to said map, and the lots described as thereon laid out. It is also alleged that among the inducements held out by the Patapsco Company to purchasers of lots was the fact that they would be entitled to the use of the streets and public square as laid out on said map, and their contention is that by the acts of the said company in so laying out and locating said town and the said lots, streets, and public square, and by making and recording the said map, and the sale of said lots with reference to it in the deeds therefor, together with the inducements before mentioned, such streets and square became dedicated to the perpetual use and enjoyment of the purchasers and successive owners and occupants of said lots. It is also alleged in the bill that the defendant the South

Baltimore Harbor & Improvement Company of Anne Arundel county, which, for convenience, we will call the "Defendant Company," by virtue of a pretended purchase from the Patapsco Company claims to be the owner of the land constituting the public square, and that said defendant company had taken possession of said square, and was about to cut down the trees thereon, and to cultivate the land embraced therein. They (the plaintiffs) asked for and obtained from the circuit court of Anne Arundel county an order for a preliminary injunction restraining the defendant company from exercising any acts of ownership over the said square. This order is dated the 28th January, 1886. On the 24th March, 1887, the joint and several answer of the defendant company and other defendants was filed. Nothing further appears to have been done by either party, with the exception of the partial examination of one witness on the part of the plaintiffs, until the 23d January, 1896, when the plaintiffs filed a petition for leave to take additional testimony. The testimony was filed 21st July last, and on the 16th November following a pro forma decree was passed, making the injunction perpetual. From this decree all the defendants have appealed.

It will be seen from the foregoing statement that there is but one question involved,—whether the land which is designated as a public square has been dedicated to public use. We have already set forth with sufficient fullness the facts on which the plaintiffs rely in their bill to establish a dedication, and we will now state those on which the defendants rely to show there never was any such dedication of the square either by the Patapsco Company, its predecessor in title, or by itself. The first and most important fact relied on by the defendants is that on the 14th July, 1858, the Patapsco Company, which it is conceded then owned the square in question, unless theretofore dedicated, made a contract with a corporation known as the Brooklyn Company, by which the former agreed to lay out on a part of its lands a town to be called "Brooklyn," and prepare a plat thereof from a lithographed plat then existing, divided into lots of certain sizes, and to grant to the Brooklyn Company the privilege of purchasing a certain number of said lots on terms therein set forth. That agreement contained the following provision: "The Brooklyn Company may fence in the public square to be located on the proposed plat, as now shown on the lithographed plat, and may plant and embellish the same with walks, trees, etc., and may erect thereon any temporary improvements at its own expense, and such improvements to belong to the Brooklyn Company, and may be removed at any time before July 1st, 1868, at which date all exclusive rights of the Brooklyn Co. as to said square shall cease, and the square be vested jointly in the contracting parties hereto, for such uses and purposes as they shall agree." This agreement

was duly acknowledged and recorded on the 6th October, 1858, among the land records of Anne Arundel county. As we have already seen, the map or plat relied on by the plaintiffs was filed for record in the same county by the secretary of the Patapsco Company some time subsequent to the recording of the agreement. By conveyances subsequent to the recording of the agreement the defendant company became the successor in title to the two corporations therein named, and its contention is that it has now vested in it all the title and estate of both of said companies, and is, therefore, the absolute donee in fee of the ground designated as a square. We do not understand that there is any question made as to the fact of these conveyances, although they are not before us in this record; but the difference arises as to their legal effect, the plaintiffs contending that they could not operate to recall or destroy a dedication made before they were executed, and the defendants claiming that neither before nor after the execution of the agreement between it and the Brooklyn Company was any dedication made, and bases its claim of absolute ownership on the true construction of that agreement, as well as on the subsequent conveyances above mentioned.

The law involved in this case is well settled. It has been always held, in this state and elsewhere, that whether a dedication to the public has been made depends in every case upon the intention of the parties, and this whether dedication is claimed by acts in pais, by solemn conveyances of record, or by judicial proceedings. And it is also as well settled that such intention to dedicate must be established by clear, satisfactory, and unequivocal testimony. Thus it has been held that, although a presumption arises that a dedication was intended by reason of the conveyance of land binding on the sides of a street, yet this presumption will be rebutted by the execution of a subsequent deed by the same grantor to the same grantee of the bed of the street. And therefore, when the street was actually opened by the city of Baltimore, it was compelled to pay substantial damages. *Hall v. Mayor, etc., of Baltimore*, 50 Md. 187. And so in *Pitts' Case*, 73 Md. 320, 21 Atl. 52, it is said that the intention to dedicate by a sale and conveyance of lots binding upon a street "may be rebutted in many ways; as by other express covenants or agreements between the parties, or by the fact that the call for the street was made merely for the purpose of convenient description of boundaries, * * * or by any other circumstances showing the absence of an intention to dedicate to public use." The rule that the strongest, clearest, and most convincing proof will be required to establish a dedication has been announced again and again by this court.

It is claimed by the plaintiffs that the alleged dedication was effected by the laying of the square on the map, by the sale of

lots in accordance with and with reference to said map, and by representations made by the agents of the Patapsco Company that the streets and square as they appeared on the map should be enjoyed by the purchasers of lots. Now, it may be conceded that, if there were any owners of lots who purchased under such circumstances, and without notice of the contents of the agreement between the Patapsco and Brooklyn Companies, they would have a standing in a court of equity. But what is the evidence? We have already seen that on the 6th of October, 1858, the agreement just mentioned, under which the defendant company claims it was impossible there could be any presumption of an intention to dedicate, was placed upon record. It seems to us that, in the face of the language of that agreement, the strength of the defendants' position cannot be denied. From its date—14th July, 1858—the Brooklyn Company was to have exclusive control of the square, with the privilege of planting trees, making walks, and erecting at its own expense any temporary improvements which could be removed before July 1, 1866, when the ground called the "Square" vested jointly in the two companies, for such uses as they should mutually agree. If this be a valid contract,—as it undoubtedly is,—then from the time it was placed upon record it was constructive notice to all the world that, so far from the square being a public square, it was the private property of the two contracting corporations, unless, as claimed by the plaintiffs, this agreement was not such a paper as, under the then existing registry laws of this state, was authorized to be registered or recorded. It has been held that the doctrine of constructive notice has no application to deeds or papers which may be in fact recorded, though not required or authorized so to be. *Johns v. Reardon*, 3 Md. Ch. 57; *Glenn v. Davis*, 35 Md. 215. And therefore, unless this agreement is such a deed or contract as was authorized by Act 1831. c. 205, to be registered, knowledge of its contents cannot be imputed to the plaintiffs or their predecessors in title, in the absence of proof of actual notice. By section 4 of the act just mentioned it is provided that in all cases of acknowledgments of deeds, or conveyances or writings obligatory, or contracts of or relating to lands, etc., or any right, title, interest, estate, or use therein, the justice taking such acknowledgment shall, etc. And section 3 provides that the following may be recorded if duly executed and acknowledged as deeds, namely, "all writings obligatory or contracts for conveyances of lands or of any interest or estate of, in or relating to lands," etc. Upon its face the agreement in question is "a writing obligatory relating to land," by which the Patapsco Company agrees to sell, and the Brooklyn Company agrees to purchase, upon certain conditions, a large number of lots, and the former agrees to "execute deeds"

for the same upon certain conditions therein mentioned. It was contended on the part of the plaintiffs that only deeds of conveyances and what are technically called "bonds of conveyance" are contemplated by this act to be recorded. But, in so far as concerns the act we are now considering, this would, we think, independent of authority, be too narrow a construction. But in the case of *Insurance Co. v. Shriver*, 3 Md. Ch. 384, the chancellor said: "There is nothing, as I conceive, in the registry acts, which restricts them to conveyances of the legal title or estates, and in the words of that eminent judge who delivered the opinion of the court of appeals in *Hays v. Richardson*, 1 Gill & J. 384: 'Their design was that all rights, incumbrances, or conveyances touching or in any wise concerning land should appear on the public records.'" And we believe the general practice as to registration of papers has been in accordance with this view before and since the adoption of the Code. Unless, therefore, the plaintiffs have, by the evidence offered by them, established a dedication either by acts in pais, or by deed or both, before the 6th October, 1858, when this agreement was recorded, their attempt to do so must fail, for, after the recording of the agreement, they and all the world were bound to take notice that the square was under the control of the Brooklyn Company until 1866, and thereafter it became the joint property of the two contracting corporations. After the recording of this paper, no act or deed of the Patapsco Company alone could work a dedication, and there is no satisfactory evidence that either company did anything to indicate an intention to dedicate the square to public use. What is the evidence relied on to prove a dedication before 6th October, 1858? In the first place, the plaintiff Henry Smith holds his lot by deed from R. W. Templeman and wife, dated 31st December, 1874, and Templeman's deed from the Patapsco Company is dated 11th July, 1872. The deed from the Patapsco Company to Donelson is dated 9th September, 1872, that to Roche in 1859, and that to McPherson in 1862. Thus all of the deeds which are produced to show the lots were conveyed with reference to the streets and square as laid out on said map are subsequent to the time required, and not one of them is the joint deed of the two parties, who alone were the absolute owners of the ground claimed to be dedicated. Some effort was made to prove sales of lots within the time,—that is, before October, 1858,—and the direct question was asked Mr. Templeman, the most intelligent and best informed witness who was examined, if he had any memoranda in his possession to shew whether any sales had been made before that time, and he answered that he had none. He was also asked if he could state the dates when the lots were agreed to be sold to other parties, but he was able only to say that he had located

lots in 1857 and 1858, but whether the lots so located were sold and conveyed in such a way as to show a dedication does not appear. The witness Stall and his wife also testify from recollection that they bought a lot from the Patapsco Company prior to 1858, and promised to produce the deed; but they have failed to do so. Nor is the evidence satisfactory in regard to the alleged inducements offered to purchasers. Mr. Stall, in answer to the question whether he bought his lot on certain representations alleged to have been made as to the square, said that when he had money he bought the lots, and that the inducements had nothing to do with his action. He never saw a map with the square on it. Mr. Templeman also says that he presumes the square was held out as an inducement to buy lots, but he does not recollect it. The so-called "Prospectus and Diagram" which was issued by Mr. Templeman was also relied on as evidence to show a dedication in 1878. It stated that a public square of 15 acres had been reserved for settlers. It is without date, and it does not appear when it was issued, but it was stated in argument that it was first circulated in 1878 or 1880, after the bridge was made free. But, as we have already said, no act of the Patapsco Company alone could, after the recording of the agreement, result in a dedication. The testimony shows that this circular was an effort of Mr. Templeman, who was then, and still is, the secretary of the Patapsco Company. It is true, he says that both companies were cognizant of his action, to the best of his knowledge. But there is no evidence that either company authorized him to print or distribute the paper in question. Under these circumstances, this evidence cannot be accepted as satisfactory and conclusive proof. Who and where are the settlers—settlers after 1878—who are claiming to have made good the implied promise of this defendant to dedicate and maintain a public square in the city of Brooklyn? No lots appear to have been sold and conveyed after issuing of the circular, and before the time when the interests of the other two companies merged in the defendant company, who claims to be a bona fide purchaser for value? There is some other testimony as to dedication and as to inducements, but none of it is so cogent, persuasive, and full as to destroy all reasonable doubt of the intention of the owners to dedicate. While some of the acts of the parties would tend to show an intention to dedicate, yet, in view of all the circumstances of the case, and especially in view of the recorded agreement, we think the parties never intended to relinquish their claim to the land in dispute, and at the most they intended only a conditional dedication, an instance of which it was said in *White v. Flannigan*, 1 Md. 543, will be found in *Howard v. Rogers*, 4 Har. & J. 278, where the ground was given for a public square upon

the implied condition that the seat of government would be moved from Annapolis to Baltimore, and, the condition not having been fulfilled, it was held there was no dedication. Doubtless, if the city or town of Brooklyn had ever existed anywhere except on the map the dedication here claimed would have become complete, and the owners of the ground would have been glad to waive all their claims in favor of the public. Dedication by user was disclaimed at the hearing, although some reliance is based upon this view in 'appellees' brief. The evidence, however, in regard to user is very unsatisfactory, and we think the position was properly abandoned. It follows that the decree appealed from must be reversed. Decree reversed and bill dismissed.

DROVERS' & MECHANICS' NAT. BANK v. ROLLER et al.

(Court of Appeals of Maryland. April 1, 1897.)
ASSIGNMENT FOR BENEFIT OF CREDITORS—TRUSTS
—FOLLOWING TRUST FUNDS.

1. Money collected by a broker's assignee for the benefit of creditors from sales made by the broker belongs to the consignor for whom the sales were made, where the check sent by the broker therefor was dishonored.

2. No lien exists on assets in the hands of an assignee for the benefit of creditors for trust funds used by the insolvent in paying debts, and which did not go to swell the fund sought to be charged.

Appeal from circuit court of Baltimore city.

In the matter of the trust estate of Sheeler & Ripple, insolvent. The claims of D. & W. Roller and William Lynn against the estate were allowed, and the Drovers' & Mechanics' National Bank, an excepting creditor, appeals. Modified.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

James McColgan, for appellant. S. S. Field, for appellees.

McSHERRY, C. J. There are two questions to be disposed of on this appeal, and they both arise upon exceptions to an auditor's report. One involves quite an interesting question of law; the other chiefly a question of fact. The circumstances out of which the first question grows are these: The firm or co-partnership of Sheeler & Ripple had for a number of years been engaged in the live-stock commission business in Baltimore. On the 17th day of January, 1895, D. & W. Roller, of Tennessee, consigned to Sheeler & Ripple, for sale, a quantity of live hogs, which, when received by the consignees, on January 21st, were sold in several lots for the consignors; and on January 24th an account of sales, together with a check for the net amount of the proceeds after deducting commissions and freight charges, was mailed to the consignors. On the 31st of January,

Sheeler & Ripple, being then, and apparently having been for some months anterior thereto, hopelessly insolvent, executed a deed of trust for the benefit of their creditors; and when the check given to D. & W. Roller reached in due course, on the 2d of February, the Drovers' & Mechanics' National Bank, upon which it had been drawn, there were no funds in bank to the credit of the drawers, they having previously overchecked their account, and the check was dishonored. The funds actually received by Sheeler & Ripple for the hogs sold had been paid out on other checks given for other demands. Most of the hogs were sold for cash, and the proceeds, without earmark or identification, were placed to the credit of Sheeler & Ripple, intermingled with funds of their own, in the Drovers' & Mechanics' National Bank, where the partnership bank account was kept; but a portion of the hogs had not been paid for by the purchasers of them when the deed of trust was made, and afterwards the trustees collected, and now have in their hands, these particular proceeds of sales. D. & W. Roller filed their claim in the trust estate for the whole net proceeds of sale, and insist that they are entitled to a priority over other creditors to the extent of the whole net proceeds of the sales of their hogs. The assets in the hands of the trustees consist of collections made by them, but, except as just stated, do not represent the proceeds of the sales of Rollers' consigned hogs, or the proceeds of the sale of any other property in which the proceeds of the sales of those hogs have been invested. The first question, then, is: Are D. & W. Roller entitled, under these circumstances, to a preferential lien upon the general assets of Sheeler & Ripple in the hands of the trustees for the full amount of the claim they have against the insolvent firm for the proceeds of the sales of the consigned hogs? With respect to the proceeds of sale which actually went into the hands of the trustees after their appointment, there can be and there is no difficulty whatever. When goods or chattels are consigned to a commission merchant or broker for sale, the title does not vest in the latter, but remains in the consignor, and the money arising from a sale of them is the money, not of the agent, but of the owner of the consigned property. Hence, whenever the money can be traced, it may be claimed by its owner, and upon an assignment being made for the benefit of creditors the trustees can have no greater right to the money than his grantor, the consignee, possessed. The proceeds of the sales of Rollers' hogs that have actually gone into the possession of the trustees, and which are capable of identification, belong to the Rollers, and must be paid over to them; but quite another and a different condition exists in regard to the proceeds received by the insolvent firm, and spent or dissipated by them before the trustees were appointed. The general doctrine in relation to the right of the owner of property or the cestui que trust to

follow and reclaim his property is, we think, thoroughly settled. The early English cases only went to the extent of holding that the owner of property intrusted to an agent, factor, or trustee could follow and retake his property from the possession of such agent, factor, or trustee or others in privity with him, whether such property remained in its original, or had been changed into some different or substituted, form, so long as it could be ascertained to be the same property, or the product or proceeds thereof, unless the superior rights of bona fide purchasers for value and without notice had intervened; but that such right of reclamation ceased when the means of ascertainment failed, as when the subject of the trust was money, or had been converted into money, and then mixed and confounded in a general mass of the same description, so as to be no longer divisible or distinguishable. The more recent rule, however, in England, as to following trust moneys, is broader, and goes to the extent of holding that, if money held by a person in a fiduciary character has been paid by him to his account at his banker's, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands; and that, if a person who holds money in a fiduciary character pays it to his account at his banker's, and mixes it with his own money, and afterwards draws out sums by checks in the ordinary manner, the drawer must be taken to have drawn out his own money in preference to the trust money. *Knatchbull v. Hallett*, 13 Ch. Div. 698. This court, in *Englar v. Offutt*, 70 Md. 78, 16 Atl. 497, following closely the supreme court of the United States in *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, has announced the same principles. But it is now insisted that the doctrine has been expanded and amplified, and that, though the funds cannot be traced or identified, a lien still exists upon the debtor's general assets in the hands of his trustee in favor of the owner or cestui que trust whose property or money has been mingled with that of the fiduciary, and has been used by him in liquidating other claims against himself; and that this lien is a preferential one over other creditors of the debtor. The theory upon which this supposed enlarged doctrine rests is that, inasmuch as the wrongful application of the trust funds reduces the general indebtedness of the fiduciary, his assets, swelled to the extent of that reduction, ought to be impressed with a trust or lien in favor of the person whose money or property has been improperly employed and used to discharge the individual indebtedness. There are some cases which support this view. *People v. City Bank of Rochester*, 96 N. Y. 32; *McLeod v. Evans*, 66 Wis. 401, 28 N. W. 173, 214; *Francis v. Evans*, 69 Wis. 115, 38 N. W. 93; *Bowers v. Evans*, 71 Wis. 133, 36 N. W. 629. *Harrison v. Smith*, 83 Mo. 210; and some others. But it is obvious, even if these cases were not opposed to the general principles already

alluded to, and even if they had not been questioned, and some of them flatly overruled, that they proceed upon a wholly fallacious and untenable theory. They are founded upon the assumption that the misapplication of the trust funds by the fiduciary to the payment of his own debts actually swells the volume of his assets. This is the introduction of a new and unsound principle into an old and well-known doctrine of equity. But, instead of such a misappropriation swelling the volume of the debtor's assets, it would merely diminish the amount of his indebtedness, and this would benefit the estate only to the extent that it increased the percentage that the other creditors would receive, provided the amount of the misappropriation were not deducted as a preferred demand. The case of *People v. City Bank of Rochester*, 96 N. Y. 32, which was followed in *McLeod v. Evans*, 96 Wis. 401, 28 N. W. 173, 214, if it can be held to support this new doctrine (for it is a brief opinion, resting on no well-defined principle), is in conflict with the more recent case of *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504, wherein it was expressly decided, in disposing of this very contention, that it was "quite too vague an equity for judicial cognizance," and that there was "no case justifying relief upon such a circumstance." *McLeod v. Evans*, *supra*, *Francis v. Evans*, *supra*, *Bowers v. Evans*, *supra*, determined by a bare majority of the court, were subsequently overruled in *Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383, the opinion of the court being delivered by one of the judges who dissented in *McLeod v. Evans*; and those cases are consequently no longer authority even in the state of Wisconsin. In *Slater v. Oriental Mills*, 18 R. I. 352, 27 Atl. 443; *Shields v. Thomas*, 71 Miss. 280, 14 South. 84; *Ferchen v. Arndt*, 26 Or. 121, 37 Pac. 161; *Bank v. Dowd*, 38 Fed. 172; *Little v. Chadwick* (Mass.) 23 N. E. 1005,—the doctrine of the Wisconsin, Iowa, Kansas, Missouri, and Texas cases is criticised and repudiated. The distinction between the two conditions that are presented when, first, trust funds remain in the insolvent estate, and go to swell it, and when, secondly, trust funds have been dissipated or spent and used in the payment of debts due by the fiduciary, and therefore no longer constitute a part of his estate, is a perfectly manifest one; and the fundamental error underlying the cases we have been reviewing consists in confusing or confounding these essentially dissimilar conditions, and a consequent failure to distinguish between property which may be either specifically identified as belonging to the claimant, or money traced to and remaining in the hands of the factor or trustee on the one hand, and, on the other hand, money arising from the sale of property confessedly never owned by the claimant or cestui que trust, or confessedly not purchased with money belonging to him. Creditors have no right to share in that which is shown not to belong to the debtor, and, conversely, a

claimant has no right to take from creditors that which he cannot show to be equitably his own. But just here comes the argument that it is equitably his own, because the debtor has taken the claimant's money, and mingled it with his estate, whereby the estate is swelled precisely that much. But, obviously, as applicable to all cases, the argument is unsound. Where the property, or its equivalent, remains, there can be no contention that the claim is just and enforceable; but where it has been dissipated, and is gone, the appropriation of some other property in its stead simply takes from creditors that which clearly belongs to them. In one of the cases the illustration was used by Knight Bruce of a debtor mingling trust funds with his own in a chest; and in another Sir George Jessel likened the situation to that of a debtor who had mingled trust funds with his own in a bag. Though the particular money cannot be identified, the amount is swelled just so much, and the amount added belongs to the cestui que trust. But where all the money has been spent,—where Knight Bruce's chest or Jessel's bag is empty,—there is no swelling of the estate at all; and in such a contingency it comes to this: that a court of equity is asked to order a like amount to be taken out of some other chest or bag, or out of the debtor's general estate, not because the creditors who are entitled to be paid out of that general estate have done any wrong, but because the debtor has been guilty of misconduct as a trustee. It comes down to the ordinary case of misfortune on the part of the claimant or cestui que trust whose confidence in a trustee or fiduciary has been abused. *Slater v. Oriental Mills*, *supra*.

But the case of *Englar v. Offutt*, 70 Md. 78, 16 Atl. 497, affords, in our judgment, a complete answer to the contention of D. & W. Rohrer as respects that portion of their claim now under consideration. In that case it appeared that John P. Shriver had been engaged in business as a merchant and manufacturer under the name and style of J. P. Shriver & Co. In May, 1883, he was appointed guardian of two infants, and received something over \$10,000 belonging to them. On the day he received this money he deposited nearly all of it in the Howard Bank, to his own credit, in an account kept in the name of John P. Shriver & Co. Against this and all other credits, aggregating considerably more than double the guardianship fund, he checked and drew out, as he needed the money, the whole amount of his deposits, except the trifling sum of \$48.49. In December, 1885, Edward C. Shriver became a partner of his brother, John P. Shriver. In November, 1886, the firm made a deed of assignment for the benefit of creditors, and the trustees sold all the assets of the firm, and there realized about \$9,500. Thereupon the infants whose money had gone into the business of John P. Shriver filed a petition in the trust estate, claiming a priority over the other creditors of

the firm in the distribution of the net proceeds of the sales of the firm's assets. After stating the general rule as we have heretofore announced it, we said: "The sole question, therefore, in every case where trust property is attempted to be traced is whether it can or cannot be identified either in its original or altered form." Then, after discussing the evidence, and showing that the whole trust fund had been drawn out, and that there was nothing in the testimony tending to show that the stock which went into the hands of the trustees had been purchased with the trust funds, the opinion proceeds: "And, such being the case, the claim of the appellants upon the fund for distribution is altogether too indefinite. At most it is but matter of conjecture, for it is impossible to say, as this case is presented, and after the great lapse of time that has occurred, whether any, or if any, what, portion of the stock of goods that passed into the hands of the assignee under the general assignment for the benefit of creditors was the product of the trust fund belonging to the appellants. * * * It is clear, therefore, that the fund now in court for distribution cannot be identified as the product of any investment of the original trust fund belonging to the appellants," who were the infants. And because this could not be done the relief sought was denied, though, had the doctrine of the Wisconsin and other cases heretofore cited been considered the law, the fund, notwithstanding the trust money had not been traced into the purchase of the firm's assets, could have been impressed with a preferential trust, and the wards' claim would have prevailed over the debts due to the general creditors of the firm. In our opinion, then, so much of the claim of D. & W. Roller as the firm of Sheeler & Ripple actually collected before the appointment of the trustees is not entitled to a priority, because the funds had been spent or dissipated, and did not in any form go into the hands of the trustees, and therefore, as to that portion of their claim, they are simply general creditors standing on the same footing with other general creditors of Sheeler & Ripple; though, as to so much of the proceeds of the sales of the consigned hogs as the trustees have collected, and which, consequently, is capable of identification, the Rollers are entitled to a priority.

The remaining question—chiefly one of fact—arises on the claim of William Lynn. It has been objected that he is not entitled to prove his claim, because he was a member of the insolvent firm. Of course, if he had been a member of the firm, he would not be allowed to compete with the firm's creditors; and the question as to whether he was or was not a partner is really the only question involved. After a careful examination of the evidence in the record, we are convinced that he was an employé, and not a partner. His compensation was measured by the amount of the profits earned in one branch of the business, but he was not on that account a co-partner.

The firm of Sheeler & Ripple was composed of John N. Ripple and T. Brandon Silcott, and the petition filed in this case by the trustees asking the circuit court to assume jurisdiction in administering the trust, makes no averment that Lynn was a partner; nor was the deed of trust itself signed by him. It would serve no useful purpose to go into an analysis of the somewhat lengthy evidence bearing on this question of fact, and we consequently content ourselves with stating the result of our examination of it. The circuit court decided that Lynn was not a partner, and in this conclusion we concur. Inasmuch as the learned judge below held that D. & W. Roller were entitled to have their whole claim treated as a preference to be paid in full, and as we do not agree with him in this, so much of the order appealed from as allows this claim in full will be reversed, and the cause will be remanded, that a new order may be passed allowing as a preference the amount of the proceeds of Rollers' hogs collected by the trustees after their appointment, and placing the balance of the claim on an equal footing with other general creditors. In so far as respects the claim of Lynn, the order appealed from will be affirmed. The costs incurred in the Roller claim must be paid by the Rollers, and those incurred on the Lynn claim must be paid by the appellant. Order reversed in part, and affirmed in part, and cause remanded; costs to be divided as above indicated.

SCOTTISH UNION & NATIONAL INS.
CO. OF EDINBURGH, SCOT-
LAND, v. KEENE.

(Court of Appeals of Maryland. March 31,
1897.)

INSURANCE—PROOF OF AMOUNT OF LOSS—CONDI-
TION OF POLICY.

1. Where the books showing the amount of goods in a mercantile house when destroyed by fire were also burned, evidence showing the amount of stock on hand when an inventory was taken, the quantity purchased afterwards and before the fire, the amount of sales made, and the average profits charged thereon, is admissible to prove the amount of the loss.

2. A requirement of an insurance policy that in case of loss the insured shall furnish a copy of the description and schedules contained in other policies, covering the same property, is substantially complied with by the furnishing of a list of all other policies, giving the names of the several companies, the number and amount of each policy, with the date of expiration, together with a copy of the written portions of each.

Appeal from superior court of Baltimore city.

Action by Leo Keene, surviving partner of Daniel Langfeld, trading in the firm name of D. Langfeld & Co., against the Scottish Union & National Insurance Company of Edinburgh, Scotland, on an insurance policy. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, ROBERTS, and BOYD, JJ.

George M. Bond, N. P. Bond, and Edward Duffy, for appellant. W. Pinkney Whyte, for appellee.

ROBERTS, J. This suit was brought to recover on a policy of insurance against loss by fire. The policy was written by the appellant in favor of D. Langfeld & Co., who were engaged in the business of manufacturing ladies' clothing. The property insured is described in the policy in these words: "\$5,000 on merchandise, consisting principally of dry goods and ladies' ready-made clothing, and on all materials used in their business as manufacturers of same, their own, or held in trust or consignment or commission, or sold, but not removed, while contained in the brick building situate No. 32 S. Paca street, Baltimore, Md.; communicating through fireproof boiler house in basement with No. 34 S. Paca St.; opening protected by fire doors." In addition to this policy, there were risks written by 16 other companies on the same stock, the aggregate of the 16 policies being \$40,000. The usual conditions were annexed to and formed parts of the policy. A fire occurred on December 2, 1893, within the period of time covered by the policy sued on, and the entire stock and machinery of the assured, as well as most of their books, were totally destroyed. Proof of loss was furnished, but was objected to as insufficient; and upon this and other grounds, to be stated presently, the insurer refused to pay the loss, and thereafter this suit was brought. The refusal of the appellant to pay the amount of the loss insured against in the policy issued by it is founded on several grounds, which may be briefly summarized as follows, viz.: That the proof of loss was not sufficient, in that it did not contain a statement in detail of the stock and materials on hand at the time of the fire, nor set forth the cash value of each item thereof, and the extent to which each article was damaged; that the assured had not furnished, as required by the policy, within 60 days after the loss, a copy of the descriptions and schedules in other policies written upon the same property; that the assured refused to subscribe an examination taken by a person designated and appointed by the insurer; and that, notwithstanding a difference arose between the assured and the insurer respecting the amount of the loss sustained by the former, the assured refused to enter into an appraisal, as provided for in the policy in such a contingency, although a demand was made for such appraisal by the underwriter. During the progress of the trial six bills of exception were taken, and they present the questions to be disposed of on this appeal. Under the rulings and instructions of the superior court

the jury rendered a verdict in favor of the assured for the full amount claimed to be due by the terms of the policy, and upon that verdict a judgment was duly entered. From that judgment the insurance company has prosecuted the pending appeal.

There was no dispute respecting the execution and delivery of the policy, the payment of the exacted premium, and the subsequent loss and destruction of whatever property was on the premises when the fire occurred. Nor was there any denial that the loss, if a loss was sustained at all, was a total and complete one. The controverted question at the threshold was whether there was sufficient evidence to show that any of the materials described in the policy were in fact destroyed by the fire. The first, second, and third exceptions, and the appellant's fourth and fifth prayers in the sixth exception, involve this inquiry, and may be considered and discussed together, because upon the correctness of the rulings on the objections set forth in the first three exceptions depends the propriety of the court's action in rejecting the two prayers just designated by their numbers. We have said that most of the appellee's books were destroyed in the fire. The only ones saved were the sales book or the day book, showing the amount of daily sales; the purchase book, showing the amount of merchandise bought from January 1, 1893, up to the time of the fire; and the book of expenditures, showing the amount paid out in manufacturing between the same dates. Now, it is obvious that to entitle the assured to recover it was incumbent on him to show to the satisfaction of the jury—First, that he had sustained a loss by fire; and, secondly, what the amount of that loss was, not with exact mathematical precision, but with a reasonable measure of certainty. Confessedly, all that he had on the premises described in the policy was destroyed. His most valuable and important books had been burned, and there is no pretense that from mere memory he could possibly have stated the quantity or description of a stock of goods, such as it is apparent he carried. But his inability to do this, arising as it clearly does from the very misfortune against whose disasters the appellant wrote the insurance, can scarcely, in a court of justice, be considered a valid and sufficient ground to defeat his claims for indemnity. Though deprived, by the casualty which the policy was designed to reimburse him for, of the best means to compute the precise amount of his loss, he was by no means precluded from resorting to other, even if less satisfactory, methods of laying that branch of his case before the jury. And to other methods he did resort. He showed most incontestably that the amount of stock which he had on hand the 1st day of January, 1894, was \$22,131.46. He then showed by his book of purchases that from that date to the day of the fire he had bought \$107,821 worth of

materials, and by one of his other books saved from the fire that the cost paid for manufacturing during the same period had been \$35,311.04; making a grand total of \$165,263.50. He likewise demonstrated from his day book, or book of sales, that his sales during the same period had been \$169,215.25, and that the average or usual profit included in this gross amount of sales was 40 per cent., or \$48,347, which, on being deducted from the gross amount of sales, showed the cost value of the manufactured articles sold to be \$120,868.25, and, that sum being deducted from \$165,263.50, the aggregate of the inventory, the merchandise bought, and the cost of manufacture, left the sum of \$44,395.25 as the value of the goods and materials in stock when the fire occurred. This process is the one objected to in the exceptions now being considered. Without pausing to consider the special questions objected to, because such a course is wholly unnecessary, we deem it only necessary to say that there was no error in allowing the questions to be asked which elicited this result. But a single observation is all that is needed to illustrate the correctness of this conclusion. Were this method of ascertaining the value of the goods destroyed excluded, there would be no possible way, in the event of a total loss of the goods themselves and the books of the assured, to arrive at even an approximate estimate of the amount of the loss, for it is not to be assumed that in a large business establishment either the proprietor or his employes can carry in their minds a schedule of the stock in trade. And, if the method of proof allowed by the court below were excluded, then in the case supposed (which is, in fact, the case at bar) no proof could be adduced at all; and it would follow that, the more complete and disastrous the conflagration, the less would be the liability of the insurer. A ruling leading to such a conclusion is obviously illogical and untenable. We find, therefore, no error in the rulings set forth in the first, second, and third exceptions, and in the rejection of the appellant's fourth and fifth prayers.

The question presented by the fourth exception arose in this way: The conditions annexed to the policy provide, among other things, that "the insured, as often as required, shall submit to examinations under oath by any person named by this company, and subscribe the same," etc. On March 5, 1894, Mr. Thomas E. Bond, adjuster, required the appellee to submit to an examination under oath. No authority from the company to Mr. Bond to make the examination was shown the appellee, but he nevertheless did undergo an examination, which was taken down by a stenographer, and he states he produced what books he had. He further testifies that Mr. Bond never asked him to sign the examination, and that he did not sign it because, as taken down, it was full of errors. He likewise stated that he was not asked to sign it.

He was then asked whether Mr. Bond ever refused to let him (the appellee) correct the statement. The question was objected to, the court sustained the objection, and hence the fourth exception. The question was irrelevant. It did not appear that Mr. Bond had been appointed by the company to make the examination, and the appellee was under no obligation to submit to or to sign an examination until he had been informed that some person had, in the language of the policy, been "named by" the company to make it; and whether Mr. Bond refused to let the appellee correct errors in the stenographic report of the examination was, under the circumstances, wholly immaterial, as respects the liability of the company. If the company desired the statement signed, it should have demanded that the appellee sign it. The mere fact that Mr. Bond did not refuse to correct any errors in the copy was no evidence that the company either exacted or insisted on the signature. It literally proved nothing.

The fifth exception also presents a question of the admissibility of evidence. Listner was the adjuster for the appellee. He made out the proof of loss, and was present at the examination alluded to in discussing the preceding exceptions. Mr. Bond testified that he had given a copy of the examination to Listner, and he was then asked, "What did you say to Mr. Listner at the time you gave him the copy of the deposition of Mr. Keene [the appellee]?" An objection was made, which the court sustained, and this ruling is the one complained of in the fifth exception. Clearly, there was no error in this ruling. Nothing that Mr. Bond said to Mr. Listner could affect in any way the rights of the appellee. There is no pretense that Listner had any authority to bind the appellee. Listner was the appellee's adjuster, and any declarations made by Bond to him about a totally different subject, viz. the written examination of the appellee, could not possibly bind the appellee. The proffered evidence was wholly irrelevant.

The remaining exception relates to the prayers. The appellant presented seven, all of which were rejected. The appellee offered four, the first, second, and fourth of which were granted, the third not being in the record; and the learned judge of the superior court gave an instruction of his own. The appellant filed special exceptions to the granting of the appellee's first and fourth prayers. We find no errors in the granted prayers. The first prayer asks the court to instruct the jury that, if they find from the evidence that the defendant made the policy of insurance offered in evidence, and delivered the same to the plaintiff; and further find that the property described in said policy was totally destroyed by fire on or about the 2d day of December, 1893, and that the defendant had notice of the fire at the time thereof, and that the plaintiff furnished the proofs of loss referred to in the evidence, together with the certificate of the magistrate; and furnished,

so far as it was possible for him so to do, an inventory of the property destroyed, stating the quantity and cost of each article, and the amount claimed thereon; and furnished, so far as it was possible for him so to do, the cash value of each item, and the amount of loss thereon; and also furnished the copy of all the descriptions and schedules in all the policies,—then the plaintiff is entitled to recover. This prayer is clearly sound if supported by the evidence; and we think the evidence alluded to in considering the first, second, and third exceptions was quite sufficient to go to the jury, and, if believed by them, to support the hypothesis of the instruction. *Insurance Co. v. Mispelhorn*, 50 Md. 193. The second instruction is not open to criticism. There was evidence, if credited, to support the facts hypothetically submitted; and, if the jury found those facts, then obviously the failure of the appellee to sign the examination heretofore mentioned furnished no reason for the refusal of the appellant to pay the loss. The fourth prayer is not obnoxious to the special exception filed to it, for the same reason we have given in disposing of the special exception to the first prayer. The legal principle it announces is sound, and is that generally applied in estimating damages in such cases as this, and in apportioning them among contributing companies.

The first, second, and third prayers of the appellant were properly rejected. They relate to the proof of loss and its legal sufficiency. The proof of loss furnished in this case—a case of total loss—was, under the circumstances, all that could have been required. These prayers, exacting a more detailed proof, were consequently erroneous. The sixth prayer, being the converse of the appellee's second, and the latter being right, the former must be wrong. The seventh prayer asserts that the appellee did not furnish a copy of all the descriptions and schedules in all policies, as he was required to do under the terms of the policy sued on; and, inasmuch as the evidence shows that such description and schedules were duly demanded by the defendant, the verdict of the jury must be for the defendant. But the evidence does not justify the assumption of facts contained in this prayer. The proof of loss distinctly gave the names of the other 16 companies having policies on this property. It gave the numbers of these policies, the amounts covered by each, and the dates of their respective expiration; and it expressly stated that "full copies of the written portions of all other policies and indorsements, transfers, and assignments are hereto annexed, or will be furnished on demand." The requirement was substantially complied with. The written portion of the policy sued on was set out, and, as stated, a statement of the names of the other companies holding policies on the same property; and a statement of the respective amounts and of the dates, showing that they were concurrent with the policy in suit, constituted a substantial com-

pliance with the condition relied on in the seventh prayer. *Jones v. Insurance Co.* (N. Y. App.) 22 N. E. 578; *Keeney v. Insurance Co.*, 71 N. Y. 396. The court's instruction was clearly right under the case of *Insurance Co. v. Doll*, 35 Md. 103. Finding no errors, the judgment will be affirmed, with costs above and below. Judgment affirmed, with costs above and below.

PARLETT, City Collector, et al. v. DUGAN.
(Court of Appeals of Maryland. April 1, 1897.)

Tax on Leased Premises—LIABILITY OF TRUSTEE FOR CREDITORS OF LESSEE — PAYMENT FROM FUNDS NOT ARISING FROM LEASED LAND.

Under the statute making the holder of a leasehold liable for the taxes on the leased premises; and Code, art. 81, § 47, making taxes liens on the tax debtor's realty, but not making them liens on his personality; and Id. § 64, as amended by Acts 1892, c. 513, providing that, when a sale of realty or personality is made by any ministerial officer, only such taxes as have accrued against the particular property sold shall be prior claims on the proceeds,—a trustee for the creditors of a lessee, who refused to take possession of the leased premises, because they would not benefit the trust estate, cannot be required to pay the taxes on such premises out of funds realized from sales of property not forming part of the leasehold.

Appeal from circuit court of Baltimore city. Suit by John F. Parlett, city collector, and another, against Ferdinand C. Dugan, as trustee of George C. Nicholas. From a pro forma order sustaining a demurrer to the petition, complainants appeal. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, PAGE, RUSSUM, and BOYD, JJ.

Thomas I. Elliott, S. D. Schmucker, George Whitelock, and Liston G. Ketchum, for appellants. Jos. W. Hazell, for appellee.

BOYD, J. This appeal was taken from a pro forma order of the circuit court of Baltimore city sustaining a demurrer to the petitions of John F. Parlett, collector of state and city taxes for Baltimore, and of John M. D. Heald, trustee, which asked the court to require Ferdinand C. Dugan, trustee of George C. Nicholas, to pay certain state and city taxes out of funds in his hands. The two petitions were consolidated by order of the court. They allege that on the 1st day of October, 1867, a certain lot of ground on Post Office avenue, in the city of Baltimore, was leased for the term of 99 years, at the annual rent of \$900, payable quarterly, free and clear of all deductions for taxes, etc.; and the lease contains a covenant on the part of the lessee, his assigns, etc., to pay the taxes. The reversionary interest became vested in the petitioner, Heald, in trust for certain children of Adaline Spurrier; and on the 28th day of November, 1883, George C. Nicholas became the owner of the leasehold interest. On the 18th day of May, 1895, Nicholas assigned to Mary N. Forman an undivided half interest in the leasehold; and on the 24th day of May, 1896, he executed

to the appellee a general deed of assignment of all his property, in trust for the benefit of his creditors. On the 1st day of May, 1896, at the instance of Mary N. Forman, a receiver was appointed to take charge of the leasehold property, collect the rents, and pay the charges thereon until the further order of the court. The receiver had in hand when the petitions were filed \$812.15, while the ground rent due October 1, 1896, amounted to \$815, and the state and city taxes for 1894, 1895, and 1896 were still unpaid, amounting to \$1,428.68 for the three years. The appellee refused to enter into possession of Nicholas' interest in said leasehold property, and rejected it, "as being without benefit to his trust estate." The petitions further allege that the appellee had in hand funds of the estate of Nicholas far more than sufficient to pay the taxes.

The question intended to be raised is whether, under these circumstances, the state and city taxes on the leasehold property must be paid out of the funds in the hands of the trustee, which were received from other parts of the estate. It is conceded that the taxes for 1896 cannot be collected by this proceeding, but those for 1894 amount to \$498.00, and for 1895 to \$460.96, and the appellants claim that they should be paid. Although, at the time of the assignment, Nicholas only owned a one-half interest in the property, there is nothing in the record to show when the levy for 1895 was made, and therefore we do not know whether Mary N. Forman was the owner of the half interest then, or whether she became such after the levy. Nor is there anything to show from what the fund in the hands of the trustee was derived, although we presume from the argument of counsel that most, if not all, of it, was from collections or the proceeds of sales of personal property. By section 47 of article 81 of the Code, all state, county, and municipal taxes are made liens on the real estate of the party indebted from the time they are levied, but they are not made liens on personal property. Although the legislature has broad powers in making taxes liens either on the property taxed or other property, they are not liens merely because they are taxes, but must be expressly made so by legislation. The legislature of the state has given taxes priority over other debts in a number of instances. Administrators are required by section 65 of article 81 of the Code to pay all taxes due by their decedents as preferred debts, to the exclusion of all others, except funeral expenses. By section 64 of that article, when a sale of either real or personal property was made by any ministerial officer, under judicial process or otherwise, all sums due and in arrears for taxes from the party whose property was sold were required to be first paid and satisfied; but by Acts 1892, c. 518, that section was so amended as to only require the taxes on the particular property sold to be paid out of the proceeds of sale. Section 15 of article 47, amended by Acts 1896, c. 184, in giving priority to certain

wages and salaries, expressly reserved from the effect of the preference all proper and legitimate costs, expenses, taxes, etc. But there is no statute which makes the taxes now in controversy a lien on the fund in the hands of the trustee, nor is there any statute which expressly gives them priority over other claims in the distribution of that fund.

It is contended, however, that, at least so far as the state taxes are concerned, the priority in no wise depends upon a lien in favor of the state, but it is by virtue of its prerogative right derived from the common law entitling her to be first paid, excepting only where some antecedent lien stands in the way. It is true that it has been the settled law of Maryland for many years that such a right does ordinarily exist in favor of the state. In the case of *State v. Bank of Maryland*, 6 Gill & J. 226, Chief Judge Buchanan, in delivering the opinion of the court, gave, as a reason why this should be so, that "the government of the state is established for the good of the whole, and can only be supported by means of its revenues, which revenues the good of the whole requires to be protected. And as it can only act by its agents, who, no matter how vigilant, cannot always be present to protect its rights, a priority in the payment of its debts (which must always be of a public nature) is necessary to enable it to accomplish the ends of its institution." But if it be conceded that the state has such priority in the distribution of all of an insolvent's estate, and if that doctrine be extended so far as to include the city taxes, should it be applied to a case like this? Although the tax collector did file a petition, it was consolidated with that of the holder of the reversion of the property from which these taxes are due. It is virtually a contest between the owner of that reversion and the general creditors of Nicholas. The reasoning of Judge Buchanan in the above-cited case does not apply to this, because the property primarily liable for these taxes is still in existence, unsold, and ample for the payment of them. When the deed of trust was made, the property was in the hands of a receiver, who was, and has since been, collecting rents. If Nicholas has not made an assignment, the tax collector could, on proper application, have had the net income applied to the payment of the taxes due; and, if the leasehold estate cannot earn the taxes, ground rent, and other proper expenses, the court should, and doubtless would, discharge the receiver, or direct the leasehold interest to be sold if possible, or surrendered to the reversioner if a sale be impossible, and he desires possession. But, as the trustee of Nicholas has refused to accept the property, and has not received anything from it, in the absence of a statute requiring it, we can see no valid reason for allowing priority in favor of the taxes in the distribution of the fund in the hands of the trustee, when both state and city are amply protected by the lien on the property from which the taxes are due.

It is true that by the statute the person holding the leasehold estate is required to pay the taxes levied on the demised premises, and in this case the lease also required that; but the whole property, and not merely the leasehold interest, is liable to the state and city for the taxes. It may be that Mary N. Forman is responsible for one-half of the taxes of 1895, and, if that be so, it is another reason why all of them should not be paid out of the fund. It is suggested on the part of the appellants that the trustee would have his remedy against her, but a trust fund should not be subjected to the costs, and possibly ultimate loss, that might be incurred by such payment, unless the law clearly impose such burden on it. If she is peculiarly responsible, the reversioner can proceed against her for whatever ground rent or taxes she may be liable for. He can also file his claim against Nicholas, and receive his proper distribution from the fund in the hands of the trustee.

The case of *Casualty Ins. Co.*, 82 Md. 563, 34 Atl. 778, so much relied on by the appellant, differs materially from this. The taxes there due were on the shares of stock of the company, which, by the statute, it was required to pay, and they were made a lien on the stock. The stock represented all the assets and property of the corporation, and the corporation and the property were liable for the taxes. The receivers were dealing with all the property (certainly all in Maryland, not only a part), and, in the distribution of the proceeds of sales and collections, we held that the taxes must be paid. But in this case the facts and circumstances are altogether different. In *Re Lewis*, 81 N. Y. 421, the court of appeals of New York refused to require the trustee to pay taxes to certain mortgagees who were seeking to have the taxes due on the mortgaged property paid by the trustee out of the funds in his hands. While the court declined to determine whether the state itself could successfully assert a claim to a preference over other creditors, it did reject the claim of the mortgagees who occupied the same position to the common fund that Mr. Heald does in this case. As the petitions were consolidated, Mr. Heald is a party to the proceedings now seeking to subject this fund to the payment of taxes; and it is manifest that the claim is being urged by him, or at his instance, as it would make but little difference to the tax collector whether the taxes are paid out of this fund or out of other property. It is clear that Mr. Heald has no right to demand that this preference be given, and the demurrer was properly, therefore, sustained to his petition. But we think the tax collector's petition was also properly dismissed, and, in addition to the reasons we have already given, we might refer more at length to Act 1892, c. 518, amending section 64 of article 81, which indicates the intention of the legislature to confine the priority and payment of taxes to the proceeds of the sales of the property from which such taxes are due,

unless, of course, specially provided for by some other law. For many years the statute required the party selling to pay all taxes due and in arrear from the party whose property was sold; but the act of 1892 amended it so as to only require payment of the taxes due and in arrear on the property sold. That section of the Code is not only applicable to sales by trustees appointed by decrees of courts of equity, but also to those made by trustees under wills (*Gould v. Mayor, etc.*, of Baltimore, 58 Md. 46), and under deeds of trust (*Hebb v. Moore*, 66 Md. 167, 7 Atl. 255). As the trustee refused to accept the leasehold property, as he had a right to do, as was decided in *Horwitz v. Davis*, 16 Md. 316, the taxes that would seem to be contemplated by the act of 1892, as properly payable by him, are those on the property taken into his possession, and not on that property which he not only did not sell, but refused to accept. As it was proper that both of the trustees who are parties to this proceeding should have this question determined by the court, we will direct the costs to be paid out of the estate of George C. Nicholas, in the hands of the appellee, but must affirm the order of the court below dismissing the petitions. Order affirmed, costs to be paid out of the estate of George C. Nicholas, in the hands of the appellee.

PENINSULAR LUMBER CO. v. FEHRENBACH et al.

(Superior Court of Delaware. Newcastle.
Feb. Term, 1893.)

MECHANICS' LIENS—SCIRE FACIAS—FAILURE TO PROSECUTE CLAIM.

1. Where a writ of scire facias on a mechanic's lien was voluntarily stayed by plaintiff's attorney, and a second writ was not issued until after the expiration of a year, such writ should be quashed, and the statement of claim stricken from the record for want of prosecution.

2. A discontinuance as to some of several joint defendants operates as a discontinuance as to all.

Action by the Peninsular Lumber Company against Margaret Fehrenbach and others to enforce a mechanic's lien. Rule to show cause why a second scire facias should not be quashed, and the claim of lien stricken from the record. Rule made absolute.

Rule to show cause why a second scire facias on a mechanic's lien should not be quashed, and the statement of claim stricken from the record for want of prosecution. The affidavit upon which the rule was granted disclosed the following facts: (1) That the above-named plaintiff, on the 25th day of August, A. D. 1891, filed in the office of the prothonotary of the court a statement of a claim for materials furnished for additions and alterations to and in a certain building in said statement mentioned against the above-named defendants, as by reference to said statement, being No. 95 to the September term, A. D.

1891, will more fully appear. (2) That on the 25th day of August, 1891, there issued out of the court, at the suit of said plaintiff and against said defendants, a writ of scire facias, being No. 85 to the September term, A. D. 1891, which said writ was returned by William Simmons, sheriff of said county, as follows: "Stayed by plaintiff's attorney. So answers William Simmons, Sheriff." (3) That no further proceedings were had upon said statement of claim by said plaintiff until the 9th day of September, A. D. 1892, when said plaintiff caused a second writ of scire facias to be issued out of the court against said defendants, said writ being No. 125 to the September term, A. D. 1892, of which writ the said sheriff made return as follows: "Made known to John G. Fehrenbach and Charles Fehrenbach personally, September 16, 1892, and service accepted for all the rest, except Margaret Grier and B. Frank McVey. So answers William Simmons, Sheriff." (4) That since that time no further proceedings have been had in the said case. (5) That said statement of claim still remains among the records of this court, and is notice of a claim of lien on the property therein described, whereby it causes great inconvenience to the said defendants in the management of said property, and also interferes with the borrowing of money by way of mortgage thereon, and impairs the value thereof.

J. E. Smith and C. W. Smith, for plaintiff.
W. H. Hayes, for defendants.

PER CURIAM. Rule made absolute.

FORD v. CHARLES WARNER CO.

Superior Court of Delaware. Newcastle.
Feb., 1893.)

STREET RAILROADS—USE OF STREETS—NEGLIGENCE—CARELESS DRIVING—CONTRIBUTORY NEGLIGENCE—MASTER'S LIABILITY TO THIRD PERSONS—EXEMPLARY DAMAGES.

1. A street-car company, which has the right to use a street for its cars, is not guilty of negligently obstructing the street by allowing one of its cars to remain on a spur track on the street for a reasonable time for the purpose of allowing another car to pass.

2. Plaintiff, employed to clean street cars, was standing near a car on a spur track, while another car was passing, and was injured by a wagon driven by defendant's servant in such a way that when he was attempting to pass the car the rear wheels of the wagon slid along the tracks, and crushed plaintiff against the car. Held that, though plaintiff was guilty of some negligence in standing on the street without looking about him, it would not prevent a recovery if defendant's servant did not exercise due care in attempting to pass the car.

3. A master is responsible for the injuries of a third person, caused by the negligence of his servant, acting within the scope of his employment.

4. The recovery in an action for personal injuries may embrace compensation for nursing and medical expenses, loss of time from inability to work, loss of bodily and mental powers, and for actual suffering of mind or body if they are the necessary consequences of the injury.

5. In an action for personal injuries where

there is evidence that plaintiff was injured, the court will not charge that the jury could not take into account future loss of wages because there was no proof that the wage-earning capacity had been reduced by any definite sum, the presence of such proof being for the jury.

6. A corporation is liable for exemplary damages for injuries caused by the negligence of its servant only when the injury was intentional and willful, or was inflicted under circumstances showing a reckless disregard for the safety of the person injured.

Action by Butler Ford against the Charles Warner Company for damages for personal injuries. Verdict for plaintiff.

Action on the case to recover damages for personal injuries arising from collision with a mortar wagon of the defendant company, while being driven by its servant upon the public highway. Clarence A. Forwood, a foreman under whom the plaintiff had worked prior to his being hurt, was asked by Mr. Biggs whether Ford was shamming or whether he was really hurt. Mr. Hilles objected, on the ground that the witness could not give his opinion, not being an expert. The court, Robinson, C. J., upon the authority of Abbott's work on Trial Evidence (pages 600 and 649), ruled that the witness might testify to the fact whether he appeared well or sick; and, unless borne out by the decision in *Peace v. Forge* (about which there was some doubt), the court did not think the witness could be asked whether or not, in his opinion, the plaintiff was shamming. "Mr. Biggs: From his appearance and his complaint, and seeing him as you did, was he, as a matter of fact, badly hurt? (Objected to.) Cullen, J.: What is that but an opinion? This man is not an expert. The decision made by Chief Justice Comegys, and which was ruled here in the *Forge* Case, allowed the witness to testify as to declarations and exclamations made by *Peace* in the presence of the witness, showing the man in a suffering condition; but I don't understand that it gave the witness the right to give his opinion, except he was produced as an expert. Mr. Biggs: Were you ordered to pay him [the plaintiff] ten dollars a week? (Objected to as hearsay. Mr. Biggs stated that he could show that the witness would not have paid this man ten dollars per week unless ordered to do it, because the plaintiff, after the injury, was not able to do the work.) Robinson, C. J.: You have a right to show that." Dr. Joseph Pyle, witness, was asked in cross-examination by Mr. Biggs: "Who is this gentleman sitting here [referring to a person sitting at the bar of the court]? Do you know him? A. I know him. Q. Where does he live? (Objected to as irrelevant. Counsel for defendant admitted that the name of the person was Bradbury. Mr. Biggs stated that his object was to show the bias of the witness, because of the relations between him and the gentleman in question, in whose presence he was testifying; that said Bradbury was from Newark, N. J., and was directly interested in the suit now being prosecuted.) Robinson, C. J.: We

think you can show that fact. (Mr. Biggs, for plaintiff, objected to any testimony being adduced by the defendant tending to show that the accident was unavoidable, contending that it was inadmissible under the plea of not guilty, in this case, and that it should have been specially pleaded. *Cotterill v. Starkey*, 8 Car. & P. 691.)" Robinson, C. J., overruled the objection upon the authority of *Collins v. Bilderback*, 5 Har. (Del.) 133.

John Biggs, for plaintiff. William S. Hilles, for defendant.

ROBINSON, C. J. (charging jury). This action is what is called in law "an action on the case," that is, an action on the plaintiff's case, wherein in his declaration he sets out the particular circumstances of the injury he received, and claims damages for that injury. In this case Butler Ford seeks to recover damages for injuries he received in consequence of the negligent driving of one George T. Johnson, who was at the time in the employment of the defendants, and was driving a mortar wagon belonging to them. Butler Ford himself was in the employ of the Wilmington City Railway Company, and worked at Union and Lancaster avenue, or at Front and Union, as it is agreed that it shall be called in this case, and his business was keeping the cars clean and attending to the lamps. The Wilmington City Railway Company is a corporation of this city and state, having a right to lay tracks and run cars along and over the streets of this city. Having single tracks along some of the streets, they have laid what they call "turn-outs,"—that is, short sidetracks connecting with the main track, on which a car can lie by until the one coming in the opposite direction passes it. There was such a turnout at Front and Union, which, if we understand the testimony, was near the terminus on that street. On the 14th of November, 1891, car No. 16 was standing on this turnout. The horses were attached to it, but the driver was nowhere about. There were two ladies in the car, one of whom was Mrs. Cyrilla Long, a witness in this case. No one knows who the other lady was. Butler Ford had cleaned the inside of the car, and was standing on the ground at the side, with a little, short-handled brush in his hand. When the accident occurred, he was either sweeping off the platform or answering some questions as to transfer tickets which the unknown lady had asked him. While the plaintiff was doing this, George T. Johnson, a driver employed by the Charles Warner Company, the defendant, drove down the street from the direction of Silverbrook. He was driving two horses, hitched to a large mortar wagon belonging to the defendant corporation. The wagon, he says, was about 24 feet from the tongue to the end of the hind wheel. He had upon it, he says, six mortar boxes, which were empty, and placed crosswise of the wagon, edge up, not flat down, and in one row. These boxes were,

according to the evidence, about 10 feet long. In attempting to pass the car No. 16 as it was lying there upon the turnout, George T. Johnson drove against the plaintiff as he was standing upon the ground either sweeping the platform or answering the inquiries of the lady in the car. The plaintiff was caught between the car and either the boxes or wagon and injured, and it is for the injury so received that he seeks to recover damages. In answer to the plaintiff's claim for damages the counsel for defendant contends that he ought not to be allowed to recover—First. Because, as he asserts, the driver, George T. Johnson, was not guilty of any negligence in driving the wagon at that time, and that the accident occurred solely because the wagon slipped on the tracks, which, as he claims, could not have been foreseen by him. Second. Because, even though the driver of defendant's wagon might have been guilty of negligence, yet, as both the car and plaintiff were unlawfully in the street at the time the accident occurred, and plaintiff did not exercise that care in looking up and down the street, while he was standing in it, which the law requires of him, that he was, therefore, guilty of contributory negligence, and cannot recover in this action.

In support of the first branch of his defense the defendant produces the testimony of George T. Johnson, the driver, that, in turning out, the hind wheel caught in the track, and slid along the track, and against the car. And he refers to the testimony of Elwood Stewart, the blacksmith,—a witness produced by the plaintiff,—who states that "when the wheels turned out too short there was a slipping, and it threw the wagon right into the car, and caught Butler there." Gentlemen, if you believe the evidence of these witnesses as to the slipping, and that the accident was caused by this slipping, you have further to consider whether defendant's driver used due care and caution in selecting a time to turn out, and whether he did not approach too near the car before he began to do so. If you believe he did not approach the car too closely, and was not then and there guilty of any negligence, your verdict should be for the defendant. But in considering the respective claims of the plaintiff and the defendant you may first consider the positions of the plaintiff, and street car, and the wagon driven by George T. Johnson, and the respective duties of each party under the circumstances in which they were then placed. It is true that highways are made for the convenience of the traveling public, and that many obstructions to public travel are nuisances, but it is also perfectly well settled that travelers are not bound to keep in motion every instant they are on the road. They have a right to stop temporarily for business or pleasure, provided they do not unreasonably interfere with the rights of others who wish to use the road. The Wilmington City Railway have a right to use the streets of

this city for the purpose of laying their tracks and running their cars, and they have all the rights and powers necessary for such a user. They had a right to keep car No. 16 a reasonable time on this turnout, so that car No. 10 might pass it, or for any other purpose necessary and proper for using their cars; and we do not think the ordinance cited by the learned counsel deprives them of that right. If the highways are for public convenience, so also are the cars and tracks of the city railway company.

But although, if car No. 16 had only been on this turnout for a reasonable time, and for a proper purpose, had Butler Ford the further right to stand on the ground for five minutes or over, and sweep the platform, and, while sweeping, to answer the inquiries of the lady in the car, without paying any attention to what was coming or going on the street? That is one of the questions for you to decide in this case. You must determine whether, the car being rightfully there, he could rightfully and lawfully stand on the ground, and brush the platform off. If he had that right, could he do so without keeping watch for passing vehicles? For whoever places himself in a public street is bound to exercise all the care ordinarily required to keep himself from being injured. Now, as to the duty of George T. Johnson, the driver of the wagon belonging to the Charles Warner Company, he saw the car there, and turned out to pass it. It was his duty to ascertain whether there was space to pass in, and, if there was not, he was bound to stop. *McLane v. Sharpe*, 2 Har. (Del.) 483. He had no right to endanger the car, and those in and near it, by the want of ordinary care and caution in passing; and the care and caution he was required to use was proportioned to the size of his wagon and of the load upon it, and the difficulty of passing with a vehicle and load of such dimensions. In other words, if a car or person is standing in the road, and I see them, and drive into them carelessly and negligently, I am liable in damages to the person and owner. But the learned counsel for the defendant contends, as we said above, that George T. Johnson did not see the plaintiff, and that, because the plaintiff was guilty of contributory negligence in standing in the road, he cannot recover for any want of ordinary care on the part of George T. Johnson. Whatever may have been the former rulings of this court, we cannot now, since the case of *Jones v. Belt* (Del. Super.) 32 Atl. 723, adopt the language of one of the counsel's prayers, and tell you that any negligence, however slight, on the part of the plaintiff, will prevent his recovery. The court there held that the negligence of the plaintiff must have a causal relation to the accident. In that case the plaintiff, Jones, was upon a ladder, replenishing lamps which hung across the street. The foot of the ladder

was in the street, and unattended by any one. The team of the defendant Belt, which his driver had allowed to remain unhitched in the street, wandered away, and, striking the ladder, injured the plaintiff. The court held that, notwithstanding the plaintiff was guilty of contributory negligence in allowing the foot of the ladder to be unattended, and in not keeping a careful watch for himself, he could nevertheless recover, because there was no causal connection between the negligence of the plaintiff and the act of the defendant. And the court, in their opinion in that case, say: "A man is unlawfully in a certain place. He is therefore there certainly by his negligence in not obeying the law, and keeping away, to say the least. While there, he is injured by the carelessness or negligence of another. It will be no excuse to that other that he is there unlawfully unless by being there he promoted, in some other way than by simply being there, the other's wrongful act." Apply this principle to the case we are now trying. Suppose you should find that Butler Ford had no right to be standing on the street. Further suppose that you find that he ought to have exercised greater care in looking up and down the street,—that is, that he did not exercise that watchfulness which a man situated as he was should have exercised,—still, if you further believe from the testimony that George T. Johnson saw the car as it was standing on the turnout, and in turning out to pass it did not use reasonable care to avoid injuring the car and those in and about it, and that, in consequence of that want of care on the part of George T. Johnson, Butler Ford was injured by his wagon, you may find for the plaintiff. In estimating the care and attention which George T. Johnson should have used you must take into consideration the size of the wagon, with its load, which he was driving along the street; for a person driving such a wagon as he was driving should exercise greater care, lest he injure others, than one who was driving a small carriage. You may also take into consideration the fact that it was probable that some one or more persons would be in or near the car. In estimating the care and attention which Johnson did actually use you may take into consideration the evidence of those witnesses who say that they called out, warning him and Ford of the danger impending over the latter, and the conduct of Johnson after the accident occurred. And you should also take into consideration the evidence of those witnesses—that is, of Johnson himself and of Elwood Stewart, a witness for the plaintiff—that the wagon slipped as he turned on the track. You are the sole judges of all these things, and their determination lies entirely with you.

The relation between the Charles Warner Company and George T. Johnson, the driver of their wagon, was that of master and

servant; and the master is always responsible in damages for the negligence of which the servant is guilty while transacting his business. So in this case the Charles Warner Company is responsible for the negligence of George T. Johnson, if you find that the latter was negligent.

If your verdict should be for the plaintiff, he should "receive one compensation for all damages, past and prospective, in consequence of the defendant's negligent act. They are understood to embrace adequate compensation for actual nursing and medical expenses, and loss of time or loss from inability to perform ordinary labor, or incapacity to earn money; also a reasonable amount for loss of both bodily and mental powers, or actual suffering of body and mind, which are the immediate and necessary consequences of the injury." We have adopted the language of the court in the case of *Wallace v. Railroad Co.* (decided in this court in 1889; Del. Super.) 18 Atl. 818, and to which we have been referred by the learned counsel for the defendant. We cannot say to you, as in the defendant's eighth prayer we are asked to do, that, there having been no proof that his wage-earning capacity has been reduced by any definite sum, you are not at liberty to take into account future loss of wages; for whether there has been such proof or not is entirely within your province to determine. He cannot recover for injuries which he might, by the exercise of reasonable care, have avoided; and you should not consider any future pain and suffering of which the proof is that there is only a possibility. Nor can he recover damages for the intercostal rheumatism which he says he suffers, if that was not the natural and necessary result of the injury complained of, but could only be induced by some intervening cause, such as cold and work.

The learned counsel for the defense has also asked us to charge you that no exemplary damages can be allowed by you in this case, because, as he says, exemplary damages cannot be given against a corporation except for negligence of its vice principal. We cannot so charge you, gentlemen. Corporations are equally liable with other masters in exemplary damages whenever the circumstances of the case will justify said damages being given. The Charles Warner Company placed George T. Johnson in full control as driver of this wagon, and they are responsible for his negligence, whether that negligence be gross or only ordinary. But it is not every case of injury to another that should be visited by a jury with exemplary damages. Such damages ought only to be allowed where the act causing the injury has been willfully done, or where the circumstances show that there was a deliberate, preconceived, or positive intention to injure, or that reckless disregard of the safety of person or property which is

equally culpable. We cannot do better than to adopt upon this point the language of this court in the case of *McLane v. Sharpe*, 2 Har. (Del.) 483, as we have been requested to do by the learned counsel for the plaintiff. If you believe the circumstances of this case warrant it, you are at liberty to find exemplary damages for the plaintiff, if you believe the life of the plaintiff was endangered at the time of the injury by the gross negligence of the driver, and that the conduct of the driver at that time betrayed a disregard of the ordinary dictates of humanity which require every man to succor his fellow man in distress, and especially when that distress has been caused by his own fault. But whether exemplary damages should or should not be awarded depends, in the case you are now trying, on the view you take of the conduct of George T. Johnson, and whether you think it worthy of such damages. We can only tell you that exemplary damages ought not to be awarded except in cases of the most aggravated nature, and in considering this question in this case you should recall to your minds the evidence of George T. Johnson and Elwood Stewart that the accident was caused by the slipping of the wagon on the tracks; and, if you believe this evidence, then you must further consider what weight you will give it as rebutting any inference from other facts that the accident was the result of recklessness or gross negligence on the part of the driver.

There is one part of this case to which we wish to refer before leaving it in your hands. We compelled Dr. Pyle to testify as to his relations with Mr. Bradbury and the insurance company, and as to the relations of the insurance company with this suit, because we thought it might show bias on his (Pyle's) part, and thus affect the weight which you might give to his testimony. His testimony is in this case for that purpose, and that purpose only. If you allow it to have any other weight in this case, if you permit it to bias your judgment in fixing the amount of damages, you are so far departing from the high function you are called here to perform, and not doing justice between man and man. We warn you upon this point, not because we think you would intentionally take it into consideration, but lest it might creep in unwittingly to yourselves. We are trying a case between Butler Ford and the Charles Warner Company, and not between Butler Ford and the insurance company. Gentlemen, the case is in your hands. You must first decide whether you think the plaintiff entitled to damages or not. If you think he is entitled to damages, then the amount is entirely within your discretion; but it must be a wise and just discretion, applied to all the facts and circumstances of this case.

Verdict for plaintiff for \$900.

MORROW v. STATE.

(Court of Errors and Appeals of Delaware.
April 19, 1897.)

CONSTITUTIONAL LAW—COURTS—JURISDICTION.

1. 19 Laws, c. 655, § 5, giving to the party charged with a violation of the game law an appeal to the superior court from the judgment of a justice of the peace, who is given summary jurisdiction by 17 Laws, c. 507, which declares such violation a nuisance, does not violate Const. art. 6, § 15, which provides that the general assembly may regulate the jurisdiction of inferior courts as to nuisances, and "may grant or deny the privilege of appeal to the court of general sessions of the peace"; such provision being merely discretionary, and not exclusive.

2. The power of the general assembly to confer such appellate jurisdiction is recognized by Const. art. 6, which, after defining the jurisdictions of the several courts in sections 3 and 4, provides, in section 12, that "the general assembly, notwithstanding anything contained in this article, shall have power to repeal or alter any act * * * giving jurisdiction, * * * or giving any power to either of said courts."

Case reserved from superior court, Castle county.

William L. Morrow was convicted in a justice's court of a violation of the game law, and appealed to the superior court. Reserved on the question of appellate jurisdiction. Jurisdiction sustained.

W. H. Porter and W. T. Lynam, for appellant. Walter H. Hayes, for the State.

GRUBB, J. This case is before us for the decision of a question of law reserved by the superior court in the matter of the appeal of William L. Morrow from the judgment of the justice of the peace against him, upon his conviction of a violation of the provisions of chapter 507, 17 Laws Del. Section 1, together with section 11 of said chapter 507, creates an offense of a criminal nature, specifies the penalty for its commission, and prescribes the mode of trial by a justice of the peace, without either indictment or jury trial, in accordance with the provisions of section 15 of article 6 of the constitution of this state, authorizing the legislature to give to one or more justices of the peace such summary jurisdiction of nuisances and the other minor criminal matters therein enumerated. Pursuant to the provisions of said chapter 507, the said William L. Morrow was tried and adjudged guilty of selling two rabbits and one dozen partridges in violation thereof, and sentenced by the justice of the peace to pay a fine of five dollars for each of said rabbits and partridges, besides the costs of his prosecution. Thereupon the said defendant, upon giving the required security, took an appeal to the said superior court, in accordance with the provisions of section 5, c. 655, 19 Laws Del. Afterwards the counsel for the state, at the hearing in said superior court of a rule to show cause why said appeal should not be stricken from the record, and the cause remanded to the justice, etc., contended that

the said court had not jurisdiction to hear and determine said appeal, as it was a criminal action, and that, therefore, said rule should be made absolute; whereupon the superior court directed that the question whether or not said court has jurisdiction to hear and determine said appeal be reserved and heard here in the court of errors and appeals. Our determination of this question of law will be confined to the requirements of the case presented by the record. Said chapter 507, 17 Laws Del., has prescribed and authorized what is virtually a summary proceeding before a justice of the peace for the enforcement of a forfeiture for the violation of the provisions of a statute for the protection of game in this state, and which unlawful act the general assembly has therein declared to be a common nuisance, with the view of bringing it within the class of minor criminal matters which are enumerated in said section 15 of article 6 of the constitution, and excepted and excluded from the constitutional requirement of procedure by indictment and trial by jury. Chapter 655, 19 Laws Del., has given to the party charged with such violation of the game law a right of appeal to the superior court from the judgment rendered by the justice for the recovery of the prescribed forfeiture; and the superior court is authorized by said chapter to render upon such appeal a judgment for the recovery of said forfeiture, against the said party or his executor or administrators. As the act has not provided to the contrary, the proceeding in the superior court, upon the appeal, may be of a summary nature, and according to such regulations as may be appropriate and necessary to the execution of the appellate power conferred upon said court by the general assembly.

It has not been contended by counsel on either side that the summary jurisdiction provided by chapter 507, 17 Laws Del., has not been constitutionally conferred by the general assembly, and lawfully exercised by the justice who rendered the judgment in this case. The sole objection or contention is that the general assembly had not constitutional power to confer, nor the superior court to exercise, the appellate jurisdiction given by chapter 655, 19 Laws Del. The present is not a case of an appeal from the court of general sessions of the peace and jail delivery, and therefore within the inhibition of section 10 of the schedule of the constitution. This is simply an appeal from the judgment of a justice of the peace, rendered in a summary proceeding, for the recovery of a forfeiture for the violation of a game law enacted by the legislature of this state. There is no constitutional provision expressly prohibiting such an appeal, nor, indeed, expressly prohibiting an appeal from justices of the peace in any case, civil or criminal, lawfully within their jurisdiction. Nor do we find that there is any constitutional provision which, by necessary im-

plication, inhibits or precludes the general assembly from conferring, or the superior court from exercising, the jurisdiction by appeal authorized and prescribed by said chapter 655. It is true that section 15 of article 6 of the constitution, which provides that the general assembly may by law give to any inferior courts by them to be established, or to one or more justices of the peace, jurisdiction of nuisances and the other criminal matters therein enumerated, also further declares that "the general assembly may by law regulate this jurisdiction, and provide that the proceedings shall be with or without indictment by grand jury, or trial by petit jury, and may grant or deny the privilege of appeal to the court of general sessions of the peace," but we do not consider that this provision, viewed in connection with other provisions, of the constitution, and with reference to the origin and gradual development of the judicial system of this state, absolutely and exclusively restricts and confines to the court of general sessions of the peace the exercise of appellate jurisdiction over the summary jurisdiction and procedure under said section 15 of article 6.

It must be observed that all the authority vested in the legislature under section 15 of article 6 is entirely discretionary, and nowhere mandatory. Therefore the denying or granting of jurisdiction over the criminal matters therein enumerated, the regulation of such jurisdiction, and whether or not the proceedings shall be with or without indictment by grand jury or trial by petit jury, and the granting or denying of the privilege of appeal to the court of general sessions of the peace, are all absolutely subject to the judgment and pleasure of the general assembly. Because said constitutional provision, in express language, gives the legislature the discretionary power to confer original jurisdiction of the criminal matters therein enumerated upon a justice of the peace, or upon any inferior court by them established for such purpose, it does not thereby preclude or prohibit the granting by the general assembly of such original jurisdiction to the court of general sessions of the peace. Nor does said provision, by its express grant of merely discretionary power to authorize an appeal from such original jurisdiction to the court of general sessions of the peace, thereby exclude or inhibit the granting by the legislature of such an appeal to the superior court as it has given in the present instance. The provisions of said section 15 of article 6, of themselves, unaided by other constitutional language or implication of clearer and stronger negative import, are not sufficient to exclude and prohibit the legislative power from conferring summary jurisdiction, either original or appellate,—and whether concurrent or exclusive,—of the criminal matters therein enumerated, upon either the court of general

sessions of the peace or the superior court in this state.

From the earliest period of our colonial history to the present, both the granting and the regulation of criminal jurisdiction have been intrusted exclusively to the legislative judgment and action. Indeed, under our colonial charters, and until the adoption of our first state constitution of 1776, even the creation and composition of the courts, civil and criminal, as well as the apportioning, granting, and regulating of their respective jurisdictions and powers, were uniformly left entirely and exclusively to statutory provision. While our present constitution of 1831, in its sixth article, expressly creates and prescribes the composition and organization of the several courts thereby established, yet its framers deliberately abstained from directly conferring, defining, and regulating the jurisdiction and powers (save as to territorial extent) of the court of general sessions of the peace and of the justices of the peace, as well as of the superior court, except as to the latter's original civil jurisdiction at common law, and its appellate jurisdiction over the orphans' court and register's court, and designedly intrusted this authority and duty to the legislative power where it had always theretofore been left, under all of our previous state constitutions and colonial charters. Section 4 of article 6 of the said constitution of 1831, at the time of its adoption, expressly conferred upon the present court of general sessions of the peace all the jurisdiction and powers then vested by the laws of this state in the court of general quarter sessions of the peace theretofore established by the prior constitution of 1792; and section 3 of said article 6 also expressly conferred on the present superior court "jurisdiction of all causes of a civil nature, real, personal and mixed, at common law, and all other the jurisdiction and powers vested by the laws of this state in the supreme court or court of common pleas," which were also established under said preceding constitution. That the jurisdiction and powers vested in said pre-existing courts by the statutes subsisting at the adoption of the present constitution of 1831, and thus transferred to the said present courts, were not to remain unchanged and unchangeable, but might be modified, divested, supplanted, or transferred from time to time, as the general assembly might thereafter deem conducive to the general welfare, is manifest by examination of section 12 of said article 6. It provides that "the general assembly, notwithstanding anything contained in this article, shall have power to repeal or alter any act of the general assembly giving jurisdiction to the * * * supreme court, or the court of common pleas, or the court of general quarter sessions of the peace and jail delivery, * * * in any matter, or giving any power to either of said courts." Careful consideration of this section, and of sections 3 and 4 of said article, in connection

with the fact that the framers of the present constitution abstained from conferring and defining by specific constitutional provisions the jurisdiction and powers of the court of general sessions of the peace and of the superior court, other than the latter court's aforesaid excepted civil jurisdiction, clearly discloses that the constitution has confided to the legislature the power and duty of conferring by statute the jurisdiction of each of said courts, other than the superior court's original civil jurisdiction at common law, and its appellate jurisdiction over the orphans' court and the register's court, as heretofore observed.

If this view be correct, then it follows that the general assembly may, by legislative enactment from time to time, confer upon the superior court such new and additional jurisdiction and powers as have been granted in the present instance, and regulate the exercise thereof. As already stated, the constitution nowhere specifically defines the jurisdiction of justices of the peace. It therefore leaves the granting and regulating of both their criminal and civil jurisdiction to the legislative discretion, subject, of course, to such limitations as may be found in that instrument. In the case before us the general assembly has deemed it proper to confer upon justices of the peace summary jurisdiction of a criminal nature in the matter of a violation of the statutory provisions for the protection of game in this state, under section 15 of article 6 of the constitution, and to give like jurisdiction thereof, by appeal, to the superior court. In giving this appellate jurisdiction of such a criminal matter, the legislature has not divested any court of this state of any jurisdiction hitherto exclusively vested therein by the constitution, or actually conferred thereon by statute. It has merely conferred a new and additional jurisdiction upon the superior court, by giving it appellate powers over a summary proceeding of a criminal nature before an inferior tribunal. The superior court is now, by statute, as was, from a very early period, the pre-existing supreme court which it superseded, the tribunal especially charged with supervisory jurisdiction and authority over inferior tribunals and officers. The old supreme court formerly had jurisdiction of criminal offenses, by removal thereto from the court of general quarter sessions, etc., until this power was abrogated, as to indictments therein for other than capital offenses, by the act of June 14, 1793 (2 Laws Del. p. 1090). In 1829 another statute was enacted, and which is still subsisting and incorporated in chapter 94, p. 702. Amended Code, vesting jurisdiction of all criminal offenses not cognizable by the court of oyer and terminer in the court of general quarter sessions (now general sessions) of the peace. But there does not appear to be any valid constitutional reason why a criminal jurisdiction, whether appellate or original, which has heretofore

been divested by statute, may not now be restored by statute under the power vested by the constitution in the legislature to confer upon the superior court as above explained, either new or renewed jurisdiction. In the present instance the general assembly has exercised this constitutional power and discretion by conferring upon the superior court the appellate jurisdiction in question. Having done so, it is considered and adjudged by this court that the superior court has jurisdiction to hear and determine said appeal, and that this be so certified to said court.

DOLBY v. HEARN.

(Superior Court of Delaware. Sussex. October, 1893.)

NEGLIGENCE—FIRES—PLEADING.

1. A person burning slabs on his own premises is not liable for the damage by the escape of the fire unless such escape was caused by his negligence.

2. On a declaration for damage on land "contiguous and next adjoining" defendant's premises by the escape of fire started by defendant, plaintiff can recover for damage to two tracts so connected as to form one close, which at any point adjoins defendant's premises.

3. A public road running through the land does not divide it into separate and disconnected tracts.

Action on the case by Andrew J. Dolby against Edward E. Hearn for damage to standing timber, peach trees, poles, and cordwood, by fire escaping from defendant's premises.

C. W. Cullen, for plaintiff. Robert C. White and Charles F. Richards, for defendant.

LORE, C. J. (charging jury). This is an action on the case, brought by Andrew J. Dolby, the plaintiff, against Edward E. Hearn, the defendant, to recover damages for injuries done to the plaintiff's property by fire, which it is alleged originated through the negligence of the defendant. It is claimed by the plaintiff that on the 29th day of April, 1891, the defendant was in possession of and running a sawmill on lands next to and adjoining the lands of the plaintiff; that the defendant so negligently burned slabs at the said sawmill that the fire escaped, ran across and upon the lands of the plaintiff, and burned up and injured the standing timber, peach trees, poles, and cordwood on the lands of the said plaintiff, and injured to some extent the land itself. The plaintiff, in his declaration, has described the close or land upon which the injury was done as "contiguous and next adjoining" the land upon which the mill of the defendant was located. Upon this issue was joined, and the case so stands before you.

The first question for you to decide, therefore, is: Did the damages, whatever they were, arise from the negligence of the defendant? To entitle the plaintiff to recover,

the jury must be satisfied by a preponderance of the proof that the fire originated through the negligence of the defendant. The burden of such proof is upon the plaintiff. Positive evidence, however, is not necessary; presumptive or circumstantial evidence will be sufficient, if it is so strong as to satisfy the mind of the fact. The defendant is answerable only for want of due care, skill, or diligence in the transaction of his business. The care, skill, or diligence required is always in proportion to the danger of the business, and such in all cases as ordinarily prudent men exercise in the management of such a business.

If you are satisfied from the evidence that the fire originated in the slab pit of the defendant, and ran from thence, through the defendant's negligence, upon the land of the plaintiff, and thereby did the injury complained of, your verdict should be for the plaintiff, for such amount of damages as from the proof you may consider was actually done. In ascertaining this damage, you must consider, however, this question: Two pieces of land have been referred to in the proof, viz. the Fooks tract and the home tract. If you should be satisfied from the proof that these were two distinct and unconnected tracts of land, one of which "was contiguous and next adjoining" to the mill land, and the other not so contiguous, and that these two were not at any point connected with each other, so as to form one continuous tract, then you can only render a verdict for the damage done to that one of the two tracts that was "contiguous and next adjoining" the mill property. The plaintiff has laid his damages in his narr. as done upon land "contiguous and next adjoining" the mill property. He is therefore bound by such description, and may recover for no other. In case you should so find, evidence relating to any other close or tract of land should be disregarded by you in making up your verdict. On this point, however, the plaintiff may recover, if the proof satisfies you that the two tracts referred to formed one continuous close, and in any point were contiguous or next adjoining the mill tract, and were so used and occupied by the plaintiff. If you are satisfied, therefore, that the fire was caused by the negligence of the defendant or his servants, your verdict should be for the plaintiff, and for the entire damage done to the two tracts referred to in the evidence, if they formed continuous land,—at any point were "contiguous and next adjoining" the mill land; but your verdict should only be for the damage done to that tract which was "contiguous and next adjoining" the mill land if the two tracts were entirely separate and apart from each other. A public road running through and within the said tracts would not, in law, make them separate and distinct, however. If, on the other hand, you believe the fire did not start from the defendant's pit, and did not arise from his neg-

ligence, your verdict should be for the defendant. In forming your conclusions in this case, you are to be governed entirely by the evidence as delivered to you from the witnesses in this court room, and are not to consider information derived from any other source whatever.

Verdict for the defendant.

EMBLEY v. EMBLEY.

(Court of Chancery of New Jersey. March 23, 1897.)

DIVORCE—DESERTION—EVIDENCE.

A divorce for willful and continued desertion by the husband is not warranted where it appears that he left town because he had been arrested for debt, and attacked by the newspapers, and still owed money which he could not pay; that his parting from his wife was friendly; that he subsequently wrote affectionate letters, indicating his desire to continue their marital relations; that he was at first unable to comply with her demand for money to enable her to go to him, and that when he became able, and wrote requesting a reunion, she ignored his letters.

Bill by Martha Embley against Robert L. Embley for a divorce. Dismissed.

This cause has been reported upon ex parte, by a special master, who, on the petition and proofs submitted, advises a decree because of the desertion of the husband, defendant, of the wife, petitioner. The petition and proofs show that the marriage was celebrated March 23, 1881, in Chester, N. J., and no question arises as to residence, etc., of parties. The husband lived with and supported the wife until June, 1884, when the petition alleges he deserted her, went to Trenton, and has not since supported her. There are two children of the marriage, one twelve years old, the other nine, the latter born about five months after the alleged desertion. The master reports that the evidence shows that, shortly prior to the defendant's departure from Chester, he had been arrested for debt; that a few months afterwards he wrote to a witness, asking him to see the petitioner, and ask her to come to Trenton, and live with him. The witness saw the petitioner, who told him that, if her husband would send her money, she would go to him. At this time she was poor, and was carrying an unborn child. The witness wrote defendant, advising him that there was no legal obstacle to his return to Chester, as his difficulties there had been settled, and requesting him to send money to petitioner, which he never did. Referring to several letters written by defendant, which indicated a desire that petitioner should live with him, the master deems them to be insincere, because none of them contained any money to provide means by which his family could come to him at Trenton. The master also reports, regarding a letter written in March, 1885, by defendant, reproaching his

wife because, as he writes her, "I am very sorry to hear from outsiders that in last October or November you had another child, a little girl, and you have never even so much as intimated such to me," that the petitioner had in fact written him about the birth of this child shortly after it occurred. The master considers that this letter shows that the defendant had no regard for his wife or for her feelings. Upon the whole evidence, the master advises that a decree of divorce be granted the petitioner, because of the willful, continued, and obstinate desertion of the defendant.

E. Irwin Smith, for petitioner.

GREY, V. C. (after stating the facts). A review of the evidence discloses the following history of the marriage relations of these parties: In June, 1884, the parties were living at Chester, in harmony, as husband and wife. The husband was then arrested for debt, and, as he was unable to pay the money claimed, his mother came, and advanced it for him, and thus secured his freedom. The defendant strongly resented this arrest, as an outrage upon him, and his subsequent letters to his wife show that its effect upon him had been to create a feeling of dislike and repulsion against Chester and its people, except his wife and child. In addition to this, a publication was made in one of the local papers (the *Era*) of Chester, exposing the private affairs of the defendant and his wife, and severely, and, as he declares, falsely, criticising him; and he ascribed the inspiration of this attack to his wife's family, who were unfriendly to him. The evidence of the wife indicates a sense of the justice of this resentment, for she testifies that "he was arrested as an absconding debtor, though he and his family did not intend to leave the state." At the time the defendant was discharged, he went away with his mother, but he left other debts unpaid which he owed in Chester, as is shown by his letters, for on August 25, 1884, he writes that he does not want to be disgraced by having his clothes sent in a box, directed to his mother's name; he guesses he can pay Tredway, and then get his things away in his own name. The going away was in no way occasioned by any difference with the petitioner. He left a number of articles of his personal property. The petitioner herself swears: "We all parted on pleasant terms, and he said he would be back in a few days. We had never had any trouble between us. His mother, in the hearing of my husband, asked me to come and see her in Trenton." This statement of the wife of the friendly terms of their parting is in entire accord with the other proof in the case, and with her husband's subsequent letters; yet it is this separation of the husband and wife that the master finds to have been a willful deser-

tion. The husband, having left this place, where he had been arrested for debt, and where, in his most private relations, he had been attacked in the public newspaper, and where he still owed money which he could not pay, began writing to his wife letters which show his desire to retain her affection, and as well his inability to pay his debts, his hostility to Chester, and his fears that the influence of his wife's relatives was unfavorable to her regard for him. He reproaches her for not making prompt replies to his letters, and inquires if she gets them. On July 8, 1884, he writes from Trenton: "If I had anything, I would have left it to you to get along. But you know that mother paid my way here, and has always and at all times done by and for me what none of the rest of the children had done to them." In the same letter he writes: "Kiss my dear little son a thousand times for papa, and the same to yourself, and believe me ever, with love and kisses, to remain unflinching and unfailing your husband, Rob." It is plainly apparent that this separation in June, 1884, was no willful desertion of the petitioner on the part of the defendant, but was simply a separation occasioned by the poverty of the defendant and his arrest for debt, and that his affection for his wife and his purpose to continue his marital relations with her were then, and remained thereafter, undisturbed. I think the master erred when he reported that the defendant deserted the petitioner in June, 1884.

The letters which the petitioner wrote to the defendant have not been offered, because they are in possession of the defendant, but the spirit and tone are indicated by his replies. In his letter of July 28, 1884, the petitioner is recited to have previously written to the defendant that he "took her for a fool," and to have charged him with "lying" about her mother, and he asks her, "Oh, Martha, how could you talk so hard and threatening to me?" His letter of August 25, 1884, indicates that she had written him that she thought it best to stay where she was, at Chester, and that he should support her there, which he refused to do. He writes that if he cannot support her at Trenton, and at his mother's house, he cannot support her in any other way. His letters abound in defenses of his conduct, and requests to his wife to write to him, to tell him what her plans are, and about his son. He sends her a letter pad and envelopes, to enable her to write to him. On October 20, 1884, the petitioner's child was born. On the 29th he writes her that he had been away for a month, and was surprised that he had no answer to his letter of September 30th. The tone of this letter indicates that he is hurt at her failure to write, but he sends his love to her and his son. On the envelope of this letter he indorses in manuscript an order for its return if not delivered in five days. Shortly after the child was born, he writes to her again,

and his letter makes no mention of the birth of the child. The master accepts without doubt the petitioner's statement that she had previously written the defendant informing him of the birth of the child; but, as the defendant always wrote kindly of this new child when he had certainly been informed of its birth, I cannot accept her statement as conclusive that he had received notice of the birth before he wrote this letter. On March 2, 1885, he writes to the petitioner that he had no reply to his two previous letters of November and March; that he had "offered her every inducement that was in his power to come away from her folks, and not to go with his, and to go by themselves, which she had deliberately refused to countenance." It is in this letter that he reproaches her with having failed to notify him of the birth of their child, which the master thinks shows that he had no regard for his wife or for her feelings. I am not so impressed by the letter. It is written under a sense that his wife's family have induced her to treat him with indignity, and under a strong sense of resentment, but does not at all indicate a want of regard for her. On the contrary, the spirit of resistance shown to their supposed influence over her indicates that they were, to his sense of the matter, intruding upon his rights, and endangering her feeling for him, which he prized. He continues the correspondence, constantly reproaching her for her failure to answer his letters; in October, 1885, doubting if her mail is not tampered with, declaring he cannot believe she would treat him with such heartlessness, begging a reply, and threatening never to trouble her again; but still again writing her, in March, 1886, and still getting no answer; on July 13, 1886, sending a most pitiful letter of appeal, reciting his efforts to establish a business, and its success, but that, to enjoy it, he needs the reinstatement of their relations. He says: "I have offered everything to have our troubles made right. O, Martha, what is the use of continuing this separation? What will become of our children? If they be spared to grow up, what would be said of us and them?" "Martha, I have dreamed of you, I have thought of you, I have prayed for you and our little children, yes, even wept bitterly for you all; and will you not remember your husband, and write him a line or two?" The petitioner testifies that she made no reply to this letter, under the advice of counsel. She says she thought it was his place to come to her, and offer her a home; that he never did this, and never sent her money to come to him. I am not able to accept this statement of the defendant's duty at this time to the petitioner. He was so poor in June, 1884, that his body was seized for debt; in August, 1884, that it was proposed by his wife to hide his property from his creditors, by shipping it to his mother. The letter of August 25, 1884, shows that he had offered to support her at Trenton, but she had thought it best that

she should stay in Chester, and that he should support her there. It is perfectly obvious from his letters that his poverty still afflicted him all through the fall and winter of 1884. They also show that he was affectionately disposed towards her, and that she was very indifferent about answering them, and that after November 23, 1884, she never so much as answered one of them. He still persisted in his appeals to her, in ignorance whether she even received his inquiries as to her plans and his requests for reunion, until March 7, 1887, and the last of his letters is a more urgent appeal to her than any of the others. Her excuses for ignoring him are, in my view, too trivial to be accepted. She knew that Chester was to him an abominable place, wherein he had been put to public shame. She insisted that she should live there, at his expense, or that he should come there for her, or, as she now testifies, that he should send her money to come to Trenton. Under my view, he was not called upon to do any of these things except the last. As to this assertion, that he refused to send her money to come to Trenton, it is perfectly plain that she never asked him to do so at any time when it was possible for him to comply with such a suggestion. He was in the last dregs of poverty and debt from June, 1884, until after November 21, 1884, after which time, as she herself swears, she never answered one of his letters.

The testimony of the witness Yawger and the defendant's letters to him are relied on to show that the defendant refused to send money to bring his family to Trenton. This witness swears that he lived in Chester, and that the defendant, a few months after he left, wrote Yawger, asking him to see defendant's wife, and ask her to come to Trenton and live with him. Yawger says he did see her, and she said she had no money to go, but would go if her husband would send her the money; that he wrote this to the defendant, and told him to send the money either to petitioner or to him (Yawger); that defendant replied to the letter, but sent no money. The witness was able to find two letters from defendant. Their dates show that the witness was mistaken as to the time when the correspondence took place. It was not a few months after defendant left. It was more than two years after. At this time, August, 1886, the defendant had written many letters to his wife, covering a period from November, 1884, some of them beseeching her to let him know her plans, to come to live with him, to write him a word of love, to which she had made no reply whatever. He now wrote to Yawger, to ascertain whether he could get her to return to him. The whole, even, of the defendant's letters are not produced, but the two offered show that he opened the correspondence himself, in the most friendly spirit, and evidently with the hope by this means to induce his wife to come to him,

making in the letters specific plans for future reunion of the family, explaining that he had not sent her any money before because, as he got no replies to his letters, he was of opinion she did not receive them, and he thought, if he sent money, it would not bring a reply any sooner. He wanted an answer from his wife herself, and sent her a sheet of paper, and a stamp and addressed envelope, on which he directed Yawger "to get her to write a note to him, and fail not to get her also to let you mail it." He names a time when he will have his home fixed for his wife and the children, and sends her word that he is willing to assist her all he can, provided he is assured she will take up the responsibilities of a wife. Here was a direct and explicit offer to resume their marital relations, the husband simply asking that the wife should with her own hand (after having for nearly two years ignored him) verify her willingness to return to him and perform her duty. Mr. Yawger swears that he saw the petitioner, and told her what her husband said; so that she knew that her husband required a note from her to show that she was herself willing to come to him. She evidently wrote no letter saying she would come as suggested; but, instead of that, as appears by the letter of defendant of September 5, 1886, she rehearsed to Yawger the exasperating circumstances of her past relations with her husband, which Yawger duly reported to the defendant, accompanied with a suggestion that he send money, and that ended this effort at reconciliation. In the following spring, by a letter dated March 7, 1887, the defendant again wrote to the petitioner, addressing it "My dear, dear wife, Cyril, and the little stranger that I am not acquainted with." He declares he cannot help loving her, beseeches her to write once more, assures her that he can never give her up, etc., to which there is no pretense of a reply by the petitioner, who swears she did not answer it, under the advice of counsel. Her failure to answer is, however, entirely consistent with her previous neglect to take any notice of her husband's overtures towards a reconciliation, without an appeal to the protection of the advice of counsel, claimed to have been given some seven years before suit was brought in this case.

I have in this review of the evidence given more weight to the letters written at the time of separation, and shortly thereafter, and their verification by the actions of the parties, than I have to the parol testimony presently given, which is inconsistent with the acts of the parties when the events narrated took place, and is presented ex parte, under the temptation which the desire for a decree inspires. I think the evidence shows that there was no willful, continued, or obstinate desertion of the petitioner by the defendant in 1884, nor at any time since, and that in his letters of July 13, 1886, and

of March 7, 1887, to the petitioner, and that of August 24, 1886, through Yawger, he made requests for a resumption of marital relations, which the petitioner was bound to have noticed and replied to, and that, in refusing so to do, she has shown an obstinate and unreasonable neglect of her wifely duty, which has been the main cause of the separation of the parties. The petitioner having failed to support her petition with sufficient proof, the bill should be dismissed.

SMITH v. SMITH.

(Court of Chancery of New Jersey. March 22, 1897.)

DIVORCE—JUDGMENT FOR SEPARATE MAINTENANCE —RES JUDICATA—DESERTION.

1. A decree in favor of a wife against her husband, under the twentieth section of the divorce act (Revision, p. 318), founded upon an actual abandonment on a particular day, *held*, in a subsequent suit for absolute divorce on the ground of desertion, to be conclusive evidence of a desertion on that day.

2. It is no bar to the wife's suit for divorce, by reason of desertion by the husband for the statutory period, that she in fact during that period did not desire her husband to return, and felt unwilling to live with him, provided such state of feeling on her part was the result of her husband's misconduct, involving cruel treatment of her.

(Syllabus by the Court.)

Bill by Alice B. Smith against Charles J. M. Smith for divorce. Decree for plaintiff.

William Pintard, for complainant. Edmund Wilson, for defendant.

PITNEY, V. C. (orally). This is a bill for divorce on the ground of desertion. It was filed on the 29th of April, 1896, and sets forth a desertion on the 2d day of March, 1894. It casually mentions that the defendant has contributed to the support of the complainant since the desertion, under a decree of this court made on the 24th of January, 1895. The answer admits the marriage, admits the payment of the money under the decree of the court mentioned in the bill, and denies that he deserted the complainant on the 2d of March, 1894, and that he has willfully, continued, and obstinately deserted her since that time, and charges that previous to the 2d of March, 1894, the complainant had frequently threatened him with violence, and had inflicted bodily injury upon him, and declared that she would continue such conduct unless he conveyed to her certain properties mentioned in the answer, and referred to hereafter, and that on the 2d of March, 1894, she assaulted him because he refused to give her a certain certificate of bank stock, and attempted by violence to take it from his possession, and shut him in a room, and confined him there for over three hours, and attempted by duress to gain physical possession of the certificate. Further, by way of cross bill, the answer sets up that he (the defendant) has not lived with nor shared the companionship

or society of the complainant since the 2d of March, 1894, and then charges her with adultery on divers dates and times in the years 1890, 1891, 1892, and 1893, with one Charles Smith, and prays that he may be divorced from her on that ground. At the hearing, the complainant, in order to sustain the issue on her part, introduced in evidence the bill, answer, and decree of this court in a suit brought by her against her husband for maintenance, under the twentieth section of the divorce act. The bill in that cause was filed on the 16th of March, 1894, and set up that she had been married to the defendant in 1888; that she lived with him in various houses, at various places in New Jersey, until the 2d of March, 1894, when he abandoned her. She charged that during all that time he failed to provide for her, so that she was obliged to work to support herself; that he treated her in a brutal manner; struck and bit and kicked her on various occasions; and that on the 2d of March, 1894, he packed up all his personal belongings, clothing, and some books and other chattel articles, and moved away from their house, declaring that he would not live with her any longer, and that he intended to return to the house, and wished her to leave, so that by the 1st of April he could take possession of it; but that she declined to leave, and was at the time of the filing of the bill still in possession. That bill set out other facts with regard to the pecuniary situation and ability of the defendant, which will be referred to further on. The defendant filed his answer to that bill on the 14th of May, 1894, in which he admitted the marriage and his having lived with his wife at various places in this state, as set out in the bill; denied any rough or cruel treatment, but says that the only violence he ever used towards her was when he found it necessary to protect himself from her violence in attempting to forcibly take from his possession the certificate of bank stock; and charged her with having on one occasion struck him with violence, such as to leave permanent marks upon him. He alleged that on the 2d of March, 1894, "he packed up his personal belongings, and left the house where the complainant now lives, saying that he was going away to leave her, and not live with her any longer, as charged in the said complainant's bill of complaint"; but he denied that upon that occasion he said that he would return on the 1st of April, and bring some other woman with him, and that he wished his wife to leave the house, so as to get possession. He admits that he caused a notice to be published in the newspapers declaring that he would no longer be responsible for debts contracted by her. He charges extreme cruelty in her treatment of him, and frequent infliction of bodily injuries, and reasserts the assault committed on him on the 2d of March, in what appears to have been a scrambling quarrel for the possession of the certificate of bank stock. It will be observed that this answer sets up no adultery, nor does

it allege any willingness on the part of the defendant to resume cohabitation with his wife. That cause was brought to a hearing, and a decree was made on the 24th of January, 1895, in favor of the complainant, that defendant pay her \$400 a year, commencing with the 2d of March, 1894, and ordering the defendant to give bond with security to insure the payment. The decree recites: "That the defendant, without justifiable cause, abandoned and separated himself from his wife, the complainant, on the second day of March, eighteen hundred and ninety-four, and has ever since refused, and still refuses, to maintain and provide for her."

On the hearing of this cause, I held that the pleadings and decree in that cause were conclusive that the defendant did separate himself from his wife on the 2d of March, 1894, and refused to permit the defendant to contradict that fact; but, subject to further consideration, I permitted the defendant to offer proof—First, of his subsequent bona fide offers to resume cohabitation and live with his wife, and support her in the ordinary way; and, second, to prove the adulteries charged in his answer and cross bill. The defendant made no attempt to sustain the charge of adultery, but did attempt to prove that he had offered to resume cohabitation with the complainant. In support of that allegation, the defendant swears that on the 3d of March, and several days subsequently, he returned to the house where his wife was living, and asked her if she would not have him come back and live with her, and that she declared that she never would live with him again. This asking to come back and live with her was positively denied by the wife, and I find her quite as reliable as a witness as he. The husband further swore that he did remove his belongings from day to day, commencing on the day after the 2d of March, until he had taken them all away from the house where his wife lived, except one bedroom suit, which he said belonged to him, but which he left for her use. The only other proof of any offer on his part to resume cohabitation with his wife was in the shape of a letter which he wrote to her some time in September, 1894, and shortly prior to the actual hearing of the suit then pending between them, before Advisory Master Williams. They have lived near each other ever since, and have never spoken to each other.

In order to understand the force and effect of the letter in question, it is necessary to state other facts that are proven or admitted either by counsel in open court or by the pleadings in the two causes. The defendant is apparently the only child of a wealthy gentleman of Monmouth county, who lived in Middletown township, not far from Red Bank, and was at his death, which occurred some time after the marriage of the parties, the owner of two farms and

considerable personal property. By his will he devised the homestead farm, containing about 100 acres, to his wife for life, and at her decease to go to his son, the defendant. He also devised to his son a second farm, containing about 200 acres, in the possession of one Quigley as tenant, and spoken of in the evidence as the "Quigley Farm." This is a farm of considerable value, and produced a competent rent. He also left him personal property, including a certificate of bank stock, which at one time was worth nearly 300 per cent., and attained a value of nearly \$5,000. Some time after the father's death the complainant induced the defendant to make a conveyance to her of the Quigley farm, in which he had a present estate; but in the conveyance the defendant reserved to himself the use of that farm for his own life, so that the settlement gave the wife no present income. The wife swears, and it is hardly disputed, that the husband was thriftless and incapable of carrying on successfully any business, and his appearance on the stand indicates that she was right in this; and she swears that he furnished her with very slender living and support during the whole of their cohabitation; that after she had acquired the title to the Quigley place, having no comfortable place to live, the defendant's mother having married a second time, and desiring to occupy the homestead, the husband, at the request of his wife, built a comfortable cottage on the Quigley place, which they occupied together. Subsequently the defendant's mother having removed from the homestead, the parties went there to live, and were living there, at the homestead farm (the present use of which belongs to the defendant's mother), on the 2d of March, 1894, when they separated. The quarrel which was the immediate cause of their separation arose over the possession of the bank stock. The wife heard the husband rummaging in the storeroom where their valuable papers were kept, and not desiring him to get possession of the bank stock, and spend the proceeds, she attempted by violence to prevent him; and the result was that he overpowered her, got the certificate of stock, took it away, and transferred it to his mother, who swears that she sold it to pay his debts,—among others, a debt which he had incurred in building the cottage on her farm. At the same time, the defendant conveyed to his mother his title to the homestead farm, in consideration of her entering into a covenant to support him comfortably during his lifetime. He also gave her a general power of attorney to transact his business; in fact, submitted himself entirely to her control and guardianship. At the hearing, the defendant appeared to be dressed as an ordinary gentleman, showing no appearance of being engaged in any business or occupation whatever, and on the stand appeared to be of slender intellect.

The difficult question in the cause is as to what effect should be given to the evidence of the wife given in answer to questions in connection with the letter written by defendant to her in September, 1894. The substance of the letter is as follows: He requested her to come over to the Quigley house at a certain hour on a day named, to sign papers transferring to him her title in the Quigley place, and then used the following language: "Will you compromise the lawsuit, and come back and live in the cottage?" The complainant, when asked on the stand what she did in regard to that letter, answered that she did nothing whatever,—did not answer it; and, asked by me why she did not, answered that she was unwilling to live with her husband again, and that her parents would not permit her to live with him again; that she was afraid of him; that he had pinched her and tickled her, and had slapped her. On a subsequent hearing, complainant produced a respectable lady, whose evidence I see no reason whatever to doubt in the least, who visited the parties as a friend at times, but on other occasions as a seamstress; and she swears that, on one occasion while she was at their house, the husband came in, and sat down to the tea table in a violent temper, and misbehaved himself, by shoving the plates around against each other on the table, and behaved generally in an indecent manner, and that his wife complained, and said she could not sit at the table, and arose; that thereupon the husband arose, and struck her, and caught her by the arm, and attempted to pull and drag her and put her out of the door, declaring that he would do so; but she caught with her hands to a heavy chair, and, by reason of her tenacity to that chair, he was unable to get her out of doors. This witness says he then and at other times exhibited considerable temper, and that she had seen him at other times punch her with his fingers, not in fun, but, as she says, in anger; and she expressed it in such a way that I have no doubt it was in anger.

Now, I think that the mere writing of the letter in question does not improve the position of the defendant. After the occurrences of March 2, 1894, and the actual abandonment of his wife, and withdrawal of support, with the insertion of the insulting notices in the two newspapers, and the permitting her to be ejected from their dwelling, and the putting of himself (properly enough) and his affairs under the complete control of his mother, if he sincerely desired to resume marital relations, and live with his wife, and love and cherish her as a husband should, something more was necessary to be done by him in order to accomplish that result than the mere writing of the letter in question. He should have gone himself or should have procured some other proper person to go to her, who could show her reasonable grounds to believe that he would act the part of a husband to

wards her, and that he would do it by the consent and approbation of his only parent; for it was idle for the wife to go to live with him unless it was to be an harmonious living, and unless that cohabitation had the approval and support of his mother. It was unreasonable to ask her to resume cohabitation with him unless she was assured of a proper support, and she could only be assured of that, through the cheerful co-operation and approval of his mother. Therefore, if he really wished and had any reason to hope to resume cohabitation with his wife, it was necessary for him to do a great deal more than appears on the face of that letter. Hence I conclude that he has not put her in the position of having refused a reasonable request to resume cohabitation.

The difficulty in the case is not that the defendant has made an offer to return, which has been refused, but is the frame of mind and the feeling of this lady, which were developed by her examination. The burden is on the defendant, in my judgment, to show that his desertion worked no injury to his wife, because she did not wish him to live with her, and she did not wish to live with him; and a person who is willingly injured is not injured. "*Volenti non fit injuria*," is the principle. But that maxim, in my judgment, does not apply here if, as a matter of fact, the defendant himself is responsible for the feelings of aversion entertained by the wife. If he, by his conduct, has alienated her affections, and given her good cause to dislike him, and to have no desire to live with him, he cannot take advantage of those feelings to excuse himself for a continued desertion, without any serious and honest effort to terminate it.

The question, then, is, was the defendant responsible for his wife's dislike of him? The complainant knew the defendant and his peculiarities before she married him; but she could not anticipate that he would lead her an uncomfortable life, or one that she was not obliged to submit to. She says in her evidence, and the original bill alleges, that, up to a few months before that bill was filed, they lived fairly comfortably, although he did not support her in the way that a person in his circumstances ought to. He was probably unable to do it. I think, from the fact that he kept a fine horse, that he had some expensive habits. Keeping a fine driving horse takes some money; and, as he was not engaged in any business, he would be very likely to spend money. I have no doubt, from the wife's account of it herself, that she was not supported in a manner that she had a right to expect. But that is a very small matter. In this case it is undoubtedly proven—I must accept it—that he did lay violent hands on her on several occasions, and did it in anger. Now, the measure of the extent of violence which is held by the courts to amount to "cruelty" has changed considerably within 50 years. We are living in an age when

physical violence is almost unpardonable; certainly among people of this character. No man of his station in life has the right to lay his hands in anger on his wife. And he is, besides, a man of some peculiarities of temperament and intellect. And can you be sure of a man who has that temperament, who has indulged it once or twice in the way of laying violent hands on his wife? You can only judge of the future by the past; and where a man of that temperament, and of that lack of intellectual control over himself, has once given way to violence, you do not know what to expect of him. The wife says that she was afraid of her husband, and gives as the reason, and proves, that he had used violence towards her. Then is to be considered the fact that she was treated with great indignity shortly after the separation, by the publication by him of the two offensive notices in the newspapers, stating that he would not be responsible for her debts any more. And she, undoubtedly, had reason to believe that these notices were not the act of the husband alone, but that he was prompted by the persons behind him. And on the stand it was not pretended that he wrote and inserted the notices; it was said that he was responsible for them. Then we have the answer in this cause, and it throws a reflective light. It deliberately charges her with a long course of adultery before the separation; and I gave the defendant an opportunity to prove it, on the ground that it was not known to him when the previous answer was filed, and had come to his knowledge since, but not a scintilla of proof has been offered of that charge. Now, it has been held in many cases, and in some states, that the mere making of an unfounded charge of adultery against the wife is in and of itself extreme cruelty; and it has always been held in this state as an element of cruelty. And the state of mind on the defendant's part which would induce him, whether of his own accord or at the instigation of others, to make this unfounded charge of adultery at this late date, shows what sort of a person he was to live with, and what sort of a home he made for his wife.

For these reasons, I think that the husband should, upon the proofs submitted, be held responsible for the state of mind exhibited by his wife. She swears that she was afraid of him, and I cannot say that she was not justified in it. She evidently had lost all affection for him, and I think that her affection was destroyed by his misconduct. He had abandoned her under aggravating circumstances, and had manifested no real desire to go back and live with her. I think it must be considered as settled since the decision of the court of errors and appeals in *Sergeant v. Sergeant*, 36 N. J. Eq. 644, reversing *Vice Chancellor Van Fleet*, as reported in 33 N. J. Eq. 204, that the mere fact that the deserted wife, for sufficient reasons, for which her deserting husband is responsible, does not

desire to return to him, is no bar to her action for divorce on the ground of his desertion. If he has committed that offense, and there is no collusion between the parties. In that case Vice Chancellor Van Fleet refused the divorce on the ground that it was plain that the desertion of the husband was acquiesced in by the wife, and that she really did not wish him to return. But he was reversed by the court of errors and appeals, and I gather that the real ground of reversal was that the court differed with him on the point above stated. I hold, therefore, that the state of mind of the complainant herein, having been caused by the misconduct of the defendant, is no bar to her right to a divorce against him on account of his willful and continued desertion, and will advise a decree accordingly.

LAUER et al. v. GRAY.

(Court of Errors and Appeals of New Jersey.
March 23, 1897.)

CREDIT INSURANCE—CONSTRUCTION OF POLICY— PREMIUMS—RENEWALS—ADJUSTMENT OF LOSSES.

1. Where a party was the holder of a certificate of guaranty or policy of insurance against the loss of credits for goods shipped and loss occurring between the commencement and expiration thereof, and which contained a provision that "if this certificate is renewed by the said above-named party, on or before the date of its expiration, at the regular terms of the company in force at the time of such renewal, then, in that case, losses occurring after the expiration of this certificate on goods shipped between the commencement and the expiration thereof shall be provable under the renewal in the same manner as if losses occurred on goods shipped after the commencement of the renewal," upon which original policy losses occurred in accordance with its terms and conditions, and which, upon adjustment and allowance by the insurers, were not paid to the insured, but retained by the insurers, under an agreement, made subsequent to the expiration of the policy, that upon the cancellation thereof such losses should answer the payment of a premium for a renewal policy,—*held*, that the retention of these losses under such an agreement constituted payment, "on or before the date of the expiration" of the original policy, of the guaranty fee or premium of the renewal policy, and was a compliance with the condition therein that, "if this certificate has been paid for on or before the date of the expiration of the certificate held by the above-named party last prior to this one, then, in that case, losses occurring during the life of this certificate on goods shipped during the term of the last prior one shall be included in the calculation of losses under this certificate, in the same manner as if the goods had been shipped and the loss had occurred during the life of this certificate," although the adjustment of the losses under the prior certificate, and the cancellation thereof, and the execution and delivery of the renewal, did not take place until after the expiration of the original certificate. The two certificates or policies of insurance were connected together, and had reference to each other, and the adjustment of loss, cancellation, agreement aforesaid, and the execution and delivery of the renewal had relation to the life of the prior certificate, the losses upon which, by virtue of the agreement, constituted the payment of the pre-

mium of the renewal, by reason of the situation which existed before the expiration of the prior one, and to which the renewal had reference; and it was immaterial, under such circumstances, that the execution and delivery of the renewal was postponed until the adjustment of the losses and cancellation of the former policy could be accomplished.

2. The obligation of the insurer to issue and deliver the certificate of renewal, accepting, as payment of the premium therefor, the losses owing to the insured upon the prior policy when adjusted and the policy canceled, being established, the payment related back to the life of the prior policy, and was of the time during which such losses occurred, and the mere delay during negotiations of putting the obligation into a written agreement or contract, or embodying it in a formal certificate of renewal, did not alter or extinguish such obligation. Equity will impute the intention to fulfill the obligation, and, if necessary to protect and enforce the just rights of the parties, it will assume the obligation to have been fulfilled in accordance with the principle or maxim that equity looks upon that as done which ought to be done.

(Syllabus by the Court.)

Appeal from court of chancery.

Petition in chancery by Henry Lauer and others, partners as Stern, Lauer, Shol & Co., against George R. Gray, receiver of the United States Credit-System Company, on appeal from the disallowance of losses by the receiver. There was a decree dismissing the bill, and a decree advised denying permission to sue for reformation of petitioners' certificate, and petitioners appeal. Reversed as to decree of dismissal. Affirmed as to decree denying leave to sue.

The appellants are the holders of a certificate of guaranty or policy of insurance for the sum of \$20,000, issued and delivered to them June 12, 1893, by the United States Credit-System Company, guarantying or insuring them against losses upon credits given by them to their customers in business, on sales and shipments made by the appellants between June 1, 1893, and May 31, 1894. This certificate also contained the following clause of insurance, to wit: "If this certificate has been paid for on or before the date of expiration of the certificate held by the above-named party last prior to this one, then, in that case, losses occurring during the life of this certificate on goods shipped during the term of the last prior one shall be included in the calculation of the losses under this certificate, in the same manner as if the goods had been shipped and the loss had occurred during the life of this certificate." The appellants had been the holders of a prior certificate of guaranty against losses of this character dated June 12, 1892, to run until May 31, 1893, as the date of its expiration. This prior certificate contained the following clause, to wit: "If this certificate is renewed by the above-named party on or before the day of its expiration, at the regular terms of the company in force at the time of such renewal, then, in that case, the losses occurring after the expiration of this

certificate on goods shipped between the commencement and expiration thereof shall be provable under the renewal in the same manner as if the losses had occurred on goods shipped after the commencement of the renewal." Under the terms of this prior policy, and before its expiration, losses upon adjustment to the amount of \$580 had occurred. When the adjustment of these losses had been made, on June 10, 1893, it was agreed that this policy should be canceled, and this amount of losses should be devoted to the payment of the guaranty fee or premium for a renewal certificate. The losses and the cancellation, it was agreed, should stand as the consideration or payment for the renewal certificate. Under this arrangement between the appellants and the credit-system company, the appellants, on June 10, 1893, indorsed upon the original or prior certificate the following receipt, to wit: "Cincinnati, O., 6-10, '93. Received from U. S. Credit-System Co. five hundred and eighty $\frac{80}{100}$ dollars (\$580), in full and complete satisfaction of all claims and demands, of whatever kind or nature, of within certificate. Stern, Lauer, Shol & Co." This sum of \$580 was not paid to appellants, but retained by the United States Credit-System Company; and at the same time, contemporaneously with the receipt, on June 10, 1893, the following agreement was delivered to the appellants: "Cincinnati, O., 6-10, 1893. It is agreed and understood that the U. S. Credit-System Company will issue to Stern, Lauer, Shol & Co. a renewal certificate, on terms as follows: Own loss to be 1 $\frac{1}{4}$ per cent., Class D 2, 1 $\frac{1}{4}$ per cent. Class D 1, limit of single accounts \$5,000; absconding debtor special; also special allowing S., L., S. & Co. to renew certificate for \$10,000, instead of \$20,000, should they desire. This certificate to be gratis, in consideration of canceling certificate No. 470.5, having expired May 31, 1893. U. S. Credit-System Co., Oscar Ising, Inspector." The delivery of the certificate of renewal to which reference is made in this agreement was made by the secretary of the company, by mail, with an accompanying letter, to wit: "Newark, N. J., June 12, 1893. Messrs. Stern, Lauer, Shol & Co., Cincinnati, Ohio: Inclosed we hand you \$20,000 guaranty, in accordance with arrangements made with an application submitted by our inspector, Mr. Oscar Ising. Yours, respectfully, Frank M. Wheeler, Secy." To this letter and inclosure the following reply was made by Stern, Lauer, Shol & Co.: "Cincinnati, June 16th, 1893. United States Credit-System Co., Newark, N. J.—Dear Sirs: We are in receipt of your \$20,000 guaranty policy in accordance with arrangements made with your Mr. Ising. Respectfully yours, Stern, Lauer, Shol & Co." On June 16, 1893, the following letter was sent to appellants: "Newark, N. J., June 16, 1893. Messrs. Stern, Lauer, Shol & Co.—Gentlemen: Inclosed we hand you special for attachment

to your certificate No. 1,414, which you will please substitute for the one now attached to your certificate, as we notice that the amount of \$10,000 mentioned in the second paragraph of the special reads '\$1,000,' the last naught of the '\$10,000' being quite indistinct. Yours, very truly, Frank M. Wheeler, Secretary."

Under these facts and circumstances, the appellants became the holders of the renewal certificate which contained the clause to which reference has been made. Certain losses, amounting, as computed according to the terms of the renewal, to the sum of \$15,256.83, were sustained, on goods shipped between June 15, 1892, and May 31, 1893, during the life of the prior policy, the losses occurring after the expiration thereof; and the same were presented to the receiver of the United States Credit-System Company, as provable under the certificate of renewal issued June 12, 1893. These losses were disallowed by the receiver, on the single ground that the guaranty fee or premium of the renewal certificate was not paid on or before the expiration of the prior certificate, that date being May 31, 1893, and that, therefore, the certificate under which the claim was presented was not a renewal. It is agreed that if the claim of the appellants does not include losses occurring during the year ending May 31, 1894, on shipments made during the year ending May 31, 1893, then there are no losses provable against the receiver under the conditions of policy. The appellants filed in the court of chancery a petition of appeal from the disallowance of losses by the receiver, claiming that the last certificate was a renewal of the prior policy, on the ground that the guaranty fee or premium for the renewal had been paid before the expiration of the prior certificate, and also that the respondent was estopped by reason of the issuance of the renewal certificate under the circumstances from denying the effectiveness of this particular clause of the renewal certificate to cover losses upon goods shipped during the life of the prior one. The petition also prayed a reformation of the certificate in case it was found in contradiction of the agreement between the credit-system company and the appellants, so that the claims for losses sustained during the period covered by the prior certificate might be lawfully made. Subsequently the appellants also presented a petition to obtain permission to bring suit against the receiver, if it should be found necessary, to reform the certificate of renewal so as to include such losses. The vice chancellor, after hearing, approved the disallowance of the losses by the receiver, upon the ground that the renewal certificate had not been paid for before the expiration of the prior certificate, and that, therefore, the clause in the renewal policy intended to cover losses during the life of the prior policy never had any force or effect, and, besides, that there existed no waiver by the credit-system

company of the condition of such clause that, in order to have effect, it should have been renewed and paid for before the expiration of the prior certificate. The vice chancellor therefore advised that the petition of appeal from the disallowance of losses by the receiver be dismissed, and decree was accordingly made. At the same time a decree was advised denying permission to sue for reformation of the certificate. From both these orders and decrees an appeal has been taken.

Edward A. & William T. Day, for appellants. Howard W. Hayes, for respondent.

LIPPINCOTT, J. (after stating the facts). No question has been or could be made against the validity of the issuance of the certificate of guaranty or policy of insurance to the appellants on June 12, 1893. It is only assailed upon the ground that the condition of the clause under which the appellants seek to establish liability was never complied with. The certificate was in form a renewal certificate, as distinguished from an original certificate. It is clear from the terms of the renewal that it had relation to a prior certificate, and, besides, that the agreement to renew was made in view of the fact that a prior policy existed, upon which, and in accordance with the terms thereof, a liability for losses had arisen. The original policy, by its terms, only insured losses on credits for merchandise sold and delivered where the sales had been made and the losses incurred before or on the date of its expiration; but it contemplated specifically a renewal, which would cover and include losses for goods shipped before its expiration, where such losses did not actually occur until after its expiration. Under this renewal certificate, not only losses occurring before its expiration on goods shipped during its life were provided for, but it also, by this special clause, covered losses incurred during the same period on sales and shipments of merchandise during the life of the prior certificate. That the renewal certificate succeeded a prior certificate is conceded, and the only defense to its effectiveness in the respect claimed is that the premium or guaranty fee for which this renewal was made was not paid before the expiration of the original or prior certificate.

The conclusion reached is that no such defense has been sustained by the evidence presented to the court. The losses sustained by the appellants under the prior certificate were sustained before its expiration on May 31, 1893. These losses were subject to adjustment payable to the appellants on or before that time. These losses, amounting to the sum of \$580, retained by the insurer, and the cancellation of the certificate, related to the date of its expiration; and thus all of the benefits which could

ever arise to the appellants from it were surrendered to the insurer as of the date of its expiration. The amount of losses was not only retained, but the policy, perhaps covering other losses than those which had been adjusted, was extinguished by the assent of the appellants, upon the condition that they were to receive from the insurer a renewal policy, and which was duly and formally issued and delivered. The negotiations which resulted in the agreement which accomplished these ends continued over a period of 10 days after the expiration of the prior certificate, but all the benefits and considerations of the renewal were in the hands of the insured before the expiration of the prior certificate, and related to a period prior to that date, and must, upon every process of reasoning, be held to have been a fair and substantial compliance with the condition of the clause in question, which required that the renewal certificate must be paid for on or before the expiration of the original certificate; and, if this be true, it would matter little when the renewal certificate was actually issued and delivered.

It must be recalled that the terms of the renewal certificate must govern in its construction and the effect to be given to its different provisions. In order to make every clause effective, it only required the payment prior to the expiration of the original certificate. The renewal policy not only included this special clause, but also others covering the different losses which might be incurred. The prior certificate may have contained terms antagonistic to the validity of this clause of the renewal, but, the renewal being the legally substituted contract, liability must be determined by it. The only condition of the renewal in order to make every provision, including the one in question, effective, was that whatever was considered and agreed upon as the premium for the renewal must be paid or satisfied before or on the date of the expiration of the prior certificate. If this was done, the renewal became the right and due of the appellants, in such form as would cover the losses contemplated. The satisfaction, or payment, if that term is to be chosen, being found in the existence of the liability of the insurer to the appellants, during the life of the prior policy, and before its expiration, under the agreement to renew, the obligation of the insurer arose to carry out the intention of the parties to so devote this previously existent liability to the purpose of this renewal. The nature of the transactions between the insurer and the appellants not only exhibited the intention of the parties that this was to be so, but, I think, indicated conclusively that the renewal was based upon the benefit of the retention of the losses occurring under the old policy during its life, and the extinguishment of liability of the insurer under it on the day of its expiration. It is difficult to

perceive upon what course of reasoning or upon what principle of equity it can be contended that the letter, as well as the spirit, of this contract of insurance, has not been complied with, or upon what ground liability can be equitably and honestly avoided. It can be fairly concluded that, in order to arrive at this conclusion, there exists no need of construction or interpretation of the agreement between the parties for the renewal policy. It has direct reference to the satisfaction or payment of premiums, by applying the losses arising out of the prior policy incurred before its expiration; and, upon such express reference, it is discovered that under it, and during its life, and before its expiration, the full premium for a renewal had been retained; and, by express agreement, these considerations are made to answer for the payment of the premium for the renewal policy. This is conceded by the insurer, but the answer is made that the agreement making this application was not made until after the prior policy had expired. Under the renewal policy it may be a question when the expiration of the prior policy occurred; but, conceding that it expired at the time claimed by the insurer, the mere delay of embodying the renewal agreement in a formal certificate did not alter or extinguish the obligation, for, the obligation once being established, the application of equitable principles imputes an intention to fulfill it; and, if necessary to protect the parties in their just rights, and enforce them, equity will assume the obligation to have been fulfilled, in accordance with the doctrine that equity looks upon that as done which ought to be done. It is therefore concluded that, according to the terms of the contract between the insured and the insurer, there was a satisfaction and payment of the premium or guaranty fee of the renewal certificate during the life and before the expiration of the prior policy.

It is not necessary to consider the other grounds urged to establish the liability of the insurers upon this clause of the renewal. The receiver therefore was bound, under the terms of this renewal policy, to make allowance for the losses of the appellants upon merchandise shipped during the term of the prior certificate, where the losses occurred after its expiration, and during the life of the renewal certificate, and include the same in the calculation of losses under the renewal certificate, for a pro rata distribution of the assets of the United States Credit-System Company. The decree dismissing the appeal from the disallowance by the receiver must be reversed, with costs. With this result, the petition for permission to bring suit against the receiver for a reformation of the renewal certificate becomes unnecessary, and therefore the decree denying the permission to bring such suit must be affirmed, without costs.

LONGSTREET v. BROWN et al.

(Court of Chancery of New Jersey. April 7, 1897.)

MORTGAGES—SALE OF PARCELS BY MORTGAGOR—RELEASE FROM MORTGAGEE TO GRANTEE—CREDITING PRICE ON MORTGAGE DEBT—ACTION TO FORECLOSE—LIMITATIONS—PAYMENT ON MORTGAGE.

1. Where a mortgagee receives the price of a portion of the mortgaged premises sold by the mortgagor, and executes a release as to such portion, with notice, recited in the release, of a prior deed of another portion to a different grantee, who had received no release, he will be charged, in foreclosing as against such prior grantee, with the value of the land released, in reduction of the mortgage debt, unless he has already credited its value as a payment on the mortgage.

2. If the statute limiting the time of bringing ejectment to 20 years protects from foreclosure a mortgagor in possession for that time, a payment on the mortgage, made within 20 years before suit by the owner of the equity of redemption of a portion of the premises, insured to the benefit of the owners of the equity in all other portions of the mortgaged land, and removed the bar of the statute as to the whole premises.

Bill by Henry H. Longstreet, as administrator de bonis non of the estate of Emeline Smock, deceased, against Warren Brown and others, to foreclose a mortgage. Heard on bill, answers, replication, and oral proofs. Decree for complainant.

W. H. Vredenburg, for complainant. John S. Applegate, for defendants.

EMERY, V. C. The mortgage sought to be foreclosed in this suit was given by Warren Brown and wife to the defendant Henry S. Little, upon a tract of land in Matawan township, Monmouth county, containing about 12 acres, and to secure payment of \$2,793.88 in five years from date, with interest, payable annually on April 1st of each year. The mortgage and accompanying bond are dated January 27, 1868, and by a written guaranty under seal indorsed on the bond Dr. Alfred B. Dayton guaranteed its payment. The mortgage was given to secure the purchase money of the premises which were conveyed to Brown by Mr. Little, and Dr. Dayton, the guarantor, was, as appears by the evidence, interested with Brown in the purchase. The purchase of the tract was made for the purpose of division into parcels for sale as building lots. Several lots were sold before the mortgage became due; and after it became due, and on June 19, 1873, Brown and wife conveyed to the New York & Long Branch Railroad Company a portion of the premises, containing about two acres, and this portion has since shortly after that time been occupied by this company and its lessee, the Central Railroad Company, for the purposes of their railroad and station. No release from the mortgage was given at the time, or has since been executed; and at the time of this conveyance the amount due upon the mortgage was \$2,680.96 of principal, besides interest from April 1,

1872. On April 1, 1874, Warren Brown, being still the owner of the remainder of the property, paid the interest due to that date, \$377.72, besides \$860 on account of the principal. This payment of April 1, 1874, was the last payment of interest or principal made directly by Brown. In the meantime, and in 1870, before the bond became due, Dr. Alfred B. Dayton, the guarantor, had died, and his son, R. W. Dayton, Esq., with two others, were appointed his executors. On April 15, 1879, Mr. R. W. Dayton received a sheriff's deed for Warren Brown's interest in the mortgaged premises, the sale being made by virtue of a judgment obtained against Brown, April 6, 1877, and levied upon the premises. After this conveyance, and on about April 15, 1879, Mr. R. W. Dayton conveyed to one Lichenstein a portion of the premises conveyed to him by the sheriff's deed, and containing about one acre, at the price of \$325. Warren Brown and wife, for the purpose of perfecting title to this lot, executed a deed to Lichenstein for the nominal consideration of one dollar, but the whole consideration received for the purchase was, by agreement of the parties, paid over to Mr. Dayton, to be applied on the mortgage, which was thereupon to be released. Mr. Little still held the legal title to the mortgage, but it was in fact held by him in trust for the testatrix, Emeline Smock, under a written deed of trust; and Mr. Little, as Mrs. Smock's trustee and agent, collected the interest and principal of the mortgage. The \$325 was paid to Mr. Little, who afterwards paid it to Mrs. Smock, and she released from her mortgage the premises sold to Lichenstein for the consideration of \$325, stated in the release, which is dated April 1, 1879. The release recites the description of the lands released, and in the description the lands of the New York & Long Branch Railroad Company are referred to as having been conveyed by Brown to the company on June 19, 1873. Mr. Little did not execute any release, and a formal assignment by him of the bond and mortgage was not made until after the death of Mrs. Smock, and until April 6, 1889, when he formally assigned it to her executor. After this payment upon the mortgage, made April 1, 1879, by Mr. R. W. Dayton, as the full proceeds of sale of the portion released by the equitable owner of the mortgage, further payments of interest were made; all of these payments being made by Mr. Dayton, who at the time still appears to have been the owner of a portion of the premises covered by the mortgage, as well as executor of his father, Dr. Dayton, the guarantor of the bond. No indorsement upon the bond was made of any of these subsequent payments or of the payment of \$325 made on the sale to Lichenstein, the indorsement being withheld by Mr. Little at the request of Mr. Dayton. The precise date of these subsequent payments is, on this account, only approximately fixed, and is as follows: \$741.89 interest to the year ending April 1, 1884, paid

between April 1 and November 29, 1884; \$329.55 interest on April 1, 1886, paid after that date, and before April 1, 1887. These payments were all made to Mr. Little by Mr. Dayton, and either from his own property or the property of his father's estate. Brown made no payments directly on the mortgage after April 1, 1874, the date of the last indorsement on the bond. The bill to foreclose was filed by Mrs. Smock's executor on April 8, 1896.

The substantial defenses are raised by the answer of the New York & Long Branch Railroad Company and its lessee, the Central Railroad Company, viz.: First. Adverse possession of the premises conveyed to them for over 20 years before the filing of the bill, without any payment on account of either principal or interest by them, or any one claiming under them, or any acknowledgment of the mortgage, and the statute of limitations is formally pleaded. The second defense is that the release of the Lichenstein lot was made with notice of their conveyance; and, if the mortgage is a lien at all, the complainant is chargeable with the value of that lot, to be credited on the bond; and that this value exceeded \$325, the price at which it was sold.

As to the second ground, my opinion on the facts is that the sale seems to have been made at a fair price, considering the circumstances of the case; and that the defendant has failed to show that the complainant, on account of the release, is to be charged with more than was received. The release of Mrs. Smock recites the company's deed as previously made, and is, therefore, sufficient proof of actual notice of that deed at the time of executing the release; and therefore she was, upon the release, chargeable, in equity, with the value of this lot in reduction of the liability on the mortgage. But this application of the value of the lot to the reduction of the mortgage, is the only equity the defendant had, or now has; and, inasmuch as the whole price of the lot was in fact applied by the mortgagor as a payment on the mortgage, the entire equity of the defendant was, therefore, satisfied. If this price had not been paid on the mortgage, it would now be credited; but there is no basis of equity for crediting it twice. *Vanorden v. Johnson*, 14 N. J. Eq. 376 (Green, Ch.; 1862); *Patty v. Pease*, 8 Paige, 277, 284 (Walworth, Ch.; 1840).

Second. Nor do I think that the defense of the statute of limitations can be sustained. Whether the possession of a mortgagor or his grantees for 20 years after default is to be considered a possession adverse to the mortgagee, so as to deprive the latter of the equitable remedy of foreclosure, has not been decided by our courts. Under the English statute from which the sixteenth section of our statute limiting the right of entry to 20 years was substantially taken, it was held by the English courts, both at law and in equity, that the possession of the mortgagor was the possession of the mortgagee, and therefore the

statute did not run against the mortgagee. See cases cited. *Heath v. Pugh*, 6 Q. B. Div. 359; *Lehman v. Newnham*, 1 Ves. Sr. 51. The mortgagor was considered a tenant at will to the mortgagee, so long as the latter permitted him to remain in possession, and did not elect to treat him as a trespasser by bringing ejectment. And in our courts the mortgagor, in actions of ejectment, is treated as a tenant at sufferance, entitled to remain after default, so long as the mortgagee chooses, but, not entitled, as against the mortgagee, to lease the premises, or to receive notice to quit. *Den v. Stockton* (1831) 12 N. J. Law, 322; *Den v. Wade* (1844) 20 N. J. Law, 291; *Howell v. Schenck* (1853) 24 N. J. Law, 89, 91, 94. Section 17 of the statute of limitations limits the action of ejectment to 20 years, but I have not been referred to any decisions of the courts of law as to the application of this statute to actions upon mortgages. Mortgagees in possession for 20 years are expressly protected by a subsequent section (section 18). I shall not pass on the question of the application of the statute, as, in my judgment, if the statute is applicable to foreclosure bills, the payment on the mortgage made in 1879—less than 20 years previous to the filing of the bill—stopped the running of the statute up to that time. This payment was made by the owner of the equity of redemption of a portion of the mortgaged premises, and inured to the benefit of all the mortgaged premises still subject to the mortgage. So far as the mortgagee is concerned, the whole mortgage debt is charged in equity on all the mortgaged lands; and, while conveyances by the owner, subsequent to the mortgage, may give rise to equities relating to the order of application of the lands for payment, yet the whole mortgage debt still continues, until payment, a debt chargeable upon all the lands. All the lands being therefore chargeable with the debt, in their proper equitable order, the lands of the owners of the equity of redemption in different portions of the premises subject to the debt are to be treated, so far as the mortgagee is concerned, as jointly liable to the equitable charge, and the payment to the mortgagee by any one of such owners should be considered as a payment made on account of this joint equitable liability. And if, in addition, the owner of the portion of the mortgaged premises who paid the interest was, as between him and a previous grantee, under an equitable obligation to pay the mortgage, I think there can be no doubt that this owner, in making the payment, must be considered as making it for the benefit of and as the agent of all the owners of the equity as to whom his land is primarily liable to the entire charge. In this respect the case is analogous to the payment on account of a joint liability made by one of two joint debtors. Such payment is, by reason of the existence of the joint obligation at the time of payment, held to be made at the request and by the authority of all the joint debtors, and

to prevent the running of the statute against all. *Merritt v. Day* (Sup. Ct.; 1875) 38 N. J. Law, 32, 37, approved. *Casebolt v. Ackerman* (Err. & App.; 1884) 46 N. J. Law, 169. An assignee of the equity of redemption, who has covenanted to pay interest on a mortgage, is an agent of the mortgagor, within the meaning of the statute of limitations requiring payment by the party liable, or his agent. *Forsyth v. Bristowe* (1853) 8 Exch. 715, 722. In *Murphy v. Coates*, 33 N. J. Eq. 424, an acknowledgment of the first mortgage by the mortgagor was held to be sufficient to prevent the running of the statute against a second mortgagee. The equitable liability of Mr. Dayton's lands to relieve the defendant company's lands should, therefore, be considered as sufficient in equity to make the payment by Mr. Dayton to the mortgagee in 1879 a payment for the benefit and on account of the defendant, and at its request, and one which the mortgagee was entitled to receive as protecting her lien up to that time upon all the lands subject to her mortgage. So far as this payment is concerned, the defendant company has no right to insist that, as against the mortgagee, its lands shall be considered in equity, as if the payment had not been made, and as if its lands were at the time of the payment held adversely to the mortgagee. The subsequent purchaser's discharge of his equitable obligations to the defendant to pay the mortgage, and thus relieve the defendant's lands, cannot, on any equitable ground, be made the basis of barring the mortgagee's rights against defendant's lands on the theory that the payment was not made in relief of defendant's lands; for defendant's equitable right to require the primary payment of the lien by the subsequent purchaser carried with it all obligations and admissions necessarily arising from the payment by him as a payment made pursuant to an equitable status created by defendant's consent, and therefore it must be treated as an acknowledgment of the debt on the part of all those for whom or for whose benefit it was, in equity, to be considered a payment by reason of this equitable status. See 2 Jones, *Mortg.* § 1198, and cases cited. As to the payments made in 1884, I have some doubt as to their effect, because it does not clearly appear whether these were made by Mr. Dayton as owner of the equity, or as executor of the guarantor. Payment by a guarantor to the obligee is, or may be, different in its effect on the lands, for the reason that the guarantor, upon payment by him, is generally entitled in equity to be subrogated to the securities of the obligee, and it is a question, therefore, whether the lands are relieved from the debt by the payment, and whether the guarantor is not, by the payment, subrogated to a lien of the obligee against the lands to the extent of his payment. *Gedye v. Matson* (1858) 25 Beav. 310; notes to *Dering v. Earl of Winchelsea*, 1 White & T. Lead. Cas. Eq. (4th Am. Ed.) 127; *Pennsylvania R. Co. v. Pemberton & N. Y. R. Co.*, 28 N. J. Eq. 338,

344; *New Jersey Building, Loan & Investment Co. v. Cumberland Land & Improvement Co.*, 53 N. J. Eq. 644, 33 Atl. 964. If he is so subrogated, then the payment by the guarantor may not be considered as a payment made by the assignee of the equity of redemption, or in relief of his lands, or at his request. The assignee's rights are rather adverse to the payment, and, so far as the assignee of the principal is concerned, the guarantor may stand only as the obligor would without his payment; that is, as subject to the statute. It is manifest that, as between the guarantor of the bond and subsequent purchasers of the equity of redemption, the circumstances of each case might vary the equities; and in the present case I shall not undertake to decide as to the effect of this payment upon the running of the statute of limitations. Such decision is not necessary, inasmuch as, in my view, the payment of April 1, 1879, was a payment effective against the defendant to stop the running of the statute. Being made within 20 years before the filing of the bill, the statute runs only from that time of payment. *Barned v. Barned*, 21 N. J. Eq. 245. No further equities are set up on the record in relation to these payments, and, inasmuch as the complainant has proved and given credit for the payments made up to April 1, 1887, by Mr. Dayton, and no reason has been alleged or shown for treating them otherwise than as payments for the benefit of all the lands, decree will therefore go for the principal unpaid, with interest from that date.

DANECK v. PENNSYLVANIA R. CO.

(Court of Errors and Appeals of New Jersey.
March 1, 1897.)

NEGLECT—UNGUARDED EXCAVATION—PROXIMITY TO HIGHWAY.

A public highway was so constructed that it terminated 20 feet west of a previously existing railway cut, the depth of which was 5 feet or more below the crown of the highway. Of the 20 feet of land between the cut and the highway, a strip 5 feet wide next to the cut was owned by the railway company, and the remaining 15 feet, next to the highway, constituted an unused strip owned by a third person. This intermediate land was a foot or more above the crown of the highway, and rose higher to the west. The railway cut was not fenced or otherwise guarded against accident to users of the highway. A., who was ignorant of the locality, accompanied by a friend, in the dark, at night, drove a horse and buggy through the highway, and up over the intermediate land, into the railway cut, where he sustained injury. *Held*, that no liability for the damage suffered by A. attached to the railway company.

(Syllabus by the Court.)

Error to supreme court.

Action by Jacob G. Daneck against the Pennsylvania Railroad Company. From an order directing a verdict for defendant, plaintiff brings error. Affirmed.

On the night of the 15th of April, 1895, the plaintiff in error, with another man, attempted to drive a single horse, drawing a

buggy in which they rode, from Elizabeth to Newark. After reaching North Elizabeth, they turned westerly, through Louisa street. That street is graded, flagged, and curbed to a point about 15 feet easterly from the easterly line of the right of way of the Pennsylvania Railroad Company, at which point the street terminates. The 15 feet of land between the terminus of the street and the defendant's right of way is the property of a third person. When the street was graded, the crown of its westerly terminus was a foot below the adjacent land, which, from thence westerly, rose still higher above the roadway. Five or six feet westerly from the westerly line of the defendant's right of way, and about twenty feet from the westerly terminus of Louisa street, the railway of the defendant, prior to the construction of Louisa street, was, and from thence hitherto has been, constructed through a cut which runs at right angles to Louisa street, and is in depth some five feet lower than the crown of the street. Between the terminus of the graded street and the railroad cut there is a low earth embankment. When the plaintiff and his companion reached the westerly end of Louisa street, being ignorant of the locality, they continued on over the 15 feet of land which intervened between that and the defendant's right of way, into and upon the right of way, and over the embankment there, and plunged down the slope beyond it, into the railroad cut. The consequence was that the horse was killed, the buggy was broken up, and the plaintiff was injured. For the damage thus occasioned, the plaintiff brought suit against the railroad company. The facts stated, being shown at the trial, the court directed the jury to find for the defendant. That direction is now the subject of review.

Samuel Kallsch, for plaintiff in error. James B. Vredenburgh, for defendant in error.

McGILL, Ch. (after stating the facts). The single question presented is whether there existed any liability upon the part of the defendant in error for the injury which the plaintiff sustained. It is insisted in behalf of the plaintiff that it was the duty of the defendant to have fenced or otherwise to have suitably guarded the terminus of Louisa street against the railway cut, and that, because of its failure to do so, the plaintiff may maintain his action. The doctrine invoked is that an unguarded excavation upon land outside a public highway, but so near it as to endanger those who pass along the way in the exercise of ordinary caution, is a public nuisance, from which may spring a right of action to one who suffers individual injury therefrom. The doctrine appears to be recognized by the weight of authority (*Barnes v. Ward*, 9 C. B. 392; *Beck v. Carter*, 68 N. Y. 283; *McAlpin v. Powell*, 70 N. Y. 126, 133; *Association v. Giles*, 33 N. J. Law, 260, 264; *Vanderbeck v. Hendry*, 34

N. J. Law, 467, 471; *City of Norwich v. Breed*, 30 Conn. 535; Wood, Nuls. § 271; Ray, Neg. Imp. Dut. 26; Elliott, Roads & S. 542; and the cases hereafter cited), although it seemingly has not the approval of the supreme court of Massachusetts (*Howland v. Vincent*, 10 Metc. [Mass.] 371; *McIntire v. Roberts*, 149 Mass. 450, 22 N. E. 13). Our supreme court, in the case of *State v. Society for Establishing Useful Manufactures*, in its decision upon motion to quash the indictment, which is reported in 42 N. J. Law, 504, accepted the doctrine broadly as to excavations made after the construction of the highway; but in its decision in the same case, upon the rule to show cause why there should not be a new trial (44 N. J. Law, 502), held that the doctrine was not applicable in the case of a highway dedicated after the making of the excavation, for in that case the dedication was accepted by the public subject to the existing adjacent excavation, and the duty to protect it became a duty of the public, and limited its decision to that point.

It is not necessary in the disposition of the present case that any opinion shall be expressed as to the tenability of the doctrine invoked. Assuming its correctness for the purpose of disposing of this case, it is observed that an essential requisite to the defendant's liability and limitation of the doctrine is that the unguarded excavation shall be so near the highway as to endanger those who use the way with reasonable care. What is meant by such proximity is well defined in the following quotation from the opinion in *Hardcastle v. Railway Co.*, 4 Hurl. & N. 67, 28 Law J. Exch. 139: "When an excavation is made adjoining a public way, so that a person walking on it might, by making a false step, or being affected with sudden giddiness, or, in the case of a horse or carriage, who might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to me to be different. We do not see where the liability is to stop. A man going off a road on a dark night, and losing his way, may wander to any extent; and, if the question be for the jury, no one can tell whether he was liable for the consequences of his acts upon his own land or not. We think the proper and true test of legal liability is whether the excavation be substantially adjoining the way; and it would be very dangerous if it were otherwise, and if in every case it was to be left as a fact to the jury whether the excavation was sufficiently near to the highway to be dangerous." In that case the plaintiff's intestate, at night, walked along an ancient public footpath, running beside

the by-wash of the defendant's canal, and, coming to a turn in the path to a bridge over the by-wash, he, by mistake, continued straight on out of the path, upon the defendant's land, some 20 or 30 feet, over a but-tress, and into a reservoir of the defendant, where he was drowned. It was held that the defendant was not liable in an action brought by the administratrix. The decision was put upon the principle of *Blyth v. Topham*, Cro. Jac. 158, 1 Rolle, Abr. 88, where it was held that if A., seised of a waste adjacent to a highway, digs a pit in the waste, within 36 feet of the highway, and the mare of B. escapes into the waste, and falls into the pit, and dies there, B. shall not have an action against A., because the making of the pit in the waste, and not in the highway, was not any wrong to B., but that it was the default of B. himself that his mare escaped into the waste. In the case of *Hounsell v. Smyth*, 7 C. B. (N. S.) 731, the allegation of the declaration was that an unguarded quarry was situate near to and between two public highways in a waste, and that it was dangerous to persons who might accidentally deviate or stray from the highways or intentionally cross the waste from one to the other, and it was held, as the danger was not alleged to the persons passing along either highway, but to persons who might accidentally deviate or stray from or intentionally leave the ways, that no duty to guard the quarry appeared, and, therefore, that no liability for the injury complained of existed. The case of *Binks v. Dun Co.*, 3 Best. & S. 244, is perhaps as nearly like the case before us as any adjudication that can be found. There a canal was constructed beside an ancient footway, at a distance of about 24 feet from it, with a towing path on the bank of the canal, and an intermediate space between that and the footpath, which intermediate space, through laxity on the part of the defendant company, was generally walked over by the public, and had become obliterated as a dividing line; yet it was held that the proximity of the canal to the footpath was not such as imposed upon the defendant company a duty to guard it, or a liability for accident to one who strayed from the path.

The definition of proximity which is stated and illustrated in these cases is accepted, without exception, I think, by all the cases which have acquiesced in the doctrine invoked by the plaintiff in error. It is deemed that the case considered is clearly within these adjudications. The railway cut was 20 feet or more from the street, and was separated therefrom, not only by 5 or more feet of intervening land belonging to the defendant, but also by a strip of land 15 feet wide, which belonged to some third person. All this land was above the crown of the street, and presented enough barrier to progress towards the railway cut to plainly mark the departure from the highway and excite

to caution. It is deemed that the cut did not substantially adjoin the highway, so that, by false step, or in surprise at the sudden termination of the highway, the plaintiff could have been thrown into it, but, on the contrary, that the case made is one in which in the dark, at night, the defendant wandered from the highway over the land of the third person, into the land of the defendant, and from thence into the railroad cut. We think that the defendant is not liable for the injury consequent upon the plaintiff's accident, and consider that the jury was properly instructed. Let the judgment be affirmed.

DUNN v. McNAMEE et al.

(Court of Errors and Appeals of New Jersey.
March 1, 1897.)

INJURY TO MINOR SERVANT—ASSUMPTION OF RISK.

A person, under age, who is employed in operating a dangerous machine, knowing it to be so, and being old enough to appreciate its dangers, assumes those risks which are incident to its operation, to the same extent as a person of mature years; and no action will lie against his employer for injuries received by him in such a case.

Dixon, J., dissenting.

(Syllabus by the Court.)

Error to circuit court, Hudson county; Nevius, Judge.

Action by William Dunn against Frank McNamee and others. Judgment of nonsuit for defendants, and plaintiff brings error. Affirmed.

Warren Dixon, for plaintiff in error. Wm. P. Douglass, for defendant in error.

GUMMERE, J. This is a suit to recover for personal injuries received by the plaintiff while in the employment of the defendants, and for which he seeks to hold them responsible. The defendants were engaged in the bottling business in the city of Jersey City, and the plaintiff, who was 19 years old, was employed by them as a "passer under"; his duty being to put bottles in the bottling machine, and to remove them again after they had been filled by the man who was operating it. He entered the defendants' employ in February, 1894, and remained with them until the 3d day of August in that year. On that day he was put to work by the defendants' foreman on the bottling machine, to bottle ginger ale, and continued at that work during the whole of the forenoon. He returned to the same work at the expiration of the noon hour, and the first bottle, which he filled and capped, burst, and one of the flying pieces of glass struck him in the eye, entirely destroying its sight. It appeared from the evidence adduced on the part of the plaintiff that the bursting of bottles, in bottling machines, while in process of filling and capping, was a matter of frequent occurrence, and had often happened in the presence of the plaintiff. It

further appeared that, when a bottling machine came from the maker, it was protected by gates which prevented the flying glass of bursting bottles from injuring the person who was operating the machine, but that these gates were almost always removed from the machine by the workmen, not only in the defendants' establishment, but in other places, and a piece of board substituted as a protection, in order that the machine might be worked more rapidly than it could be if the gates were permitted to remain on it. It was also shown that the machine in question had been originally furnished with gates, but that they had been removed, and the usual board put up in front of the machine to protect the person operating it. It was further proved that the men employed on bottling machines sometimes wore masks to protect their faces from glass, but whether such masks were furnished by the employer or the employé was not shown. It would appear, however, that masks were not in use in the establishment of the defendants, as the plaintiff testified that he never saw any there. The trial judge, conceiving that this state of facts did not impose upon the defendants any legal liability to compensate the plaintiff for the injury received by him, directed a nonsuit, and the correctness of that ruling is now before us for review.

It is urged on behalf of the plaintiff that the liability of the defendants was conclusively shown, because, by permitting the gates to be removed from the bottling machine, and a section of board to be substituted for the protection of the operator, they rendered the machine unsafe for use, and yet neglected to furnish the plaintiff with a mask to shield his face from the flying glass from bursting bottles. But the assumption that the machine was rendered unsafe by removing the gates, and using the board as a protection in their place, does not seem to me to be warranted by the proofs; for although it appears that it is the common practice, not only in the defendants' establishment, but also in those of other bottlers, to use the board instead of gates, it does not appear that an accident ever occurred, either at the defendants' or elsewhere, to a person operating one of these machines without a mask, and using only the board as a protection, until the occasion upon which the plaintiff lost his eye. But, accepting the assumption of the plaintiff as true, that the removal of the gates and the substitution of the board increased the risk of the operator to injury from the glass flying from bursting bottles, we would not be justified in disturbing the nonsuit. The danger, if it existed, was an obvious one. The plaintiff was familiar with the machine, and knew as well as any one else the danger to be apprehended from working it. The law is entirely settled that under such circumstances the servant takes upon himself the risks incident to the employment, and that no action will lie against the master for injuries to the

servant in such cases. *Foley v. Light Co.*, 54 N. J. Law, 411, 24 Atl. 487, and cases cited; *Buckley v. Manufacturing Co.*, 113 N. Y. 540, 21 N. E. 717; *Sullivan v. Manufacturing Co.*, 113 Mass. 396, 399. Nor is the fact that the plaintiff was a minor material. He was 19 years of age,—old enough to fully appreciate the danger of operating the machine,—and consequently took upon himself the risks incident to his employment, the same as a person of more mature age. *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286; *Buckley v. Manufacturing Co.*, supra. The trial judge properly directed a nonsuit, and the judgment below should therefore be affirmed, with costs.

DIXON, J. (dissenting). I vote to reverse this judgment of nonsuit, on the ground that a master who employs minors to work upon dangerous machinery is bound to take care, not only that the minors shall perceive the danger, but also that they shall receive necessary instruction as to the reasonable means of avoiding or lessening the danger, so that they may be upon a level, as far as practicable, with workmen of mature age. In this case a part of the machine at which the plaintiff was set to work consisted of gates intended to inclose the bottle while being filled, so that, if it burst, the fragments would not be scattered. These gates have been taken off, to facilitate the work of filling. Their removal made the machine defective and dangerous. The plaintiff knew nothing of the gates. Had he known, he might, by replacing them, have guarded himself against the danger which resulted in his injury. It is not claimed that the plaintiff was negligent. The claim is that he assumed the risk. But the true rule is that a minor employé assumes even apparent risks only so far as he is presumed to understand, or has been properly instructed in, the means of obviating them by due care; and if the master has taken no care to give him necessary instructions, and injury results through the lack of them, the master is responsible.

DOREMUS et al. v. DUNHAM et al.

(Court of Errors and Appeals of New Jersey.
March 15, 1897.)

ESTATES—FORECLOSURE OF MORTGAGE—PLEADING.

1. It is an established rule of equity practice that estates limited over to persons not in esse are represented by the living owner of the first estate of inheritance.

2. A foreclosure bill need not define the nature of the interests which the defendants have in the mortgaged estate, when the peculiar nature of those interests is unimportant to the relief sought by the complainant.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill by Cornelius Doremus and others against Mary Dunham and others. Decree for complainants, and defendants appeal. Affirmed.

Mr. Harding, for appellants. Mr. Hilton, for respondents.

DIXON, J. The bill in this case was filed for the purpose of quieting the title to a parcel of land in Paterson, and the only question now raised is whether the children of Mary Magee, who appeal, have any interest in the premises. It appears that the property formerly belonged to John Magee, who died seised in 1857, leaving a widow and one child, Mary, then about six years old. By his will he gave the property to his daughter, adding: "In case Mary should die without having any children, then I wish her mother to have and possess the property. Should Mary have children, I wish them to possess the property, share and share alike, at her death." Mary's children claim that under this clause the fee was limited over to them by way of executory devise or contingent remainder, and is now vested in them. Conceding this interpretation of the words quoted, it nevertheless is true that, until the birth of Mary's children, the fee either was devised to Mary by the other clauses of the will, or passed to Mary as her father's heir. This being the state of the title, the widow of John Magee, soon after his death, purchased a bond secured by a mortgage on the property, which John Magee had given in 1846 to the Society for Establishing Useful Manufactures, and in 1857 she filed a bill to foreclose this mortgage, making her daughter Mary, then 12 years old, a defendant, as her father's heir, and the owner of the fee. On this bill the property was duly sold under decree of the court of chancery, and the title thus conveyed is now vested in the complainants. We are of opinion that by this sale the estate limited over to the unborn children of Mary Magee was cut off. The established rule of equity practice is that estates limited over to persons not in esse are represented by the living owner of the first estate of inheritance. *Reynoldson v. Perkins*, 2 Amb. 564; *Giffard v. Hort*, 1 Schoales & L. 386, 407; *Lloyd v. Johnes*, 9 Ves. 37; *Mead v. Mitchell*, 17 N. Y. 210; *Calv. Parties*, 48 et seq.; *Mitt. & T. Pl. & Prac.* 24; 1 *Daniell, Ch. Prac.* 262. When, therefore, Mary Magee was brought into court to answer the complainants' charge that the mortgage created a lien upon the absolute fee simple, and the complainants' prayer that the fee simple should be sold to pay the mortgage debt, the decree that such sale should be made bound not only the estate of Mary Magee, but also all estates which might thereafter have arisen.

It is further argued that, in order to bar the estate of the appellants, it was necessary that the foreclosure bill should set forth their estate definitely; and, since it does not do so, their estate remains. The bill charges that John Magee, owning the fee simple, had made the mortgage, and had died seised, leaving a will, of which profert was made,

and leaving Mary as his only child. This was sufficient. It clearly indicated the extent of the lien claimed, and called attention to the means by which the mortgaged estate had been transmitted, and brought into court all the persons by whom that estate could or ought to be defended. Nothing further can be required of a complainant. *Lloyd v. Johns*, 9 Ves. 37, 64. It would be unjust to cast upon a complainant the burden of correctly describing the rights of the various defendants, at the risk of defeating his own claims in case of error, when the nature of those rights is of no importance to the relief which he seeks.

The further claim of the appellants that the widow of John Magee bought the bond and mortgage with moneys belonging to John Magee's estate, is not supported by the proofs; and, if it were, it could not now avail the appellants. In the foreclosure bill she asserted that the bond and mortgage were her own, and constituted an outstanding lien upon the estate of John Magee, and the decree in her favor conclusively establishes that as the truth against all the parties in or represented in that suit. Nor were the persons who purchased under that decree bound to inquire whether it was one proper to be made, provided it was within the issues presented by the bill, and of that there can be no question. In our judgment, the title of the complainants is not open to dispute, and the decree below should be affirmed.

INHABITANTS OF TOWNSHIP OF BLOOMFIELD v. MAYOR, ETC., OF BOROUGH OF GLEN RIDGE.

(Court of Errors and Appeals of New Jersey. March 4, 1897.)

BOROUGH—DIVISION OF TERRITORY—PROPERTY RIGHTS—TRESPASS ON PUBLIC WORKS.

1. When a municipal corporation is divided, the old corporation retains title to all its property, unless provision is made to the contrary by the act authorizing the division.

2. Where the new corporation attempts to interfere by ordinance with such property, the appropriate remedy is by certiorari to set aside the ordinance.

3. Trespases of an ordinary character upon public works are to be redressed by an action at law in the usual manner.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill by the inhabitants of the township of Bloomfield against the mayor and common council of the borough of Glen Ridge. From a decree dismissing the bill (33 Atl. 925), complainants appeal. Affirmed.

Colle & Swayze, for appellants. Coult & Howell, for respondent.

VAN SYCKEL, J. The township of Bloomfield, in connection with the city of Orange, constructed a system of sewers, by which the territory of Bloomfield was sew-

ered. Afterwards, on the 12th of February, 1895, the borough of Glen Ridge was formed out of part of the township of Bloomfield. Prior to that date Bloomfield had constructed lateral sewers in what is now the territory of Glen Ridge, at an expense of over \$30,000. On the 20th of May, 1895, the common council of said borough of Glen Ridge passed an ordinance entitled "An ordinance to establish rules and regulations for the management and use of the public sewers, drains and appurtenances and connections therewith," by which it is ordained that the sewer committee of the said council shall have charge of all public sewers and drains within said borough, and that all connections therewith shall be made under the supervision of said committee, and that no connection shall be made without a permit from said committee, and that any person who shall make connection with such sewers contrary to the provisions of said ordinance shall forfeit \$25 for each offense. The inhabitants of Bloomfield filed their bill setting up these facts, and alleging that the borough of Glen Ridge had, by virtue of the aforesaid ordinance, asserted its ownership of so much of said sewer system as lies within the limits of said borough, and threatened to take absolute control and management thereof. The prayer is for an injunction restraining the borough from interfering with the complainants' sewers within the limits of the borough, and from exercising any authority over them. The question which the complainants submit for decision is whether the title to and the right to control the sewers lying within Glen Ridge resides in the township of Bloomfield or has passed to the borough government. There is no legislation providing for a division of property between the two local governments. The borough act of 1878 gives no power over sewers. The first act relating to sewers in boroughs is that of March 23, 1892 (P. L. 1892, p. 196), which gives power to purchase sewers from private individuals or corporations owning them. The act of April 7, 1892, applies only to boroughs having authority by their charters to adopt a general plan of sewage, and does not apply to Glen Ridge. The act of March 14, 1893 (P. L. 1893, p. 271), does not apply to existing sewers, but simply provides for the construction of sewers. The act of March 27, 1893 (P. L. 1893, p. 460), is of like purport. There is no other pertinent legislation in this respect. The acts of 1895 and 1896 do not divest the title of the old corporation, or transfer the title to its property to the detached territory. They provide a way in which property may be divided between certain local governments, but, so far as appears, no action has been taken in this case under these laws, and it is questionable whether they apply to Glen Ridge. The township of Bloomfield constructed the sewers, and issued bonds to an amount exceed-

ing \$53,000 for the money expended upon them. Those bonds are still outstanding, and the township as now existing is alone responsible for them. *Dill. Mun. Corp.* § 128. That the sewers thereby became the property of the township will not be denied. Do they continue to belong to Bloomfield, or have they passed to that part of the territory severed from it, and now forming part of Glen Ridge? The cases relied upon to support the title of Glen Ridge are the following: *Hartford Bridge Co. v. East Hartford*, 16 Conn. 171; *School Dist. v. Tapley*, 1 Allen, 48; *Laramie Co. v. Albany Co.*, 92 U. S. 315; *Mt. Pleasant v. Beckwith*, 100 U. S. 525; *Town of North Hempstead v. Town of Hempstead*, 2 Wend. 109. The case in 16 Conn. does not hold that the title to lands and buildings will pass to the territory in which they lie. The court said that when territory of a municipal corporation is divided, and a new one erected, the old corporation retains all the property, rights, and privileges formerly belonging to it, at least so far as regards property which has no fixed location. The case in 1 Allen, 48, presents this situation: A town formed new school districts within its new territory by abolishing the old ones, and it was held that the legal title to the existing school-houses rested in the new districts within whose territory they were. The town had power to change the districts at will, all the districts being within its own limits; and it was a matter of internal concern only, and did not affect another municipality. Judge Hoar based his opinion upon the fact that the old districts were wiped out, and said it was unnecessary to determine what the rule would be where there was only an alteration of the limits of the old district. *Laramie Co. v. Albany Co.*, 92 U. S. 315, involved only the question of the liability of the old corporation for all its debts contracted prior to the severance. 100 U. S. 525, is a case where the old corporation was legislated out of existence, and all its territory annexed to other corporations. The property of the extinct corporation, as well as the liability for its debts, passed to the corporation which had absorbed it. There was no other place in which the title could reside. The case in 2 Wend. 109, was where a town had been divided into two distinct and separate municipalities, and the old corporation no longer existed. It must have been the legislative intent that each division should succeed to the title to the property within it. In my judgment, the weight of authority is decidedly on the side of the township of Bloomfield. In *Inhabitants of Windham v. Inhabitants of Portland*, 4 Mass. 384, in discussing this question, Chief Justice Parsons said: "If a part of the territory and inhabitants of a public corporation are separated from it by the erection of a new corporation, the former corporation still retains all its property, powers, rights, and privileges, and

remains subject to all its obligations and duties, unless some new provision be made by the act authorizing the separation." *Inhabitants of Windham v. Inhabitants of Portland* was approved in *Hampshire v. Franklin*, 16 Mass. 76, where Chief Justice Parker declared that the rule as stated in the former case was correct, unless some express provision to the contrary be made by the act authorizing separation. It was not suggested in these cases that it would make any difference in the rule where the property was situated in the detached territory. In *Union Baptist Society v. Town of Candia*, 2 N. H. 20, it appeared that Candia was formed from Chester, and that the land in question was in Candia; yet it was held that the title to it remained in Chester. *South Hampton v. Fowler*, 52 N. H. 225; *Board of Health v. City of East Saginaw*, 45 Mich. 257, 7 N. W. 808; and *City of Winona v. School Dist. No. 82*, 40 Minn. 13, 41 N. W. 539,—support the proposition that the old municipality retains title to all its property, including that which, upon the change of boundaries, happens to fall within the limits of the other corporation. The cases in Wisconsin are to the same effect. *Town of Milwaukee v. City of Milwaukee*, 12 Wis. 93; *Town of Depere v. Town of Bellevue*, 31 Wis. 120. These cases rest upon sound principle, as it is difficult to perceive how the title to property passes from the old to the new corporation by the mere fact that it falls within the limits of the latter. Glen Ridge acquired by its incorporation mere municipal control over the territory within it. The legislation under which it acquired such municipal control contains no provision bestowing upon it title to lands or property of any kind. It has simply a capacity to acquire property for its public purposes. The argument advanced that the new corporation will take the property within it because the old corporation cannot use the property outside its limits for the purposes for which it was designed, will not apply to this case. This sewer system is an entirety, and cannot be advantageously controlled and devoted to its intended uses unless it is under one management. If a new municipality should be carved out of part of the territory of the city of Newark, the right of such new municipality to exercise an independent control over such sewers and water mains as were within its limits could not be recognized without impairing the safety of the entire system. Public policy is manifestly against the admission of such dual control. The difficulty of suggesting a way in which a public corporation could be divested of its title except by making a grant, or by legislative enactment, presented itself to our supreme court in *Dummer v. Board*, 20 N. J. Law, 86. We therefore conclude, both upon reason and authority, that the title to these sewers remained unchanged by the creation of the borough, and that the right to control and

regulate and maintain them is vested exclusively in the township of Bloomfield. The right of the residents of Glen Ridge to use the sewers under reasonable regulations to be established by the township of Bloomfield, and without unjust discrimination against them, is a question not involved in this controversy; nor is it intended to deny the right of Glen Ridge to control and regulate the highways within its territorial limits within which these sewers are laid.

We deem it to be the duty of this court to express its view of this question, as the facts are undisputed, and as it is of the utmost importance to both parties to the controversy that the title to this property, held for public purposes, shall be no longer in doubt, although the question as to the right to maintain this bill in equity must be decided upon another ground, which does not involve the question of title. The foundation upon which the complainants' right to relief rests is that the borough of Glen Ridge has by an ordinance asserted its right to control and regulate the sewers lying within its own territorial limits, and granted some permits to make connections with them. The principle is well settled that, where the rights of individuals or public corporations are invaded by the acts of persons exercising municipal powers in an illegal manner, the parties aggrieved must seek redress by certiorari. *Tucker v. Freeholders of Burlington*, 1 N. J. Eq. 283; *City of Camden v. Mulford*, 28 N. J. Law, 49; *Gregory v. Mayor*, 34 N. J. Law, 390; *Staates v. Inhabitants of Washington*, 44 N. J. Law, 605; *South Orange v. Whittingham*, 58 N. J. Law, 657, 35 Atl. 407; *Hunt v. Common Council*, 46 N. J. Law, 59. That the legality of these ordinances can be reviewed, and the proceedings under them arrested by certiorari, cannot be successfully controverted. The existence of an adequate remedy at law excludes the right to invoke the aid of a court of equity. Certiorari is the appropriate proceeding to test the validity of municipal ordinances, and, so far as appears, it will be an adequate remedy in this case. It is not to be presumed that the public officers to whom such writ is addressed will attempt to take any action in virtue of such ordinances pending the litigation. It is not intended to deny that an appeal to the injunction power of equity may be appropriate where the illegal interference with a sewer system is persistent and continued, and of such a character as to prevent its beneficial use by the corporation entitled to control it. In a matter vitally concerning the public health and safety, such an injury would be considered irreparable. Trespasses of an ordinary kind upon public works can be redressed by an action at law as readily as trespasses upon private property.

It is suggested that the equity jurisdiction should be retained, even though the appropriate remedy would have been by suit at

law, because the facts are undisputed, and the rights of the parties could now be determined and finally adjudged without requiring the complainants to resort to further litigation. There is a discretionary power to retain the suit, and finally adjudicate upon the rights of the parties; but it has been exercised in rare cases, and under peculiar circumstances. *Palys v. Jewett*, 32 N. J. Eq. 802, and *Higgins v. Water Co.*, 36 N. J. Eq. 538, are instances. The case now considered is before us on demurrer to the complainants' bill, and has no feature which distinguishes it from any other case in which the party defendant challenges the jurisdiction of the court of equity. For the reason that there is an appropriate and adequate remedy at law, the decree below dismissing the complainants' bill should be affirmed.

CASE v. CENTRAL R. CO. OF NEW JERSEY.

(Court of Errors and Appeals of New Jersey.
March 1, 1897.)

**NONSUIT—FAILURE TO PROVE CAUSE OF ACTION—
CATTLE KILLED ON TRACK.**

1. If the plaintiff fails to prove the cause of action alleged in his declaration, but proves a different cause of action, a nonsuit is not erroneous, in the absence of a motion to change the narr.

2. If horses break out of their owner's pasture lot and stray upon a railroad track, without fault on the part of the railroad company, and there are killed through the negligence of the company's servants, the negligence of the owner in permitting the horses to stray will bar him from recovering damages, for their loss.

(Syllabus by the Court.)

Error to supreme court.

Action by Abram S. Case against the Central Railroad Company of New Jersey. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Mr. Kuhl, for plaintiff in error. Mr. Large, for defendant in error.

DIXON, J. The declaration in this case charged that "the defendant willfully and wantonly drove its locomotive engine and cars" against several horses belonging to the plaintiff, and killed them, and therefore the plaintiff claimed damages from the defendant. Upon the trial the plaintiff proved that the horses had broken through the fence between his pasture lot and the highway, had strayed along the highway to the defendant's railroad, and there, while wandering upon the track, several hundred feet from the highway crossing, had been killed. At the close of the plaintiff's evidence, the trial justice ordered that a nonsuit be entered, and upon this judgment error is assigned. In more than one aspect of the case, this judgment can be justified:

1. The testimony did not present the slightest indication that the defendant or its servants had willfully or wantonly driven the

engine against the horses; nor does the plaintiff now contend that any fault, beyond a lack of ordinary care on the part of the engine driver, was shown. Manifestly such proof did not establish the alleged cause of action, and, in the absence of an application to change the narr., a nonsuit was not erroneous.

2. But, if the declaration had charged that the horses were killed through the defendant's negligence, still the nonsuit would have been proper. The horses were trespassing upon the defendant's track, without any shadow of right, and the plaintiff did not attempt to prove that for this trespass the defendant was in fault, under either the common law or any statute. The authorities are not entirely agreed whether, in such circumstances, the defendant owed to the plaintiff the duty of exercising ordinary care with respect to the horses, or only the duty of abstaining from willful injury. But if it be conceded that, *prima facie*, the defendant owed the larger duty of ordinary care, yet, as it appears that the animals came upon the track through the fault of the plaintiff, his claim against the defendant was legally defeated by his own contributory negligence. For, "according to the principles of the common law, * * * every man, at his peril, is bound to keep his cattle on his own close, and prevent them from going on to that of his neighbor." *Coxe v. Robbins*, 9 N. J. Law, 384; *Chambers v. Matthews*, 18 N. J. Law 368. It was a natural and proximate consequence of the plaintiff's failure to discharge this duty that the horses should stray into the highway, and thence upon the track, and there meet with injury from passing trains. Such a fault precluded recovery, even though the negligence of the defendant's servants helped to cause the accident. *Vandegrift v. Rediker*, 22 N. J. Law, 185; *Price v. Transportation Co.*, 31 N. J. Law, 229.

3. But lastly the existence of negligence on the part of the defendant's servants was negated by the testimony. The plaintiff called the engineer as a witness, and he swore that when the animals were discovered upon the track the alarm whistle was sounded, the engine was reversed, the Westinghouse brake was applied, and the train was stopped as soon as possible. Against this there was no contradictory evidence. The judgment of nonsuit should be affirmed.

CONSOLIDATED TRACTION CO. v. GLYNN.

(Court of Errors and Appeals of New Jersey.
March 10, 1897.)

STREET RAILWAYS—NEGLIGENCE—PROVINCE OF JURY.

1. Under the state of facts testified to on the part of the plaintiff, it was a question of fact, for the jury, whether the plaintiff, in the exercise of reasonable prudence and caution, should

have apprehended that the electric car was approaching him at so high a rate of speed that it would reach him before he could pass over the tracks, and to determine whether a prudent man, with the right to presume that the company would exercise due care on its part, would have proceeded to cross the street under the circumstances presented by the evidence.

2. It was the duty of the motorman to keep his car so far under control that he could have averted the impending danger, if the plaintiff was in the exercise of due care for his own safety when he went upon the track.

3. It was likewise a question for the jury whether the motorman lost control of his car by reason of the dangerous rate of speed at which he was running.

(Syllabus by the Court.)

Error to circuit court, Essex county.

Action by John Glynn against the Consolidated Traction Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Depue & Parker, for plaintiff in error.
Saml. Kalisch, for defendant in error.

VAN SYCKEL, J. Error is assigned upon the refusal of the trial court to nonsuit the plaintiff below, who is the defendant in error. He was run over by an electric car in April, 1894, while crossing Market street at Frederick street, in the city of Newark, on foot. The evidence on the part of the defendant company was that the motorman saw the plaintiff leave the curbstone, and supposed from the conduct of the plaintiff that he intended to get on the car, and that, when the car was within five or six feet of him, he stepped in front of it and was run down. If these had been the admitted facts, the motion to nonsuit should have prevailed; but the testimony on the part of the plaintiff was that he saw the car at Fillmore street, a distance of more than 300 feet from where he was struck; that he waited two or three seconds, and then proceeded to cross the street without looking again for the approaching car, and was struck before he succeeded in crossing the tracks. It must be assumed that the jury found the facts to be as testified to on the part of the plaintiff, and the case must be passed upon in that aspect.

It has been repeatedly declared in this court that the company must run its cars with such care, and at such a rate of speed, that other persons, either on foot or in vehicles, may use the street in safety, provided they exercise reasonable care for their own protection. The company had no right to propel its cars at such a rate of speed as was incompatible with the safe and customary use of the street by others who have equal rights with the company upon it. It was therefore a question of fact for the jury to settle whether the plaintiff, in the exercise of reasonable prudence and caution, should have apprehended that the car was coming at so high a rate of speed that it would reach him before he cleared the tracks, and to determine whether a prudent man, with the right to presume that the company would exercise due care on its part,

would have proceeded to cross the street under the circumstances presented on behalf of the plaintiff. Contributory negligence cannot, as a matter of law, be predicated on the evidence for the plaintiff. It was the duty of the motorman to keep his car so far under control that he could have averted the impending danger, if the plaintiff was in the exercise of due care for his own safety when he went upon the track. It was likewise a question for the jury whether the motorman lost control of his car by reason of the dangerous rate of speed at which he was running; and if the jury found that he did not make proper effort to prevent the collision, or that the inability to stop the car was due to its excessive and unlawful rate of speed, that constituted actionable negligence on the part of the company. The nonsuit was properly refused, and the evidence submitted to the jury with proper instructions. There was no error in the proceedings of the trial court, and the judgment of the supreme court affirming the judgment of the trial court should be affirmed.

STATE ex rel. KENNY v. HUDSPETH.

(Court of Errors and Appeals of New Jersey.
March 1, 1897.)

WRIT OF ERROR—WHEN LIES—CONSTITUTIONAL LAW—REDUCTION OF JUDGES.

1. If final judgment be rendered on a demurrer to an alternative writ of mandamus, a writ of error will lie.

2. Under the constitution of this state, as construed in the light of the uniform and long-continued practice of all the departments of the government, the legislature has power to reduce the number of the judges of the court of common pleas whenever, in its opinion, the public good requires.

(Syllabus by the Court.)

Error to supreme court.

Mandamus by the state, on the relation of John Kenny, against Robert S. Hudspeth. Judgment for defendant, and relator brings error. Affirmed.

Chauncey H. Beasley and Allan McDermott, for plaintiff in error. Foster M. Voorhees and Frank Bergen, for defendant in error.

DIXON, J. The mandamus contained in this record is a peremptory writ, in form, but it was treated in the supreme court and on argument here as an alternative writ, and therefore will be now so regarded. The defendant filed a demurrer to it, and, the relator having joined in the demurrer, the supreme court gave final judgment for the defendant.

The first question to be considered is whether, upon such a judgment, error will lie. At the common law a peremptory writ of mandamus was always awarded or denied on the return to the alternative writ. If the return was, on its face, insufficient, it was quashed, and a peremptory writ was awarded. If the return was, on its face, sufficient, a peremptory writ was denied, unless the relator, by a

separate action against the defendant to recover damages for making a false return, obtained a final judgment that the return was false, and so vindicated his right to a peremptory writ. On an award of the writ in such proceedings error would not lie. *Rex v. Dean and Chapter of Dublin*, 1 Strange, 536; s. c., on error, 1 Brown, Parl. Cas. 73. The reasons for this rule, which are given only in the king's bench report, were partly technical and partly substantial,—technical, in that the proceedings contained no formal judgment ("ideo consideratum est"); substantial, in that the right was not there adjudicated, but either was confessed by the defendant in his return, or had been established in the action for a false return. The same rule holds in New Jersey, where the common-law procedure is followed. *Layton v. State*, 28 N. J. Law, 575; *American Transp. & Nav. Co. v. New York, S. & W. R. Co.* (N. J. Err. & App.) 35 Atl. 1118. So, also, did it in New York. *People v. Brooklyn*, 13 Wend. 130. But the statute of 9 Anne, c. 20, did away with the reasons for this rule in the cases which it covered, by providing that the relator might plead to or traverse the material facts contained in the return, and that the person making the return should reply, take issue, or demur, and thereupon such further proceedings should be had as if the relator had brought his action for a false return, and the relator might have judgment for damages and costs, or the defendant might have judgment for costs. Under this statute there was a real determination of the rights of parties, and a formal judgment for the successful litigant; and accordingly Blackstone says that in cases within the statute the proceedings are in the nature of an action, and a writ of error may be had thereupon. 1 Bl. Comm. 265. To the same purport is the editor's headnote in 1 Brown, Parl. Cas. 73. So, also, Little-dale, J., in 3 Barn. & Adol. 281. On December 2, 1794, a statute was passed in New Jersey extending to all cases the procedure prescribed in 9 Anne, c. 20 (Gen. St. p. 2000). A like statute was also passed in New York. Under these laws a somewhat different practice obtained in this country from that pursued in England. There the words of the act were very closely adhered to, and as they do not in terms authorize a demurrer to the return or to the alternative writ, the practice was to challenge their sufficiency in law, not by a formal demurrer, but on a concilium, which was in the nature of a demurrer. *Rex v. Pier Co.*, 3 Barn. & Adol. 220; *Rex v. Mayor, etc., of London*, 3 Barn. & Adol. 255, 279; *Rex v. Oundle*, 1 Adol. & E. 283; *Reg. v. Churchwardens, etc., of St. Saviour*, 7 Adol. & E. 925; *Reg. v. Ledgard*, 1 Q. B. 616. Whether the determination of the court on such an argument was reviewable by writ of error seems doubtful, the negative apparently being assumed in *Rex v. Pier Co.*, 3 Barn. & Adol. 220, and in *Rex v. Oundle*, 1 Adol. & E. 283, and the affirmative in *Reg. v. Churchwardens, etc., of St. Saviour*, 7 Adol. & E.

936, and in *Reg. v. Kendall*, 1 Q. B. 366. Afterwards the statute 6 & 7 Vict. c. 67, authorized a demurrer to the return, and expressly gave a writ of error in any case within the acts. But in New York and New Jersey the practice of demurring to the return always prevailed. *People v. Champion*, 16 Johns. 60; *Ex parte Jennings*, 6 Cow. 518, 536; *Silverthorne v. Railroad Co.*, 33 N. J. Law, 173, 372; *State v. Assessors of City of Rahway*, 43 N. J. Law, 338, 348; *Gallagher v. Board*, 45 N. J. Law, 465. And in both states the practice was commended as one enabling either party to review the judgment by writ of error. *Per Spencer, J.*, in 16 Johns. 65 (A. D. 1819), and *per Beasley, C. J.*, in 33 N. J. Law, 178 (A. D. 1868). See, also, *Commercial Bank of Albany v. Canal Com'rs*, 10 Wend. 25. From all these authorities it appears to be beyond doubt that when the proceedings for mandamus take the form of pleadings in personal actions, so that the rights of the parties are presented for determination therein, and a final judgment is rendered, a writ of error lies, according to the principles of the common law. The statute of March 17, 1870 (2 Gen. St. p. 2001), expressly sanctioning such writs of error, was merely declaratory of an existing right. A still wider departure from the letter of the statute of 1794 has taken place in this state, viz. the practice of demurring to the alternative writ itself. *Fairbank v. Sheridan*, 43 N. J. Law, 82; *Rader v. Union Tp.*, Id. 518; *Hopper v. Freeholders*, 52 N. J. Law, 313, 19 Atl. 383; *Wilbur v. Railway Co.*, 57 N. J. Law, 212, 31 Atl. 238. This practice is justified on the ground that it tends to simplicity, without in the least jeopardizing any right, and is in harmony with the modern idea, which likens the application for a mandamus to a personal action, and the alternative writ to a declaration therein. As a demurrer to the return opens for examination the contents of the writ itself (*Town of Belvidere v. Warren R. Co.*, 34 N. J. Law, 193, 195), and final judgment thereon is subject to review by writ of error, there is no reason why the same matter may not be considered on a demurrer directly aimed at the writ, or why the judgment on that matter so determined should not be similarly reviewed.

For these reasons we think the present writ of error should be sustained. Consequently, we come to the merits of the question decided below, which is whether the relator was entitled to exercise the functions of a judge of the court of common pleas in the county of Hudson. This question turns upon the validity of the act of March 28, 1896 (Pamph. Laws 1896, p. 149), which enacted that after March 31, 1896, there should be but one judge of that court in each county; that he should be the president law judge then in office, and his successors; and that the terms of office of all other judges of said court should end on March 31, 1896. The relator contends that under the consti-

tution of this state the legislature has no power to reduce the number of judges in this court, and therefore the act is invalid. The pertinent provisions, as found in the constitution of 1844, are these:

"Art. 6, § 1. The judicial power shall be vested in a court of errors and appeals in the last resort in all causes, as heretofore; a court for the trial of impeachments; a court of chancery; a prerogative court; a supreme court; circuit courts; and such inferior courts as now exist, and as may be hereafter ordained and established by law; which inferior courts the legislature may alter or abolish, as the public good shall require."

"Art. 6, § 6. (1) There shall be no more than five judges of the inferior court of common pleas in each of the counties in this state, after the terms of the judges of said court now in office shall terminate. One judge for each county shall be appointed every year, and no more, except to fill vacancies, which shall be for the unexpired term only. (2) The commissions for the first appointments of judges of said court shall bear date and take effect on the first day of April next; and all subsequent commissions for judges of said courts shall bear date and take effect on the first day of April in every successive year, except commissions to fill vacancies, which shall bear date and take effect when issued."

"Art. 7, § 2, subsec. 2. Judges of the courts of common pleas shall be appointed by the senate and general assembly in joint meeting. They shall hold their offices for five years; but when appointed to fill vacancies, they shall hold for the unexpired term only."

Article 6, § 6, and article 7, § 2, taken together, seem to indicate that the number of judges in this court for each county was fixed at five. This is the natural purport of the provisions that one judge, and no more, for each county, shall be appointed every year, that the commissions of judges of this court shall take effect on the 1st day of April in every successive year, and that they shall hold their offices for five years. While the first clause of article 6, § 6, that there shall be no more than five judges in each county, may be thought to contain an implication that there might lawfully be less, yet this implication is hardly clear enough to counteract the express provisions before mentioned. The language of that clause is readily accounted for by the fact that the number had previously been large and indefinite. But article 6, § 1, expressly authorizes the legislature to alter or abolish this court, and, of course, due effect must be given to these words. Indisputably, the abolition of the court must end the functions of the judges; and, if the legislature should exert its power to abolish the court, there could not remain five, or any, persons authorized to act as judges thereof. But the alteration of the court need involve no such consequence.

The power to alter the court could have reasonable scope without including the power to change the number of judges. If, therefore, this were *res integra*, my interpretation of the constitution would be that, so long as the legislature left the court of common pleas in existence, its judges must be five in each county, one appointed every year and holding his office for the term of five years, except when appointments were made to fill vacancies, but that the legislature could at any time abolish the court, and thereby end the functions and terms of the judges. This, I think, would accord due force to every word of the organic law on this subject. But the matter is not *res integra*. On February 9, 1855, the legislature passed an act to reduce the number of judges in the court of common pleas to three, and empowering justices of the supreme court to sit as judges in the lower court. This act was approved by the governor. It contravened the above interpretation of the constitution, and also the apparent purport of the clause which required judges of the common pleas to be appointed by the two houses, in joint meeting, for a term of five years; for justices of the supreme court were appointed by the governor and senate for a term of seven years. Since that statute, many others have been enacted changing the number of judges in this court. See P. L. 1859, p. 421; P. L. 1868, pp. 363, 580; P. L. 1869, pp. 105, 306, 681; P. L. 1871, p. 925; P. L. 1878, pp. 315, 333; P. L. 1880, pp. 240, 397; P. L. 1885, p. 414; P. L. 1889, pp. 492, 495. It is thus seen that for a period of over 40 years, beginning shortly after the adoption of the constitution, the legislature has claimed the power to alter the number of judges, and to determine who shall compose the court of common pleas. Not only have the executive and judicial departments acquiesced in this claim, but whenever the matter has been presented to either of them the claim has received their sanction. Thus, in 1875 an amendment of the constitution transferred the power of appointing the judges to the governor with the consent of the senate, and since that time he has appointed, not one every year, but only so many as the statutes required. Since the passage of the act of February 9, 1855, the justices of the supreme court have sat as members of the common pleas under this legislative authority only, and whenever questions as to the composition of the court of common pleas have been raised the higher courts have always had recourse to the statutes, not to the constitution, for their solution. Thus, every department of the government has, for more than a generation, gathered from the constitution a meaning which confers upon the legislature power to alter the court of common pleas in the respects stated. This uniform construction, begun so soon after the fundamental law was framed, and continued so long, must be regarded as settling the mean-

ing of that instrument in clauses which are of themselves somewhat contradictory. The authorities for resorting to this practical construction in the exposition of the organic law are presented with such fullness by Mr. Justice Depue's opinion in *State v. Wrightson*, 56 N. J. Law, 126, 206, 28 Atl. 56, that they need not be here collated. Other cases may be found cited in 23 Am. & Eng. Enc. Law, 340, and a very recent decision is *Com. v. Reeder* (Pa. Sup.) 33 Atl. 67.

It is further insisted that, even if this long-continued usage controls, yet, as the legislative practice has been to retain the judges in office until their terms ended by lapse of time, the act of 1896 was unwarranted, in its attempt to deprive the judges of their functions before their prescribed terms had expired. But in this position due regard is not given to the force of the usage. Its proper effect is to define the scope of the clause which empowers the legislature to alter the court, so as to make it inclusive of the power to change the number of the judges. If we then ask, when may such an alteration of the court take place? the words of the constitution furnish the answer: The legislature may alter the court "as the public good shall require." Such words, annexed to a legislative power, confer upon the legislature the absolute authority to determine when its exercise shall take effect. If the legislature enacts that the change shall occur at once, the courts cannot adjudge that it shall occur only as pending terms expire. The fact that heretofore the legislature has thought the public good required changes to be made in the number of judges only in consonance with the reasonable expectations of the then incumbents, cannot prevent the legislature from now forming a different opinion as to the present requirements of the public service, nor confer upon the courts any right to supervise the discretion of the legislature. Our conclusion, therefore, is that on and after March 31, 1896, the relator was not entitled to sit as a judge of the court of common pleas of Hudson county, and the judgment of the supreme court should be affirmed.

MAGIE, J. I vote to affirm the judgment in this case upon the grounds stated by Judge Depue in his opinion in the supreme court (36 Atl. 662), with which I entirely concur.

GENZ v. STATE.

(Court of Errors and Appeals of New Jersey.
March 2, 1897.)

HOMICIDE—INSANITY AS A DEFENSE—HARM-
LESS ERROR.

1. Where insanity is set up as a defense to an indictment for murder, unless it appears that the prisoner was not conscious, at the time of the killing, that the act which he was doing

was morally wrong, he is responsible, even if it be shown that he was impelled to its commission by an impulse which he was unable to resist.

2. Where it clearly appears that testimony which was illegally admitted on the trial of a criminal cause could not have injuriously affected the defendant, the admission of such illegal testimony does not constitute a ground for the reversal of the judgment.

(Syllabus by the Court.)

Error to court of oyer and terminer; before Justice Lippincott.

Paul Genz was convicted of murder in the first degree, and brings error. Affirmed.

Gilbert Collins and William S. Stuhr, for plaintiff in error. Charles H. Winfield, for the State.

GUMMERE, J. The plaintiff in error was indicted by the grand jury of the county of Hudson for the crime of murder, in willfully, deliberately, and premeditatedly killing one Clara Arnim, on Tuesday, the 28th day of August, 1894. Being tried upon that indictment, he was found guilty, by the verdict of a jury, of murder of the first degree. The judgment entered upon that verdict and all the proceedings had upon the trial have been removed, by writ of error, into this court, and it becomes our duty, under the supplement of May 9, 1894, to the act regulating proceedings in criminal cases (Gen. St. p. 1154, § 170), to review the whole of such proceedings, in order that we may be satisfied that the plaintiff in error has not suffered manifest wrong or injury, either by the rejection of testimony, or in the charge made to the jury, or in the denial of any matter by the trial court which was a matter of discretion, or upon the evidence adduced upon the trial.

It was admitted at the trial that Clara Arnim, who was the mistress of the plaintiff in error, came to her death at his hands. His defense was that he was insane at the time when he committed the act, and the principal injury which it is alleged on his behalf that he suffered at the trial was the failure of the court to correctly charge the jury on the subject of insanity as a defense. The instruction of the court to the jury on this point was as follows, viz.: "That the defense of insanity is that the mind of the prisoner was so impaired and diseased that, at the time of the commission of the act of killing, he was not capable of distinguishing the nature and quality of the act done by him; that he was then incapable, by reason of mental disease or impairment of his mind, to conceive the intent to kill the deceased; that at that time he was incapable of distinguishing between right and wrong with respect to that act; that, if he was in this state of mind, in the eye of the law, he was insane; that the burden of proof in making out the defense of insanity rests upon the prisoner; that he is presumed to be sane; and that, when he sets up the defense of in-

sanity, he must make out such defense by sufficient proof,—such proof as would satisfy the jury that he was mentally incapable of understanding the nature and quality of his act, or incapable of understanding whether his act of killing was right or wrong; that if the jury should find the prisoner was, by reason of any disease of the mind, at the time of the commission of the act of killing, incapable of distinguishing between right and wrong in the doing of the act, it would be their duty to acquit him of any degree of murder." It is insisted on behalf of the plaintiff in error that this instruction was not a correct exposition of the law of insanity as a defense in criminal cases, and that the court should have charged the jury that if they believed from the evidence that the prisoner was mentally diseased, and, being in that condition of mind, was forced by an irresistible impulse to take the life of the deceased, it was their duty to acquit him. Whether or not the true test of responsibility for criminal acts, in cases of alleged insanity, is the ability to distinguish right from wrong, has never been considered or determined in this court; but, ever since the charge of the court to the jury in the case of *State v. Spencer*, 21 N. J. Law, 196, it has been accepted as the law of this state that if the accused, at the time of committing the act, was capable of distinguishing between right and wrong, and was conscious that the act was one which he ought not to have done, he cannot be excused on the ground of insanity. Since the promulgation of that decision, more than 50 years ago, the test of responsibility in cases of alleged insanity there laid down has always been adopted by the criminal courts of our state in instructing juries upon this branch of the law. A rule so important, and which has been accepted so long and so universally, ought not now to be changed by judicial decision. As was said by Chief Justice Beasley in the case of *Graves v. State*, 45 N. J. Law, 208, in commenting upon an attack made upon another rule laid down in the *Spencer Case*: "If such a rule, after so conspicuous and protracted an existence, is to be pushed aside, or even is to be considered as liable to challenge on theoretic grounds, it is difficult to divine upon what stable basis the administration of the law is to be conducted. Very many of the legal regulations which belong to the trial of causes, criminal and civil, are the creatures of custom and usage, and if such regulations, after having been unquestioned and enforced for half a century, are to be deemed, with respect to their legality, subject to assault, the utmost uncertainty and confusion would be introduced." The test of criminal responsibility in cases of alleged insanity, as stated by the trial court in its charge to the jury, was in accordance with the settled law of the state, and consequently the plaintiff in error suffered no injury therefrom.

But, even if it had been the policy of our law to relieve insane persons from responsibility for criminal acts, the doing of which they knew to be wrong, provided they were impelled by irresistible impulse to do them, it is not perceived how such a principle would have had any relevancy in the case before us. A patient examination of the whole testimony has failed to disclose the existence of a single fact which affords any ground for concluding that the killing of Clara Arnim by the plaintiff in error was the result of an irresistible impulse on his part. And not only is this so, but the plaintiff in error himself, by his testimony given on the witness stand, negatives any such idea. It appears that, on the morning of the homicide, he bought the revolver with which he shot to death the woman who had been his mistress; that, after purchasing the revolver, he went to a flower store, and purchased a bouquet of flowers, which, the florist understood from him, was to be used at a funeral; that he then went to a barber shop to be shaved; and that, as he sat in the chair, he told the barber to hurry up, because he (the plaintiff in error) had only eight minutes to live, that he only had until 2 o'clock to live, and that he intended to kill himself at that hour; that, after being shaved, he went to the house where his mistress resided, but that, before entering it, he stopped in an adjoining saloon, and took a glass of ginger ale; and that, as he left the saloon, he bade the proprietor farewell, saying, "Good-bye, you will never see me again. Don't condemn me too hard." Within five minutes after leaving the saloon, he had fired the shots which took the life of his mistress; and she was shortly afterwards found lying dead upon the floor, holding in her hand the flowers which he had bought, and with his arms clasped around her. The story told by him on the witness stand was that he did not know, and could not explain, why he had purchased the revolver, although he remembered that he had done so; that, although he recollected being in the flower store, he did not know what was in his mind when he bought the bouquet; that he remembered slightly his being in the barber shop, but that he had no recollection of going to the house of his mistress, or of shooting her; that his first recollection of being in her house, or of seeing her, was when she was lying bleeding and dead upon the floor of her room; that he knows that he must have shot her, but that he did not remember anything whatever about it. It needs no discussion of these facts to show that there is nothing whatever in them to justify the inference that the killing of Clara Arnim by the plaintiff in error was the result of an irresistible impulse on his part, or even to suggest the idea that such was the case. The conclusion that these facts tend to show the existence of an uncontrollable impulse can only be supported by holding that an uncontrollable and an irresistible impulse are one and the same thing.

That the prisoner had thought of taking his mistress' life prior to the day on which the homicide occurred, and resisted the impulse to do so, is evident from his own testimony. He says that, on the Sunday evening preceding her death, he had a conversation with her, in which she said to him, "Paul, you look so strange. What is the matter with you?" and that he replied to her, "Clara, I have got to take my whole will power together, that I don't take you by the throat, and strangle you." He further says that, while he was talking with her on this occasion, he made up his mind to commit suicide on the Thursday then following. We are told, on his behalf, that this conversation affords some evidence of the fact that the homicide was the result of an irresistible impulse, but I am unable to see that it has any such effect. Instead of showing the existence of an impulse which could not be controlled, it proves that the impulse which existed in his mind to take her life was one which he was not only capable of resisting, but was one which he actually did resist, on the occasion concerning which he testified.

A careful reading of these proceedings has led me to the conclusion that when the plaintiff in error purchased the revolver with which he shot Clara Arnim, and the flowers which were found in her hand after her death, he had made up his mind to first shoot her, and then himself. He carried out this plan so far as the taking of her life was concerned, but abandoned it when it came to the taking of his own life, although no change seems to have occurred in the circumstances which caused him to determine to kill her and himself. That such a thing as an irresistible impulse to take life sometimes exists in the human mind, I am willing to concede. I do not, however, believe in the uncontrollability of an impulse to kill, which remains irresistible so long as the weapon is directed against another, but ceases to be so when the slayer turns it against himself.

It is further alleged by counsel for the plaintiff in error that the trial court erred in refusing certain requests to charge, and thereby manifestly injured the prisoner. The jury had been instructed by the court that, in a case of murder, the presumption was that it was of the second degree, until the state should establish by affirmative proof that the killing was wilful, deliberate, and premeditated; and the court was then requested to charge that there was no such proof in this case, unless effect was given to certain statements made by the prisoner after the killing, and that, if those statements were made by an insane man, they should have no effect. This request was refused, and, in our opinion, properly so. An examination of the case makes it clear that there was testimony, outside of the statements made by the prisoner after the homicide, which would have been sufficient to sustain a verdict of murder of the first degree, if the jury had so found.

Another alleged injurious error to which we are pointed by counsel is the admission of certain evidence, against objection, which is said to have been incompetent. The situation was this: The state had proved that the prisoner and the deceased had been for some time living together as man and wife, and proposed to show that, a few weeks before the homicide, the deceased became engaged to be married to one Bernard Stensel, who thereafter went to Chicago to live. The prosecutor of the pleas then sought to prove that the prisoner, a few days before the shooting, had threatened to kill Stensel if he should meet him, and the court permitted this evidence to be put in against the objection of the prisoner. It seems to me that this testimony was competent, as tending to show the determination of the prisoner to prevent the marriage of his paramour with Stensel, even if it was necessary to destroy life in order to do so, and as further tending to show that, by reason of the fact that Stensel was beyond his reach, he killed her, in order to accomplish that result. But, even if the evidence objected to was incompetent, its admission would not justify this court in reversing the judgment under review. The eighty-ninth section of our criminal procedure act (Gen. St. p. 1138) declares that "no judgment given upon any indictment shall be reversed * * * for any error except such as shall or may have prejudiced the defendant in maintaining his defense upon the merits." In *Hunter v. State*, 40 N. J. Law, 495, it is said by this court that, by force of this statute, the admission of illegal testimony will not avoid a judgment on error if it plainly appears that such testimony could not have injuriously affected the defendant on the merits of the case. That the admission of the testimony now under consideration could not have injuriously affected the plaintiff in error on the merits, even if it was illegal, is beyond question, for he himself, when upon the witness stand, testified upon his direct examination to making the same threat which was sought to be proved against him by the testimony objected to.

The counsel for the plaintiff in error have not called our attention to any other matter which seems to them to have injuriously affected their client on the trial of this indictment, nor has the careful examination which we have made of the record and proceedings sent up with the writ disclosed the existence of any. On the contrary, that examination and the exhaustive consideration which we have given to this case has satisfied us, not only that no injurious error has crept into the trial, but also that the plaintiff in error has not suffered any wrong or injury either "by the rejection of testimony, or in the charge made to the jury, or in the denial of any matter by the trial court which was a matter of discretion, or upon the evidence adduced upon the trial." The judgment, therefore, should be affirmed.

STATE ex rel. HOOS v. O'DONNELL,
City Clerk.

(Supreme Court of New Jersey. March 30, 1897.)

ELECTIONS—CERTIFICATES OF NOMINATION—WHEN
TREATED AS VALID.

Election Act, §§ 205, 206, 209, 223, authorize nominations for public office, prescribe the form of certificate, require the written acceptance of the candidate nominated, and declare that certificates in apparent conformity with the provisions of the act shall be deemed valid; that, if objection is to be raised before the clerk, it must be presented in writing within five days, and notice by him given to the candidate affected. *Held* that, where there is no objection in writing filed, the clerk must treat a certificate of nomination as valid.

Application by the state, on the relation of Edward Hoos, for a peremptory mandamus directing Michael J. O'Donnell, city clerk of Jersey City, to file relator's certificate of nomination for the office of mayor of such city. Writ granted.

Argued February term, 1897, before GAR-
RISON and GUMMERE, JJ.

Allan McDermott and William D. Daly, for
relator. Chandler W. Riker and Spencer
Weart, for defendant.

PER CURIAM. With respect to the duty of the city clerk to receive and file the certificate of nomination we have no difficulty. Section 205 of the election act provides that nominating bodies of a political party may nominate candidates for public office. Section 206 prescribes the form of the certificate, and section 209 requires the written acceptance of the candidate so nominated. Section 223 declares that certificates in apparent conformity with the provisions of this act shall be deemed to be valid. If objection is to be raised before the clerk, it must be presented to him in writing within five days, and notice by him given to the candidate affected. If the candidate make application to the justice of the supreme court holding the circuit of a threatened invasion of his right under such certificate, a summary hearing may be had. The plain interpretation of these provisions is that, the action of the political body in question having been certified in the manner prescribed by the statute, the certificate should have been received and filed by the clerk, leaving both objectors and the candidate to pursue the respective remedies given to each by the statute. Any other interpretation would be intolerable, for it would place it in the power of the clerk, of his own motion, and without even the knowledge of the party affected, to ignore the certificate. Where the supposed invalidity arises, not from any lack of "apparent conformity to the provisions of the act," but from some matter aliunde, as in the present case, the clerk, if he have jurisdiction (for none is expressly given him), must derive it by the strictest conformity to the

statute by which it is claimed to be conferred. Our opinion, therefore, is that, inasmuch as no objection in writing was filed with the clerk in the present instance, his duty to treat the certificate as valid was clear.

Inasmuch as this determination rests upon a mere interpretation of the election law, and does not involve the constitutionality of the statute of 1897, we have thought it right to dispose of it as soon as practicable. A peremptory mandamus should issue, directing the respondent to file the relator's certificate. The application for a mandamus to compel the city clerk to print the ballots for an election cannot be disposed of without passing upon the constitutionality of the statute of 1897, above referred to. The decision of a question of this importance should, in our judgment, be made in a form capable of review by either party. The question will be presented in such form if the facts contained in the stipulation of counsel now before us be treated as the return to an alternative writ to which the relator has demurred. We will hear the parties at the state house on Thursday, April 1st, at 11:30 a. m., on an application to frame pleadings in accordance with this suggestion, unless the parties shall before that time notify us of a stipulation by them to the effect that the issue may be regarded as so presented.

KOHL v. STATE.

(Court of Errors and Appeals of New Jersey.
March 11, 1897.)

HOMICIDE—IMPEACHMENT OF WITNESS—INSTRUCTIONS.

1. It is error to permit the state to introduce evidence of previous statements made by a witness for defendant that deceased, with whose murder defendant was charged, had money on his person, for the purpose of impeaching the witness, when the witness did not testify as to such matter on direct examination, but the testimony sought to be contradicted was new matter elicited on cross-examination.

2. It was error to submit to the jury the question as to whether a deceased had money on his person at the time he was murdered, as bearing on the question of a motive for the crime, when the only evidence of such fact in the case was incompetent.

Error to court of oyer and terminer.

Henry Kohl was convicted of murder, and brings error. Reversed.

For separate opinions, see 36 Atl. 931.

Thomas S. Henry and Chauncey H. Beasley, for plaintiff in error. Elvin W. Crane, for the State.

VAN SYCKEL, J. Henry Kohl was convicted in the Essex county court of oyer and terminer of the murder of Joseph Preinel. The evidence was purely circumstantial. There was a general exception to the charge of the court to the jury, which exception was allowed by the trial court. The motive imputed by the state to the defendant on the trial was that

he murdered Preinel to secure possession of money which it was alleged he had upon his person. In my review of the case, I deem it necessary to call attention to that evidence only which relates to that subject. Martha Block, a witness produced on the part of the state, in her examination in chief testified that she said to the defendant "that it was funny that Preinel's gold watch was taken, and his money, if he committed suicide; and he said it was not a gold watch, it was a silver watch." On cross-examination of this witness the defendant's counsel very properly asked her the following questions: "Q. You spoke about him having money. Did you ever see Preinel with any? A. No. Q. How do you know he had any money? A. Henry's mother told me." And afterwards the witness said that the defendant's mother told her that he had \$400 or \$500. When the defendant's counsel asked the witness how she knew Preinel had money, he had no reason to think that she would give an answer not responsive to the question. The answer was clearly incompetent, and it should have been stricken out if defendant's counsel had requested it to be done. No such motion was made, but the answer showed that the witness had no knowledge whatever that Preinel had any money in his possession or on his person. Her knowledge was mere hearsay, and entitled to no consideration whatever. The next allusion to this subject is in the testimony of George Breuckner, a witness sworn on behalf of the state. The prosecuting attorney asked this witness why he cut the clothes off the murdered man, and, after replying that they were saturated, so that he could not get them off, he was asked: "Q. What was the other reason? A. The other reason was Mrs. Kohl said he had \$800 on his body." The court said: "That is scarcely competent evidence." The defendant's counsel said: "I don't think it is competent, your honor." The court said: "It is not. It may become so during the trial of the case; but, as it is now, it is not competent evidence." After the state had rested its case, Elizabeth Kohl, the mother of the defendant, was sworn as a witness on his behalf. On her examination in chief she was asked this question: "Q. At any time since the time Joe came there, did he show any large sums of money? A. No; never." That was all she testified to in her examination in chief on this subject. On her cross-examination by the prosecuting attorney the following questions and answers appear in the state of the case: "Q. You finally searched the trunk, didn't you? A. Yes; Mr. Breuckner said I should examine the trunk. Q. What did you examine the trunk for? A. Because it was said that the boy had money. Q. Who told you so? A. Plenty of people. Q. Lots of people told you so? A. Yes. Q. Didn't you know that he didn't have any? A. Joe had no money, only what he received from us. Q. A dollar on each Sunday? A. Father gave him a dollar on every Sunday. By the Court:

Do you say that everybody thought he had money? A. Yes; everybody said he had money. He had his property in his pocket." It is manifest that all this cross-examination, including the question by the court, was incompetent and illegal. On her examination in chief the witness was not asked whether Preinel had any money; all she was interrogated about, and all she said, was that he never showed any large sums of money. It was therefore no contradiction of her testimony that other people said he had money. It was the merest hearsay, and of no evidential value whatever against the defendant, but yet so prejudicial to the defendant's case that I cannot conceive why the defendant's counsel did not object to it, and have it overruled, unless he was misled by the question asked by the court, and therefore assumed that, in the opinion of the court, the case was in a situation which made it competent, as the court had said during the examination of Breuckner before referred to, that it might become competent during the trial. All this evidence of Mrs. Kohl as to what people said was hearsay, and could not lawfully have any weight against the defendant; nor was it competent to impeach her in respect to anything she had sworn to on her examination in chief. The only competent testimony given by her in this regard, on her cross-examination, was her statement that Preinel had no money except the small amount he had received from her husband. This was not a cross-examination. It was new matter, about which the witness had not been questioned in chief; and therefore it became the testimony of the state, and the witness to that extent was the witness of the state. The state had no right to impeach her, by showing that she had made statements before she was sworn inconsistent with that testimony. Other witnesses could have been called by the state to show that Preinel had money, but testimony to impeach her in respect to the statement made by her on cross-examination in reference to a matter not alluded to in her direct examination was incompetent.

After the defendant's case was rested, the state called George Breuckner, and asked the following questions: "Q. I asked if she [Mrs. Kohl], upon her first visit to your place, on Sunday morning, did not tell you that she thought this boy was murdered, and that he had \$800 upon him. A. That is what she said on the first visit. Q. Just tell us about that." The court said: "Just tell all the conversation." The witness then stated "that Mrs. Kohl told him that Preinel had \$800 on his body." The entire record is brought into this court by the writ of error, and by the act of May 9, 1894, it is provided that if it appear from such record that the plaintiff in error, on the trial below, suffered manifest wrong or injury, whether by rejection of testimony, or in the charge made to the jury, or in the denial of any matter by such court, which was a matter of discretion,

or upon the evidence adduced upon the trial, the appellate court shall remedy such wrong or injury, and give judgment accordingly, and order a new trial. The evidence of George Breuckner was clearly incompetent. It was inconsistent with nothing which Mrs. Kohl had testified to, so far as she can be regarded as a witness for the defense. The defendant's counsel had objected to this testimony when it was previously offered by the state, and I think under a humane administration of the criminal law, in a case involving the life of the defendant, it should be considered that the objection previously made was still interposed to this evidence, and that the objection would have been repeated if the court had not instructed the witness to tell this story. The evidence was incompetent, and must have been highly injurious to the defendant, and he was thereby manifestly wronged by the evidence so adduced. But, if this view of the case is not taken, in my judgment there is an error in the charge of the court to the jury, whereby the defendant suffered manifest injury. In alluding to the alleged motive of the defendant in killing Preinel, the court charged the jury as follows: "The prosecutor contends that in the evidence a motive appears in this case which induced the prisoner to kill the deceased. On the other hand, the prisoner's counsel earnestly contend that there is a total absence of such motive. I leave the discussion by counsel on that head to your consideration."

Assuming that all the testimony which has been recited was competent, there is not a word in it which justified the jury in finding any motive to commit the crime, or which justified the court in leaving it to the jury to find that Preinel had money on his person. The evidence of Martha Block was admitted to be founded on hearsay only. The testimony of Mrs. Kohl was that Preinel had no money, and the evidence introduced to contradict her by her own cross-examination, and by the testimony of Breuckner, was not substantive evidence to show that Preinel had money. No such inference or conclusion could lawfully be based upon that evidence. That evidence simply rendered less credible her sworn statement that Preinel had no money. Therefore, when the court told the jury that the question of motive was left to their consideration on this evidence, it was an instruction, in substance, that the jury might find that Preinel had a considerable sum of money, and that declarations not under oath, competent only for the purpose of impeaching the sworn testimony of Mrs. Kohl to the contrary, could be accepted by the jury as proof of a most damaging fact against the prisoner. The court should have instructed the jury, as the law unquestionably is, that this evidence offered to contradict Mrs. Kohl had no probative force whatever to establish the fact that Preinel had money, and thereby show

that a motive existed to commit the crime. For the reason that the jury was permitted by the charge of the court to regard this hearsay evidence as proof of a controlling fact in the case, to the manifest injury of the prisoner, and for that reason alone, the judgment, in my opinion, should be reversed, and a new trial granted.

READ et al. v. BENNETT et al.

(Court of Errors and Appeals of New Jersey.
April 2, 1897.)

DISTRIBUTION OF TRUST FUND—PARTIES.

Where a suit is brought to determine the ownership of a fund in the hands of the trustee of an intestate decedent, an administrator of the decedent's estate must first be appointed, and it is error to decree that the fund be paid "to such person as may hereafter be appointed administrator."

Appeal from court of chancery; Bird, Vice Chancellor.

Suit by John Read, administrator, etc., of Wilson Read, against William T. Read, Emma H. Bennett, and others, to determine the ownership of a trust fund, the beneficiary having died. From a decree directing it to be paid "to such person as may hereafter be appointed administrator" of the deceased beneficiary, John Read and William T. Read appeal. Reversed.

Halsted H. Wainwright, for appellants. Robert Allen, Jr., and William Pintard, for respondents.

PER OURLAM. The controversy in this case is over the sum of \$1,647.73 in the hands of William T. Read, one of the appellants, who was trustee of William L. Bennett, an idiot. William L. Bennett, the cestui que trust, died before the commencement of this suit intestate. No administrator has been appointed to administer upon his estate. John Read, administrator with the will annexed of Wilson Read, deceased, makes claim to this fund as part of the assets of the estate of Wilson Read, deceased. John Read, administrator, etc., has also appealed. The decree adjudges that the said trustee pay the balance in his hands, after deducting taxed costs and counsel fees, "to such person as may hereafter be appointed administrator of William L. Bennett, deceased." Both the appellants in the petitions of appeal challenge the form of this decree, and John Read, in his petition of appeal, renews his claim to this fund as administrator of Wilson Read. An administrator of William L. Bennett, deceased, was a necessary party to this litigation while it was pending in the court of chancery. The conflicting claims of other parties to this fund could not be litigated in the absence of a legal representative of the deceased. The decree cannot be sustained. It should be reversed, and the record remitted.

STATE v. LEE.

(Supreme Court of Errors of Connecticut.
April 6, 1897.)

CRIMINAL LAW—APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE—REFUSAL OF CONTINUANCE—EXAMINATION OF JURORS UNDER OATH—ABORTION—EVIDENCE—SUFFICIENCY—PRESUMPTIONS.

1. Pub. Acts 1893, c. 51, entitled "An act concerning new trials of civil actions," which in terms appears to apply only to civil actions, and authorizes the supreme court of errors to grant a new trial on the ground that the verdict is against the evidence, applies to criminal cases.

2. On appeal a new trial will not be granted on the ground that the verdict is against the evidence, where the jury have passed on a mere question of fact, unless the verdict is manifestly against the evidence.

3. A refusal of a continuance to defendant on the ground that counsel did not have time to prepare for trial, will not be disturbed where a plain case of abuse of discretion is not shown.

4. The court on appeal will not interfere with the refusal of the trial court to allow defendant to examine each juror under oath.

5. In a prosecution for abortion the state showed that defendant took a woman, who was then pregnant, to a certain house in D., and there assaulted her, and used the means set forth in the information to procure a miscarriage; that without accused's knowledge she went to a railroad station, where she remained in the toilet room until the arrival of the train for N.; that she rode in the baggage car to N., where she went to an hospital named; and that on the same day she was delivered of a still-born child. *Held*, that the woman could testify that she waited in such toilet room because she was afraid of defendant, who was standing on the station platform; and that she left the station through a window, and entered a baggage car, in which she rode to N.

6. The conductor, after testifying that he saw the woman standing in the toilet room, looking out of the station door, could testify that she backed out of the window feet first, got into the baggage car, and rode to N. in it; that "she was very nervous, excited, and looked awful careworn and haggard"; and that "she looked as if she had been through a great deal."

7. While, under Gen. St. § 1411, which prohibits the use of any means with intent to procure upon a woman an abortion "unless the same be necessary to preserve her life or that of her unborn child," the state must establish the truth of the negative averment, in the absence of any evidence on the question, the presumption that a miscarriage is not necessary to save the life of a pregnant woman or that of her unborn child is sufficient for the purpose.

Appeal from superior court, New Haven county; John M. Thayer, Judge.

J. Edward Lee was convicted of procuring an abortion, and appeals. Affirmed.

Prentice W. Chase, for appellant. William H. Williams, State's Atty., and Alfred N. Wheeler, for the State.

TORRANCE, J. In the court below, the defendant, Lee, was convicted of the statutory crime of procuring an abortion or miscarriage upon the woman named in the information, and by the means therein described. Within six days after judgment, Lee filed in the trial court a written motion for a new trial on the ground that the verdict was against the evidence, which motion the judge overruled.

Thereupon the defendant filed a written motion, in substance, requesting the judge to certify the evidence in said cause to this court for its consideration, to the end that a new trial might be had if this court should be of opinion that the verdict was against the evidence. This motion and request the judge denied, but, that the defendant might not be injured by said rulings, if erroneous, the judge certified said evidence, and made it, with said motions and rulings, a part of the record. The defendant also appeals from the judgment of the court below in this cause for the matters set forth in his reasons of appeal. In this court the state filed a written motion to dismiss the defendant's motion for a new trial for a verdict against evidence for the following reasons in substance: (1) Because the defendant had not appealed from the action of the court below in overruling and denying his request and motion to have the evidence certified to this court. (2) Because, as this is a criminal case, "this court has no jurisdiction or power to entertain or grant a motion of this character, or a new trial in a criminal case, on the ground that the verdict therein is against the evidence in the case." (3) Because it does not appear that the superior court was dissatisfied with the verdict, or was of opinion that it was against the evidence.

This motion presents the question whether the provisions of chapter 51 of the Public Acts of 1893 apply to criminal cases. In support of the view that they do not so apply, it is urged by the state that the act is entitled "An act concerning new trials of civil actions," and that, in terms, it appears to apply only to that class of actions, and not to prosecutions for crime. Ordinarily, the fact that the act appears by its title and its terms to be confined in its operation to civil actions, would be conclusive in favor of the contention of the state, but it is not necessarily so in this case. Under the statute first passed in 1821, and finally embodied in the Revision of 1887 as section 1127, this court has ever since exercised the power to grant new trials for a verdict against evidence in criminal cases in favor of the accused; and yet the statute has always been printed under the head of "Civil Actions," and in terms it appears to apply only to such actions. For a great many years past it has been the general policy of this state to give to a defendant in a criminal proceeding substantially the same remedies by way of new trial or by proceedings in error as are given to parties in civil proceedings. In 1843 this court said that: "In all cases of conviction in criminal prosecutions the accused, by our law, is entitled to relief by new trial in the same manner as in civil actions; and our courts do not, in such cases, as is sometimes done elsewhere, turn the convict round to the clemency of the pardoning power, where the penalty alone is remitted, while, though he may be innocent, the disgrace and degradation remain." *State v. Brown*, 16 Conn. 54, 59. This policy was expressly carried out, prior to the present

statute allowing appeals to this court, by the law allowing the defendant in criminal prosecutions relief for errors of law by way of motion for a new trial, motion in error, or writ of error, as in civil cases (*Rev. St. 1875*, p. 539, § 16); and since the passage of the statute allowing appeals it has been carried out by expressly allowing to defendants in criminal cases a remedy for errors of law by way of appeal or by writ of error as in civil causes. *Gen. St. § 1635*. But the power to grant a new trial in a criminal case, in favor of the defendant, for a verdict manifestly against the evidence, has never been in express terms conferred either upon this court or the superior court. The act of 1762, finally embodied with no substantial change of terms in section 1125 of the General Statutes, gives to the courts named in said section power to grant new trials for the causes therein named; but this relates to civil actions, and has always appeared under the head of "Civil Actions" in our statutes. Notwithstanding this, however, the superior court has for a great many years exercised the power to grant new trials in criminal cases under the authority of this statute. Under this statute it has entertained petitions for a new trial for newly-discovered evidence in numerous criminal cases. *Lester v. State*, 11 Conn. 415; *Andersen v. State*, 43 Conn. 514; *Shields v. State*, 45 Conn. 266; *Hamlin v. State*, 48 Conn. 92. So far as we are aware, however, the superior court has never, under the law embodied in section 1125, attempted to grant a new trial in a criminal case for a verdict against evidence; and whether it now possesses such a power under the decision in *Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226, is a question upon which it is unnecessary to express any opinion. In 1821 power was conferred upon this court, under certain circumstances, to grant new trials for verdicts against evidence. The law conferring this power, with no substantial change of terms, was embodied in the Revision of 1887 as section 1127; and, as before stated, it in terms seems to relate only to civil actions, and has always appeared under that title. It has, however, always been regarded as conferring upon this court power to grant a new trial for a verdict against evidence in criminal cases in favor of the defendant, as well as in civil causes in favor of either party; and this practical construction of the statute has prevailed for many years. As early as 1838 this practice of seeking relief in this court in criminal cases for verdicts against evidence seems to have been firmly established. *State v. Lyon*, 12 Conn. 487. In that case the defendant was convicted of burning a shop, and he moved for a new trial on the ground that the verdict was against the evidence. This court granted a new trial. The right of the defendant in that case to the relief sought is taken for granted by court and counsel, for no question is made about it. In *Andersen v. State*, 43 Conn. 516, *Carpenter, J.*, speaks of the power of this court in both civil and criminal

cases to grant a new trial where the verdict is against the evidence, and seems to ground the exclusive power of this court to do so in both cases upon the law of 1821 as then embodied in the Revision of 1875 (title 19, c. 15, § 3). During the time this statute was in force numerous motions for new trial in criminal cases, made by defendants for verdicts against evidence, have been brought to this court, and considered by it, so that the practice in this respect must be regarded as firmly established. Under section 1127 of the General Statutes, however, as it stood prior to the act of 1893 before referred to, such motions could be brought to this court only under certain restrictions and conditions prescribed in said section, one of which was, among others, that the trial court should be of opinion that the verdict was against the evidence. The act of 1893 in effect repealed section 1127, and provided, among other things, that such motions could be brought to this court without reference to the opinion of the trial court upon the question whether the verdict was against the evidence, and introduced other changes in the method and manner of bringing such motions to this court. *Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226. Although the act of 1893 contains provisions as to the manner of bringing such motions before this court radically different from those contained in the old section 1127, yet we think it should be construed as applying to criminal as well as civil cases, just as the old section was. "The principal mischief which the act of 1893 had in view evidently was that a verdict might be returned which was palpably against the evidence, and yet the trial court take a different view of it, and decline to report the evidence for the consideration of the court" (*Bissell v. Dickerson*, 64 Conn. 70, 29 Atl. 229); and to construe it as taking away the power of this court to consider motions of this kind in criminal cases—a power exercised under the old statute since 1821—simply because of its title or its terms would, we think, under the circumstances, be a harsh and unwarranted construction. We are of opinion that the motion for a new trial for a verdict against evidence in the case at bar is properly before this court.

The next question is whether the verdict in this case is so palpably and manifestly against the evidence as to warrant this court in granting a new trial on this ground. The act of 1893 has made no change in the principles which determine under what conditions a verdict may be set aside as against evidence (*Johnson v. Norton*, 64 Conn. 134, 29 Atl. 242); and those principles have been so recently stated in the case just cited, and in *Brooks' Appeal*, 68 Conn. 294, 36 Atl. 47, that any further reference to them here is entirely unnecessary. After reading the entire evidence carefully, and duly considering the same, we deem it sufficient to say that the verdict is not against the evidence.

The questions next to be considered are those specified in the reasons of appeal, and

these relate to certain rulings of the court below, five in number, and to certain portions of the charge to the jury. The first error assigned is the action of the court in refusing to continue the case to the next criminal term, as requested by counsel for the defendant. This motion to continue was made on October 20th, during the trial of another case before the court below, in which the counsel for the defendant was then engaged, and was based upon the ground that, if the trial of the case at bar were to follow the one then upon trial, the defendant's counsel would not have time to prepare a proper defense. The court refused to continue the case, but directed that it should not be called earlier than the 27th of October. This was a matter largely within the discretion of the trial court, and one in which this court ought not to interfere unless the record shows a very plain and clear case of the abuse of such discretion to the great prejudice of the defendant. The record shows nothing of the sort. For aught that appears, the discretion vested in the trial court was wisely and fairly exercised, and the defendant took no harm from the refusal.

The next assignment relates to the refusal of the court to permit the defendant's attorney to examine each juror under oath. Upon this point the record shows that the attorney for the defendant moved for permission to examine each juror under oath, giving as his reasons therefor the following: "That the case had become so notorious through newspaper publications, and because of the fact that the defendant had been repeatedly tried in said court for charges and crimes of a similar nature, that it would be difficult to find twelve men in the county who had not formed an opinion of the case, or who had not become prejudiced against the accused." "A similar motion by the same counsel had been made in the last preceding case (*State v. Morse*) and had been granted, and the jurors had each been exhaustively examined by counsel, and had been fully instructed by the court as to what matters of opinion, bias, relationship, etc., would disqualify them to sit in any criminal cause. The court was of opinion that a panel of fair jurors to try the defendant's case could be impaneled in the customary way, and overruled the defendant's motion." The attorney for the state then stated to the jurors the name of the case, and the nature of the charges against the accused, and requested that if any of them knew anything of the case, or had formed any opinion as to the guilt or innocence of the accused, or knew any reason why they could not as wholly disinterested and impartial men try the case between the state and the accused fairly, to make it known, so that they might be excused. Counsel for the defendant was then asked if he desired to make a statement to the jury,

and he said that he did not. The court then instructed the jury that if any of them had formed any opinion in regard to the case, one way or the other, either from reading newspapers or hearing about the case, or if related to the parties, or conscious of any reason why they should not sit upon the case, it was their duty to make it known to the court, that they might be excused. "Thereupon two members of the panel informed the court that they had formed opinions in regard to the case; and, it appearing to the court upon inquiry that the opinions formed were of such a character as to disqualify those jurors to sit upon the case, they were excused by the court. The jurors remaining were then called, an opportunity given to the state and the accused for peremptory challenges (neither of whom exhausted his challenges), and from those jurors remaining after such challenges, a panel was chosen by lot, and duly sworn." Under our practice the accused was not entitled, as a matter of strict right, to have the jurors sworn as requested; this being a matter which is left largely to the discretion of the trial court. *State v. Hoyt*, 47 Conn. 518. In the case at bar this discretion appears to have been properly exercised, and the record fails to show how the defendant was in any way harmed by the refusal of which he complains.

The next three reasons of appeal relate to rulings upon evidence, and may be considered together. Upon the trial the state offered evidence to prove, and claimed to have proved, that the defendant, on the 24th day of September, 1896, took the woman named in the information, "who was then six months pregnant with a child begotten by him, to a place called the 'Mansion House,' in Derby, and that there, on the following day, at or about noon, "with the intention to procure an abortion, he assaulted her, and used the means set forth in the information to procure a miscarriage; and that shortly afterwards, without the knowledge of the accused, she left the Mansion House, and went to the railroad station, where she remained in the toilet room until the arrival of the train for New Haven; that she then, with the aid of the conductor of the train, made her exit from the station through a window, entered the baggage car, and rode in the baggage car to New Haven, and there went to Grace Hospital, and that on the same day, at about 5 o'clock in the afternoon, at the hospital, she was delivered of a still-born child, as the result of the defendant's said operation at the Mansion House." The woman was called as a witness for the state, "and described what occurred before and after the arrival of herself and the defendant at the Mansion House, and her going therefrom to the railroad station at Derby, and her awaiting the train there." After this testimony was given, the state's attorney asked this

witness on her direct examination the following question: "Describe your coming to New Haven,—how you came, and what you did." The defendant objected generally to this question, but the court overruled the objection, and the defendant excepted. The witness then stated, in substance, that she waited in the toilet room of the station for half an hour till the train came, because she was afraid of the defendant, who was then standing on the station platform; that she left the railroad station through a window, entered a baggage car, and rode to New Haven in it. The conductor of the train was called as a witness by the state, and, having testified that he saw the woman standing in the toilet room, looking out of the door of the station, was then asked by the state's attorney to describe what was done. The defendant's attorney then said, "I object to what was done." The objection was overruled, and an exception taken. The witness then stated, in substance, that the woman backed out of the window, feet first, got into the baggage car, and rode to New Haven in it. He was then asked about her appearance. Counsel for defendant objected, the objection was overruled, and the defendant excepted. The witness answered as follows: "She was very nervous, excited, and looked awful careworn and haggard. She looked as if she had been through a great deal." None of the occurrences thus testified to were claimed by the state to have been in the presence of the defendant. Under the circumstances disclosed by the record, we think this last objection was very properly overruled. The evidence objected to, whatever may be said as to its weight, which was a matter for the jury, tended to support the claims of the state with reference to what had been done to this woman in the forenoon of that day by the defendant. The state was also, we think, entitled to show that the woman left the Mansion House and went to the hospital in New Haven, and was there on the same day delivered of a still-born child, as the result of the operation performed upon her by the defendant in Derby; and was also entitled in a general way to show by what means she left Derby and reached the hospital. Her manner of entering and leaving the station at Derby was unusual. It tended to show an anxiety on her part to escape observation, and particularly the observation of the defendant. If, in fact, her object was to avoid his eye, and this because she stood in fear of him, the acts in question would serve to confirm the evidence previously introduced of the brutal violence which she had recently suffered at his hands. The superior court did not err in allowing her to testify that such were the reasons why she acted as she did. Her conduct was material only in view of the cause for it, and she knew best what that cause was. The story could not be fairly understood unless

the whole of it were told. Her intent characterized her acts, but was only partly evidenced by them. To make it apparent, it was necessary to bring it out by positive testimony; and that could only come from her. The existence of a mental state such as an apprehension of fear under certain circumstances is a fact to be proved, like every other fact, by the best evidence of which the nature of the case admits.

The last assignment relates to the charge to the jury. The record upon this point is as follows: "The defendant's counsel orally requested the court to charge the jury that it was incumbent on the state to prove not only that the accused committed acts with the intent to commit an abortion, but that it was not necessary for the purpose of preserving the woman's life, or that of the unborn child." The court did not so charge, but, having instructed the jury that, "If it be so that the accused did use such means, if it appear from the evidence that it was necessary to use such means to preserve her life, or that of her unborn child, then the accused could not be guilty," charged them as follows: "It has been claimed in reference to this matter that it is incumbent upon the state to prove not only the fact of the use of means to procure the abortion by the accused, and with the intent to procure a miscarriage, but that the state must also establish the fact that it was not necessary to save the life of the woman or the child. But the law assumes that under ordinary circumstances such means are not necessary to save the life of either the mother or the child; and the fact that it is necessary to use such means, or to procure a miscarriage, is a matter of defense, which the accused may establish if such be the fact; but it is not incumbent on the state, in the first instance, to establish the negative,—that it was not necessary. If the act is committed with the intent alleged, it is not incumbent on the state to establish the fact that it was not necessary to save the life of the mother or of the child." The statute (Gen. St. § 1411) upon which the information in this case is based prohibits the use of any means with intent to procure upon a woman a miscarriage or abortion, "unless the same be necessary to preserve her life or that of her unborn child." The information in this case contains two counts, and in both it is alleged that the act charged against the defendant was not necessary to preserve the life of the woman or that of the unborn child. Where the exception, as here, is contained in the clause of the statute which describes or defines the crime, apparently as a part of the description or definition, it is almost universally held that the exception in the statute must be negated in the indictment or information. Bish. St. Crimes (2d Ed.) pars. 755, 1042-1044, and cases cited; Whart. Cr. Law (10th Ed.) par. 597, and cases cited. Assuming, then, that it was necessary to negative the statutory exception in this case, two questions arise: (1) Was it incumbent upon the state to finally establish

the truth of the negative averment? (2) If so, was it bound, under the circumstances disclosed by the record, to offer testimony in support of the averment as claimed by the defendant? We think it was incumbent upon the state in some way to establish the truth of the negative averment. The want of necessity was an element of the crime as charged in the information, as much so as the act or the intent charged, and the burden of proving the former as well as the latter elements rests upon the state for the same reason, namely, because under our law it is the duty of the state to prove guilt, and not that of the accused to prove innocence. See 1 Bish. Cr. Proc. pars. 1049-1052. The first question, then, must be answered in the affirmative. But from this it by no means follows that the second must be so answered. The truth of this negative averment as part of the state's case must in some way be made *prima facie* to appear at the trial; but it need not necessarily be so made to appear by evidence. For instance, where there is a presumption of law in favor of the truth of an averment of this kind, the state may, in the first instance, and until evidence to the contrary is introduced by the defendant, rest upon the presumption, just as it might upon evidence sufficient to make out a *prima facie* case. In such a case the burden of proving the averment still rests upon the state, but by the presumption it is relieved for the time being from introducing evidence—testimony—in support of the averment, because the presumption, under such circumstances, stands in the place of evidence. Thus, in indictments for murder according to what appears to be the weight of authority, the fact of the sanity of the accused is an element of the crime, a part of the government's case, although it is only impliedly, and not in terms, alleged; and the burden of proving it—that is, the duty to show its existence in some way—rests upon the state, and remains upon it throughout the trial. *State v. Jones*, 50 N. H. 369; *People v. Garbutt*, 17 Mich. 9; *State v. Crawford*, 11 Kan. 32; *Dacey v. People*, 116 Ill. 555, 6 N. E. 165; *Com. v. Heath*, 11 Gray, 303; *Brotherton v. People*, 75 N. Y. 159. But according to these authorities, and to all authorities, so far as we are aware, the state is not obliged, in the first instance, and as part of its case, to produce affirmative evidence of sanity. The presumption is that all men are sane, and the state, in the first instance, and in the absence of evidence of insanity, may rest upon that presumption. If the accused puts his defense on the claim that he is insane, he must introduce evidence to that effect. If he is silent, the presumption may prevail. *State v. Hoyt*, 47 Conn. 518. This presumption as to sanity is founded upon the common experience that sanity is the general rule, insanity the comparatively rare exception, and that what is common in general prevails in the particular case. We think it is equally a matter of common experience that the ability to bear and bring forth children is the rule, and that the neces-

sity of procuring an abortion or miscarriage in order to save the life of mother or child is the rare exception; that the presumption is against such necessity; and that the state, in the first instance, and in the absence of evidence to the contrary, may rest on that presumption in cases brought under the statute in question. In the case at bar the state offered evidence of the act and the intent as charged, and rested, without having offered any specific testimony in support of the negative averment. No testimony was offered on behalf of the accused. It was under these circumstances that the request was made and the charge given as set forth in the record. We think the court properly refused to comply with the request, and did not err in its charge as claimed in the assignment of error. The jury were, doubtless, properly instructed that it was incumbent upon the state to prove all and every essential element of the crime beyond a reasonable doubt, that the burden of proof in this respect was upon the state, and that the presumption was that he was innocent until his guilt was proved; for no complaint is made about any part of the charge save the part hereinbefore quoted. In this part of it they were, in effect, told that if it appeared from the evidence that what was done by the defendant was necessary to save the life of the woman or of the unborn child, the accused could not be guilty; that the presumption was that no such necessity existed; that the state might rest on that presumption in the first instance, in the absence of evidence to the contrary; and that under such circumstances it was for the defendant to go forward with evidence, if he desired to overcome the presumption against him. This, we think, was a correct statement of the law. There is no error. The other judges concurred.

STATE v. MAIN.

(Supreme Court of Errors of Connecticut.
April 6, 1897.)

CRIMINAL LAW—VIOLATION OF STATUTE—CONSTITUTIONALITY—POLICE POWER—DUE PROCESS OF LAW—JURY—EXCESSIVE FINES—QUESTIONS FOR COURT—JUDICIAL NOTICE—RECORDS—EXPERT EVIDENCE.

1. Gen. St. § 1630, providing that "the court shall state its opinion to the jury upon all questions of law arising in the trial of a criminal cause, and submit to their consideration both the law and the facts, without any direction how to find their verdict," does not authorize, in a prosecution based on a statute, a charge for the jury "to consider the legal questions regarding the constitutionality of the statute in question; and, if they conscientiously believe that the statute is unconstitutional upon any of the grounds claimed, then they should acquit the defendant."

2. The question whether a statute called in question in a prosecution for a violation of its provisions is so uncertain as to be void is to be determined by the court.

3. The courts will take judicial notice of the prevalence and serious character of the disease termed "peach yellows," ordinarily resulting in the premature death of the tree affected; and whether the general assembly was justified in

enacting a statute looking to its suppression (Pub. Acts 1893, c. 216) is not, therefore, a question for the jury.

4. It was in the police power of the general assembly to order the destruction of a tree, affected by the "yellows," without compensation to the owner, and against his will.

5. The summary destruction by the state of trees affected with "peach yellows" is within the rule that whatever is dangerous to public health may be summarily abated; and hence the owner has no right, before the trees are condemned, to a jury trial of the question whether they are so diseased.

6. Whether the fine prescribed in a statute for its violation is excessive is a question of law.

7. The record of a public board cannot be orally impeached in a collateral proceeding in which it has been introduced in evidence.

8. Under Pub. Acts 1893, c. 216, providing that the commissioner or deputy commissioner of "peach yellows" shall visit peach orchards where the disease is suspected, make a personal investigation, and order the destruction of infected trees, a deputy commissioner may be permitted, in a prosecution for failure to destroy trees as ordered, to testify, without qualifying as an expert, that, after an examination of defendant's orchard, he condemned trees which were diseased with the "peach yellows."

Appeal from superior court, New London county; Milton A. Shumway, Judge.

Amasa M. Main was convicted of a violation of the statute relating to "peach yellows," and appeals. No error.

Donald G. Perkins, for appellant. Solomon Lucas, State's Atty.

BALDWIN, J. Upon the trial of this cause, the defendant claimed that the statute (Pub. Acts 1893, c. 216) upon which the prosecution was based was unconstitutional for various reasons, and asked the court to instruct the jury as follows: "The jury are the judges of the law bearing upon the case, as well as the facts; and they are entitled, and it is their duty, to consider the legal questions regarding the constitutionality of the statute in question; and, if they conscientiously believe that the statute is unconstitutional upon any of the grounds claimed, then they should acquit the defendant." The court refused to charge as thus requested, and instructed the jury that the statute (Gen. St. § 1630) made them the judges of the law, but not in such a sense that they were at liberty to disregard it; that, when their judgment was satisfied as to what the law was, that law, as thus ascertained, was binding upon them; that, in the opinion of the court, the statute upon which the prosecution was brought was a constitutional and valid law; but that, under the limitations already stated, they were the judges of the law, as well as of the facts; and it was for them to say, on all the evidence, and under the law as they should find it to be, and as they conscientiously believed it to be, whether the accused was guilty or not guilty. There is nothing in this part of the charge of which the defendant can complain. Constitutional law, in the form which it has taken in the United States, is an American graft on English jurisprudence. Its prin-

ciples and rules are mainly the work of the present century. They rest upon the fundamental conception of a supreme law, expressed in written form, in accordance with which all private rights must be determined and all public authority administered. The constitution of Connecticut (article 2) has divided the powers of government into three distinct departments, each confided to a separate magistracy. To one of these departments is intrusted (article 5) the judicial power of the state. In all cases where the meaning of a written document is to be collected from the words in which it is expressed, its construction, if called in question in the course of a judicial proceeding, is to be determined by the court. This is a proper and necessary exercise of judicial power. It belongs, therefore, to the magistracy to which the exercise of this power has been confided by the constitution, to determine the meaning and effect of the words in which that instrument is expressed.

The defendant contends that as, by Gen. St. § 1630, it is enacted that "the court shall state its opinion to the jury upon all questions of law arising in the trial of a criminal cause, and submit to their consideration both the law and the facts, without any direction how to find their verdict," the superior court, in the case at bar, were bound to submit to the determination of the jury the meaning and effect of the constitution, in its bearing upon the validity of the statute under which he was prosecuted. If this contention could be supported, it would follow that the general assembly has power indirectly to transgress the constitutional limitations which the people have imposed upon the exercise of legislative power. It is undisputed that that body cannot enact a law which is in conflict with the constitution. But if it can enact a law that juries, in certain cases, shall decide between the constitution and a statute, where it is claimed by a party to the proceeding that they are in conflict, the legislative magistracy can thus invest the jury with a prerogative which it does not itself possess, and can take that prerogative away from the judicial magistracy, which does possess it, under the tripartite division of the powers of government upon which our constitution rests.

These questions first claimed the serious attention of the court and bar of the United States in connection with the prosecutions growing out of the sedition law of 1798. By that act of congress it was provided that in any prosecution for libel the truth might be given in evidence, and the jury should have "a right to determine the law and the fact under the direction of the court, as in other cases." Notwithstanding this, the circuit courts uniformly held that the jury could not pass upon the constitutionality of the statute. *U. S. v. Lyon*, Whart. St. Tr. 333, 336, Fed. Cas. No. 8,646; *U. S. v. Callender*, Whart. St. Tr. 688, 713, 716, Fed. Cas. No. 14,700. In the latter of these cases, Mr. Justice Chase observed in his charge that, by the provision

above quoted, "a right is given to the jury to determine what the law is in the case before them, and not to decide whether a statute of the United States produced to them is a law or not, or whether it is void, under an opinion that it is unconstitutional; that is, contrary to the constitution of the United States. I admit that the jury are to compare the statute with the facts proved, and then to decide whether the acts done are prohibited by the law, and whether they amount to the offense described in the indictment. This power the jury necessarily possess, in order to enable them to decide on the guilt or innocence of the person accused. It is one thing to decide what the law is, on the facts proved, and another and a very different thing to determine that the statute produced is no law. To decide what the law is, on the facts, is an admission that the law exists. If there is no law in the case, there can be no comparison between it and the facts; and it is unnecessary to establish facts before it is ascertained that there is a law to punish the commission of them. The existence of the law is a previous inquiry, and the inquiry into facts is altogether unnecessary, if there is no law to which the facts can apply. By this right to decide what the law is in any case arising under the statute, I cannot conceive that a right is given to the petit jury to determine whether the statute (under which they claim this right) is constitutional or not. To determine the validity of the statute, the constitution of the United States must necessarily be resorted to and considered, and its provisions inquired into. It must be determined whether the statute alleged to be void, because contrary to the constitution, is prohibited by it expressly or by necessary implication. Was it ever intended by the framers of the constitution or by the people of America that it should ever be submitted to the examination of a jury to decide what restrictions are expressly or impliedly imposed by it on the national legislature? I cannot possibly believe that congress intended by the statute to grant a right to a petit jury to declare a statute void. * * * I have uniformly delivered the opinion 'that the petit jury have a right to decide the law as well as the fact, in criminal cases,' but it never entered into my mind that they therefore had a right to determine the constitutionality of any statute of the United States." *Callender's Case* was tried in 1800, and the grounds upon which the charge was based, so far as concerns the point now under consideration, have since been repeatedly approved by American courts of last resort. *Com. v. Anthes*, 5 Gray, 185, 191, 192; *Pierce v. State*, 13 N. H. 536, 553, 561; *Franklin v. State*, 12 Md. 236, 245, 246; *Sparf v. U. S.*, 156 U. S. 51, 71, 15 Sup. Ct. 273.

Gen. St. § 1630, which first appears in the Revision of 1821, was not intended to narrow the functions of the court, but rather to enlarge them. *State v. Fetterer*, 65 Conn. 287, 291, 32 Atl. 394. Trial by jury in criminal cases had, for more than a century before the

adoption of our constitution, become something very different in Connecticut from what it was under the common law. The judges, after the first generation of colonists (among whom were some who had been trained for the English bar) had passed away, had seldom received any special legal education. They did not assume to express any opinion of their own to the jury on points of law, contenting themselves with simply recapitulating in the charge the points made by counsel. 2 *Swift's System*, 258, 401. If a verdict of guilty were returned in the county court, the prisoner had, by a statute passed in 1705, an absolute right of "review"; that is, to a new trial. *Comp. St.* 1715, p. 131. As soon as the judicial establishment of the state was re-organized, in 1806, by placing only trained lawyers upon the bench, the judges began the restoration of trial by jury to something like its form at common law. *General Rules of Practice*, 3 Day, 28. The general assembly took action in the same direction in 1812 (*Sess. Laws* 1812, c. 15, p. 106); and in 1818 the framers of the constitution completed the work (article 1, § 21).

Trial by jury had lost, under our colonial government, its native strength and dignity. Legislation and judicial practice had done something towards their restoration. The constitution, in providing that the right of trial by jury should remain inviolate, was designed to perpetuate its essential characteristics, as they existed at common law; preserving its substance, while leaving its form to be regulated from time to time as the legislative power might deem the public interests to require. *Gulle v. Brown*, 38 Conn. 237, 243; *State v. Worden*, 46 Conn. 349, 365. The effect of the statutory provisions in the Revision of 1821, by which it was sought to give proper effect to the declaration of rights in this particular, was probably not fully apprehended by those who penned them. Chief Justice Swift, who was one of the revisers, states in his *Digest*, with reference to *Gen. St.* § 1630, that it precludes the court from expressing any opinion on the facts, or giving any direction to the jury with regard to them, and so that the judge is made a mere cipher, as it respects the facts in criminal cases, and the jury deprived of that benefit from his ability and experience which in other states, where the common law is recognized, is secured by his explanation and illustration of the testimony, and the statement of his opinion as to its weight and sufficiency. 2 *Swift's Digest*, 412. The judicial construction of the statute, however, has always been otherwise; and it is settled by a long course of decisions that the judge can, and, wherever it seems necessary, should, in the charge, give his own opinion of the nature, bearing, and force of the evidence adduced. *State v. Rome*, 64 Conn. 329, 336, 30 Atl. 57. The meaning of a statute must always depend on the words used and the intention as thus expressed. *Furniture Co. v. Cram*, 63 Conn. 433, 438, 28 Atl. 540; *Dartmouth College v. Woodward*, 4

Wheat, 518. Courts cannot with safety proceed under any other rule, even if satisfied that this expressed intention was not that which the legislature designed to express or that understood by contemporary expositors. It has been assumed in some of the decisions of this court that the statute now under consideration (*Gen. St.* § 1630) may subject to the determination of the jury in criminal cases questions of statutory or common law to a greater extent than would otherwise have been allowed. *State v. Buckley*, 40 Conn. 248; *State v. Thomas*, 47 Conn. 546, 551. If this be so, it would not follow that it has subjected to their determination any question of constitutional law. It is true that the requests for instructions, which came under review in the cases above cited, related to questions of that nature; but the distinction between constitutional law and other law was not alluded to in argument or considered by the court. We have now found it necessary to consider it fully, and are satisfied that to hold the statute to mean that it is in the rightful province of the jury to determine the true construction of the constitution in criminal cases would be to attribute to the general assembly an intent to trench upon the judicial power, and give to verdicts a superior force to that of the words of the constitution itself.

At common law no jury ever exercised such a function, for there was no written constitution under which the government was created, and by which its limitations were established. The constitutional guaranty that the right of trial by jury shall remain inviolate lends, therefore, no aid to the defendant's position. On the other hand, the section of the declaration of rights (*Const. art. 1, § 7*) which declares that "in all prosecutions or indictments for libels the truth may be given in evidence, and the jury shall have the right to determine the law and the facts, under the direction of the court," implies that, but for such a declaration, it would be, to say the least, doubtful whether, in prosecutions for that offense, the jury could, under the principles of the common law, determine the law of the case by their verdict. On that subject there had been a sharp contest between the English bar and the English bench. In 1792, only 26 years before the adoption of our constitution, it had been affirmed by the 12 judges of England, in response to questions put to them by the house of lords, that the general criminal law was also the law of libel, and that in prosecutions for that offense it was the duty of the judge to declare to the jury what the law was, and their duty, should they find a general verdict, to compound it of the fact as it appeared in evidence before them, and of the law as it was declared to them by him. *Annual Register* for 1792, *Chron.* 69, 75. The same rule was laid down in 1803 by Chief Justice Lewis, in an important prosecution of this nature in New York. *People v. Crosswell*, 3 Johns

cas. 337, 341. The earliest state constitution in which indictments for libel are specifically mentioned is that of Pennsylvania, adopted in 1790, two years before the passage of Fox's libel bill in parliament, in which it was declared that in such proceedings "the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases." 2 Poore's Charters & Const. p. 1554. Constitutional provisions similarly phrased were adopted by Delaware in 1792, by Kentucky in 1792 and 1799, by Tennessee in 1796, and by Illinois in August, 1818. 1 Poore's Charters & Const. pp. 278, 447, 655, 666; 2 Poore's Charters & Const. p. 1674. The same terms were also introduced, as has been stated, in the sedition act of 1798. In 1817, Mississippi put into her declaration of rights, from which that in our constitution, adopted in September of the following year, was largely copied, a section precisely identical with that now under consideration. 2 Poore's Charters & Const. p. 1055. It will be remarked that the words "as in other cases" were thus dropped by Mississippi, and, following her lead, by the framers of our constitution. This would seem to indicate that they intended to secure to juries larger power over questions of law in prosecutions of libel than in other criminal trials; and our statute (section 1630) is in entire harmony with this view, since, in lieu of declaring that the jury shall have the right to "determine" the law under the direction of the court in ordinary prosecutions, it only provides that the court shall state its opinion to them on all questions of law, and then submit the law to their "consideration," without any direction how to find their verdict. The distinguishing feature of trial by jury in criminal cases, as compared with trial by jury in civil cases, has always been the right of the jury to return a general verdict, and such a verdict as they might deem proper, on the law and the evidence, without dictation from the court. The English judges, from the earliest times, were accustomed to instruct the jury, as to the law, with the same freedom in criminal as in civil proceedings; but after the decision in *Bushell's Case*, Vaughan, 135, in 1670, they never assumed the right to direct a verdict of guilty.

It was the duty of the superior court to instruct the jury as to the constitutionality or unconstitutionality of the statute under which the defendant was prosecuted; but it would have had no right to direct a verdict either of conviction or acquittal. Their duty to accept the construction of the constitution which the court might adopt was absolute. They were bound to this, as well by their official oath as jurors "well and truly to try and true deliverance make between the state of Connecticut and the prisoner at the bar, according to law and the evidence" before them, as by the oath which each had

taken as a freeman to be true and faithful to the state of Connecticut and the constitution and government thereof. Gen. St. § 3264. But their right to return such a verdict as they thought proper was absolute also. Law and fact are inseparably blended in every general verdict. By a verdict of not guilty, they might, in effect, have disregarded the instruction of the court, but only by disregarding the constitution and disobeying the government which they had sworn to support. The request for instructions which has been under consideration was therefore properly refused. It is unnecessary to decide whether the instructions which were given in response to it, and substantially followed the charge sustained in *State v. Buckley*, 40 Conn. 246, were in all points correct. They gave the defendant no cause of complaint.

The superior court was also right in refusing to instruct the jury, as requested, that if they should "find that the 'yellows' is not a contagious disease, and the existence of the disease in one tree does not cause it to spread from that tree to other trees, and thus endanger other trees, the property of others, and that a tree so diseased is not a public nuisance, then this statute is an improper and unwarrantable invasion of the rights and property of citizens, the right to care for his property, and plant and cultivate his trees as he desires, without interference, and is unconstitutional and void." Whether the "yellows" was such a disease as to justify the general assembly in enacting the statute under which the prosecution was brought depended on the existence and nature of the disease, and also on the apprehension of danger from it commonly entertained by the public at large. That such a disease existed, and was one of a serious character, ordinarily resulting in the premature death of the tree affected, is a matter of common knowledge, of which the court had a right to take judicial notice. Cent. Dict. "Peach Yellows," and "Yellows"; Webst. Int. Dict. "Yellows." Such a disease it was proper for the general assembly, in the exercise of its police power, to endeavor to suppress, even by the destruction of the trees attacked by it, if there was a reasonable apprehension of substantial danger, from allowing them to live, to those who might eat their fruit, or to other peach orchards. Unless the courts can see that there could by no possibility be such danger, the propriety of such legislation as that now in question is to be determined solely by the discretion of the legislative department. The description of this disease given in standard works and government publications, and the legislation in regard to it to be found in the statute books of Delaware, Maryland, Michigan, New York, Pennsylvania, Virginia, and the province of Ontario, are amply sufficient to establish, as a matter of judicial notice, the possibility, if not the probability, that it is a contagious disease. *Grimes v. Eddy*, 126 Mo. 168, 28 S.

W. 756. The destruction of a tree affected by a disease of that character, without compensation to the owner, and against his will, is as fully within the police power of a state as the destruction of a house threatened by a spreading conflagration, or the clothes of a person who has fallen a victim to smallpox. Such property is not taken for public use. It is destroyed because, in the judgment of those to whom the law has confided the power of decision, it is of no use, and is a source of public danger.

Judicial notice takes the place of proof, and is of equal force. As a means of establishing facts, it is therefore superior to evidence. In its appropriate field, it displaces evidence, since, as it stands for proof, it fulfills the object which evidence is designed to fulfill, and makes evidence unnecessary. *Brown v. Piper*, 91 U. S. 37, 43; *Com. v. Marzynski*, 149 Mass. 68, 21 N. E. 228. "The true conception of what is judicially known is that of something which is not, or rather need not, unless the tribunal wishes it, be the subject of either evidence or argument,—something which is already in the court's possession, or, at any rate, is so accessible that there is no occasion to use any means to make the court aware of it." *Thayer, Cas. Ev.* 20. If, in regard to any subject of judicial notice, the court should permit documents to be referred to or testimony introduced, it would not be, in any proper sense, the admission of evidence, but simply a resort to a convenient means of refreshing the memory, or making the trier aware of that of which everybody ought to be aware. *State v. Morris*, 47 Conn. 179, 180. The defendant therefore had no right to have the jury pass upon the danger of contagion from trees affected by the yellows, as a means of determining the constitutionality of the statute, by such verdict as they might render under the instructions of the court. It was for the court to take notice that it was a disease which might be contagious. *Norwalk Gaslight Co. v. Borough of Norwalk*, 63 Conn. 495, 525, 527, 28 Atl. 82. This being established, the validity of the statute became a matter of pure law. Police legislation for the extirpation of a disease of such a nature, which the legislative department deems dangerous to the public welfare, cannot be pronounced invalid by the judicial department by reason of any difference of opinion, should one exist, between these two agencies of government, as to the probability of such danger. If the law may be an appropriate means of protecting the public health and the agricultural interests of the state, it is for the legislature alone to determine as to its adoption. It may have been the opinion of the general assembly that peach growers in general would abandon their business from dread of contagion from orchards infected by the yellows. In such a case, whether their apprehensions were well founded or ill founded would be immaterial, unless it also appeared that there could be no reasonable grounds for them. A

wide spread apprehension throughout the community justifies itself, and is a sufficient basis for legislative action towards the removal of the cause, real or supposed, of the danger apprehended, when this cause is a deadly disease of a food-producing tree. *Bissell v. Davison*, 65 Conn. 183, 191, 32 Atl. 348. The destruction of the infected trees by order of a public official, after due inspection, is a remedy, which, however severe, is one appropriate to the end in view, and may properly be enforced without any preliminary judicial inquiry, as well as without any compensation to the owner for resulting loss. *State v. Wordin*, 56 Conn. 216, 226, 14 Atl. 801; *Powell v. Pennsylvania*, 127 U. S. 678, 685, 8 Sup. Ct. 902, 1257.

The superior court also properly refused to instruct the jury, as requested by the defendant, that "if the term 'yellows,' in the statute, does not define with clearness and certainty a well and commonly known disease of peach trees, capable of being clearly and readily recognized, identified, and shown to exist, but the term is so vague and uncertain that it furnishes no clear and fixed standard so as to determine what said disease is, and when it exists, then the statute is void for doubt and uncertainty in defining the disease and the crime of failing to destroy such diseased trees." As has already been stated, the court had a right to take judicial notice that the term "yellows" was one the meaning of which was clearly defined by common usage. This being so, whether the statute was void for uncertainty or not depended simply on the construction of a written document, and was properly and only a question for the court. *Jordan v. Patterson*, 67 Conn. 473, 479, 33 Atl. 521; *People v. Smith*, 106 Mich. —, 66 N. W. 384.

The requests for instruction that "the statute is unconstitutional and void, because it deprives a person of his rights and property without notice and hearing, and without due course of law, without compensation, and violates the right of trial by jury," and that "if the minimum fine provided by the statute is unreasonably great and out of proportion to the act for which it is imposed, considering the nature and circumstances of the act, and such fine would be oppressive and unjust, then it is an excessive fine, and the statute imposing it violates the constitution of this state, and is invalid and unconstitutional, and the defendant is entitled to an acquittal, even though guilty of the act charged," were also properly refused.

The notice from the deputy commissioner of peach yellows, and the proceedings conducted by him upon the defendant's premises, were sufficient to satisfy every requirement of the constitutions of Connecticut and of the United States, as well as the principles of natural justice, if the trees in question were in fact diseased with the yellows. Summary proceedings for the abatement of whatever is dangerous to the public health

or safety are often necessary, and have always been permitted, when authorized by appropriate legislation. *Raymond v. Fish*, 51 Conn. 80, 97. If, indeed, the trees which the defendant was ordered to destroy did not in fact have the yellows, he was justified in disobeying the order. As to this, he was entitled to demand a trial by jury; and he has had one, in which the question was properly submitted to their determination. *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100; *Health Department of City of New York v. Rector, etc., of Trinity Church*, 145 N. Y. 32, 39 N. E. 833.

Whether the fine prescribed in the statute was excessive presented a question of law, and was properly disposed of as such. It is not so clearly disproportioned to the offense as to come necessarily within the constitutional prohibition, and it is only in case of a plain conflict between the supreme law and an enactment of the legislature that the courts can interfere for the protection of the citizen. *Blydenburgh v. Miles*, 39 Conn. 484, 497.

The superior court instructed the jury that as the legislature had, by this statute, declared trees diseased by the yellows to be a public nuisance, that decision was final, and it was not for them to inquire whether they were in fact such, or not. This position is not without authority for its support. *Train v. Disinfecting Co.*, 144 Mass. 523, 11 N. E. 929. But, whether sound or unsound (as to which we express no opinion), the charge in this particular did the defendant no injury, for it was delivered only with reference to the constitutionality of the statute, and as to that the jury had been already definitely and correctly instructed that it was a constitutional and valid law. Its validity did not depend on the question of nuisance or no nuisance. It was enough that the court could see that reasonable apprehensions of danger from the disease were commonly entertained in the public mind, and that it was not impossible that it was dangerous, because contagious. The court below therefore reached the right result, even if it were by the wrong road.

The defendant requested instructions to the effect that, before the commissioner of peach yellows or his deputy "could legally order trees destroyed, regulations in relation to so ordering trees destroyed must have been adopted or approved by the state board of agriculture, and that, the state having failed to prove any such regulations, the defendant should be acquitted." They were properly refused, because the state had offered evidence tending to show that such regulations had been previously adopted. This evidence was a copy from the records of the board, duly certified by its secretary, under its seal, purporting to set forth the doings of the board at a meeting held several months before the date of the order served upon the defendant. He sought to

meet this document by oral testimony from the secretary that the statement in the minutes of the meeting that certain regulations were adopted had been interlined pending this prosecution, and was no part of the original record. This testimony was properly rejected by the court. It was offered to impeach the record of a public board, and such a record cannot thus be collaterally attacked. *Gilbert v. New Haven*, 40 Conn. 102.

It is also assigned for error that James F. Brown, a witness for the state, by whom the order in question was made, when asked what position he held at the time it was issued, was allowed to state that he was then acting as a deputy commissioner of peach yellows. If by this he meant to be understood as saying that he acted as such a deputy commissioner in issuing the order, or in inspecting and condemning the trees, the testimony was properly objected to. If, on the other hand, his meaning was that at the time in question he was acting in other matters generally as such a deputy commissioner, the evidence was admissible. But in either case its reception would be no ground of error, since the copy of record subsequently introduced showed his due appointment to the office in question.

The same witness was allowed to testify that, after an examination of the defendant's orchard, he condemned 64 trees, which were diseased with the peach yellows; the defendant excepting, because no facts were stated showing the condition of the trees or symptoms of disease. There was no error in this ruling. It is a familiar rule of law that every man acting officially shall be presumed to have done his duty until the contrary appears. *Booth v. Booth*, 7 Conn. 367. This rule rests on the assumption that he will not undertake the execution of his office unless he is reasonably competent to discharge the duties which belong to it. A man cannot be expected to do his duty who does not know what his duty is, and how to perform it. A commissioner or deputy commissioner of peach yellows is charged by statute with the duty of visiting any peach orchard where it is suspected that there are trees diseased with the yellows, making a personal investigation to determine as to the presence of the disease, and, should he find that any trees are infected by it, ordering their destruction. The witness had for more than a month before his inspection of the defendant's trees been a deputy commissioner of peach yellows under this law. This was, to say the least, a circumstance which the court had a right to consider in determining whether to receive him on the footing of an expert, even if he were not to be regarded as presumably *peritus virtute officii*. *The Sussex Peerage*, 11 Clark & F. 85, 125, 134; *Dickenson v. Inhabitants of Fitchburg*, 13 Gray, 546, 557; *Grayson v. Lynch*, 163 U. S. 468, 480, 16 Sup. Ct. 1064.

The record does not disclose whether any further evidence as to his practical acquaintance with the symptoms of the disease was or was not introduced. The decision of a trial judge in admitting a witness to testify as an expert will not be reviewed, unless it is clearly shown to have been based on incompetent or insufficient evidence. There is no error in the judgment appealed from.

TORRANCE and FENN, JJ., concur.

HAMERSLEY, J. (concurring in judgment). The defendant relied upon satisfying the jury that, even if every fact alleged in the complaint were found true, nevertheless the law applicable to those facts demanded his acquittal. The propositions of law upon which he mainly relied are: (1) The provisions of the constitution relative to trial by jury, compensation for property taken for public use, due process of law, and excessive fines, render void the act under which the prosecution is brought. (2) By the true construction of the act itself, the commissioner is authorized to condemn and to destroy peach trees of his own motion, without any process of law, and without any liability for damage, and, by the true construction of the act, this admittedly lawless proceeding is made the basis of the prosecution. (3) The language of the act used in creating the offense is so vague and indefinite that it conveys no meaning, and therefore no crime is defined. He asked the court to instruct the jury that they "are the judges of the law bearing upon the case, as well as the facts," and that they not only have the power, but that it is their duty, to consider the legal questions, even those regarding the constitutionality of the act, and to decide these questions in accordance with their conscientious belief, and especially asked the court to submit to the jury, to decide on their conscientious belief, the legal question whether the language of the act was sufficiently clear and certain to define any crime. No other construction can in common fairness be given to the defendant's requests. He was trying his case in reliance on his power to influence the decision of the jury as judges of the law, and demanded his right to have the jury told that, if they decided on their own belief (although the court might express a contrary opinion) that any part of the law bearing on the case was as claimed by the defendant, it was their duty to apply that law to the facts. The court did not comply with these requests. If the defendant had the right to have the jury so instructed, there is error in the judgment. To hold only that the jury cannot decide a question of constitutional law does not meet the issue. It may be true that, if the jury are judges of the law as claimed by the defendant, yet they are not judges of the limitations placed on the powers of the legislature by the con-

stitution; but this can be so only because the constitutionality of an act either as a question of law or fact is a matter wholly outside the province of a jury. The validity of an act under a written constitution is a judicial question, but in its very nature is one that must be determined by the court, and is one which, as fact or law, has never been within the issue submitted to a jury since trial by jury was first known. The limitation of governmental power by a law supreme over every department of government was unknown until the close of the last century. It has developed a branch of jurisprudence absolutely new and incapable of administration except by the court. Questions arising under this law are utterly foreign to "trial by jury." It is impossible that the term "right of trial by jury" could ever have included such questions, and their submission to a jury involves a vital change in jury trial, and would be subversive of the foundation on which a strictly constitutional government must rest. But, if the jury are judges of the law as to every question within the issue submitted to them, they are judges of the law bearing upon the true meaning of the language of a statute, and the extent and meaning of "judicial notice." These questions are within the issue tried to a jury, assuming them to be judges of the law. In the trial below, the defendant was denied the right he claimed to have the jury told that, as to the questions of law within the issue referred to them by the pleadings, they are the judges to decide in accordance with their opinion what the law is. The denial as to the questions within the issue cannot be justified because some of the questions as to which the right was claimed in the defendant's requests were without the issue; especially when neither counsel in framing, nor court in answering, the requests, contemplated any such distinction. It is impossible, therefore, to hold that there is no error in the judgment without passing upon the right claimed by the defendant, and denied by the court, in language that was erroneous only because it partially conceded the defendant's claim. I think the court did not err in refusing to charge in accordance with the defendant's request, because it is not true that the jury in the trial of a criminal prosecution are judges of the law, in the sense that it is their duty to review the decisions of the court upon questions of law arising in the case, and to decide the law in accordance with their own judgment.

Trial by jury is a process peculiar to the English common law, slowly developed from diverse experiences, and finally adopted as the best attainable, in certain kinds of litigation, for ascertaining facts from evidence, and applying to them settled principles of law. It seeks to unite the benefits to be derived from the common sense of average citizens in getting at substantial truth from conflicting testi-

mony, and from the learning and skill of the judge in accurately determining the appropriate law. Its main essential feature, which marks its practical value, is that throughout the whole judicial process, from the institution of a case to the final judgment, the judge determines the law, and the jury determines the facts referred to them by the pleadings. These powers of judge and jury are distinct. As Lord Hardwicke said in 1734: "If ever they come to be confounded, it will prove the confusion and destruction of the law of England." Lee t. Hardw. 23, 28. Whenever a question of law is presented, whether it concern the sufficiency of the complaint, the impaneling of the jury, the admission of testimony, or the conclusion of law from the facts admitted or proved, the court alone answers. Whenever the pleadings terminate in an issue of pure fact, the jury alone answers. It happens, however, in some cases, and usually in criminal cases, that, under existing rules of procedure, the issue of fact presented by the pleadings, and referred to the jury, is one where the law and the facts are complicate; i. e. the pure question of fact cannot be fairly determined except in relation to the law, and the pure question of law cannot be determined until the facts are found. In such case the jury may, at their option, pass separately upon the facts by the return of a special verdict, or, applying the law, as stated by the court, to the facts as found by them, determine the whole question presented by the pleadings by means of a general verdict; and the respective powers of court and jury are preserved by the judge stating his determination of the law hypothetically,—if the facts be so and so, this is the law,—leaving the jury to find the facts in view of the law so determined by the judge. Here the court and jury exercise their respective powers, as it were, jointly; and the general verdict should express the law as determined by the judge and the facts as found by the jury. It is evident that, as a general verdict involves an application of the law as declared by the court to the facts as found from the evidence, the jury must consider the law in connection with the evidence in reaching their ultimate conclusion, and in this limited sense they may, with doubtful accuracy, be called judges of the law; but, as the law determined by the court is the law they must consider, it is clear that in no sense which involves any independent determination of what the law of the state is are they the judges of the law. It is within the physical power of the jury to disregard the law, as well as the evidence; and it was to induce the abuse of this power that the phrase "judges of the law" was first perverted from the limited sense in which only it can be used, and became a favorite euphuism in appeals to juries for a violation of duty. These essential features of jury trial—i. e. the power of the court to direct the jury in matters of law, and the power of the jury to apply the law received from the court to the facts found from the evidence, and so determine, by general verdict, issues of fact presented by the

pleadings where the law and the fact may be complicate—are involved in the right of trial by jury which our constitution declares shall remain inviolate. Section 1630 of the General Statutes, in connection with section 1101, is in accordance with, and does not alter, such trial by jury.

The cases of *State v. Buckley*, 40 Conn. 256, and *State v. Thomas*, 47 Conn. 546, in so far as they assume that the statute has made the jury judges of the law in any other than the limited sense above stated, do not rest upon sound reason, and are contrary to what must now be considered well-settled authority. *State v. Carrier*, 5 Day, 131; *State v. Smith*, Id. 175; *State v. Ellis*, 3 Conn. 185; *State v. Tuller*, 34 Conn. 280, 287; *State v. Fetterer*, 65 Conn. 287, 293, 32 Atl. 394; *Rex v. Dean of St. Asaph*, 3 Term R. 429, note; *U. S. v. Battiste*, 2 Sumn. 240, 243, Fed. Cas. No. 14,545; *Pierce v. State*, 13 N. H. 536, 554; *Com. v. Porter*, 10 Metc. (Mass.) 263, 285; *Com. v. Anthes*, 5 Gray, 185; *Com. v. Rock*, 10 Gray, 4; *U. S. v. Morris*, 1 Curt. 23, 63, Fed. Cas. No. 15,815; *State v. Smith*, 6 R. I. 33, 34; *Duffy v. People*, 26 N. Y. 588, 591; *Hamilton v. People*, 29 Mich. 173; *State v. Burpee*, 65 Vt. 1, 34, 25 Atl. 964; *Sparf v. U. S.*, 156 U. S. 51, 15 Sup. Ct. 273. I think there is no error in the judgment of the superior court which calls for a new trial on any of the grounds stated in the appeal.

ANDREWS, O. J. I dissent entirely from the views stated by Judge HAMERSLEY; I have serious doubts as to the correctness of the opinion written by Judge BALDWIN; but I have so far yielded to the arguments of my brethren as not to dissent from the result reached by them.

LAUER et al. v. LAUER BREWING CO.,
Limited, et al.

(Supreme Court of Pennsylvania. April 12,
1897.)

EQUITY—APPEAL—INTERLOCUTORY ORDER.

Refusal of the court, after consideration of the proofs, to open a settled account to a certain date between the parties, with direction, however, for an account from such date, the bill having prayed for what was refused, as well as what was granted, is but an interlocutory decree or order, from which plaintiff cannot appeal, though Act June 24, 1895 (P. L. 243), authorizes an appeal by defendant from an interlocutory decree requiring him to account.

Appeal from court of common pleas, Berks county; James N. Ermentrout, Judge.

Bill by George F. Lauer and others against the Lauer Brewing Company, Limited, and others. From a decree, plaintiffs appeal. Quashed.

Wm. B. Bechtel, J. Howard Jacobs, Isaac Hiestler, and Cyrus G. Derr, for appellants. Phillip S. Ziebler, Baer & Snyder, and Ermentrout & Ruhl, for appellees.

STERRETT, O. J. This appeal appears to be premature. The decree appealed from is not final, nor is it such an interlocutory order or decree as comes within the purview of any of the statutory exceptions to the general rule that appeals in equity lie only from definitive orders or decrees. For a brief period, it was otherwise as to the common pleas of the First judicial district. The act of March 17, 1845 (P. L. 158), authorized an appeal from "any interlocutory or final order or decree of the court of common pleas of Philadelphia county" (Purd. Dig. p. 785, pl. 67); but so much of that act as authorized appeals from "interlocutory" orders or decrees was promptly repealed by the act of April 16, 1845 (P. L. 543). This was followed by the act of April 21, 1846 (P. L. 432), the third section of which declares: "Any person or body corporate aggrieved by any final order or decree in equity, under the general or special equity powers conferred upon the several district courts and courts of common pleas * * * other than those of the city and county of Philadelphia, * * * shall be entitled to an appeal to the supreme court, in the same manner and upon the same terms as appeals are allowed from the orphans' court." By the act of February 14, 1857 (P. L. 39), conferring on the several courts of the commonwealth the additional chancery powers and jurisdictions then vested in the court of common pleas and district court of Philadelphia county, it was provided that an appeal may be taken to this court from the final decrees of said courts, respectively, in the same manner and on the same terms and conditions as are provided in cases of appeals from the common pleas or district court of the city and county of Philadelphia. In the language of the act of March 17, 1845, *supra*, appeals from the common pleas of Philadelphia were then required to be "upon the same terms and with the same regulations as are provided by existing laws in regard to appeals from any definitive sentence or decree of an orphans' court." Purd. Dig. p. 785, pl. 67. It thus appears that, as a general rule, appeals in equity lie only from final or definitive orders and decrees. Some of the exceptions to that rule are under the acts of February 14, 1866 (P. L. 28), and June 12, 1879 (P. L. 177), providing for appeals from interlocutory decrees granting and refusing to grant special injunctions, respectively, and from interlocutory decrees, under the act of June 24, 1895 (P. L. 243), requiring one or more of the defendants to account, etc.

The averments of fact on which plaintiffs rely are fully set forth in the bill, and the prayers based thereon are: (1) That the settled account of March, 1892, alleged to have been fraudulently procured, be opened; (2) that an account be stated, under the direction of the court, of the profits and dividends of the said Lauer Brewing Company, Limited, distributable and belonging to said George F. Lauer; (3) that the defendants, and each of

them, be directed to make such payments to the plaintiffs, or any of them, as upon such accounting may be found to be due; and (4) general relief.

The averments of fact which form the basis of these prayers are fully and specifically denied in the answers. That of the brewing company, by its treasurer, and Frank P. Lauer, in his own behalf, after denying all the material allegations of the bill, avers, in substance, that, from the making of the alleged settlement until the time of the demand referred to in the bill, the said George F. Lauer acquiesced in all the terms of said settlement, and accepted the benefits thereof, and at no time offered to return the said stock and ask for a reopening of said settlement. But, as appears by the bill, he "pledged said stock for a large loan, and made an assignment thereof, and thereby put it out of his power to restore said status as it existed at the date of said agreement; * * * that neither the said George F. Lauer, nor his assignee, nor the said Reading Trust Company has any legal or equitable right to ask for the rescission of said agreements and the accounting prayed for"; and, as to the prayer for an account, they further aver that the plaintiffs have an adequate remedy at law.

The learned president of the court below, after a full and patient hearing of the parties, their witnesses, etc., and a careful consideration of the pleadings and proofs, found adversely to the plaintiffs on all the material averments of fact relating to the first prayer of their bill, and therefore refused to open the amicably settled account, embracing all transactions between the parties prior to March 1, 1892, and then decreed that an account be stated of the profits of said Lauer Brewing Company, Limited, beginning with said 1st day of January, 1892, and ending with the 27th day of January, 1895, the date of the assignment for the benefit of creditors. It cannot be doubted that this is merely an interlocutory order or decree; and, in the absence of any legislative authority for an appeal by plaintiffs from such an order or decree, what right have we to pass upon the merits of the decree, however groundless the objection to it may appear to be? There appears to be a growing disposition to appeal indiscriminately from every important ruling, interlocutory order, or decree of trial courts, and thus bring cases into this court by installments, and unnecessarily delay their final disposition. With rare exceptions, the disadvantages of such a practice are so obvious and serious that it should not be encouraged. If the defendants had appealed from the decree to account, they could have successfully pointed to the act of June 24, 1895, *supra*, as their authority for so doing. That act was intended to provide for an appeal from an interlocutory order or decree requiring the defendants, or some of them, to account, when their liability to do so was denied. Among other things, the plaintiffs pray for an account from

the defendants, and on the part of the latter "there is a denial of liability to account." "Upon this preliminary question of liability, the decision or decree of the court is in favor of the plaintiffs (in part at least), and requires an account." In such case, an appeal to this court by any of the defendants who may be aggrieved by the order or decree to account is clearly allowed by the act; but it appears to make no provision for an appeal by the plaintiffs. In fact, this appeal is from the failure or refusal of the court to find such facts as were necessary to sustain the first prayer of the bill. The time for an appeal on any such ground as that will be after final decree. Appeal quashed, and it is ordered that the plaintiffs pay the costs.

COLL v. EASTON TRANSIT CO.

(Supreme Court of Pennsylvania. April 12, 1897.)

STREET RAILWAYS—ACCIDENT TO PEDESTRIANS—EVIDENCE—RES GESTÆ.

1. Testimony that when witness last saw deceased, before he was run over by defendant's street car, deceased was 80 or 90 feet from the car, on a narrow footpath between the tracks and the edge of an embankment; that he saw D., who had been riding with the motorman, jump from the car, and run in advance of it, the speed of the car not being checked till it was suddenly stopped; and that deceased was then behind the car, his legs having been run over by it; and that D. had hold of him,—justifies inferences by the jury that deceased, considering his position dangerous, attempted to cross the track, and fell; that D. saw him, and ran to his assistance; that the motorman saw or should have seen him, and should have attempted to stop the car at once.

2. Statements of one riding with the motorman on a street car, made immediately after a person was run over, and before he was removed from the track, that he had run ahead of the car to pull him off the track, and did not have time to do so, is admissible as part of the *res gestæ*, though he was not in the company's employ.

3. Declarations of a motorman two minutes after he ran over a man, and while he and others were in charge of the body of the man, that he could have stopped the car in time, but supposed a person who had run ahead would have the man removed from the track before the car reached him, is not too remote from the occurrence to be admissible as *res gestæ*.

Appeal from court of common pleas, Northampton county; W. W. Schuyler, Judge.

Action by Sophia C. Coll against the Easton Transit Company for death of plaintiff's husband. Judgment for defendant. Plaintiff appeals. Reversed.

William C. Shipman and Henry S. Cavanaugh, for appellant. W. S. & M. Kirkpatrick and Russell C. Stewart, for appellee.

FELL, J. It appeared from the testimony presented by the plaintiff that, at the time of the accident, the defendant's car was running after dark on a declining grade, on a road which passed along the top of an embankment. Between the tracks of the rail-

way and the edge of the embankment was a footpath covered with cinders, and varying in width from four to six feet. At the outer edge of the path was a guard rail supported by posts. The roadbed was in an unfinished condition. The earth which had been thrown out in making an excavation for the track had not been replaced, the ties were exposed, and the rails projected above the surface of the road. The plaintiff's husband, when last seen before the accident by the witness called at the trial, was on the footpath 80 or 90 feet from the car. Dalton, a lineman in the employ of the defendant company, who had been riding with the motorman on the front platform of the car, was seen by the witness to jump from the car, and to run forward in advance of it. The speed of the car was not checked until it was brought to a sudden stop. The person injured was then found behind the car, his legs having been run over by it, and Dalton had hold of him.

From these facts it may be inferred that the deceased, finding himself in a position of danger on the narrow path, and fearing that he would be crushed between the projecting side of the car and the guard rail, attempted to reach a place of safety by crossing the road, and, in so doing, he tripped, and fell across the track, and that Dalton saw him fall, and ran to assist him. There is no other explanation of Dalton's conduct in jumping from the car, and running ahead, in connection with the fact that he had hold of the man immediately after his legs were crushed. If Dalton saw the man when he fell, the motorman, who was standing on the same platform, and whose duty it was to look ahead, saw him, or should have seen him, when he was 80 feet away, and he should have attempted to stop the car at once. The car was running only half as fast as Dalton ran, and its speed was not checked until it had run 80 feet. Whether these inferences could properly be drawn was a question for the jury. The judge could not say, as matter of law, that they were without foundation on the facts testified to, and it was error to enter a nonsuit.

As the case goes back for trial, it is important that the remaining assignments should be considered. A witness had testified that immediately after the accident, and before the man injured had been lifted from the tracks, Dalton, the lineman, said that he had run ahead to pull him off the track, and did not have time to do it. This testimony, on motion, was struck out; and an offer to prove that the motorman, within two minutes of the occurrence of the accident, and while he and other employes of the company were in charge of the body of the injured person, had said that he could have stopped the car in time, but that he supposed that Dalton would have had the man removed from the track before the car reached him, was rejected.

The testimony relating to Dalton's statement appears to have been struck out for the reason that he was not employed in the operation of running the cars, and that relating to the statement of the motorman to have been rejected for the reason that it was too remote from the occurrence to be admissible as part of the *res gestæ*. Neither ground was well taken. To make his declaration admissible as part of the *res gestæ*, it was not necessary that Dalton should have been in the employ of the company for the purpose of running its cars, or for any purpose. His acts were a part of the occurrence, and they could have been proved if done by an entire stranger. His declarations made at the time explained the nature of his acts and the acts of others, which together made up the whole occurrence under investigation. The declaration of the motorman, of which proof was offered, was separated in time two minutes only from the infliction of the injuries. It emanated from the act. It was unconsciously associated with, and stood in immediate causal relation to, it. The occurrence had not yet ended. He was not speaking as the narrator of a past event, but as a participant in an uncompleted one. Both of these declarations clearly come within the comprehensive definition given in Whart. Ev. § 262: "The *res gestæ* may therefore be defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander. They may comprise things left undone, as well as things done. Their sole distinguishing feature is that they should be necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not promoted by the calculated policy of the actors."

As the plaintiff was allowed to show the actual physical condition of the road at the time of the accident, she was not injured by the exclusion of the testimony referred to in the fourth and fifth assignments; and, as the pleadings stood at the time of the trial, it is doubtful whether the testimony was admissible. The first, second, and third assignments are sustained, and the judgment is reversed, with a *procedendo*.

FREDERICKS et al. v. HUBER et al.
(Supreme Court of Pennsylvania. April 12, 1897.)

PRELIMINARY INJUNCTION—TITLE INVOLVED.

1. A preliminary mandatory injunction restraining defendants, who had been in undisturbed possession of a church for years, as pastor and trustees, from interfering with the

property, and putting complainants, who claimed to be the pastor and trustees, in control, was improvidently granted without other evidence than an *ex parte* affidavit, and a part of the bill, sworn to as an injunction affidavit, the facts in which were met and denied by the answer.

2. A bill by persons claiming to be the pastor and trustees of a church, and asserting title in said trustees by virtue of their adherence to the discipline of an evangelical association, to restrain defendants, who had been in undisturbed possession for years, as pastor and trustees, from officiating in the church, or exercising any control over the property, was met by an answer which denied complainants' right to represent said church, and alleged that the property had long since reverted to the original grantor, who subsequently conveyed the same to defendants, and that the latter were in possession, independent of said evangelical association. Held, that the disputed title must first be adjudicated at law.

Appeal from court of common pleas, Schuylkill county; Weldman, Judge.

Bill by W. E. Fredericks and others for an injunction against C. D. Huber and others. From a decree awarding a preliminary injunction, defendants appeal. Reversed.

A. W. Schalck and Wesley K. Woodbury, for appellants. H. B. Esher and John W. Ryan, for appellees.

MITCHELL, J. This injunction was very improvidently granted. The complainants were confessedly not in actual possession of the church, and they had admitted themselves out of legal possession by bringing an action of ejectment against the respondents. Yet on a preliminary hearing, not conducted by the examination of witnesses under the new equity rules, but without evidence except a part of the bill sworn to as an injunction affidavit, and a single other *ex parte* affidavit, and in the face of a responsive answer denying the facts set up in the bill, a mandatory injunction was issued, which prevented the clerical respondents from performing their functions in the church, commanded the lay respondents not to interfere in the management of the property, and practically reversed the whole status of the parties by dispossessing the respondents, and putting the complainants in control. This is not the office of a preliminary injunction, which is not to subvert, but to maintain, the existing status, until the merits of the controversy can be fully heard and determined. "The sole object of a preliminary injunction," says Strong, J., in *Farmers' R. Co. v. Reno O. C. & P. Co.*, 53 Pa. St. 224, "is to preserve the subject of the controversy in the condition in which it is when the order is made. It cannot be used to take property out of the possession of one party, and put it into the possession of the other." See, also, *Audenreid v. Railroad Co.*, 68 Pa. St. 370, where the whole subject is authoritatively discussed by Sharswood, J. It is true that, in order to meet the practices so emphatically condemned by this court in *Easton, S. E. & W. E. P. R. Co. v. City of Easton*, 133 Pa. St. 505, 19 Atl. 486, and *Cooke v. Boynton*, 135

Pa. St. 102, 19 Atl. 944, equity has been compelled to advance a step, and, if necessary, to make even preliminary injunctions mandatory, as in *Whiteman v. Gas Co.*, 139 Pa. St. 492, 20 Atl. 1062. But such cases are exceptional and are founded on the fact that there has been what was graphically described in *Cooke v. Boynton*, supra, as "a race against the law." Equity regards the substance, rather than the form, of things, and will not allow itself to be baffled by a wrongful change while its aid is being invoked. The modern cases, therefore, have established the rule that the status quo which will be preserved by preliminary injunction is the last actual, peaceable, noncontested status which preceded the pending controversy, and equity will not permit a wrongdoer to shelter himself behind a suddenly or secretly changed status, though he succeeded in making the change before the chancellor's hand actually reached him. The doctrine is not new, only its application in practice to meet the efforts of those who endeavor to be swifter than justice and the law. Nearly half a century ago, *Lowrie, J.*, expressed the principle in *Baptist Congregation v. Scannel*, 3 Grant Cas. 48: "The object of this motion [for preliminary injunction] is to put and keep matters in the position in which they stood before the disorder commenced, and to prevent the defendants from gaining any advantage by their own wrongful acts." There is nothing in the present case to bring it within this exceptional class. The respondents had been in undisturbed possession for years, and the only change that was sought was by the complainants. Color for a preliminary injunction was given by the averment in the bill of acts of waste committed or threatened by the respondents, but the evidence utterly failed to sustain the charge. It was supported by only a single affidavit, which was fully met and denied by the answer. But, even if it had been sustained, the terms of the injunction went far beyond any relief on this basis. On every ground, therefore, the injunction was improvidently issued, and must be dissolved.

But the objections to the bill are deeper seated than to the mere injunction. The case is nothing but an ejectionment in disguise. The bill is brought by parties asserting themselves to be the pastor, presiding elder, and trustees of the Salem Church, and claims title to the property by virtue of their adherence to the discipline, law, and usages of the Evangelical Association. The answer denies that the complainants are officers, or even members, of the Salem Church, and avers that the self-styled trustees in whom the legal title is claimed to be had voluntarily withdrawn from the church years ago, and that the Salem Church was not a member of the Evangelical Association, but was, and had been for years, an independent organization. In regard to the title to the church property, the answer averred that the ground had been granted in 1856 by the Little Schuylkill Navigation, Railroad & Coal Com-

pany to the First Baptist Church of Tamaqua for use for public worship according to the uses and ceremonies of the Baptist Church only, and with a condition of forfeiture if used for any other purposes; that the land and the improvements thereon had been transferred by certain members of the Baptist Church to the Salem Church; and that in 1894 the Little Schuylkill Company, under its right of re-entry for condition broken, had granted and conveyed the land to the respondents. It will thus be seen that the case raises two main questions or issues: First, whether the complainants are entitled to represent the Salem Church; if not, if, as the answer avers, the trustees in whom title is claimed to be voluntarily withdrew from the church prior to this controversy, then, whether respondents' title be good or bad is immaterial, as complainants have no standing to question it. The second and more important question is the title to the land. It is admitted that title is to be derived from the Little Schuylkill Company under its deed, first, to the Baptist Church, and, secondly, to the respondents; and which is the superior title must depend on the conveyances and the acts of the parties under them. These are questions to be settled at law, and cannot be brought into equity without some other basis than has been shown here. The learned judge below was apparently of opinion that this case fell within the authority of *Krecker v. Shirey*, 163 Pa. St. 534, 30 Atl. 440, and it is not impossible that it may turn out to be so, but it has not yet been made to appear. That will depend on the facts as they shall be proved at the trial. The controversy in the Evangelical Association is undoubtedly at the bottom of both cases, but the issues are entirely different. In *Krecker v. Shirey* both parties belonged to the Evangelical Association, and each claimed to be the rightful representative of the Immanuel Church. The complainants did not depend on the moral merits or justice of the case, which rather appeared to be with the majority of the congregation, who had raised the money, supported the pastor, and kept the church going; but, as our Brother Williams said: "Our concern is with the legal aspects of the case, * * * leaving the moral side of the controversy to the consciences of the combatants;" and, as the law regarded those who adhered to the original doctrine and discipline, whether majority or minority, as the regular organization, the legal right followed such organization. The plaintiffs succeeded on their strict legal title, and the plaintiffs in the present case must win or lose by the same standard. There is here, however, no question of regularity of standing in the church. The respondents deny that they belong to the Evangelical Association at all, and claim that they have, in their independent capacity, acquired the title to the property. If they can establish that fact, they will be entitled to a verdict without regard to the regularity of their religious stand-

ing. The issue is an ordinary one of disputed title, and should be adjudicated at law. The right of the pastor to officiate in the church is a secondary question, depending on the solution of the first. If he establishes his right at law, he will then be entitled to ask the assistance of equity to enforce it. Decree reversed, injunction dissolved, and bill ordered to be dismissed, with costs.

In re CONTESTED ELECTION OF LAWLOR.

(Supreme Court of Pennsylvania. April 12, 1897.)

ELECTIONS—BALLOTS.

There can be no election to an office, the name or title of which is not designated on the official ticket, by voters putting on the ballot stickers bearing the title of the office and the name of the candidate; the only provision for addition to the ballot being the insertion of names in blank spaces under the titles of offices thereon.

Appeal from court of quarter sessions, Schuylkill county; C. L. Pershing, Judge.

Contest by certain citizens of the borough of Shenandoah of the election of Martin J. Lawlor as a justice of the peace of said borough. From a decree holding the election void, contestee appeals. Affirmed.

John F. Whalen and Wm. A. Marr, for appellant.

STERRETT, C. J. At an election held in and for the borough of Shenandoah on the third Tuesday of February, 1896, the appellant was returned elected to the office of justice of the peace in said borough. The validity of the election having been duly contested, it was adjudged illegal and void, and was accordingly set aside by the court for want of compliance with the election law. Hence this appeal by the contestee, in which the correctness of said adjudication is challenged. A careful consideration of the record has convinced us that the decree is substantially correct, and hence the only specification of error thereto cannot be sustained. Indeed, the conclusion reached by the learned president of the quarter sessions is so obviously correct that it is scarcely necessary to do more than affirm the decree. The petition on which this proceeding is based charges that, for various causes therein specified, "the said pretended election for borough justices was unauthorized and illegal," etc. It is unnecessary to notice all of said specified "causes." A brief reference to one of them will suffice. The fifth specification avers: "The pretended votes cast, or alleged to have been cast, at said election, for said Lawlor, for said office, were not printed or written on the ballots on which it is claimed they were cast, but, if voted at all, they were pasted thereon without authority of law." The ninth avers: "The official ballots distributed by the county com-

missioners according to law * * * did not contain the name or title of borough justices of the peace, or justices of the peace of said borough, as being among the offices then to be filled or to be voted for at said election, and in no wise designated said office, or provided for it, as one of the offices to be voted for at said election." The tenth avers: "There was no designation of said office on said official ballots, nor was there any blank space on said ballots for the insertion of said office, or of the names of the candidates therefor, or of any one to be voted for, for said office at said election; and the attaching of the pasters or stickers thereon as aforesaid was indiscriminate, unauthorized, and illegal." While appellant's answers to these and other specifications in the petition are far from being as direct, specific, and responsive as they should have been, they either admit, in express terms, or, by their failure to specifically deny, tacitly concede, facts enough to show that the votes alleged to have been cast for appellant for the office of borough justice were illegal and void. In his answer to the ninth specification, supra, he avers "that the official ballots on which his name appeared as a candidate for borough justice * * * were the ballots printed and distributed by the county commissioners, and further avers that the title of 'Borough Justice of the Peace' did appear upon the tickets inserted and pasted upon said ballots." This answer consists of two averments, the first of which, standing alone, is vague and uncertain, and would be misleading, if it were not for the explicit declaration of the last averment, viz. "that the title of 'Borough Justice of the Peace' did appear upon the tickets inserted and pasted upon said ballots." In his answer to the tenth specification, appellant asserts "that there were blank spaces on said ballots for the insertion of said offices, and for the insertion of the names of the candidates therefor," and virtually admits that the votes cast for himself were prepared by attaching pasters or inserting the same upon the official ballots, on which pasters the names of candidates for justice of the peace and the name or title of said office appeared; and he claims that this mode of voting for persons and for offices not appearing on the official ballots "was authorized and according to law." Without further reference to averments on which contestants rely as evidence of the illegal manner in which appellant was voted for, etc., it is sufficient to say that so far as said averments are material, they are either substantially admitted, or they are not sufficiently denied, in the answers. It clearly appears that the only way in which appellant, as a candidate for borough justice, was voted for, was by using a sticker, or adhesive ticket, having thereon appellant's name and the title of the office of justice of the peace, and pasting or otherwise attaching said sticker, or ticket, to the official

ballot. It is not even pretended that the official ballot, as printed by order of the commissioners, and distributed by them, contained either the name of appellant, or the name or title of the office of "Borough Justice," or "Justice of the Peace." The only way, therefore, in which appellant's name and the title of the office could have appeared on the official ballot cast for him was by their being upon separate tickets or stickers, which were "inserted and pasted upon said ballots" by those who voted for him. There is no authority in the election law, or elsewhere, for thus voting for a person to fill an office, the name or title of which is not designated on the official ballot prepared for the use of voters. It is the duty of those specially charged with the preparation and distribution of the official ballots to see that the name or title of every office to be filled at the forthcoming election is distinctly designated thereon as the election law specifically requires. The obvious reason why the office of borough justice of the peace was not so designated on the ballot prepared for the use of voters at the election in question is because no such officer was authorized to be chosen at that time, as the court below correctly held. If it had been otherwise, the title of the office would have been properly designated in each column of the official ballot; and if appellant's name as a candidate for the office of borough justice, etc., did not appear on the ballot, those desiring to vote for him could do so by inserting his name on the blank, or right-hand, column, immediately under the designation of said office. As was said in *McCowan's Appeal*, 165 Pa. St. 233, 30 Atl. 955: "The only prescribed mode of voting for persons whose names are not already on the ballot is by inserting their names in the blank spaces prepared therefor, in the right-hand column of the official ballot. It is the name only that is to be thus inserted, not the title of the office to be filled. The latter is already printed there, and constitutes part of the ballot prepared for the use of voters," etc. In that case the respective titles of all the offices to be filled, or that were voted for, were properly designated on the official ballot; but some electors conceived the idea of amending the official ballot by preparing a right-hand column of their own, containing titles of the respective offices to be filled, and names of candidates for each, and pasted the same over the right-hand column of the official ballot, thus substituting for the latter the ticket or column prepared by themselves. It was there held that "to permit the voter to procure from outside parties a slip ticket, or sticker, corresponding in size with said column, and paste the same over the printed matter, as well as the blank spaces thereon, would be contrary to the letter as well as the spirit of the act." It would be equally contrary to both to sanction what was done in this case. The direc-

tions of the act as to what the voter shall do, and how it shall be done, are plain, explicit, and mandatory. No substantial departure from those directions can ever be safely recognized as their legal equivalent. There appears to be no error in the decree, and it is therefore affirmed, with costs to be paid by appellant.

HEIMGAERTNER v. STEWART.

(Supreme Court of Pennsylvania. April 12, 1897.)

JUDGMENT—OPENING—DEFAULT.

A rule to open a judgment entered on bond and warrant of attorney, and to allow defendant to answer, was improperly discharged where defendant, corroborated by two other witnesses, testified to an agreement which, if made, entitled him to a credit on the judgment, and plaintiff's denial of said agreement was unsupported by other testimony.

Appeal from court of common pleas, Philadelphia county; Craig Biddle, Judge.

Rule by William Stewart to open a judgment entered against him in favor of William Heimgaertner on bond and warrant of attorney, and to allow defendant to answer. From an order discharging the rule, defendant appeals. Reversed.

Wendell P. Bowman, for appellant. Frederick L. Breiting, for appellee.

McCOLLUM, J. The judgment in question was entered upon a bond of the defendant secured by a mortgage upon his real estate therein described, and it represents a loan of \$1,000, which the plaintiff made to him on the 30th of June, 1893. When the loan was made, he gave his promissory note for it, payable in one year, without interest. When the note fell due, the plaintiff accepted, in place of it, the bond and mortgage, payable in one year, with interest at 5.4 per cent. On the 6th of July, 1895, the defendant, claiming to have valid defenses to the judgment, petitioned the court to open it, and allow him to present them to a jury. Thereupon a rule to show cause was granted, which rule, on consideration of the testimony submitted for and against it, was discharged. From the order discharging the rule this appeal was taken.

It appears that when the loan was made the defendant was a retail liquor dealer, who wanted more money to carry on his business, and the plaintiff was a brewer, who wanted to sell his beer. The plaintiff loaned the money for a year, and the defendant bought 262½ barrels of his beer at \$6 a barrel. In his petition to open the judgment the defendant alleged that he agreed to buy the plaintiff's beer if it was satisfactory and acceptable to his customers, but that it was not satisfactory to them, and because of their dissatisfaction with it he lost their patronage, and was materially injured in his business. He also alleged in his petition that he understood he was to give the mortgage as security for

the loan, and that he did not know that he had given the bond until some time after the judgment was entered upon it. These allegations were specifically denied, and, so far as they related to the plaintiff's claim respecting the execution of the bond, and the condition on which he agreed to buy the beer, they furnished no ground for opening the judgment, because they rested exclusively on his own testimony, which was fully met and answered by the testimony of the plaintiff. But another matter of defense is alleged in the petition, which deserves separate consideration. It is that the plaintiff agreed to allow the defendant a credit of \$1 on the loan for each barrel of beer purchased by him, and that under this agreement he was entitled to a credit on the judgment of \$262.50. This agreement was made, if at all, a few days after he gave his note for the money loaned. The plaintiff denied the existence of such an agreement, and supported his denial by his own testimony. He was not corroborated in this particular by a single witness. The defendant testified distinctly that the agreement was made as alleged, and he was corroborated by two witnesses. It is not necessary to specify here the circumstances under which it is claimed the agreement was made, nor the considerations which induced the parties to enter into it. These sufficiently appear in the evidence relied on to establish it. A considerable portion of the evidence in the case related to the quality of the plaintiff's beer, and is unimportant, except as it may have some bearing on the question whether there was an agreement to allow the defendant a credit of one dollar on the loan for each barrel of beer sold to him by the plaintiff. Upon due consideration of all the evidence in the case, we are of the opinion that the defendant should have an opportunity to present to a jury his defense founded upon the alleged agreement for a credit on the loan. The order discharging the rule to open the judgment is reversed, the rule is reinstated and made absolute as to \$262.50 and interest thereon from the date of the bond, and as to the balance of the judgment the rule is discharged.

MULLEY v. SHOEMAKER.

(Supreme Court of Pennsylvania. April 12, 1897.)

FRAUDULENT CONVEYANCES—INSTRUCTIONS.

The jury, in an action to recover property as that of a debtor, though standing in his wife's name, will not be held to have been led to believe that she could claim it, though his money purchased it, if she did not collude with him, where, after instructing that, if she made the purchase with her own money exclusively, she acquired a good title, but if she connived with him in the purchase thereof, by using in payment any of the money which he had received for his property, then she could not hold it, the court told the jury that, if the husband's money went into the purchase, she could not

hold the property, and that the burden of showing that his money did not go into the purchase was on her.

Appeal from court of common pleas, Lackawanna county.

Ejectment by Ambrose Mulley against George H. Shoemaker. Judgment for defendant. Plaintiff appeals. Affirmed.

The first assignment of error is as follows: "The court erred in charging the jury as follows: 'But if you should find that she connived with him or colluded with him in the purchase of this property, by using any of the money which he received from the property which was sold in Green Ridge for the purchase of this property, for the purpose of cheating, delaying, or hindering creditors, or avoiding the costs of prosecution in which he was engaged, then the plaintiff is entitled to your verdict. If, on the other hand, you find the wife's hands are clean, even though the husband may have sold his property for the purpose of hindering and delaying his creditors, then your verdict should be in her favor, because she is not responsible for his misdeeds unless she joins in them.'"

W. S. Hulslander and A. A. Vosburg, for appellant. John F. Murphy and George W. Beale, for appellee.

WILLIAMS, J. The important question presented by this appeal is that which is raised by the first assignment of error. The action is ejectment by a purchaser at sheriff's sale upon a judgment against George H. Shoemaker. The defense alleges that the title to the lot in controversy was in Mrs. Shoemaker, the wife of the defendant, and that it was never in the defendant. In support of this line of defense, evidence was given tending to show that Mrs. Shoemaker negotiated the purchase, and borrowed the money which she paid upon it from a relative. The good faith of this purchase was attacked by the plaintiff, who showed that Shoemaker had sold his own house and lot, just before the judgment was recovered against him, for \$1,600, which was paid to him in cash, and that some of this money had been paid to the relative from whom Mrs. Shoemaker claimed to have borrowed the money used by her in the purchase of the lot now in question. The question in the case was whether Mrs. Shoemaker had shown a title obtained in good faith by the investment of her separate moneys, or whether she held for her husband, having used, directly or indirectly, his money in effecting the purchase. Upon this question the learned judge instructed the jury that, if she made the purchase with her own money exclusively, she acquired thereby a title good against her husband and his creditors, but that if she connived or colluded with him in the purchase of the property, by using any of the money which he received for his house

in Green Ridge in payment of the purchase money, then the plaintiff is entitled to a verdict. "If, on the other hand, you find the wife's hands are clean, even though the husband may have sold his property for the purpose of hindering and delaying his creditors, then your verdict should be in her favor, because she is not responsible for his misdeeds unless she joins in them." But he said much more upon this subject, and, omitting all reference to collusion between the husband and wife, told the jury plainly that, if the husband's money went into the purchase of this lot, the plaintiff ought to recover, and that the burden of showing that it did not was upon her. He said: "She must show she obtained the money from some other source than from him or through him. If she fails to overcome that burden, then, *prima facie*, his money paid for it. But, if you fail to find from the evidence in the case that his money went into it, then, even if he sold his property at Green Ridge for the purpose of cheating his creditors, the wife might still be entitled to recover." When we consider all the learned judge said to the jury upon this subject, we do not feel that they were misled, or left without adequate instructions. The good faith of the purchase by the wife with her own property or credit was properly made the turning point in the cause. This was correct. The jury may have erred, but it does not seem that any responsibility of such error, if error there was, rests upon the learned judge. The assignments of error are not sustained, and the judgment is affirmed.

IN re NICHOLS.

(Supreme Court of Pennsylvania. April 12, 1897.)

SUPREME COURT—JURISDICTION.

A petition for the reproduction of a lost deed under which petitioner claims title to realty is not within the original jurisdiction of the supreme court, in view of Const. art. 5, § 3, limiting such jurisdiction to enumerated cases which do not include such proceeding.

Original petition by James Nichols against Flora A. Nichols and George Nichols. Dismissed.

Vosburg & Dawson, for petitioner.

STERRETT, C. J. James Nichols, the petitioner, avers, in substance, that on or about July 29, 1880, his father, Dr. Hiram Nichols, then owner in fee of about 40 acres of land in South Adington township, Lackawanna county, and duly described in the petition, in consideration of natural love and affection and one dollar conveyed same land to him by deed fully delivered; that said deed was not recorded, and has since been lost, and he has no evidence of his title to said land;

that the only persons who claim to have any interest in the same are Flora A. Nichols and George Nichols, both of whom reside in said county; that neither of said persons, nor any one else, is a bona fide purchaser of said land, or has any valid title to the same or any part thereof; and prays (1) that a subpoena issue to said Flora A. Nichols and George Nichols requiring them to appear in this court, to make answer, etc.; (2) that an order may be made directing that said lost deed be reproduced, and a copy thereof be recorded in the office for recording deeds, etc., in and for said county; and that such other orders and decrees in the premises may be made as to justice and equity may appertain, etc. The case thus presented is one of a class in which this court, prior to 1874, doubtless had original jurisdiction concurrently with the several courts of common pleas under the Acts of March, 1786, and January 19, 1793, respectively. *Pepper & L. Dig.* pp. 1577-1581. But since the adoption of the present constitution the latter courts alone appear to have such jurisdiction in their respective counties. Const. art. 5, § 3. This section declares, among other things, that the judges of the supreme court "shall have original jurisdiction in cases of injunction where a corporation is a party defendant, of habeas corpus, of mandamus to courts of inferior jurisdiction and of quo warranto as to all officers of the commonwealth whose jurisdiction extends over the state, but shall not exercise any other original jurisdiction; they shall have appellate jurisdiction, by appeal, certiorari, or writ of error in all cases, as is now or may hereafter be provided by law." As compared with what it was before, the original jurisdiction of this court is very much restricted by the language above quoted. It is very clear that it has been entirely taken away in the class of cases to which the one under consideration belongs; but, if it were otherwise, we would decline to assume jurisdiction unless good and sufficient reasons were shown for not presenting the petition to the common pleas of the proper county. The petition is therefore dismissed at the petitioner's costs.

REILLY v. SHANNON et al.

(Supreme Court of Pennsylvania. April 12, 1897.)

NEGLIGENCE—LIABILITY OF LESSEE.

Lessees of a building damaged by fire, and being repaired under a contract, are not liable to an employé of the contractor injured while working in the elevator shaft by the moving of the elevator; such use as they had of the building at the time being permissive, the elevator not being completed or having been turned over to them, though they were allowed to carry some goods by means thereof to the upper floors, and it not being shown that they, or any one in their employ, started the elevator.

Appeal from court of common pleas, Philadelphia county.

Action by John Reilly against Albert P. Shannon and others. Judgment for defendants. Plaintiff appeals. Affirmed.

J. Washington Logue and Francis H. Garrett, for appellant. Richard P. White, for appellees.

McCOLLUM, J. The defendants were lessees of the building in which the plaintiff was injured, and Henry C. Lea was the owner and lessor of it. Some time previous to the occurrence in question the building was damaged by fire, and at the time of the accident the work of repairing it was in progress. It appears that the work was being done under a contract, and that William McPherson, Jr., was the contractor. The evidence does not show when the lease was made, who was the other party to the contract for repairs, or that the defendants were in possession of the building before the fire. It is clear, however, that such use as the defendants had of the building at the time of the accident was permissive only. They were allowed to bring into the building, and, by means of the elevator, carry, some of their goods to upper floors. The elevator was not turned over to them. It was unfinished, and still in charge of the men who put it in. These men were not employees of the defendants, or subject to their orders. The plaintiff was an employé of McPherson, whose foreman directed him to do the work in which he was engaged when he received his injury. The defendants had no supervision of this work or control of the person performing it. They had no connection with the alleged cause of the accident. It was not shown that they, or any one in their service, started the elevator while the plaintiff was in the shaft. McPherson's foreman testified that when he went to work in the building "it wasn't occupied at all," but that defendants had some stock in it at the time of the accident. The evidence submitted by the plaintiff clearly shows that the repairs and improvements contracted for, and necessary to fit the building for the possession and use of the defendants in carrying on their business, were not completed on the 28th of August. The carpenters, painters, plumbers, and elevator men were then at work there. All the work then in progress was being done under contract. The defendants did not supervise or direct the performance of any portion of it. The injury the plaintiff received may have resulted from his want of ordinary care in the performance of the work he was directed to do, from the negligent act of a fellow workman, or from some omission of duty on the part of his employer; but his evidence is insufficient to charge the defendants with any negligence in connection with the accident. Judgment affirmed.

LAIB v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. April 12, 1897.)

RAILROAD-CROSSING ACCIDENT—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

Testimony that deceased, killed on the fourth track at a crossing, stopped a few feet before the first track, then started across, and that at the time there was a severe rain storm and it was almost as dark as night; an admission that no whistle was blown; conflicting testimony as to whether the bell was rung, and whether at the time there was a watchman at the crossing; and evidence that the train was running from 88 to 50 miles an hour,—present a case for the jury, on the questions of negligence and contributory negligence.

Appeal from court of common pleas, Philadelphia county.

Action by Barbara M. Laib against the Pennsylvania Railroad Company for death of plaintiff's husband, who was killed at a crossing of defendant's railroad. Judgment for plaintiff. Defendant appeals. Affirmed.

Geo. Tucker Bispham, for appellant. P. F. Rothermel, Jr., for appellee.

McCOLLUM, J. We cannot assent to the claim that in this case the court should have directed a verdict for the defendant. The cases cited and relied on to support it were determined upon the evidence in them. They were cases in which a compulsory nonsuit was entered, or a verdict directed for the defendant, on the ground that the plaintiff's evidence disclosed contributory negligence. The negligence which precluded a recovery was the failure of the person injured or killed to stop, look, and listen before attempting to cross the railroad. The fact that he was struck by the train the moment he stepped or drove upon the track was deemed conclusive against the presumption or claim that he complied with the settled rule which required him to do so. But the principle on which they were decided does not bar a recovery in every case in which a person is injured or killed while crossing a railroad. It must be clear and undisputed that he did not comply with the rule, or that, if he did so, he must have seen or heard the approaching train. If the evidence raises a doubt on these points, it must be submitted to the jury. In *McNeal v. Railway Co.*, 131 Pa. St. 184, 18 Atl. 1026, it was held that while *Carroll v. Railroad Co.*, 12 Wkly. Notes Cas. 348, and the decisions which followed it, are sound in principle, the rule enforced by them is applicable only in a clear case. *Ellis v. Railroad Co.*, 138 Pa. St. 506, 21 Atl. 140; *Whitman v. Railroad*, 156 Pa. St. 175, 27 Atl. 290; *Smith v. Railroad*, 158 Pa. St. 82, 27 Atl. 847; and *Link v. Railroad*, 165 Pa. St. 75, 30 Atl. 820, 822,—are to the same effect. Our Brother Williams, referring to these cases in his opinion in *Davidson v. Railway Co.*, 171 Pa. St. 522, 33 Atl. 86, said: "In all these cases

the parties injured drove directly in front of a moving train, and were injured. If that single circumstance was enough to dispose of the question, regardless of the surrounding circumstances, the plaintiff in each of these cases would have been denied access to the jury. But it is not enough. There must be no doubt or uncertainty about the facts attending the accident, in order to justify the courts in treating the question of contributory negligence as one of law." The foregoing views harmonize with the views expressed by our Brother Mitchell in *McNeal v. Railway Co.*, supra, and in *Ely v. Railway*, 158 Pa. St. 233, 27 Atl. 970, and are in accordance with many decisions of this court prior and subsequent to the decisions in the cases cited. Among the recent decisions on this point we note *Haverstick v. Railroad Co.*, 171 Pa. St. 101, 32 Atl. 1128; *Gray v. Railroad Co.*, 172 Pa. St. 383, 33 Atl. 697; *Philpott v. Railroad Co.*, 175 Pa. St. 570, 34 Atl. 856; and *Roberts v. Canal Co.*, 177 Pa. St. 183, 35 Atl. 723. In the cases in which the rule contended for by the appellant was enforced, it was clear that the only inference from the uncontested facts was that the person injured or killed did not stop, look, and listen, or, if he did, he must have seen or heard the train which struck him the moment he walked or drove upon the track. If it is clear that this is the only inference which can be drawn from the evidence in the case before us, the defendant's fourth point should have been affirmed. There were four tracks at the crossing on which Laib was killed. These tracks crossed a public highway, on which there was a great amount of travel. Hundreds, if not thousands, of people passed over it daily. There were no gates at the crossing, and there was no electric bell there to give notice of approaching trains. Near sunset on the 10th of September, 1894, Laib approached the crossing from the north side of the railroad. "A short time before he arrived, a severe storm arose. It became almost as dark as night, and the rain descended in torrents." Three disinterested witnesses testified that he stopped with his horse's head a few feet from the first track, then started across, and was struck by a train on the fourth track, which train was moving at the rate of about 50 miles an hour. They also testified that no bell was rung or whistle blown, and as he started across the tracks they looked in the direction from which the train came, and that it was not visible then, because of the rain and darkness. They testified further that there was no watchman at the crossing at the time of, or immediately before, the accident. This testimony was contradicted by the defendant's witnesses. The engineer testified that the train was running at the rate of from 38 to 40 miles an hour, although he had previously testified before the coroner that it was running at the rate of about 50 miles an hour.

He also testified that the bell was rung, and that there was a headlight on the engine. The watchman testified that he was at the crossing when Laib approached it, and that he waved his lamp, and called to him to "look out for the fast train." He also testified that he saw the headlight and heard the bell ring. Their testimony was supported to some extent by the testimony of other witnesses for the defendant. It was conceded by the engineer and the defendant that the whistle was not blown. It is obvious from the undisputed testimony that the conditions created by the storm were not favorable to a view of the tracks for any considerable distance from the crossing, and that they naturally impaired the ability to hear the signals which ordinarily give notice of an approaching train. If these conditions required of Laib a higher degree of care in the performance of his duty to stop, look, and listen, they also required the defendant to exercise care, commensurate with the danger, to render the crossing reasonably safe under the circumstances. In *Childs v. Railroad Co.*, 150 Pa. St. 73, 24 Atl. 341, we held that, "The greater the speed, the greater the degree of care required in giving warning when approaching a road crossing at grade." In that case, as in this, the defendant's witnesses testified that the bell was rung, and it was admitted by the defendant that the whistle was not blown. The questions whether the ringing of the bell furnished adequate notice of the approach of the train, and, if not, whether the failure to blow the whistle was negligence on the part of the defendant, were submitted to the jury. In this case the speed of the train and the conditions referred to, independent of the conflicting testimony in relation to the ringing of the bell, fairly raised the questions submitted to the jury in *Childs' Case*.

We discover nothing in the defendant's first and second points which furnish ground for reversing the judgment. The questions whether the presumption that the engineer and fireman did their duty in giving the signal of the approach of the train to the crossing was strengthened by the testimony of the engineer as to the ringing of the bell, and whether the testimony that the bell was not rung outweighed the presumption and the testimony that it was rung, were clearly for the jury, upon the evidence in the case applicable to them. In this connection, we may add that it was held in *Haverstick v. Railroad Co.*, supra, that the presumption that the trainmen performed their duty when a train approached a grade crossing might be rebutted by the testimony of a single witness for the plaintiff that no whistle was sounded or bell rung. Upon full consideration of all the evidence in the case, we conclude that the questions of the alleged negligence of the defendant and the alleged contributory negligence of the plaintiff's decedent were for the jury, and were submitted to them under proper instructions. Judgment affirmed.

LAWALL v. GROMAN.

(Supreme Court of Pennsylvania. April 12, 1897.)

ATTORNEY AND CLIENT—LIABILITY FOR NEGLIGENCE—OVERLOOKING FIRST LIEN—AGENCY—EVIDENCE.

1. Though an attorney is acting for the borrower in the matter of a loan, and is to receive all his compensation from him, he may be the attorney of the lender, so as to be liable to him for negligence in failing to discover liens on the property on which security was to be given; the lender having told him to search the records therefor, and he having said he would.

2. One who undertakes to do a certain thing for another, though without reward, knowing that the other is relying on him to do it, is liable for negligence in not doing it with ordinary and reasonable skill and care.

3. A mortgagee who contracted for a first lien may recover the difference in value between that and what she got, of the attorney who undertook to search the record for her, but negligently overlooked prior liens; and this without waiting to see if there is any loss by failure to collect the loan secured.

4. Though agency cannot be proved by declarations of the alleged agent, he is a competent witness to prove it, and his testimony is admissible generally on the whole subject.

Appeal from court of common pleas, Lehigh county; Edwin Albright, Judge.

Action by Marion Lawall against Clinton A. Groman for negligently overlooking a prior lien on property on which plaintiff took a mortgage. Judgment of nonsuit. Plaintiff appeals. Reversed.

William H. Glace and James S. Blery, for appellant. Milton C. Henninger and Marcus C. L. Kline, for appellee.

MITCHELL, J. At the close of the plaintiff's testimony, defendant moved for a nonsuit on three grounds: (1) There was no evidence of the relation of attorney and client; (2) there was no evidence of negligence, fraud, or collusion; and (3) there was no evidence of any damages sustained by the plaintiff. The court entered a nonsuit, and, in refusing to take it off, dwelt principally upon the failure to establish the relation of attorney and client between the parties; but we must, of course, assume that all three of the grounds were considered. The payment of a fee is the most usual and weighty item of evidence to establish the relationship of client and attorney, but it is by no means indispensable. The essential feature of the professional relation is the fact of employment to do something in the client's behalf. There must be an agreement, express or implied, for compensation, but whether payment is made in part or in whole by retainer in advance is not material. Nor is it even indispensable that the compensation should be assumed by the client. Ordinarily it is so from the nature of the employment, which in the vast majority of cases involves the guarding or enforcement of the client's interest against an adverse one, and is therefore exclusive. But even adverse interests, if to be amicably adjusted, may be

represented by the same counsel, though the cases in which this can be done are exceptional, and never entirely free from danger of conflicting duties. In matters of the present kind, it is not uncommon, in many places, including some, at least, of the counties of this state, for the same counsel to represent both borrower and lender, upon mortgage or similar security, although the former only is expected to pay the fees. In *Scholes v. Brook*, 63 Law T. (N. S.) 837, plaintiff had invested money on mortgage, relying on the opinion of "valuers"; and, the property proving inadequate, she sued the valuers for negligence. *Romer, J.* said: "No doubt, in this case, as is common, the costs of Brook and Dansfield's valuation were intended to be paid by the mortgagor, just as the costs of the solicitors employed by the mortgagee were expected to be paid by the mortgagor, in the sense that they would be paid out of the money advanced; but that does not determine the relation between the parties. I am satisfied, on the evidence that as between Brook and Dansfield, on the one hand, and the plaintiff, on the other, it was understood by both that Brook and Dansfield were advising the plaintiff, and that the plaintiff was going to act, in her capacity as mortgagee, on the footing and faith of their valuation and of their being her advisers. * * * It was contemplated, according to what, as I said before, was a usual custom, that the costs of the valuation, if the proposed loan was effected, should be borne ultimately by the mortgagor; but, to my mind, it is clear that Brook and Dansfield were asked to make the valuation, to their knowledge as valuers, on behalf of the mortgagee, not the mortgagor." On appeal this was affirmed by the lord justices. 64 Law T. (N. S.) 674. So, in *Wittenbrock v. Parker*, 102 Cal. 93, 36 Pac. 374, the custom was recognized, it being said: "The burden cast upon the mortgagor of paying for the services of the attorney selected by Bithell [the mortgagee] to guard his interests was simply a condition of the loan, and did not alter the status of such attorney, or diminish the duty or responsibility which he owed to his employer." In the present case it is undeniable that the defendant was acting for Roberts, the borrower, from whom he received his compensation, and to whom alone, upon the manifest understanding of all parties, he was to look for it. But that fact does not of itself prevent the relation of attorney and client between plaintiff and defendant, if such was the mutual understanding. There was no evidence of custom in that respect, and the court below might not be able to say, as matter of law,—certainly we cannot,—that such was in fact the custom. But, outside of the existence of any general rule, there was evidence from which the jury might have inferred that such was the understanding of these parties in this particular case. The defendant unquestionably acted to some extent for and in behalf of the plaintiff. After the

money was paid over, he kept the mortgage, which was then the property of plaintiff, and he put it on record. In so doing he was clearly acting for plaintiff, and, if he had negligently delayed recording until a subsequent judgment or other incumbrance slipped in ahead of it, there can be no question that he would have been liable for the negligent performance even of a duty voluntarily assumed. But there was evidence that he did more for plaintiff than put the mortgage on record. Lawall testified that he told defendant "to search the title and the records in reference to liens," and that "he said he would," and more to the same effect. The presumption is that this was done in behalf of plaintiff. To Roberts, the borrower, the priority of other incumbrances was of no concern, with regard to this loan, except as bearing on plaintiff's willingness to advance the money; but to plaintiff it was a material fact, as part of the inducement or consideration for risking the investment. We are of opinion, therefore, that there was sufficient evidence to submit to the jury on the existence of the relation of attorney and client in the case.

But the nonsuit was also erroneous for another reason. Independent of the relation of attorney and client, there was evidence, already noticed, that defendant undertook certain duties for the plaintiff. The learned judge rightly says that collusion or fraud could not be found, on the evidence in the case, but this does not exclude liability arising from negligence. The principle settled in *Coggs v. Bernard*, 1 Smith, Lead. Cas. 369, that one who undertakes to do, even without reward, is responsible for misfeasance, though not for nonfeasance, has been generally adopted. If, therefore, defendant, knowing that plaintiff was relying on him, in his professional capacity, to see that her mortgage was the first lien, although Roberts was to pay the fees, undertook to perform that duty, he was bound to do it with ordinary and reasonable skill and care in his profession, and would be liable for negligence in that respect.

The argument for the third ground of nonsuit, that it has not yet been shown that plaintiff has suffered any damage, would not be without force, if the question were new, inasmuch as she took the mortgage as security only, and the mortgagor, when called upon, may pay the debt, or, the mortgage being sued out, the property may bring enough to cover it. But the law is settled the other way. Plaintiff is entitled to the security she contracted for, and may recover the difference in value between that and what she actually got. The cause of action is the breach of duty, not the damages, which are only an incident. *Miller v. Wilson*, 24 Pa. St. 114, was very similar to the present case. The plaintiff had judgments which were a lien on certain real estate, and agreed with a purchaser of the latter to accept his bond secured by mortgage on the

land. Defendant was employed as attorney to carry out the agreement, and in that capacity satisfied plaintiff's judgments, but neglected to have the mortgage recorded until other judgments were entered ahead of it. In meeting the point now made, Chief Justice Black said: "The argument is that plaintiff has not, as yet, suffered any actual loss from the defendant's violation of duty, and that she can recover from Miller (defendant) only in case Carson (mortgagor) make default, because, the mortgage being but a security for the bond, there is nothing due on the former until the condition of the latter is broken. But we hold it for clear law that defendant * * * subjected himself to an immediate action, in which the plaintiff may recover compensation for all she has lost, and all she is likely to lose, through his misconduct." The cases have usually arisen on the statute of limitations, and it has been uniformly held that the right of action is complete, so that the statute begins to run from the breach, although the damage may not be known, or may not in fact occur, until afterwards. In *Moore v. Juvenal*, 92 Pa. St. 484, it is said by the present chief justice: "Where the declaration alleges a breach of duty, and a special consequential damage, the breach of duty, and not the consequential damage, is the cause of the action; and the statute runs from the date of the former, and not from the time the special damage is revealed or becomes definite." See, also, *Lilly v. Boyd*, 72 Ga. 83, citing our own case of *Rhines' Adm'rs v. Evans*, 66 Pa. St. 192.

On the question of damages, the plaintiff's case was weak. The statement avers that the property is "not worth more than twelve hundred dollars." The witness Yeager thought it would be "cheap at ten or twelve hundred dollars," and Dr. Fegley, the owner of the first and second liens, testified that the property had "rather increased during the last two years." That is about all there is on the subject. But, although it is meager, we cannot say that it is not enough to go to the jury. If they should find the security worthless, and the court, in view of the fact that the verdict must necessarily be based largely on opinion on that point, should have any doubt on the subject, its powers are sufficient to prevent injustice to the defendant. In *Green v. Dixon*, 1 Jur. 137,—a similar action against an attorney for taking an insufficient security,—Lord Abinger having indicated his opinion that plaintiff had made out a cause of action, a verdict was rendered for plaintiff for the amount advanced, he undertaking to convey the security taken to any one appointed by the defendant. The equity powers of courts, even in suits at law, in Pennsylvania, are ample to protect the defendant in the same or equivalent manner.

The offer contained in the third assignment was clearly incompetent. There was no evidence, as the learned judge said, of

collusion or fraud, and nothing to make the declarations of Roberts evidence against defendant.

The fourth assignment, however, must be sustained. The authority of Edgar Lawall, from his sister, to pay over the money, was a fact to which he could testify. Though agency cannot be proved by declarations of the alleged agent, yet he is a competent witness to prove it; and his testimony cannot be restricted to the mere words used by the principal, but is admissible generally on the whole subject. Judgment reversed and procedendo awarded.

OVERSEERS OF POOR OF BOROUGH OF TUNKHANNOCK v. OVERSEERS OF POOR OF BOROUGH OF MONTROSE.

(Supreme Court of Pennsylvania. April 12, 1897.)

PAUPERS—ORDER OF REMOVAL.

It appeared that while a husband and wife were temporarily residing in M. borough, on the application of the wife, an order for their relief was issued to the overseers: that he afterwards supported his family without aid; that during the time he was supporting the family his wife went to T. borough, to remain, while sick, with relatives; that, while there, an order for her relief was issued by the overseers of T. borough; and that the husband's place of settlement was in neither of such boroughs. *Held*, that an order of removal to M. borough, as a means of returning the wife to her husband's house, and for no other purpose, would not be disturbed.

Appeal from court of quarter sessions, Wyoming county; R. W. Archbold, Judge.

Proceeding by the overseers of the poor of the borough of Tunkhannock against the overseers of the poor of the borough of Montrose for the removal of a pauper, commenced before justices of the peace, and taken on appeal by defendants to the court of quarter sessions. From a judgment affirming the order of removal, defendants appeal. Modified and affirmed.

Lott & Maxey, for appellants. W. E. & C. A. Little, for appellees.

WILLIAMS, J. This case has very little left in it for consideration. The court below amended its order by striking out so much of it as fixed the legal settlement of Larnie Murphy upon the borough of Montrose, before the record came into this court. The proper place of her husband's settlement, and therefore of her own, appeared by the evidence to be the city of Scranton. He left that city in search of work, and had resided temporarily wherever he could find it. In August, 1892, he was in the township of Troxen, Wyoming county. In September of the same year he went with his wife to Tunkhannock township. He removed to the borough of Tunkhannock in November, and near the end of December went to the borough of Montrose. For a few

weeks he was without work, and during this time his wife appealed to the overseers of the poor for assistance. An order of relief was issued in consequence of application, requiring the overseers to provide for the family "until the said Murphy can secure work and be removed." Murphy obtained work soon after, and no further aid from the overseers was thereafter asked or given. About the 1st day of May following, Mrs. Murphy, who was in an advanced state of pregnancy, returned to the house of a relative in the borough of Tunkhannock, to be confined. On the 6th day of the same month, an order for her relief was issued to the overseers of the said borough. This was followed, a week later, by the order of removal now before us. Nothing appears to have been done by the overseers except to serve notice of the order of removal upon the officers of the defendant borough. Upon the trial in the court of quarter sessions of Wyoming county, the order of removal was sustained, and the poor district of Montrose appealed.

It is admitted that neither Murphy nor his wife was in fact a public charge or in the receipt of relief from Montrose poor district when Mrs. Murphy went to Tunkhannock borough for her confinement. She clearly had no legal settlement there. She had no quasi settlement. Her husband was there temporarily, and was bound to provide for her. That was her home,—her actual domicile. Being found sick and in want in another district, the duties of the overseers of such district was to provide for her until she could be taken to her husband's house, as the statute forbids the separation of husband and wife by the overseers of the poor. As a matter of fact, the officers of Tunkhannock poor district did not remove Mrs. Murphy. She returned to Montrose when able, at her own instance and at her own cost. For what, then, is the borough of Montrose liable to the plaintiff? It is not for any relief that may have been furnished, for no evidence of such relief is before us. But, if furnished, the husband or the place of legal settlement must be looked to for payment. It is not liable for the expenses of her removal, for she was not in fact removed, having returned, as soon as she was able, to her husband's house.

The order of removal having regularly issued, it was right that it should be served upon the defendant, and the question properly determined whether the removal was for any reason proper to be made. The order of the court below, as it stands amended, is a holding that the order was properly issued, as a means of returning Mrs. Murphy to her husband's house, and for no other purpose; and for this reason alone he sustained it, notwithstanding the fact that nothing was done under its authority. We are not disposed to disturb this finding, but will further modify the order by striking therefrom the words "their reasonable costs and charges on this behalf expended," and substituting therefor the fol-

lowing: "The defendant to pay the costs of this appeal." And, so modified, the order appealed from is affirmed.

BRADDOCK TRUST CO. v. GUARANTEE TRUST & SAFE-DEPOSIT CO. OF PHILADELPHIA et al.

(Supreme Court of Pennsylvania. April 12, 1897.)

EQUITY—LACHES.

A bill in the nature of an action of deceit, based on fraudulent representations, whereby plaintiff was induced to discount a note of a corporation, cannot be maintained where brought more than six years after maturity and non-payment of the note, at which time plaintiff was informed of the main fact on which its bill is based, and put on inquiry as to everything material thereto.

Appeal from court of common pleas, Philadelphia county.

Suit by the Braddock Trust Company against the Guarantee Trust & Safe-Deposit Company of Philadelphia, administrator of Charles Siemens, deceased, and others. Bill dismissed, and plaintiff appeals. Affirmed.

L. L. Scaife and M. Hampton Todd, for appellant. Silas W. Pettit, for appellee Guarantee Trust & Safe-Deposit Co.

MITCHELL, J. The learned master found the fact of fraud in favor of the appellant, and we are therefore not required to consider the complicated transactions out of which the cause of action arose, further than as they bear upon the only question really before us,—the delay of appellant in bringing its bill. The right of action accrued in February, 1882, and this bill was not filed till more than six years later. Are there sufficient circumstances to excuse the delay either at law or in equity? The bill is a substitute for an action of deceit, the basis of which is that plaintiff was induced to discount two notes of the Siemens-Anderson Steel Company, for \$33,000 each, by the false and fraudulent representation that the capital stock of that company, of \$1,500,000, was full paid. It is not claimed that such representation was made by any of defendants, but by one Cosgrove, charged as being an agent or co-conspirator with defendants; and the master has found that the latter so acted as to participate in or be responsible for his fraud. Whether we should have reached the same conclusion is by no means clear, but, as already said, that question is not now raised on this record. The last of the notes so discounted fell due in February, 1882, and was not paid. The right of action then accrued; but it is claimed by plaintiff that the fraud was not discovered until later, and that the statute of limitations only runs from the date of discovery. The specific fraud charged is that it was represented, and made so to appear on the face of the transaction, including the statement required by the New York statute under which the company was

chartered, that the stock of the company had been issued to Dr. Siemens in payment for the license to use his patents and processes in the manufacture of steel, whereas he had in fact only received the stock temporarily as security for his real payment, which was in bonds of the company for a much smaller amount; and the stock was in truth allotted at less than par to certain promoters, as their profit in the enterprise. The crucial fact, therefore, was the variance between the real and the apparent transaction in regard to the issue of this stock to Dr. Siemens, and the question is: When was plaintiff informed of the truth in this regard, or put upon such inquiry as was equivalent to notice?

As already said, the last note came due in February, 1882, and was not paid. The Siemens-Anderson Steel Company had in the spring of 1881 bought out the Pittsburgh Steel Works, then conducted by Anderson & Co. That firm appear to have been in fact insolvent at that time, though their credit was fair, and their real condition is not shown to have been known to any one except probably to Cosgrove, who was the financial clerk or manager. The Siemens-Anderson Steel Company, having thus involved itself at the outset with an insolvent company, came to speedy failure, and in November, 1881, confessed judgments, on which its entire property was sold out, in January, 1882. At this point the facts which the master held equivalent to notice came in. On January 28, 1882, just after the sheriff's sale under the confessed judgments, and before actual delivery of the company's property to the purchasers, Dr. Siemens, through his agent, presented a petition to intervene and to open the confessed judgments, on the ground that the property was covered by a mortgage which was security for the bonds of the company, and he was the holder of \$300,000 of said bonds, which he had received in payment for his license to use his patents and processes. On February 16, 1882, the appellant also intervened as a creditor to have the confessed judgments opened; and its petition was founded on information from the contents of petitions by other interveners, including Dr. Siemens. We thus have the present plaintiff and the principal defendant brought together in a litigation as common creditors of the Siemens-Anderson Steel Company, in an endeavor to open and set aside judgments given to other and preferred creditors, and one of the petitions on which their effort was founded setting forth the crucial fact now made the basis of this bill, that Dr. Siemens was paid for his patents by bonds, and not by stock, as plaintiff had been led to believe. It is true there were other matters relied upon to prove the fraud, such as the commissions secretly paid or promised to Patrick, and to Holly, etc.; and these are of much weight on the question of fraud, but on the question of notice to put plaintiff on inquiry they were make-weights only. The substantial basis of the bill is the misrepre-

sentation as to the full payment of the stock, and that rested on the assertion that it had been issued to Dr. Siemens in payment for the use of his patents. When his petition showed that he had been paid in bonds, and not in stock, the plaintiff was informed of the main fact on which it now bases its bill, and was put upon inquiry as to everything material to the present litigation. Not having acted for more than six years, it is now too late, both at law and in equity. Decree affirmed, with costs.

FOWLER v. WEBSTER.

(Supreme Court of Pennsylvania. April 12, 1897.)

RESULTING TRUST—EVIDENCE.

Equity will not declare a resulting trust in land alleged to have been purchased by defendant in his own name, under an agreement to convey a half interest to plaintiff, where it appears that the former paid the installments of the price when due, without any offer by plaintiff to contribute; that certain payments made by plaintiff might have been on account of a partnership which existed between the parties for quarrying stone on the land; that during the time when, if the alleged agreement was made, plaintiff was in default in paying his part of the price, he loaned defendant money; and that the latter, without consulting plaintiff, leased a part of the property, and erected valuable improvements.

Appeal from court of common pleas, Lackawanna county; George S. Purdy, Judge.

Bill by John W. Fowler against M. O. Webster to establish a trust in land, and for an account. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Thos. F. Wells and Chas. H. Welles, for appellant. J. W. Carpenter and R. H. Holgate, for appellee.

FELL, J. The plaintiff alleges in the bill filed that he entered into a parol agreement with the defendant for the purchase by them of land for their joint benefit; that the contract with the vendor was made in the name of the defendant, who agreed to convey to the plaintiff a half interest in the land; that he paid to the defendant, from time to time, sums of money to be applied to the purchase; that, in violation of the agreement, the defendant has refused to account for the money received from the sale of stone quarried on the land, and for the proceeds of the sale of the land. The prayer is that the defendant be decreed a trustee, and for an account. The answer filed and the facts found negative every allegation of the bill. The learned trial judge finds that there was no agreement between the parties for the purchase of the land in question; that the plaintiff did not pay any part of the purchase money, or offer to pay any; and that the payments made by him from time to time were on account of a partnership transaction between the parties for the quarrying of stone upon the land. If these find-

ings are correct, it follows that the decree dismissing the bill is right; and it is unnecessary to consider whether a resulting trust will arise in favor of one who paid no part of the purchase money at the time the title was acquired, but who subsequently made payments in fulfillment of his original agreement, but not to the extent of the interest contracted for and claimed.

The testimony of the witnesses was conflicting and irreconcilable, and, in reaching a conclusion, the learned judge gave great, but not undue, weight to the conduct of the parties. The question was one of intention, and, in determining this, the acts of the parties in relation to the land were of the first importance. The option to buy the land and the contracts of purchase were secured solely by the defendant, and the title taken in his own name. The payment of the price was made by him as the installments fell due, without an offer by the plaintiff to assist, or a recognition by him in any way of an obligation on his part to meet the payments. During the time when, if the alleged agreement existed, the plaintiff was in default in his payments, he loaned money to the defendant, and procured loans for him from others. The defendant, without consultation with the plaintiff, leased a part of the land, erected at his own expense a dwelling house and other valuable improvements on another part of it, and constructed a railroad three miles in length, in order to market the stone. All of these acts are more or less inconsistent with the claim of joint ownership. Together they indicate that the entire and absolute right of management, control, and disposition of the property was in the defendant. On the other hand, the payment of money made by the plaintiff may be explained as connected with the partnership for quarrying stone, which admittedly existed for a few months between the parties. The case is not free from doubt, but we are not satisfied that there was any error in the findings upon which the decree was based. To establish a trust by parol, the evidence should be clear and convincing. The testimony was very carefully considered by the learned judge of the common pleas, and we agree with him that it was not sufficient to establish the plaintiff's claim. The decree is affirmed, at the cost of the appellant.

BORIE et al. v. SATTERTHWAITE et al.
(Supreme Court of Pennsylvania. April 12, 1897.)

EQUITY PLEADING—ADEQUATE REMEDY AT LAW—STATUTE OF FRAUDS—AGENTS—ACTING IN DUAL CAPACITY—VENDOR AND PURCHASER.

1. A bill for specific performance of a contract to sell land, for removal of a cloud on title, and to prevent the fraudulent use of legal process for the accomplishment of a collusive and illegal purpose, need not aver inadequate remedy at law, even in the absence of the equity rules, which dispense with formal averments.

2. An agreement to sell land, signed by the vendor, and by his agent acting for the vendee, who thereafter accepts the contract, may be enforced by the latter; the vendor's signature alone being sufficient to satisfy the statute of frauds.

3. Where it appeared, in a suit for specific performance against a vendor and his children, to whom he had conveyed the land after the contract with complainants, that there was a prior understanding between father and children that the latter should look to his property for payment of money which he owed them, but without any agreement by him to convey the land in suit, their equity was sufficiently protected by providing in the decree for complainants that the purchase money be applied to the children's claim.

Appeal from court of common pleas, Montgomery county; Aaron S. Swartz, Judge.

Suit by Beauveau Borie and others against Edwin Satterthwaite and others. There was a decree for complainants, and defendants appeal. Affirmed.

N. H. Larzelere and Amos Briggs, for appellants. Geo. Tucker Bispham and Childs & Evans, for appellees.

MITCHELL, J. This is a bill for specific performance of a contract to sell land, for the removal of a cloud upon title, and to prevent the fraudulent use of legal process for the accomplishment of a collusive and illegal purpose. As each of these grounds is, and has always been, a subject of general equitable jurisdiction, the suggestion that there is a full remedy at law does not merit serious discussion; and the absence of a specific averment of want of adequate remedy at law would not have been fatal even before the adoption of the present equity rules, by which merely formal averments are dispensed with.

The defendant Edwin Satterthwaite, being the owner and holder of the legal title to the land in question, agreed in writing to sell it to one Kohler for the complainants. The agreement was executed, acknowledged, and recorded, and the first installment of the purchase money paid by complainants, and received by the vendor, in accordance with the agreement. A few days afterwards, the vendor conveyed the land to some of the other defendants, his children, in pursuance of an alleged parol agreement previously made with them. This conveyance was made, not only with the record notice, but with actual knowledge by the grantees of complainants' rights. In fact, it was a fraudulent scheme to defeat such rights, and to enable the vendor to get out of his agreement, because his children thought they could do better. The learned judge below found there was no inadequacy of price, and no circumstance of imposition or advantage taken of the vendor. Some question was made as to whether Kohler had done his full duty to the vendor in disclosing to him the entire situation. But, as the learned judge properly held, no such failure on Kohler's part was satisfactorily established, and, if it

had been, it could only affect Kohler's right to commissions, and in no way concerned the purchasers.

But the point perhaps most relied on by the appellants is that the agreement is between Satterthwaite and Kohler, and the complainants, not being parties, have no standing to enforce it. There is no weight in this objection. The agreement recites on its face that Kohler was "acting for" the complainants, and they ratified his action by paying the money called for in the agreement. *Swissheim v. Laundry Co.*, 95 Pa. St. 367; *Sylvester v. Born*, 132 Pa. St. 467, 19 Atl. 337; *Yerkes v. Richards*, 153 Pa. St. 646, 26 Atl. 221; *Id.*, 170 Pa. St. 346, 32 Atl. 1089. Except for the statute of frauds, the whole contract might have been in parol, and the statute was satisfied by the signature of the vendor.

It is further urged that the contract is void, because Kohler was acting in a dual capacity, as agent for the seller and also for the purchasers. It is conceded that, if the facts were so, equity would refuse to enforce the contract; but the evidence entirely fails to show that, in making the bargain, Kohler acted for any one but the vendor. He was a real-estate agent, and had had this property in charge for two years to sell, at the same price. His own testimony shows that he was negotiating with other purchasers at this time; and in fact he appears rather to have forced the purchase upon the complainants by representations of the use that was likely to be made of the property by other buyers. The learned judge was entirely right in holding that Kohler was in no respect the agent of complainants in negotiating the purchase. What he did as "acting for" them was to sign the articles of agreement for the sale, and, as the learned judge found, he did this under the mistaken idea that both parties must sign in order to make the contract mutually binding between the vendor and the purchasers. His action in this respect was therefore as much in the interest of his employer, the vendor, as of the purchasers, and was openly disclosed to the vendor, who accepted it without objection, received the money from the complainants, and paid Kohler's commissions. The case does not fall within any of our adjudications where agency in a double capacity has been condemned. On all the facts, therefore, it is plain that there was no legal defense at all to the bill, and no equity on the part of the vendor.

The equity set up in behalf of the other defendants, children of the vendor, is in substance that their mother bequeathed to them the sum of \$9,000, which during her lifetime she had loaned or given to her husband, their father, and the latter, on being called upon to pay, was unable to do so without selling this land, and therefore made a parol arrangement, by which, as set forth in the answer, "subject to the existing incumbrances

thereon, * * * and subject to the payment of the other debts of said Edwin Satterthwaite, he shall hold said property for their use." The evidence of this alleged agreement, as said by the learned judge, is meager; but, taking it at its strongest, it makes out no interest in the land. It fails to establish an agreement to convey the farm to the children. The agreement, as testified to by the parties, as set out in the answers, and as recited in the deed from the father to the children, varies in essential particulars; and the learned judge took as favorable a view as the evidence would warrant, when he held that "the whole transaction shows that the children, instead of taking a mortgage, had such confidence in the father, and in the value of the farm, that they were content to look to him and his property to pay them at such time as they might make demand." The decree of the court below provides for the application of part of the purchase money to the payment of the children's claim, and, in so doing, it amply protects any equity they have shown in the case. Whether they can enforce payment in this way as against other creditors of the father, if any there be, is a question which does not arise in this case.

The remaining defendant, Mrs. Carwithian, was a mere intermeddler, who attempted to help to defeat the complainants' rights by a collusive suit on a prior mortgage. She had no equity of any kind, and was treated quite as well as she deserved when she was allowed her costs. Decree affirmed, at costs of appellants.

FOLK v. SCHAEFFER et al.

(Supreme Court of Pennsylvania. April 12, 1897.)

EVIDENCE—DECLARATION OF PARTNER TO BIND FIRM.

1. In an action against a firm for personal injuries, the declaration of one of the partners, who had no personal knowledge of the accident, that plaintiff ought to be paid, and that he preferred the money should go to plaintiff rather than to the attorneys, but that his partners did not agree with him, was erroneously admitted.

2. Error in admitting the declaration was not cured by limiting its effect to the partner who made it.

Appeal from court of common pleas, Berks county.

Action by Richard B. Folk against Lewis Schaeffer and others, trading as Schaeffer, Merkel & Co., to recover damages for personal injuries. From a judgment for plaintiff, defendants appeal. Reversed.

The following were the specifications of error: "(1) The court erred in not affirming the defendants' tenth point, which was as follows: 'Under all the testimony in the case, the verdict must be for the defendants. Answer: Declined' (and not read to the jury). (2) The court erred in not affirming the de-

fendants' fourth point, which was as follows: 'Where an employé, in the course of his employment, and from an elevated platform, directs the hoisting of a ponderous article, and discovers a slackness in one of the guy ropes, indicating the yielding or giving way of the rope bearing the strain, and undertakes himself to adjust the matter by tightening the slack rope, and then orders the men to go on with the hoisting, whereupon the strained rope separates by the opening of a knot, said employé must be regarded as having intelligently and voluntarily assumed all the risks of the situation. Answer: Declined' (and not read to the jury). (3) The court erred in not affirming the defendants' ninth point, which was as follows: 'The plaintiff's own testimony shows that the accident occurred through his negligence. Answer: Declined' (and not read to the jury). (4) The court erred in admitting the testimony of Charles B. Folk, one of the plaintiff's witnesses, as to a declaration made by Lewis Schaeffer, one of the defendants. (5) The court erred in not affirming the defendants' seventh point, which was as follows: 'While admissions by a party to a suit such as this, of pertinent facts, are evidence against him, a mere declaration that he believes himself liable is not evidence; and especially is this so where the person making the declaration is one of a number of co-partners, and does not appear to have any actual personal knowledge of the pertinent facts. Answer: Declined' (and not read to the jury)."

D. Nicholas Schaeffer and Cyrus G. Derr, for appellants. John H. Rothermel, H. P. Keiser, and J. H. Jacobs, for appellee.

FELL, J. The plaintiff was injured while assisting his fellow workmen in placing a hood on the top of an iron smokestack. The direct cause of the accident was the slipping of a knot in one of the guy ropes which held a derrick in place. The knot had been tied by one of the defendants.—Merkel. The action was against Schaeffer, Merkel, and Betolette, co-partners trading as Schaeffer, Merkel & Co. At the time of the accident the work was in charge of the plaintiff. None of the defendants were present, and none of them except Merkel had seen the appliances used, or had any connection with the work. At the trial an offer was made to prove by a witness that after the accident Schaeffer had said that the plaintiff ought to be paid; that he had always been willing to pay him; that the other members of the firm did not agree with him; and that he preferred to pay the plaintiff, rather than that the money should go to the lawyers who had brought the action. Under objection this witness testified that two years after the accident Schaeffer had made to him a statement substantially the same as that set out in the offer. It does not appear that Schaeffer had any personal knowledge of the accident, or of the circumstances under

which it happened. He made no admission of a fact from which negligence could be inferred, and no acknowledgment of a liability recognized by the firm. At the most, he but expressed his individual opinion that the plaintiff should be paid, and a willingness on his part, not acquiesced in by his partners, that the firm should pay something to avoid litigation. His opinion as to the legal liability of his firm, and his expression of a willingness to pay something in compromise of pending litigation, neither imposed a liability nor tended to establish facts from which it would arise. This testimony was doubtless prejudicial to the defendants, and the error in admitting it was not cured by limiting its effect to the party who made the statement. As the action was against the firm, there could practically be no such limitation. The case could not have been properly withdrawn from the jury, and it was carefully submitted by the learned trial judge. The first, second, and third assignments of error are overruled, and for the reasons stated the fourth and fifth assignments are sustained. The judgment is reversed, with a *venire facias de novo*.

BURNS v. SMITH et al.

(Supreme Court of Pennsylvania. April 12, 1897.)

APPEAL FROM ARBITRATORS—PAYMENT OF COSTS.

Appeal from arbitrators should not be stricken off for nonpayment of costs within prescribed 20 days, where appellant's check, given the prothonotary 16 days before expiration of the time, was good, and known to the prothonotary to be so, and was accepted by him in payment without objection, but was not presented for payment or deposited for collection.

Appeal from court of common pleas, Lackawanna county; H. M. Edwards, Judge.

Action by J. H. Burns against Cornelius Smith and another for libel. Appeal from award of arbitrators was stricken off, and defendants appeal. Reversed.

A. H. McCollum and C. Smith, for appellants. Everett Warren, O'Brien & Kelly, and J. Alton Davis, for appellee.

FELL, J. The assignments of error which relate to the action of the court in refusing to strike off the award of arbitrators must be overruled. On the hearing of the rule it was not made to appear that there was any irregularity in the proceeding, or misconduct on the part of the arbitrators. The statement set up a sufficient cause of action, and whether the publication was privileged was properly left to be determined at the trial. The first and second assignments relate to the order striking off the appeal from the award of the arbitrators. The award, which was for \$15,000, was filed September 19, 1895, and on September 28d the defendants appealed, and one of them gave the prothonotary his check for the costs. This check was

known by the prothonotary to be good. He accepted it in payment of the costs, without question or objection, and indorsed it, but failed to present it for payment or to deposit it for collection. He retained it in his possession, without notice to the defendants, until October 14th, when the time within which the appeal could be perfected by the payment of the costs in money had passed. A clerk, who was not without interest in the proceedings, entered upon the records of the office, with the knowledge of the prothonotary: "C. Smith, by check, pays costs." The rule to strike off the appeal was based upon this entry, and the fact that the money had not been actually received by the prothonotary within the 20 days allowed for an appeal. Had the entry been simply, "Costs paid," or had the check been cashed within the time, there would have been no ground for the application to strike off the appeal. The payment of all taxed costs within 20 days is a condition precedent to a valid appeal from an award of arbitrators; and it has been rigidly held that actual payment is required, and that payment by check or draft or note, or by charge to the appellant's attorney, is not payment, within the meaning of the act. *Rice v. Constain*, 89 Pa. St. 477. The rule is based upon the reason stated in *Ellison v. Buckley*, 42 Pa. St. 281, that the prothonotary should not be permitted, by accepting a note or a promise to pay, to substitute his own responsibility for actual payment. A payment by check, however, which was itself actually paid within the 20 days, was said in *Rice v. Constain*, supra, to be a valid payment. There was formerly much more reason for the rule that payment should not be made by check than there is now, when the use of checks as a means of payment has become almost universal. When the check has been paid within the 20 days, there has been an actual payment within the period fixed. Referring to the decisions on the subject, it was said by Mitchell, J., in the opinion in *Schrenkelsen v. Kishbaugh*, 162 Pa. St. 45, 29 Atl. 284: "But none of these cases, nor the reasons on which they are founded, require anything more than actual payment. They sustain the striking off or the refusal to allow an appeal, not for mere technical default, but for substantial failure of payment." If the check had been dishonored, or tendered and accepted too late for collection within the limit of time fixed for an appeal, there would have been, under our cases, a failure of payment through the default of the defendants. But their default was technical, merely, and the failure of actual payment was due to the conduct of others, which they had no reason to anticipate. Sixteen days before the expiration of the time the defendants gave a check in payment of all the costs then taxed. They had every reason to suppose that this check, which was drawn on a bank within a short distance of the prothonotary's office, would

be presented for payment in the ordinary course of business. They confidently believed it had been presented, and that they were secure in their right of appeal. It was the duty of the prothonotary to present it or return it, or notify them and give them an opportunity to pay in money. Instead of doing this, he waited until his failure to receive the money within 20 days, in connection with the entry on his docket showing that the costs had been paid by check, placed the defendants in apparent default. This was not fair dealing, it was not just, and there is no rule by which we feel constrained to sanction it. The order of the court striking off the appeal is reversed and set aside, the appeal is reinstated, and the record is remitted for further proceedings.

HALL v. WEST CHESTER PUB. CO.
(Supreme Court of Pennsylvania. April 12, 1897.)

CORPORATION — INFORMALITY IN ELECTION OF DIRECTORS — APPLICATION TO VACATE JUDGMENT.

1. A judgment note of a corporation, the execution of which was authorized by its board of directors, is not invalid because of informality in the election of the directors, where they comprise all the stockholders of the corporation, and the note represents a valid debt, which was due.

2. A director of a corporation has no standing as a stockholder to question the title of the other directors to their offices because of informalities in their election, when he participated in all the proceedings, and has acted as a director under an election equally informal.

3. An application to strike off a judgment must be on the ground of irregularities appearing on the face of the record.

4. The rights of general creditors of a corporation as against a judgment entered on a judgment note executed by it, because of the insolvency of the corporation when the note was executed, cannot be determined on a petition by one of them to set aside the judgment.

Appeal from court of common pleas, Chester county; William B. Waddell, Judge.

Petition by John B. Robinson to set aside a sheriff's sale, and to strike off a judgment, under which the sale was made, in favor of Samuel D. Hall and against the West Chester Publishing Company, entered on a judgment note. The petitioner alleged that he was a creditor, stockholder, director, and treasurer of the defendant corporation, and that the corporation was insolvent when the note was executed. The petition was dismissed, and petitioner appeals. Affirmed.

J. Carroll Hayes, T. Speer Dickson, and Wm. M. Hayes, for appellant. William Butler, Jr., and Alfred P. Reid, for appellee.

FELL, J. By the petition filed in the common pleas the court was asked to set aside a sheriff's sale of personal property because of the failure of the sheriff to duly advertise the same, and to strike off the judgment by confession under which the sale was made, for the reason that the confession was not au-

thorized by a lawfully constituted board of directors. The alleged failure to duly advertise was not sustained by proof. The execution of the judgment note had been authorized by the directors at a regular meeting of the board 10 months before the sale. At this meeting four of the five directors were present. It was admitted that the debt for which the judgment note was given was due the plaintiff for money loaned the company. Some of this money had been furnished by him nearly five years before, and a judgment note, as to the regularity and validity of which there could be no doubt, was given by the company to him at the time. This note was canceled, and the amount due on it was included in the note in question. The merits are strongly with the plaintiff, who was enforcing a judgment given months before for a debt admittedly due, and for which he could have recovered judgment by action. The apparent informality in the proceedings of the company in maintaining its organization is due to the fact that during the greater part of its existence the board of directors has included all the stockholders, and no distinction has been observed between stockholders' and directors' meetings. The last election of directors at a stockholders' meeting was in 1890, when three directors were elected. At a meeting in 1891, at which all of the stockholders appear to have been present, the number of directors was increased to five, and the appellant was chosen one of the additional directors, and on his motion the other one was chosen. Since then all the stockholders have been directors, and vacancies in the board of directors have been filled at the directors' meetings as they occurred. The action of the board has thus been the action of the stockholders, and whatever has been done has been done with the consent of all parties in interest. Under the provisions of the act of May 14, 1891 (P. L. 61), the three original members of the board would hold their offices until their successors were chosen, and it was in the power of the stockholders at any time to increase the number of directors to five. The proceedings have been informal and irregular, but the appellant, who has participated in them, and who has served as a director since 1891, under an election not more regular than that of his associates on the board, has no standing as a stockholder of the company to object to the title of the other directors to their offices. Nor had he a standing as a creditor to ask that the judgment be struck off. The judgment could not have been struck off on the application of the defendant, as there was no irregularity on the face of the record. "A motion to set aside or strike off a judgment must be on the ground of irregularity appearing on the face of the record. A motion to open it is an appeal to the equitable power of the court to let the defendant into a defense." *O'Hara v. Baum*, 82 Pa. St. 416. The distinction between these rules is very frequently overlooked in practice; and at times, owing to the admission of

facts not of record, it has not been observed in the language of the decisions. But, as said in Mitchell on Motions and Rules (page 75): "The rule as stated by Chief Justice Sharswood in *O'Hara v. Baum*, above quoted, is the true and settled rule, and will always be enforced when the attention of the court is directed to it." See, also, *France v. Ruddiman*, 126 Pa. St. 259, 17 Atl. 611; *Adams v. Grey*, 154 Pa. St. 258, 26 Atl. 423. The defendant raised no objection to the judgment, and could have raised none; and, as stated by the learned judge of the common pleas, if the application had been to open the judgment, the evidence would not have warranted the court in awarding an issue. The averment of the insolvency of the corporation made in the amendment to the petition, if established by evidence, did not affect the power of the company to make the note, and the rights of the creditors in the distribution of the assets could not be determined in this proceeding. The order of the court dismissing the petition is affirmed, at the cost of the appellant.

STERRETT, C. J., dissents.

COMMONWEALTH ex rel. McCORMICK,
Atty. Gen., v. PITTSBURG ILLUMINATING CO.

(Supreme Court of Pennsylvania. April 12, 1897.)

STIPULATIONS—CONSTRUCTION.

In answer to a writ of quo warranto calling defendant to show by what warrant it claimed the right to exercise the franchise to manufacture and supply gas for light only to the public within the city of P., it pleaded letters patent of May 8, 1895, creating it a corporation, with the rights conferred by Act April 29, 1874, and especially such right to manufacture and supply gas for light only. The replication averred the creation of the C. Company by Act 1871, and that by its certificate filed February 13, 1895, it accepted the provisions of Act April 29, 1874, whereby it obtained the exclusive right to manufacture gas for light only within the city of P.; and therefore the issue of letters patent to defendant did not give it power to manufacture and supply gas for light only to the public within said city. *Held*, that the words "prior exclusive franchise," in a stipulation that the case was subject to decision of the court on the merits "whether the defendant is entitled to exercise the franchise of furnishing gas for light only. * * * the question to depend upon whether prior exclusive franchises vested in the C. Gas Company," referred to May 8, 1895, when defendant's charter was issued; and, therefore, that, under the stipulation, the question of the effect or constitutionality of Act June 24, 1895, purporting to revoke exclusive rights of gas companies which were in existence prior to April 29, 1874, and which accepted the provisions of that act, could not be considered.

Appeal from court of common pleas, Dauphin county.

Quo warranto, on the relation of the attorney general, against the Pittsburgh Illuminating Company. Judgment for defendant. Re-lator appeals. Reversed.

The opinion of the court below is as follows (Simonton, J.):

"In answer to a writ of quo warranto, issued at the suggestion of the attorney general, calling upon the defendant to show by what warrant it claims to exercise the franchise and right to manufacture and supply gas for light only to the public between the Allegheny and Monongahela rivers, within the city of Pittsburgh, it pleaded letters patent, duly issued, dated May 8, 1895, creating it a corporation under the name of the Pittsburgh Illuminating Company, with all the rights, privileges, and franchises conferred by the act of April 29, 1874, and its several supplements, and especially the right and franchise to manufacture and supply gas for light only, as above stated. To this plea a replication was filed on behalf of the commonwealth, averring that the Consolidated Gas Company was created by a special act of assembly dated May 19, 1871 (P. L. 1872, p. 1300), incorporating it under and in accordance with the provisions of the act of assembly of March 11, 1857 (P. L. 77); and that by its certificate, duly filed for that purpose on February 13, 1895, said corporation had, in the manner provided by law, accepted the provisions of the constitution of 1874 and of the act of April 29, 1874, entitled 'An act to provide for the incorporation and regulation of certain corporations' (P. L. 73); and that such acceptance constituted a contract between the corporation and the commonwealth, by virtue whereof it acquired, on February 15, 1895, all the privileges, immunities, and franchises of a corporation created under said act and its supplements; and that among the rights, privileges, franchises, and immunities thereby obtained was and is the exclusive franchise and privilege of manufacturing gas for light only within the said city of Pittsburgh; and that, therefore, no other company can be incorporated for the manufacture and supply of gas for light only to the public within said city, until the said Consolidated Gas Company shall have realized and divided, from its earnings, among its stockholders, for five years, a dividend equal to eight per centum per annum upon its capital stock, and therefore the issuing of letters patent to the Pittsburgh Illuminating Company, as in its plea suggested, did not and could not create a corporation for the purpose of the manufacture and supply of gas for light only to the public within all or any portion of said city, and did not and could not create said defendant company a corporation for said purposes, because the incorporation of such a company is expressly forbidden by the provisions of said act of assembly and its supplements.

"When the case came on to be heard on the pleadings above stated, the parties filed an agreement of record as follows: 'The above case is subject to the decision of the court to determine upon its merits whether the defendant above named is entitled to exercise the franchise of furnishing gas for light only

to the public in said city, in the district described in its charter; this question to depend upon whether prior exclusive franchises vested in the Consolidated Gas Company. The pleadings are defective, in that no rejoinder was filed by defendant, and no reference was made in the pleadings to the act of June 24, 1893 (P. L. 266), which purports to revoke and annul the exclusive privileges conferred by the act of 1874 upon corporations theretofore existing, which had accepted its provisions and the provisions of the constitution of 1874. But in view of the agreement above recited, as well as because it is a public act, and was cited at the argument, it is properly in the case, and must be considered. This act, after declaring in its preamble that 'the true policy of the granting of exclusive rights to gas companies is the encouragement and establishment of such companies for the supply of gas where no such supply was previously furnished, and the real consideration for such exclusive rights is the new public service thus secured,' and that 'many long established corporations have accepted the provisions of the act of 1874, above referred to, for the purpose of securing a monopoly for a business the conditions of which invite competition, and of forestalling the incorporation of companies about to be organized,' and that 'it is injurious to the citizens of the commonwealth that the exclusive rights and privileges of gas companies which have accepted the provisions of the said act of 1874 should longer continue,' adds: 'Now, therefore, in recognition of the limitation of article 1, section 17, and pursuant to the provisions of article 16, section 10, of the constitution, be it enacted that all exclusive rights, franchises and privileges of each and every gas company which was in existence prior to April 29, 1874, and which has accepted the provisions of the act of April 29, 1874, and its supplements, are hereby revoked and annulled, anything in the twenty-fifth section, or in any other provision of said act, or any amendment thereof, or any supplement thereto, to the contrary notwithstanding.' It is manifest from the terms of this act that it was the intention of the legislature to revoke and annul the exclusive privileges which companies incorporated prior to April 29, 1874, had acquired, by accepting the provisions of the act of that date and of the constitution of 1874; and, as the Consolidated Gas Company was one of these, that the legislature intended to revoke and annul its exclusive privileges. If, therefore, the legislature had the constitutional right to revoke and annul these privileges, it certainly did so, and the sole question which remains is: Did it have such right?

"In the act of March 11, 1857 (P. L. 77), under which the Consolidated Gas Company was incorporated, the right was expressly reserved (section 17, p. 82), to alter, revoke, or annul all charters granted under it. The same right was reserved as to all charters there-

after granted by the constitutional amendment of 1857, as well as by the constitution of 1874. It was also expressly reserved by the act of 1874, by the acceptance of which the Consolidated Gas Company claims to have received its exclusive privileges; and the reservation was in said act expressly applied to corporations which should acquire exclusive rights under it. There has therefore been no moment of the corporate existence of the Consolidated Gas Company in which it did not hold all its rights and privileges, including its right to exist, subject to the reserved right of the legislature to alter the terms upon which it might exist, or to terminate its existence, whenever, in the opinion of the legislature, its existence or any of the rights, privileges, or immunities claimed by it were 'injurious to the citizens of the commonwealth,' subject only to the condition that the alteration or revocation of its charter should be made 'in such manner that no injustice shall be done to the corporators or their successors.'

"It is contended on behalf of the commonwealth that the legislature is not the final and absolute judge of what charters or provisions in charters are 'injurious to the citizens of the commonwealth,' and several cases have been cited in support of this argument. But these cases are cited and distinguished in *Wagner Free Institute v. City of Philadelphia*, 132 Pa. St. 612, 19 Atl. 207, where it is said that 'none of the decisions examined upon their facts really sustain this contention.' Mr. Justice Mitchell, delivering the opinion, said: 'Under the constitution of the United States and the decisions of the supreme court, a charter is ordinarily a contract, but a charter that is revocable at the will of the grantor is only a quasi contract, and approaches much more closely to the character of a license. To such a charter the ruling of the *Dartmouth College Case*, 4 Wheat. 518, does not apply, and the decisions are uniform to this effect.' And in *Gloninger v. Railroad Co.*, 139 Pa. St. 13, 21 Atl. 211, the right to repeal a charter which, in the opinion of the legislature, is 'injurious to the citizens of the commonwealth,' is recognized with the suggestion that 'such reason should appear in some way as the moving cause which induced the legislature to take such action.' The right to alter, revoke, or repeal, reserved in the constitution and in the acts above cited, is subject to the single condition that the alteration or repeal be made 'in such manner that no injustice shall be done to the corporators.' This is not a restriction upon the right to alter or repeal, but simply upon the manner in which the alteration or repeal is made. The common-law principle was that, when a corporation ceased to exist, its title to property which it owned at the time also ceased, and that its real estate reverted to the original owners, and its personal property was forfeited to the state; and it was doubtless to avoid the effect of this principle that this condition was an-

nexed to the right of repeal. The nature and effect of the condition is well stated by Mr. Buckalew, in his work on the Constitution of Pennsylvania, commenting on this section (page 256), as follows: 'A repealing statute shall not disallow the distribution of the corporate property among the stockholders, or its conversion to their use, or, if taken for public use, should provide for adequate compensation to the owners. In fact, the rights of private property in such case are under the protection of constitutional principles wholly independent of provisions in the state and federal constitutions against impairing the obligation of contracts; and those principles are plainly declared in the ninth, tenth, and eleventh sections of our Pennsylvania declaration of rights. The artificial being called a "corporation" may be destroyed or any of its powers or functions may be withdrawn from it, under the reserved power contained in the section, but private property, lawfully acquired under cover of a corporate charter, can still claim the protection of the constitution.'

'The distinction between the right of the state to repeal, revoke, or alter the charter of a corporation, and its obligation not to interfere with the property rights which the corporation has theretofore acquired, and not to do injustice to the corporators, is thus expressed by Mr. Justice Field, in his dissenting opinion in *Spring Valley Waterworks v. Schottler*, 110 U. S. 372, 4 Sup. Ct. 48: 'Whatever the state may do, even with the creations of its own will, it must do in subordination to the inhibitions of the federal constitution. It may confer by its general laws upon a corporation certain capacities of doing business, and of having perpetual succession in its members. It may make its grant in this respect revocable at pleasure. It may make it subject to modifications. It may impose conditions upon its use, and reserve the right to change these at will. But whatever property the corporation acquires in the exercise of the capacities conferred, it holds under the same guaranties which protect the property of individuals from spoliation. It cannot be taken for public use without compensation. It cannot be taken without due process of law; nor can it be subject to burdens different from those laid upon the property of individuals under like circumstances.' And the same principles are stated by Mr. Justice Cooley, as quoted by Mr. Justice Field in the same case. These illustrate the meaning and effect of the provision that the amendment or repeal of the charter shall be made in such manner as not to do injustice to the corporators. Property rights acquired by the corporation must be preserved for the use and benefit of the corporators, and a repeal must not take place in such manner as to leave them without proper remedies to ascertain and conserve these rights. The power to alter, revoke, or annul does not depend upon the question of consideration, but, in the cases to which it

applies, is absolute. 'The reservation [of the right to alter, revoke, or repeal] affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state.' *Tomlinson v. Jessup*, 15 Wall. 459. It is only in cases where a charter has been granted not subject to the reservation of the right to alter, revoke, or repeal that the question of the existence of such right is held to depend upon whether the corporation had given any consideration for the privileges. Such were *Johnson v. Crow*, 87 Pa. St. 184; *Philadelphia & Gray's Ferry Passenger Ry. Co.'s Appeal*, 102 Pa. St. 123; and *Railroad Co. v. Bowers*, 124 Pa. St. 183, 16 Atl. 836.

'The argument that the repeal of the exclusive privileges conferred by section twenty-six of the act of 1874 on corporations accepting the provisions of the constitution and of that act is special legislation or unwarranted classification does not seem to us to have much weight. The act of 1874 recognizes two classes of corporations for the supply of light and heat to the public, viz.: (1) In section thirty-four, 'Companies incorporated under the provisions of this statute,' and (2) in section twenty-six, 'corporations heretofore created by any special act, or in existence under any general law of this commonwealth.' Those of the first class are dealt with in section thirty-four, and do not derive any of their rights, privileges, or immunities from the provisions of section twenty-six; while those of the second class are dealt with in the latter section, and without it have no part nor lot in the act. When, therefore, the act of June 24, 1895, was passed, it merely continued the classification adopted in 1874, and revoked the exclusive privileges conferred in section twenty-six, by, in effect, repealing that section. When this section was enacted, it conferred exclusive privileges upon corporations accepting its provisions, and, when it was repealed, it revoked the exclusive privileges of the same class.

'Nor is the position of counsel on behalf of the commonwealth strengthened by the terms of section 25 of the act of 1874, which enacts that 'the incorporation of any association of persons for the purposes named in this act, or accepting the same, shall be held and taken to be of the same force and effect as if the powers and privileges conferred, and the duties enjoined had been conferred and enjoined by special act of the legislature and the franchises granted shall be construed according to the same rules of law and equity as if it had been created by special charter, and no modification or repeal of this act shall affect any franchise obtained under the provisions of the same.' This section was evidently inserted out of abundance of caution, lest it might be held, in the event of the repeal of the act of 1874, that the charters of corporations created under

it might thereby be repealed. More than this it could not mean or effect, for the privileges and immunities granted by section 25 are as much subject to be altered, revoked, or repealed as the privileges or immunities granted in the other sections of the act.

"The conclusion to which this discussion has brought us is that the Consolidated Gas Company is not, and was not on May 8, 1895, when the Pittsburgh Illuminating Company was incorporated, invested with the exclusive privilege of manufacturing gas for light only within the city of Pittsburgh, and therefore, in accordance with the stipulation filed by the parties, judgment is directed to be entered in favor of the defendant."

D. T. Watson and L. D. Gilbert, for appellant. J. F. Sanderson and J. H. Reed, for appellee.

MITCHELL, J. We cannot regard this case as raising, in proper form for adjudication, the question of the constitutionality of the act of June 24, 1895 (P. L. 266), involving, as it would, the construction of the phrase in section 10 of article 16 of the constitution that the general assembly shall have power to revoke or annul any charter of incorporation "in such manner that no injustice shall be done to the corporators." The learned judge below appears to have thought the question sufficiently raised by the stipulation of the parties that the decision should be upon the merits "whether the defendant is entitled to exercise the franchise of furnishing gas for light only. * * * this question to depend upon whether prior exclusive franchises vested in the Consolidated Gas Company." But the words "prior exclusive franchises" must refer in point of time to May 8, 1895, when the defendant's charter was issued, and its franchisees, whatever they were, came into existence. It is manifest that this question of priority on May 8th cannot be affected by an act not passed until June 24th, and having no retroactive words, even if such words could be effectual for that purpose. The stipulation of the parties, therefore, is not in terms broad enough to include the question under the act of 1895, and the appellant expressly declines to have it so enlarged.

The Consolidated Gas Company was incorporated by special act of May 19, 1871 (P. L. 1872, p. 1309), but was to be "organized, managed, and governed as provided by the act of March 11, 1857" (P. L. 77), for the incorporation of gas and water companies. By the general corporation act of 1874 (P. L. 73), provision was made for the incorporation of gas companies; and, by section 26, corporations theretofore existing for any of the purposes named, and covered by the act, upon accepting its provisions, were to be "entitled to all of the privileges, immunities, franchises and powers conferred by this act." And by section 34, subsequently amended by

the act of June 2, 1887 (P. L. 312), the franchises and privileges were to be exclusive within the district or locality covered by the charter, until certain dividends should be earned and divided among the stockholders. The Consolidated Gas Company, in February, 1895, accepted the provisions of the act of 1874 in the manner prescribed, and letters patent were issued to it accordingly. It would seem clear, therefore, that on May 8, 1895, the privilege of the Consolidated Gas Company was exclusive, and of this opinion apparently was the learned judge below, as he based his judgment altogether on the repealing act of June 24, 1895. But, for reasons already shown, that act cannot control this case, and we must leave its constitutionality to be determined when it comes properly before us. Judgment reversed, and judgment directed to be entered for the commonwealth.

KANE v. PEOPLE'S PASS. RY. CO.
(Supreme Court of Pennsylvania. April 19, 1897.)

COLLISION OF STREET CAR AND WAGON—
NEGLECTANCE.

A street-car company cannot be held liable for injury to one riding on a wagon which is negligently turned to cross the track when the car is but a short distance from it; the speed of the car at the time being moderate, there being no negligence in its management, and everything being done to stop it as soon as possible.

Appeal from court of common pleas, Philadelphia county; Arnold, Judge.

Action by Daniel Kane against the People's Passenger Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

The opinion of the court below on refusing new trial is as follows: "The verdict in this case was directed to be entered in favor of the defendant because there was no evidence of negligence on the part of the defendant, and because the injury to the plaintiff was caused solely by the negligence of the driver of the brick wagon in which the plaintiff was riding as a guest. Conceding that the negligence of his driver is not to be imputed to him, under the cases of Borough of Carlisle v. Brisbane, 113 Pa. St. 554, 6 Atl. 372, and Carr v. Easton City, 142 Pa. St. 139, 21 Atl. 822, yet a guest cannot recover except upon proof of negligence on the part of the other party to a collision. Here the driver of the wagon in which the plaintiff was riding turned out of the down track of a passenger railway company into the up track, directly in front of an approaching car running on a down grade; and all the evidence shows that the motorman did all he could to stop the car before coming into collision, but without success. The car was not going at a negligent rate, and it was stopped as soon as possible. There was no evidence of any excess of speed, or failure on the part of those in charge of the car to do all that

could be done to prevent running into a wagon which was deliberately driven in front of the car. Rule discharged."

Thomas A. Fahy, for appellant. Dimmer Beeber, Hampton L. Carson, and J. Levering Jones, for appellee.

PER CURIAM. A careful reading of the testimony in this case convinces us that the learned judge of the court below was entirely correct in directing the jury to find a verdict for the defendant. His reasons are clearly expressed in the opinion on the motion for a new trial. We agree that there was no evidence of negligence on the part of the defendant. The car was moving at a moderate rate of speed, and there was no negligence in its management. The wagon in which the plaintiff was riding was turned to cross the track when the car was but a very short distance away, and, the moment it was discovered, everything possible was done to stop the car. The testimony does not disclose any want of care on the part of the motorman. It is beyond all question that the wagon was very negligently driven on the track in front of an approaching car. The assignment of error is not sustained. Judgment affirmed.

In re LA BAR'S ESTATE.

Appeal of HELLER et al.

(Supreme Court of Pennsylvania. April 19, 1897.)

WILL—CONSTRUCTION—PROVISIONS FOR SUPPORT.

Testator gave to T., his housekeeper, his house and the furniture therein, so long as she live, unmarried, and on her death or marriage to his heirs, nephews, and nieces (will, cl. 2); gave in trust 106 shares bank stock, T. to receive dividends so long as she remain unmarried, "and if at any time or times she need any part of principal * * * she is at liberty to receive it for her support and maintenance," any of the stock remaining at her death or marriage to go to his heirs (clause 3); gave residue to heirs; and further declared it his intention in clause 2 and 3 that T. have the use of his house and everything therein for all of her life that she remain unmarried, "and, if she deems it necessary, may at any time or times use part or all of the principal of the bank stock for her support or maintenance" (clause 7). *Held*, that T. was not entitled to receive any of the principal of the bank stock, except as needed to supplement the income in furnishing her comfortable support and maintenance.

Appeal from orphans' court, Monroe county.

Accounting by George F. Heller and another, executors of Daniel La Bar, deceased. From a decree affirming report of auditor sustaining exceptions of Arminda Treible to executors' account, they and others appeal. Reversed.

The second, third, and seventh clauses of the will of Daniel La Bar are as follows:

"Second. I give and devise the house and lot where I now reside, and the household furniture therein, to Arminda Treible, who now lives with me, for and during such part of her natural life as she remain unmarried; and up-

on her death or marriage I direct the same to be sold by my executors hereafter named, and the proceeds thereof to be distributed as is provided hereafter, in regard to my residuary estate. I hereby give my executors full power, authority, and direction to sell the said house and lot on her death or marriage without any liability on the part of the purchaser to see to the application of the purchase money.

"Third. I also direct that fifty-six shares of the stock of the First National Bank of Easton and fifty shares of the stock of the Northampton County Bank be held in trust for the said Arminda Treible, so that she receive all the income or dividends arising or accruing therefrom, immediately from and after my death, so long as she remain unmarried; and if at any time or times she needs any part of the principal of the stock, she is at liberty to receive it for her support and maintenance. If any part of said stock is remaining at her death or marriage, it shall be distributed as is herein-after provided in relation to my residuary estate."

"Seventh. All the rest, residue, and remainder of my estate, real and personal, shall be divided as is provided and set forth in the intestate laws of the commonwealth of Pennsylvania. But I declare that it is my will and intention in the second and third items of this, my will, that Arminda Treible shall have the use and enjoyment of my Shawnee house and lot, and everything therein contained, for and during all the time of her life she remain unmarried; and, if she deems it necessary, may at any time or times use part or all of the principal of the bank stock for her support or maintenance."

Henry J. Kotz and Storm & Palmer, for appellants. Stewart S. Shafer, for appellee.

STERRETT, C. J. This appeal by the executors and residuary legatees of Daniel La Bar from the decree confirming the auditor's report involves the construction of his will so far as its provisions relate to one of his beneficiaries, Arminda Treible, and especially the trust created "for her support and maintenance." At the time of his decease, in January, 1894, the testator was a widower without children or other descendants. His nearest relatives and next of kin—to whom he gave his residuary estate—were seven nephews and nieces, children of a deceased brother. His wife predeceased him "three or four years." In her lifetime, Arminda Treible was employed in general housework, and, after Mrs. La Bar's death, continued in testator's service as his working housekeeper. It is very evident from the second, third, and seventh clauses of the will, and codicil thereto, that one of the chief objects of testator's bounty was his trusted and faithful employé, Miss Treible, for whose comfortable support and maintenance he intended to make suitable provision, not absolutely and unconditionally, nor during her entire lifetime, but only "so long

as" she lives and "remains unmarried." Indeed, his only disclosed purpose in making a will appears to have been to secure some suitable provision for her support and maintenance while "she remains unmarried," and the creation of other specified trusts. Aside from these, he appears to have been entirely satisfied with the disposition which the intestate law would make of his residuary estate, real and personal; and he accordingly directed that the same should be distributed in accordance therewith. In the second clause of his will he devised the house and lot where he then resided in the village of Shawnee, "and the household furniture therein, to Arminda Treible, * * * for and during such part of her natural life as she remains unmarried. And upon her death or marriage" he directed his executors to sell the property thus devised to her, and distribute the proceeds as thereafter provided in regard to his residuary estate. The duration of that devise is clearly limited by the marriage or death of the devisee, whichever may first happen. In the third clause he made provision for the "support and maintenance" of his said housekeeper by directing "that fifty-six shares of the stock of the First National Bank of Easton and fifty shares of the stock of the Northampton County National Bank be held in trust for the said Arminda Treible so that she shall receive all the income and dividends arising or accruing therefrom immediately from and after my [his] death, so long as she remains unmarried. And if at any time or times she need any part of the principal of said stock, she is at liberty to receive it for her support and maintenance. If any part of said stock is remaining at her death or marriage, it shall be distributed as hereinafter provided in relation to my [his] residuary estate." Again, in the seventh clause, after directing all the residue and remainder of his estate, real and personal, shall be divided and distributed as is provided and set forth in the intestate laws of the commonwealth, * * * he declares it is his "will and intention in the second and third items * * * that Arminda Treible shall have the use and enjoyment of my [his] Shawnee house and lot, and everything therein contained, for and during all the time of her life she remains unmarried; and, if she deems it necessary, may at any time or times use part or all of the principal of the bank stock for her support or maintenance." This clause enlarges the bequest of "the household furniture," made in connection with the devise of testator's house, to "everything * * * contained" in said house. With this exception, there is no repugnancy between the provisions relating to the "support and maintenance" of Miss Treible. On the contrary, when considered together, and in connection with other parts of the will, they are not only consistent with each other, but they clearly and distinctly show that the testator's intention was to create an express trust of the 106 shares

of bank stock to provide a regular annual income for the purpose of comfortably supporting and maintaining the cestui que trust until her marriage or death, whichever shall first occur, coupled with the provision that, in case it becomes necessary, she shall have the right to demand and receive from the trustees so much of the proceeds of portions of the corpus as may from time to time be needed for "her support and maintenance." This latter provision was evidently intended to provide for possible temporary exigencies that might arise and make it necessary to supplement, for the time being, her regular annual income, which he evidently considered would be ordinarily sufficient for her needs. It was never intended to be used as a pretext for demanding and appropriating to her own use the entire corpus of the trust. Nothing could have been further from the testator's intention than that his beneficiary should, within less than three years after his decease, have the right to capriciously and arbitrarily demand from his executors an absolute transfer to herself of all the bank stock constituting the corpus of the trust created solely for the purpose of providing an annual income for her comfortable "support and maintenance." If such an unconscionable demand as that were acceded to, it would not only defeat the manifest purpose of the testator in creating the trust, but it would operate as a fraud upon his residuary legatees. It cannot be seriously asserted, nor is there a particle of evidence to show, that at any time since the death of her benefactor has the income of the trust been insufficient for the appellee's comfortable support and maintenance in the style in which she had been accustomed to live. On the contrary, one of the witnesses acquainted with Miss Treible and the expenses of living in that neighborhood, being asked whether, taking into consideration the fact that she had the use of the house and lots and all the furniture in the former, he would consider an annual income of about \$300 "provision ample for her necessary support and maintenance," said "I consider it a liberal provision for her support." It is very evident that the appellee's demand for the transfer of all the bank stock to herself was not prompted by anything like "need" of additional income. She never presented for payment, nor received the proceeds of the checks for bank stock dividends which the executors from time to time sent her; so that up to the date of the audit, at least, she had received none of the "income" specially intended for her "support and maintenance." The only reason suggested for not availing herself of the money is that receipt of the income through the executors might interfere with the scheme to appropriate to herself the corpus of the trust. If she hereafter demands any portion of the corpus on the ground that she needs it, the trustees and court below should be satisfied that the alleged necessity therefor really exists. In other words, if it does not appear

that such claim is made in good faith, and is grounded on reasonable necessity, it should not be allowed. In no other way can the intention of the testator, as we understand it, be fully and fairly carried out, and the respective interests of all parties be properly protected.

In *Gröss v. Strominger*, 178 Pa. St. 64, 35 Atl. 852, this court, holding that the provision made in that case by the testator for his widow was not an absolute gift to the latter, said: "Testator's wife was manifestly the primary object of his bounty. Whatever was necessary for her support, he intended she should have. If the income of the estate was sufficient to afford her a suitable maintenance, it was his intention that the principal should go, at her decease, to the children and grandson, unimpaired. A construction of the privilege which makes it operate as an absolute gift to the wife of the residue of the estate would defeat the plain purpose of the testator, and take from the children and grandson * * * that which he intended they should have at her decease." So, in this case, if we should hold, as is contended on behalf of the appellee, that the privilege given her to receive and use part or all of the corpus of the trust "if at any time she need any part" thereof "for her support and maintenance," etc., operates as a present, absolute gift of the stock constituting said corpus, and authorizes her to demand an immediate transfer thereof to herself absolutely, it would defeat the manifest intention of the testator, not only in creating the trust for appellee's benefit, but in bequeathing the corpus, or so much thereof as may remain at the expiration of the trust, to his nephews and nieces. There is nothing in the will, or dehors that instrument, that would justify us in thus construing it. It follows from what has been said that the assignments of error must be sustained. The proceedings before the auditor appear to have been commenced at the instance of the appellee, and were carried on for her supposed benefit. It is therefore proper that she should pay the costs thus incurred. The decree of the orphans' court is reversed, and set aside, and it is ordered that the costs, including costs in the court below, be paid by the appellee, Arminda Treible.

IN RE LAFFERTY'S ESTATE.

Appeal of LINDE.

(Supreme Court of Pennsylvania. April 19, 1897.)

PARTNERSHIP—RIGHTS AS TO THIRD PERSONS—PAYMENT OF INDIVIDUAL DEBTS.

Where a co-executor, who had wrongfully withdrawn funds of the estate, repaid the same with cash belonging to a firm of which he was a member, and with a firm check drawn to his order, and indorsed to the estate, he alone was liable to the firm, and not the estate, which had no knowledge that it was partnership money.

37 A.—8

Appeal from orphans' court, Philadelphia county.

Claim by Charles F. Linde, receiver of P. Lafferty & Co., presented at the final account of Charles H. Lafferty and others, executors and trustees of the estate of Charles Lafferty, deceased. The claim was rejected, and, from a decree dismissing his exceptions to the adjudication of said account, claimant appeals. Affirmed.

That part of the adjudication which relates to the claim in suit was as follows: "On behalf of the firm of P. Lafferty & Co. (the brick company), Charles F. Linde, Esq., presented, through his counsel, a claim for \$6,700, moneys alleged to have been withdrawn from the partnership funds by Patrick Corcoran, the co-partner, and placed by him with the Fidelity Trust Company, to the credit of the estate of which he was co-executor. In proof of the payments, the checks of Corcoran, as treasurer of the brick company, drawn to his own order, and the corresponding stubs of the brick company's checkbook, and the entries in its cashbook, were produced together with the deposit slips of the estate as made out by Corcoran. Taken singly, it is conceded that these books of the claimant company would not be admissible as proof of its demand, but they formed in this instance parts of one transaction. The brick company was the firm of which Corcoran and Patrick Lafferty were the members, and of which both of them strenuously attempted to make out that Miss Lafferty was also a partner. Corcoran, the co-executor, was the controlling spirit of the company. He kept its books, and manipulated its finances, and, as a result of his care, the business passed to a receiver. By his own confession, he wrongfully diverted to the brick company, not only moneys of the estate, but of its distributees also, and certainly to a larger amount than that embraced by this claim; so that, on a balancing of accounts, the brick company would be found to be debtor to the estate. When the deposits in question were made, Corcoran was a defaulter to the estate, and his purpose in making them was to diminish the deficit. The claim is, therefore, that he used firm moneys to pay his individual indebtedness. It was, however, his duty to pay his own debts, and it was the right of the creditors to receive his moneys, unless they were earmarked as moneys of the firm; yet of all the deposits, five in number, only one was of a firm check. It was for \$700, and was drawn to the order of Corcoran, and indorsed by him to the estate. It was the only one which by any possibility could have put the representatives of the estate on their guard. But it was drawn, not to the order of the creditor, but to that of the partner; and it was chargeable to his individual account, and became his individual property, to be used for his own purposes, including therein the payment of his own debts. In no other convenient way could any partner draw out from the partnership his personal moneys. In a word, this check was

a distinct admission by the brick company that the money was Corcoran's own. The real criterion, aside from the maxim that, where one of two innocent parties must suffer, he that permits the injury shall bear its consequences, is: Which of these two parties should have exercised vigilance,—the estate which received checks and moneys in the accustomed order of business, in payment of its just debts, or the member of the debtor firm, whose partner was drawing firm checks to his personal order? That Patrick Lafferty, the partner of Corcoran, was a cipher in the business of the firm, does not affect the result. The other deposits upon which the claim is founded had not even this much to warrant their consideration. They were all of them in cash. That of January 29, 1894, was in cash, which Corcoran first obtained on a firm check, and which cash he deposited to the credit of the estate in the sum of \$1,000. That on January 31, 1894, was a similar deposit in cash of \$700. February 1, 1894, Corcoran received from Patrick Lafferty in cash, and he deposited the cash, \$2,000. February 5, 1894, Corcoran drew in cash on the firm's check, and deposited the cash as in the other instances, to credit of the estate, \$2,300. He had thus reduced all of these moneys into his own possession, and then paid them over in cash to the estate in settlement of his debt. Clearly, the brick company must look to Corcoran, and not to the Lafferty estate. The claim is rejected."

John H. Sloan, for appellant. J. Willis Martin, Crawford, Loughlin & Dallas, and Saml. Gustine Thompson, for appellees.

PER CURIAM. The decree in this case is affirmed on the opinion of the learned court below. The brick company's claim is against Corcoran, and not against Lafferty's estate. Decree affirmed, and appeal dismissed, at the cost of the appellant.

In re SMITH'S ESTATE.

Appeal of WALKER.

(Supreme Court of Pennsylvania. April 19, 1897.)

WILLS—CHARITABLE BEQUESTS—PERPETUITIES.

A bequest in trust, for the erection in a public park of a memorial arch in memory of Pennsylvania soldiers, upon which are to appear statues of certain Union generals, and also a statue of testator, with his name in large letters underneath, is a charitable gift; and the direction that the income of the residue of the estate be appropriated for the maintenance and repair of the monument does not violate the statute against perpetuities.

Appeal from orphans' court, Philadelphia county; Hanna, Judge.

Benjamin F. Walker excepted to the adjudication in the estate of Richard Smith, deceased, and from a decree dismissing said exceptions he appeals. Affirmed.

Richard Smith, the testator, bequeathed his residuary estate to his trustees, the Fidelity Insurance, Trust & Safe-Deposit Company. In trust, for the benefit of his wife, Sarah A. Smith, for her life, and after her death he directed his trustees to erect and cause to be erected in Fairmount Park, in the city of Philadelphia, under the auspices of the Fairmount Park Art Association, provided the assent of the proper authorities be obtained therefor, a monumental memorial according to a certain model approved by him during his lifetime, which was to include equestrian statues in bronze of Major Generals George B. McClellan and Winfield S. Hancock, and colossal statues in bronze of Major Generals George G. Meade and John F. Reynolds, with bronze busts of Governor Curtin and Major General Hartranft, Admirals David D. Porter and John A. Dahlgren, General James A. Beaver, Major General S. W. Crawford, and, in addition thereto, busts of the architect James H. Windrim, and his executor, John B. Gest. The design includes a mural tablet in bronze, with the inscription stating that the monument was presented by Richard Smith, type founder, of Philadelphia. "In memory of Pennsylvanians who took part in the Civil War." The testator further provided that a statue of himself should be placed upon the pedestal stage of one of the columns, with his name beneath it. The testator directed that the entire expense of the monumental memorial should not exceed \$500,000. The testator further directed that his trustees should, provided the assent of the proper authorities be obtained, appropriate, lay out, and expend the sum of \$50,000 in the erection, and the proper building and inclosing, of a children's playground, in such part of Fairmount Park as may be designated by the park commissioners; and he further directed that the residue of his estate should be invested by his trustees, and the income thereof appropriated, from time to time, in the maintenance, repair, and caretaking of the monumental memorial and the children's playhouse and the adornment thereof; and, in case the income should be more than sufficient for these purposes, he authorized the expenditure of the surplus in the erection and maintenance of such additional buildings as, in the judgment of his trustee and the commissioners of Fairmount Park, might be deemed necessary.

The opinion of the orphans' court was as follows:

"It was earnestly argued that the gifts by testator in trust, after the death of his wife, to expend a sum, not exceeding \$500,000, in the erection of a monumental memorial, and also the sum of \$50,000 for the construction of a proper building, and inclosing a children's playground in Fairmount Park, provided the assent of the proper authorities be obtained, and of the residue of his estate, to be kept well invested by the trustee, and the income therefrom appropriated from time

to time for the maintenance, repair, care-taking, and adornment of the monumental memorial, and the children's playhouse and grounds attached, and, in case the income be more than sufficient for these purposes, the surplus to be expended in the erection and maintenance of such buildings as, in the judgment of the trustee and the commissioners of said park, may be deemed necessary, are void, for the reason that the purposes of the trust do not constitute that which is recognized by the law as a charitable disposition of the estate; and, as they contemplate an indefinite and perpetual retention, accumulation, and expenditure of the income, it is a violation of the law against perpetuity, and consequently the testator must be held to have died intestate. But it is too late to suggest such a proposition. The whole current of authorities, remote as well as recent, approve and sustain such a disposition of his estate as is directed by Mr. Smith, and settles the same to be, beyond all dispute, a charitable use. It is true, the gift does not provide for the hungry, naked, sick, or homeless, nor for the scholastic or scientific education of the general public, but, with an equally exalted benevolence and love for mankind, has in view, by the foundation of an almost imperishable magnificent memorial, far excelling in beauty any creation of the sculptor's art heretofore erected within the limits of the park, the pleasure resort of hundreds of thousands of our population, which for generations yet unborn will tend to the elevation and refinement of the people, cultivate a love for the beautiful in art and architecture, and keep alive their patriotism and remembrance of the martial prowess and good deeds in statesmanship and civil life of heroes, patriots, and citizens worthy of perpetuation; and not only this, but furnishes a secure place for the comfort and gratuitous healthful amusement and recreation of young children, amid pure and attractive rural surroundings, removed from the dangers of the streets and contaminated atmosphere of a great city. We cannot conceive of any more strictly charitable use, within its legal definition, than the purposes and objects contemplated by the testator in this disposition of his large estate. The memorial monument is for the beautifying and adornment of the city, and for these reasons alone the gift would be upheld as charitable. In England such bequests have frequently been sustained; also those for the establishment of botanical gardens. And the British Museum was also held a public charity. In our own state, in *Cresson's Appeal*, 30 Pa. St. 437, the legacy was to the mayor and councils of Philadelphia, in trust as a perpetual fund, the income to be annually forever expended in planting and renewing shade trees; and this was held to be a charitable bequest. Without referring particularly to the numerous cases, both in England and in this country, upon the subject, it will

suffice to again refer to one of our own authorities,—*Insurance Patrol v. Boyd*, 120 Pa. St. 624, 15 Atl. 553,—where it was held that the insurance patrol, incorporated to save life and property in and contiguous to burning buildings, being without money capital, but supported by voluntary contributions, making and dividing no profits or dividends, etc., is a public charity.

“Nor does the fact, as was also earnestly contended, that testator directed to be placed upon the main column of the memorial a bronze statue of himself, with his name underneath in large letters, and that the building to be erected as a general hall for a playroom and shelter for children must contain a mural tablet, with the inscription, ‘Erected by Mr. and Mrs. Richard Smith, in memory of their son, Stanfield Smith,’ detract from the charitable character of the bequest. This question has also been determined, and was settled in *Miller v. Porter*, 53 Pa. St. 202, where the testator established by his will a college, to be known as ‘Porter University,’ and in *Insurance Patrol v. Boyd*, supra, where Paxson, J., says: ‘The motive of the benefactor is of no moment, and is not to be sought after, but the purpose and object of the gift determines its character, as religious, charitable, or otherwise.’

“But, in the view we take, it is scarcely necessary to consider whether the provisions made by testator are valid as charitable uses, for the reason we think he had full power and authority to direct the expenditure of his estate as he deemed proper, either for the erection of a monumental memorial or children's playhouse, or both, in the park or elsewhere, and to provide for their maintenance, as he considered advisable. He left no children or other descendants who were thus deprived of their inheritance, and disappointed in their expectations of enjoyment of so large a fortune. Testator was disposing of his own money. This is a right assured to him by law, and restrained only by those enactments and principles of public policy which, for the good order and welfare of society, have been established by the legislature or the courts. Gifts for the erection of monuments and construction of vaults or tombs in cemetery lots, and inclosing the same, and providing for their future care and adornment, together with other similar mortuary gifts, have ever been recognized, and the wishes of the donor or testator carried out by the courts. And, to remove all doubt upon the subject, the legislature, by the act of May 26, 1891 (P. L. 119), expressly declared that no disposition of property hereafter made for the maintenance or care of any cemetery, churchyard, etc., or monument or other erections on or about the same, ‘shall fail by reason of such disposition having been made in perpetuity, but shall be held to be made for a charitable use.’ Nor are we aware it has ever been suggested

that, in the absence of any express statute, the courts will regulate the amount the testator may direct to be thus expended. We see no reason why he may not bequeath his entire estate for such purposes. In *Bainbridge's Appeal*, 97 Pa. St. 482, a testator directed his executor 'to appropriate and use for and in the erection and construction of a suitable monument at my grave such as the amount of funds in his hands will warrant.' The executor expended for the purpose nearly the entire residuary estate, and it was held he had the right, under the will, in his discretion, to expend the whole or any part in the erection of the monument, *Mercur, J.*, saying such was the clear intention of the testator, and 'may not the testator have said to the appellant, as the good man of the house said to the laborer, "Is it not lawful for me to do what I will with mine own?" He had the right to make such a disposition of his estate. We see no cause to set at naught his will or to impair its force.' If a testator has this unlimited power of disposition of his estate, and can thus perpetuate his memory in costly structures, upon which may be inscribed his name, genealogy, and biography, why may he not devote his fortune to beautifying and adorning his birthplace with works of art, such as memorial arches, statues, fountains, picture galleries, and conservatories, or zoological gardens, and providing the means for the innocent and healthful diversion and recreation of the people, whether children or adults, by the construction of amusement halls, playgrounds, gymnasiums, or natatoriums? And such a catholic, broad-minded public spirit on the part of our citizens of wealth, whether men or women, should not only be commended, but encouraged, and the objects they had in view be considered as the most benevolent and beneficent public charity. The exceptions are accordingly dismissed, and adjudication confirmed."

Joseph Mellors, for appellant. John Marshall Gest, for appellees.

PER CURIAM. We entirely concur with the learned court below in holding that the bequests contained in the will of the testator are free from any objection under the statute against perpetuities. The reasons for this conclusion are so well and forcibly presented in the opinion of the court that we affirm the decree upon the grounds there stated. Decree affirmed, and appeal dismissed, at the cost of the appellant.

KEEFE et ux. v. SHOLL.

(Supreme Court of Pennsylvania. April 19, 1897.)

DECEIT—SCIENTER—RATIFICATION.

1. An action of deceit for fraud in the sale of land to plaintiff by defendant through her agent, in that false representations were made

by the agent as to the quantity of the land, cannot be maintained, where the evidence fails to show that defendant knew of the representations.

2. The question of ratification of the transaction by defendant is immaterial, since the action is not founded on the contract, but on the alleged fraud and guilty knowledge of defendant.

Appeal from court of common pleas, Philadelphia county.

Action of deceit by John Keefe and Annie Keefe against Annie C. Sholl to recover damages for fraud in the sale of land by defendant to plaintiffs, in that defendant's agent made fraudulent representations as to the quantity of the land sold. From a judgment for defendant, plaintiffs appeal. Affirmed.

James C. Sellers, for appellants. David H. Stone, for appellee.

PER CURIAM. In this action of trespass for deceit, alleged to have been practiced by defendant in connection with the sale of a certain tract of land, the statement of claim avers, among other things, that "said defendant, by her agent and attorney in fact, one Abraham Rankin, then and there represented to the plaintiffs that the said tract of land contained three and twenty-four hundredths acres, and that the line thereof ran within six feet of the door of the Wheat Sheaf Hotel upon the adjoining premises, and included the hotel stables and shedding, and other valuable improvements; * * * that the representations aforesaid were false and fraudulent; that the defendant owned but two acres and one hundred and twenty perches of ground; that the line of her land was ninety-seven feet six inches distant from the hotel door; and that the valuable stables and shedding which the defendant, by her said agent and attorney, had represented to be upon the land sold, were not upon her land at all, but were upon land owned by another person, in which she had no interest whatever." These averments constitute the alleged deceit. No scienter is averred in the statement, nor does it appear that there was any offer to make proof thereof on the trial. On the contrary, the defendant, called as on cross-examination, testified positively that she had no knowledge of the alleged false statements. The recital of the premises conveyed in the deed, executed and delivered by the defendant, as "all that certain tract or piece of ground, with the messuages or tenements, and barns, stables, and sheds thereon erected," etc., "containing about three and twenty-four hundredths of an acre, be the same more or less," is no evidence of deceit. The facts recited were literally true. The quantity of the land was stated only approximately, the true contents being given by courses and distances; and the deed did in fact convey "barns, stables, and sheds," but not all that the plaintiffs supposed they were buying. The question of ratification is not involved in the case, because the action for deceit is not founded on

the contract, but on the alleged fraudulent representations and guilty knowledge on the part of the defendant. In the absence of any evidence of such knowledge on her part especially, there could be no recovery. Freyer v. McCord, 165 Pa. St. 539, 30 Atl. 1024. Further elaboration is unnecessary. The evidence introduced by the plaintiffs was insufficient to carry the case to the jury, and hence the nonsuit was properly ordered, and there was no error in refusing to take it off. Judgment affirmed.

WILSON v. WILSON-ROGERS.

(Supreme Court of Pennsylvania. April 19, 1897.)

ATTORNEY IN FACT—POWERS.

A general power of attorney for sale of corporate stock does not authorize the attorney in fact to sell the stock in payment of his own debts, or the purchaser of the stock to so apply it; and it is immaterial that the principal is the wife of the attorney.

Appeal from court of common pleas, Philadelphia county.

Action by Ella M. Wilson against Wilson-Rogers, a corporation, for purchase price of stock. Judgment for plaintiff. Defendant appeals. Affirmed.

S. Morris Wain, for appellant. John C. Bell, for appellee.

PER CURIAM. This case hinged on questions of fact, which the jury alone could legally determine. Among others, the learned trial judge submitted to them the question whether the plaintiff was the actual owner of the stock for the price of which this suit was brought, with instructions that, if they found her husband was the real owner thereof, their verdict should be for the defendant. The verdict in plaintiff's favor has therefore, by necessary implication, established, *inter alia*, the controlling fact that she, and not her husband, was the bona fide owner of the stock in question. Without referring specially to the testimony tending to sustain plaintiff's claim, it is enough to say that it was quite sufficient to justify the jury in finding as they did; and, in view of all the evidence on both sides, there appears to be no error in the learned judge's charge of which the defendant corporation has any just reason to complain.

Under the findings of fact, of which the verdict is necessarily predicated, the case is narrowed down to the legal proposition whether an attorney in fact, acting under the general power of attorney for the sale of corporate stock, is authorized to sell the same in part or in full payment and satisfaction of his individual indebtedness, without the knowledge, precedent authority, or subsequent ratification of his principal. That such an agent may not use the property of his principal for any such purpose was recently recognized in *Re Kern's Estate*, 176 Pa. St. 375, 35 Atl.

231, and is too well settled to require discussion or further citations. If authority is needed for so plain a proposition, the case above referred to also holds that possession by such an agent of the letter of attorney is no evidence of implied or apparent authority in him to exercise any powers other than those given in the instrument itself. The cases of irrevocable powers of attorney for a valuable consideration, relied on by the defendant corporation, are virtually and proprio vigore assignments, and therefore inapplicable to the question under consideration.

The fact that the person holding the power of attorney in this case was the husband of the plaintiff could not, of course, make him any the less her agent; nor did it in any manner authorize the defendant corporation, without first obtaining plaintiff's consent, to use her money in paying her husband's debt to a greater extent than she had actually authorized.

We find nothing in any of the specifications that requires further notice. They are all overruled, and the judgment is affirmed.

In re DICE'S ESTATE.

(Supreme Court of Pennsylvania. April 19, 1897.)

CLAIM AGAINST HUSBAND'S ESTATE—EVIDENCE—RIGHT TO INTEREST.

1. On a claim by a surviving wife against the estate of her husband there was evidence that the wife had received \$2,300 from her father's estate, but no evidence that she had any other separate estate, and it appeared that she loaned such money to her husband, and that he executed three notes, payable to her, aggregating \$4,300; but it did not appear when they were signed, or whether they bore interest, and there was evidence that they were not delivered to the wife, but were destroyed while in the husband's possession. *Held*, that the court properly limited the amount of the claim to \$2,300.

2. A surviving wife will not be allowed interest on a claim against her husband's estate for money loaned to him, where it is not shown that he agreed to pay interest, and it appears that the wife received the benefit of the money as used by the husband, and it is not shown that the notes alleged to have been executed for the loan, but which were destroyed without delivery to the wife, provided for payment of interest.

Appeal from orphans' court, Franklin county.

In the matter of the distribution of the estate of Frederick Dice, deceased. From a decree of the orphans' court confirming the report of an auditor appointed to make distribution, Mary Dice, as administratrix, appeals. Affirmed.

The opinion of the orphans' court was as follows: "The exceptions to this report raise but a single question, How much money did Frederick Dice, the intestate, whose estate is for distribution, receive from his wife, Mary Dice, who is here the claimant? That he was her debtor for whatever amount he did receive is not open to question, since there is not a

particle of evidence in the case to rebut the presumption which the law raises in her favor. The widow demands \$4,300; the auditor allows her \$2,300. The exceptants, creditors of Frederick Dice, insist that the evidence shows only \$1,300 to have been derived through the wife. We fully agree with the auditor that the evidence is wholly insufficient to warrant a finding in favor of the wife's full demand. The claim of \$4,300 rests for its support on the evidence which relates to certain notes, which several of the wife's children testify to having seen in their father's possession. The auditor gave these notes all the weight they were entitled to, if, indeed, he was not too liberal in that regard. The evidence satisfied him that said notes had been in existence at one time,—notes drawn by Frederick Dice, payable to his wife, one for \$1,000, one for \$1,300, and another for \$2,000,—and that, while in the husband's possession, before delivery, they were either lost or accidentally destroyed. The evidence on this subject might not be so persuasive to every one as it seems to have been to the auditor, but, admitting it all to be true, the notes can have no significance whatever, except as they may be regarded as admissions of Frederick Dice. As the auditor has well said, never having been delivered to the wife, they never became hers, and they would afford in themselves no basis for an action against Dice or his estate. They could be of no value in this controversy, except as they help to throw light on the only question before us: How much money did Dice get from his wife? Of what little service they are in this regard is manifest when we consider the direct evidence which was offered in support of the wife's claim. Giving the notes their fullest significance, they may be regarded as admissions of Dice that he had received \$4,300 from his wife. Now, in the light of the direct evidence, he could have received no such sum. The wife is not shown to have had any estate except what she derived from her father. Indeed, the evidence is conclusive that she had no other, and it is clear beyond dispute that the whole amount of this exceeded by little the one-half of the aggregate of the notes. It comes to nothing to say that Dice may have included interest in the principal sum of the notes, and thus swelled the amount to double the original debt. If the claim were on the notes themselves, this would be a proper and necessary inquiry in order to sustain the notes; but the question here was (and the only question) what was the original debt? Certainly it was not \$4,300. How much less it was, will never be discovered from the notes. It is the business of the wife, claiming under such circumstances as we have here, to make out her claim by clear and satisfactory evidence. She must show not only that she had separate property of her own, but that the husband received it; and, like everybody else, she is limited in her recovery to the amount that she proves her debtor got. Now, the direct evidence in the

case, if believed (and the auditor credits it) leaves the amount actually received by the husband clear of doubt. The exceptants themselves admit to \$1,300,—that being an equal distributive share in the estate of the wife's father, all of which it is admitted passed to the husband. But, at least three witnesses testify that Dice admitted to them repeatedly that his wife had received from her father \$1,000,—more than any of his other children,—and that he had used this money. These admissions, if made at all, were made when Dice was entirely free from pecuniary embarrassment. There was nothing in the circumstances of the parties to make this advancement either impossible or improbable. It simply resolved itself into a question whether the testimony of the witnesses who spoke of these admissions by Dice was to be believed. If believed, the wife's claim for \$2,300 was established; if not, the claim could not exceed \$1,300. The auditor credited the witnesses, and we see no sufficient reason for doing otherwise. It is evident that the wife shared in the benefit derived from the use of the money by the husband, and of course no interest can be claimed. We concur in all the conclusions of the auditor, and now, March 6, 1896, it is ordered that the exceptions to the report be dismissed, and that the report be confirmed absolutely."

W. R. Gillan and W. U. Brewer, for appellant. Hastings Gehr, W. J. Zacharias, W. R. Keefer, G. D. McDowell, John W. Hoke, I. C. Elder, J. A. Strite, John D. Rice, Joshua W. Sharpe, and William S. Hoerner, for appellees.

PER CURIAM. The specifications of error relate to the learned auditor's findings of fact and the conclusions of law drawn therefrom. The objections to the latter are virtually based on the assumed inaccuracy of the former. If, therefore, the findings of fact are correct, the conclusions of law necessarily follow. As found by the auditor, the controlling facts are substantially these: The appellant received from her father, in his lifetime, \$1,800, and afterwards from his estate \$500, both of which sums were used by her husband, the decedent. He never repaid the same, or any part thereof, to her. There is no evidence to show that she ever had, in her own right, any money other than the two sums above mentioned, aggregating \$2,300; nor is there any evidence that her husband received any more, or that he promised to pay her interest on the amounts he received and appropriated to his own use. Prior to 1887, Frederick Dice, the decedent, had signed three sealed notes, payable to his wife, for the respective sums of \$2,000, \$1,300, and \$1,000; but there is no evidence to show the dates of said notes, when they were respectively signed, when payable, or whether they bore interest; nor does it appear that they were ever in appellant's custody or possession. On the contrary, they were kept by her husband in his private desk until they

were accidentally burned or destroyed, about two years prior to his death. These and other findings of fact were duly considered and approved by the court below; and, notwithstanding the able and ingenious argument of appellant's counsel, we are not convinced that there is any error in either of them or in the conclusions properly drawn therefrom. The only evidence on which appellant could hope to rely as tending to sustain her claim for interest, etc., was the existence of the notes above referred to, and the very indefinite admissions of the decedent in connection therewith. Taking into consideration the character of that evidence, as well as the testimony relating to the identification and delivery of the notes, we think there was no error in the rulings of the court below. In view of the clear and satisfactory opinion of the learned president of the orphans' court in support of said rulings, there is no necessity for further discussion of the questions presented by the assignments of error. Neither of them is sustained. Decree affirmed, and appeal dismissed, at appellant's costs.

HOTCHKISS v. ROEHM.

(Supreme Court of Pennsylvania. April 19, 1897.)

REVIEW ON APPEAL—REFEREE'S FINDINGS—UNAUTHORIZED CONTRACT BY AGENT—OFFER BY PRINCIPAL TO RESCIND—SET-OFF.

1. A referee's findings of fact on conflicting evidence, if confirmed by the lower court, will not be reviewed.

2. Where an agent, without authority, sold his principal's notes for part cash, and the residue in notes of other persons, an offer by the principal to rescind, made after he received the notes, and over a month after one of them had matured, came too late.

3. In a suit on a note, defendant cannot set off notes on which plaintiff was indorser, but which did not mature till after suit was brought.

Appeal from court of common pleas, Philadelphia county.

Action by Georgiana J. Hotchkiss, trading as Hotchkiss & Co., against John Roehm, to recover on two notes. From a judgment confirming the report of a referee in favor of plaintiff, defendant appeals. Affirmed.

John V. McGeoghegan and Thomas R. Elcock, for appellant. J. Martin Rommel and John Sparhawk, Jr., for appellee.

PER CURIAM. This action to recover the amount of two promissory notes made by the defendant to his own order, and by him indorsed, etc., has been thrice tried in the court below, and uniformly resulted in favor of the plaintiff. The last trial was before a referee, under the act of 1874. The others were each before a jury. From the testimony before the referee, he found that the notes in suit were sold by defendant's agent to Charles C. Cokefair, of New York City, by whom they were sold before maturity to the plain-

tiff, "who paid for them by checks, and without knowledge of the consideration given by Cokefair." The consideration moving from Cokefair, in his purchase, was part cash, and residue in notes of himself and others, the greater part of which afterwards proved worthless. Among these were two indorsed by the plaintiff. The referee was requested by the defendant to find that the plaintiff "had full knowledge of the consideration" aforesaid, but he refused to do so. Exceptions to his report were dismissed, and the report confirmed by the court below. In such circumstances, the findings of fact by a referee, or, what is the same thing, his refusal to find, cannot be reversed, where there is evidence to support the finding, or, in the case of his refusal to find as requested, there is no evidence that required him to do otherwise. While it is not ordinarily the province of an appellate court to decide on the preponderance of evidence in such cases, it may not be amiss to say that, as it appears to us, the referee was right in refusing to find as requested, and also to suggest that the evidence of collusion between plaintiff and Cokefair is unsatisfactory and inconclusive. The discrepancy, as to dates and other details as narrated by the witnesses, bears quite as strongly against the allegation of conspiracy as it does in support of it.

The offer to rescind was too late. It was not made until more than a month after the maturity of Cokefair's note. If the defendant did not authorize the exchange of notes, he should have said so as soon as the new notes came into his hands.

The notes indorsed by the plaintiff, and held by defendant, did not mature until after this suit was brought. Defendant's offer to set off the amount of said notes was therefore properly refused.

We find nothing in either of the assignments of error that requires discussion. A careful consideration of the record has failed to disclose any substantial error therein. Judgment affirmed.

HEILMAN et al. v. LEBANON & A. ST. RY. CO.

(Supreme Court of Pennsylvania. April 19, 1897.)

EMINENT DOMAIN—INJUNCTION—STREET RAILWAYS.

Defendant built its street railway without any authority so far as it passed through the township in which plaintiff's land was situate. Pending its construction, plaintiff filed his bill, which looked practically for compensation for interference with access to his buildings and fields. Two years after its completion, he amended his bill, to make prominent his prayer for injunction. In the meantime the township had approved and ratified the occupation of its highways. Held, that the decree denying injunction, and leaving plaintiff to his remedy for damages, would not be disturbed.

On reargument. Affirmed.

For original opinion, see 34 Atl. 647.

Bassler Boyer and Samuel Gustine Thompson, for appellants. S. P. Light, C. H. Kilfinger, and John G. Johnson, for appellee.

WILLIAMS, J. This is a reargument. The case was originally heard in March, 1896, and is reported in 175 Pa. St. 188, 34 Atl. 647. We do not wish to be misunderstood as to the reason of the decision then made, or the general principles applicable to this case. Street-railway companies are not endowed with the right of eminent domain, because they do not need it. They are modern local conveniences, the location and construction of which is subject to the will of the public they are intended to serve. This will is expressed through the local authorities. Such companies cannot force themselves into neighborhoods where they are not wanted. When permission is given them to occupy a public street, they acquire thereby, not an exclusive right upon its surface, but a right concurrent with that of the general public. Their cars are a substitute for the private carriage and the public omnibus. They must move them along their tracks upon the surface of the street to the grade of which they are required to conform. They have no right to grade or fill or in any manner interfere with the access to private property from the highway, or so to construct the road as to interfere with public travel or disturb adjacent landowners. This company appears to have disregarded the rights of municipalities and of private individuals, and to have forgotten or misconceived its own character and the limitations upon its powers; but it had completed its track along its entire line, a distance of six miles or more, as early as December, 1891. It has been in continuous operation ever since. It has become an important means of transportation for the public along its line, and for the towns which it connects. The interruption of its traffic would inflict great inconvenience upon the public, and great loss upon it. The general situation must now be considered, and we must take into the account the rights of the plaintiff, and the nature and extent of the injury of which he complains, but we must not overlook the interest of the general public, or the consequences to the defendant company of the decree asked for. Equity does not enforce a strict legal right, regardless of consequences. It is said that an injunction is of grace. This does not mean that a chancellor may grant or refuse an injunction as he pleases, but that his action is controlled by considerations of conscience. He does that which in good conscience he ought to do. The question in each case must depend upon the circumstances out of which it grows, and requires the exercise of judgment in determining the equities involved. We think the case was determined in this manner in the court below. We affirm the decree, because we are of the opinion that it was right under all the

circumstances of the case. *Heilman v. Railway Co.*, supra.

We have listened to the very earnest oral argument for the appellants, and have considered the case as presented in the paper books; but we see no reason to doubt the soundness of the conclusions reached when this case was here before, and accordingly make no modification of the decree then made. But this company has for nearly six years maintained its embankments along the plaintiff's property without right. If permitted to retain them, the plaintiff should be amply compensated for the inconvenience and injury he has suffered and must hereafter suffer; and the court below should see to it that this is promptly done, under its order of December 31, 1895. The decree of this court, made on the 27th April, 1896, affirming the decree appealed from, is adhered to; the costs made upon this reargument, including the cost of printing for the plaintiff, to be paid by the defendant company.

FRANCIS v. FRANCIS et al.
(Supreme Court of Pennsylvania. April 19, 1897.)

DEATH—PRESUMPTION FROM ABSENCE.

Where a husband leaves his home in Pennsylvania, and becomes domiciled at a known place in a foreign country, mere failure to hear from him at his former domicile for seven years raises no legal presumption of his death.

Appeal from court of common pleas, Lackawanna county.

Suit by Evan M. Francis against James E. Francis and another to contest the will of Rachel Francis, deceased. From a judgment for proponents, contestant appeals. Affirmed.

W. S. Hulshander and A. A. Vosburg, for appellant. John F. Scragg and George W. Beale, for appellees.

WILLIAMS, J. This was an issue *devisavit vel non*. The contestant denied the validity of the will, alleging that Rachel Francis, the testator, was a single woman when it was made, in 1884, and that it was revoked by her subsequent marriage, in 1886. She had been married to Thomas Watkins in 1870, who prior to 1876 had left his home in Scranton, and gone with a colony to settle in Patagonia. The colony was established. Watkins, as a member of it, was heard from in 1876. He was at that time residing with the other colonists, and engaged in labor with them. Since that time he has not been heard from, and the contestant invokes the presumption of his death; and it is upon this presumption that the contestant relies to establish the fact that the testatrix was single at the date of her will, in 1884. Do the foregoing facts raise the presumption of the death of Watkins? A presumption of death is raised by the absence of a person from his domicile unheard of for seven years. Absence, in this connection, means that a person

is not at the place of his domicile, and that his actual residence is unknown. It is for this reason that his existence is doubtful, and that, after seven years of such absence, his death is presumed. But removal alone is not enough. The further fact that he has disappeared from his domicile, and from the knowledge of those with whom he would naturally communicate, so that his whereabouts have been unknown for seven years or upward, is necessary in order to raise the presumption. But when a person removes from his domicile in this state, to establish a home for himself in another state or country, at a place well known, this is a change of residence, and absence from the last domicile is that upon which the presumption must be built. If alive when last heard from at his new domicile, the presumption is that life continues. 1 Am. & Eng. Enc. Law, p. 37. See, also, *Whiteside's Appeal*, 23 Pa. St. 114; *Holmes v. Johnson*, 42 Pa. St. 150. The learned judge of the court below instructed the jury correctly upon this subject. The jury found in favor of the proponents upon both the questions submitted to them. This was done under proper instructions, and we see no reason whatever for disturbing the verdict. The assignments of error are not sustained. The judgment is affirmed.

In re ROBINS' ESTATE. Appeal of HUNTER et al. Appeal of PHILADELPHIA TRUST, SAFE-DEPOSIT & INSURANCE CO.

(Supreme Court of Pennsylvania. April 19, 1897.)

EXECUTORS—MERGING SETTLEMENT WITH DISTRIBUTION—LIABILITY TO CREDITOR—FAILURE TO TAKE REFUNDING BONDS FROM LEGATEES—LIMITATIONS.

1. It is error for the executors to join in one account their accounts of the settlement of the estate and of its distribution.

2. Where executors erroneously join in one account their accounts for settlement and distribution of the estate, after having made distribution to the legatees without requiring refunding bonds (Act Feb. 24, 1834, § 45), and their account is approved, they are personally liable to a creditor whose claim is subsequently presented, though the creditor had been guilty of laches in presenting it.

3. Limitations run in favor of legatees who have received their legacies without giving refunding bonds to the executors (Act Feb. 24, 1834, § 45) against their implied contract liability to refund to the executors, at the instance of a creditor whose claim was presented after the distribution, sufficient of the funds received to pay his claim.

Appeals from orphans' court, Philadelphia county; Ashman, Judge.

Suit by the Girard Life Insurance, Annuity & Trust Company, as committee for Ella J. Robb, a lunatic and a creditor of the estate of Thomas Robins, deceased, against James Robins, as surviving executor, Lucy R. Hunter and others, devisees, and the Philadelphia Trust, Safe-Deposit & Insurance Company,

on a bond executed by decedent as surety for William J. Robins, former committee for the lunatic. From the decree rendered, defendants separately appeal. Modified.

John G. Johnson, for appellants. Joseph F. Lamorelle, Dinner Beeber, Hampton L. Carson, and J. Levering Jones, for appellee Girard Life Insurance, Annuity & Trust Co.

WILLIAMS, J. These appeals are from the same decree, and should be considered together. They involve, first, the liability of the executors for the payment of a debt, of the existence of which they had knowledge prior to the settlement of their account; and, next, the liability of the legatees to refund to the executors under the peculiar circumstances of this case. These are substantially as follows: Thomas Robins, the testator, died on the 18th of April, 1832. His will was probated on the 19th of April. His son, William B. Robins, one of his executors, had been previously appointed committee for Ella J. Robb, a lunatic. His father, the testator, was surety upon his bond. Within three months after the probate of the will the executors paid \$260,000 to the legatees by way of distribution. About nine months after the death of the testator they filed their account as executors, and filed therewith a schedule of the distribution made by them. This account was finally confirmed and adjudicated in the orphans' court on the 10th day of April, 1833. About nine years thereafter, in the year 1832, William B. Robins absconded, having previously embezzled a portion of the estate of the lunatic, Ella J. Robb. The Girard Life Insurance, Annuity & Trust Company was thereupon appointed committee for the lunatic in his stead, and immediately brought suit upon his bond. Judgment was recovered in this action in April, 1833, for \$7,279.89. A petition was thereupon presented to the orphans' court for an order on the executors and legatees of Thomas Robins, requiring them to pay said judgment. This, it will be seen, was about 10 years after the final confirmation of the account, and nearly 11 years after the payments made to the legatees. No refunding bonds or other obligations had been taken by the executors from the legatees when distribution was made to them. Upon these facts the questions of liability are raised. We concur in opinion with the learned orphans' court that the executors are liable. It is well settled that an administration and distribution account cannot regularly be blended. Especially is this true when the account is not only stated, but finally confirmed, within one year after the death of the testator. In re Yundt's Estate, 6 Pa. St. 35. Payments made by way of distribution are not part of an administration account. *Rittenhouse v. Levering*, 6 Watts & S. 190. Auditors appointed to settle an administration account have no authority to report distribution. The business of an executor or administrator is to

settle the estate. After the settlement, which ascertains its amount, comes its distribution among those entitled to it. When distribution is made by the executors, they are required by the forty-fifth section of the act of February 24, 1834, to take refunding bonds. This is for their own protection, as well as for the protection of claimants whose demands against the estate may afterwards be made apparent. The character of the security to be given by distributees is specifically described in section 41, which provides that "no person shall be entitled to receive any share in the distribution until he shall give sufficient real or personal security, to be approved of by the orphans' court having jurisdiction as aforesaid, in such sum and form as the said courts shall direct, with condition that, if any debt or demand shall afterwards be recovered against the estate of the decedent or otherwise, be duly made to appear, he will refund the ratable part of such debt or demand, and of the costs and charges attending the recovery of the same." In this case, as we have already seen, the distribution was in fact made within the year, and before the settlement of the executor's account, without taking refunding bonds, and without the authority of the orphans' court. Under such circumstances, the confirmation of the administration account, with the schedule of distribution attached, must be presumed to have been made, so far as it affects the schedule, upon the presumption that the executors, having made distribution on their own authority, had protected themselves by a careful compliance with the act of 1834, by obtaining from the distributees security against just such a contingency as has happened. The order of confirmation, so made will not protect the executors against the consequences of their failure to discharge their duties in accordance with the law. One who makes payment in accordance with a decree of the orphans' court stands upon a very different footing from one who pays upon his own judgment, and when he pleases. In the latter case the executor takes the responsibility, and a mere return of such payments attached to his account, with a final decree of confirmation of the account, will not protect him in a case like the present. *Ferguson v. Yard*, 164 Pa. St. 586, 30 Atl. 517; *Carson v. McFarland*, 2 Rawle, 118. The confirmation of an executor's account is a conclusive decree as to such matters only as are properly embraced within it. It is not conclusive as to matters not so embraced. *Leslie's Appeal*, 63 Pa. St. 355. The laches of creditors will not excuse the executor for not securing refunding bonds, but his failure to do so will amount to a devastavit, and render him liable to creditors for the amount so paid out by him. *Jones' Appeal*, 99 Pa. St. 124; *Montgomery's Appeal*, 92 Pa. St. 202; *Whelen's Appeal*, 70 Pa. St. 410; *Scott, Intest. Laws*, 430. So much of the decree appealed from as imposes liability upon the executors is therefore affirmed.

But the legatees are in a very different position. The money received by them was the voluntary payment of the executors. They gave no refunding bonds. If they were under obligation to refund, that obligation must rest upon a contract to be implied from the nature of the transaction, and the statute of limitations would apply to it, as to all other simple contract obligations. Their liability is to be determined upon our own statutes and decisions. From these it is clear that the right of the executor to call upon the distributees to refund stands on no higher ground than the right of any other creditor to enforce an implied contract. Whether this creditor, if unable to make his money from the executors, will have any remedy over against the legatees, is not now before us. His prayer for relief asks, first, that the executors be directed to pay, and, second, that the legatees "named in the will of said Thomas Robins show cause why they should not refund and pay to the said executors funds sufficient to enable said executors to pay said judgment." The second of these prayers for relief we unhesitatingly refuse on the facts of this case. The record is remitted to the orphans' court for the purpose of the enforcement of the decree against the executors. As to the legatees, the petition is dismissed at the cost of the petitioner.

DELAWARE & H. CANAL CO. v. SCRANTON & P. TRACTION CO. et al.

SCRANTON & P. TRACTION CO. v. DELAWARE & H. CANAL CO.

(Supreme Court of Pennsylvania. April 19, 1897.)

RAILROADS—CROSSING OTHER RAILROADS—GRADE CROSSING—WHEN PERMITTED.

1. Where there is no physical obstacle to the avoidance of a grade crossing at a point where a proposed electric railroad is to cross a steam railroad, and the additional expense to the electric road of an overhead crossing will not exceed \$8,000, it is "reasonably practicable" to avoid a grade crossing, even if the expense may be considered, within Act 1871, § 2, providing that if, in the judgment of the court, it is reasonably practicable to avoid a grade crossing, they shall prevent a crossing at grade.

2. Where it is otherwise reasonably practicable for an electric railroad company to construct an overhead crossing over a steam railroad, it will not be allowed to cross at grade because the overhead crossing would be an additional burden on abutting property, whose owners will not consent thereto, and its charter does not give it the power of eminent domain, so as to enable it to proceed with the construction without consent on the payment of damages.

Appeal from superior court, Lackawanna county.

Two actions for injunction,—one by the Scranton & Pittston Traction Company against the Delaware & Hudson Canal Company, and the other by such defendant against the plaintiff and another,—commenced in the court of common pleas, and taken on appeal by the

Delaware & Hudson Canal Company to the superior court. From the decree, the canal company appeals. Reversed in part.

W. H. Jessup, James H. Torrey, and W. H. Jessup, Jr., for appellant. Lemuel Amerman and H. W. Palmer, for appellees.

DEAN J. The Delaware & Hudson Canal Company, appellant, as lessees, operate a double-track steam railroad between the cities of Scranton and Wilkesbarre, on which are run about 135 freight trains every 24 hours. Some of these trains are very long and heavy, —not easily controlled or stopped when under headway. Besides the freight, many passenger trains are run daily. Switching engines, also, run frequently over these tracks. At Moosic, in Lackawanna township, the railroad has three tracks, and a fourth is being constructed. The Lackawanna Street-Railway Company, incorporated under Act May 14, 1889, is authorized by its charter to build and operate an electric railway from a point on Center street at Scranton city line, along said street and the main road to Wyoming avenue, in the village of Moosic; and thence along the avenue to the valley road through Marcy township to the borough of Avoca; thence, further, by Wyoming avenue, etc., accomplishing the circuit. The Scranton & Pittston Traction Company, organized under the general act of March 22, 1887, for incorporation of motor-power companies, etc., contracted with the Lackawanna Company to construct, complete, and operate an electric railway over the route specified in the charter of the Lackawanna, and at once proceeded with the work of construction. The public highway, along which, under the charter, the Lackawanna is authorized to be constructed, crosses the steam railroad at grade, at two points,—one on Wyoming avenue, in Moosic, and the other at Spring street; the two points being distant from each other, on the steam railroad, about half a mile. The constructing company, the appellee, attempted to lay the tracks of the electric railway at grade across the appellant's steam railroad at these points. The appellant objected, and threatened to prevent the crossings by force. Thereupon the traction company filed its bill, alleging that any other than grade crossings at the points named were impracticable, and praying that the steam railroad company be enjoined from interfering with the construction. The steam-railroad company also filed its bill against the traction company, averring that the proposed grade crossings would be highly dangerous, and that overhead crossings were palpably practicable without any great expense, and praying that the traction company be enjoined from crossing at grade. Preliminary injunctions were issued, and then a full hearing had before Judge Gunster, of the common pleas, on the merits, who, in an able opinion filed, enjoined the traction company from constructing grade crossings at either point. Subse-

quently, on additional evidence, he modified the decree, and dissolved the injunction as to the proposed crossing at Wyoming avenue, but leaving it stand as to Spring street. His principal reasons for modifying the decree as to the Wyoming avenue point, were: (1) The track of the steam road, from the crossing, is visible in one direction for 900 feet; in the other, 1,500 feet; thus enabling the motor-man of an approaching electric car to see an approaching steam train at a long distance, and thus avoid collision. (2) Evidence was given tending to show that an automatic switch could be adopted and controlled by the steam road which would render it impossible for an electric car to cross until the train had passed over. (3) An overhead crossing is impracticable, because the traction company, having no right of eminent domain, cannot build an overhead crossing against the objections of abutting property owners on the approaches to the crossing. From this decree the Delaware & Hudson Canal Company took two appeals to the superior court,—one from the refusal of the court to enjoin the traction company from crossing Wyoming avenue at grade, and the other from that part of the decree enjoining it from interfering with the construction of such grade crossing. The decree was affirmed by the superior court; two of the judges, in opinion filed, dissenting. On allowance by this court, we have two appeals by the steam-railroad company from that decree.

So, in reviewing the decisions of the superior court and court of common pleas, we have for consideration only the questions raised by the appeals of the Delaware & Hudson Canal Company from that part of the decree authorizing a grade crossing at Wyoming avenue. This brings us at once to a consideration of the duty of courts under the second section of the act of 1871: "If in the judgment of such court it is reasonably practicable to avoid a grade crossing, they shall, by their process, prevent a crossing at grade." So far as the possible may be considered the practicable, there are very few points on the surface of the state where other than grade crossings are not practicable. What a century ago were deemed insurmountable obstacles to an under or over crossing are now treated only as engineering difficulties which skill and capital can always overcome. But the legislature has modified what might be deemed a strict definition of the word "practicable," by prefixing the word "reasonably." This devolves upon the courts, in every contention of this kind, an ascertainment, from the facts of the particular case, of what is "reasonable." In the first place, we must assume, because the legislature in this enlightened age has impliedly so assumed, that it is unwise, if not reckless and barbarous, to unnecessarily subject the traveling public and the employees of carrying corporations to the death, maiming, and horrors of collisions, which in-

evitably result from grade crossings. And, if it be reasonably practicable to avoid a grade crossing, then the question as to what extent the risk of such a crossing may be reduced is immaterial; for the law assumes, and experience demonstrates, that extraordinary care by both parties using such crossing, aided by all the advances in science and mechanics, has only resulted in lessening the risk, not in abolishing it. In deciding, therefore, what is reasonable, we are bound to keep in mind the consequences to be avoided. It is not as if the result of a collision were the injury to, or even the destruction of, property, which, compared with rapid and cheap travel and transit, might, perhaps, be trivial; but it is the danger to the persons of the public which is to be avoided. Safety is the object in view, and therefore, in determining what is reasonable, we must balance expense and difficulty against loss of life and limb. Now, what are the facts relating to the Wyoming avenue crossing? The learned judge of the court below, in answer to appellant's eighth request for finding of facts, says that "the topography of the country is such at the crossing in question that an overhead crossing would not be more difficult at this point than at any other overhead crossing where the public road at the crossing was nearly level"; that is, there is no physical obstacle to the avoidance of a grade crossing. As to the cost of avoiding it where it is physically practicable, it is not clear from the act itself that the legislature intended this fact should be considered in determining what is reasonable. It may be argued with much force that this is a question for the projectors of a new enterprise, in determining whether they will proceed with it. The projected route, by reason of the topography of the territory, may render the road too expensive in grading; or, in the construction of crossings of steam roads, so as to avoid danger to passengers, the expense may be so great that the project is not reasonably practicable. Therefore, so far as cost is concerned, it is a question for the corporation to determine, before attempting construction at all, what is reasonably practicable, and not for the courts to decide on a comparison of the amount of the company's capital with the estimated cost of avoiding a proposed highly dangerous crossing. But, assuming the question of cost may properly enter into the question of reasonableness, it can have no weight here; for it is conceded that the additional expense of an overhead crossing would not be over six to eight thousand dollars,—a sum not equal to the cost of one mile of additional track; an amount which, balanced against the loss of a single limb to a passenger, is of no weight at all. The practicability of the overhead crossing being thus established, and the expense being but light when compared with the danger to be avoided, it is clearly reasonably practicable, unless there be some

other fact in the case which should impel us to an opposite conclusion. In both the common pleas and the superior court, such fact is assumed to exist, and it prompts the decree in favor of the traction company.

It appears the approaches for a reasonably practicable overhead crossing will be elevated for some distance on each side above the level of the street on which property owners have constructed their buildings. The owners allege that such elevated structure on the highway imposes an additional servitude upon their property, and they will not consent thereto. The traction company, not having the right of eminent domain under the acts of 1887 and 1889, cannot, on payment of damages, proceed with construction, in the absence of consent. But it seems clear to us this fact can have no weight in determining what is reasonably practicable, as applied to a grade crossing, under the act of 1871. The traction company, in effect, says: "We have no power, under our charter, to construct a reasonably practicable overhead crossing, as required by law. Therefore, as to us, a crossing, except at grade, is impracticable." But the reasonably practicable is not to be determined by want of corporate power to invade the rights of the property owner. The construction of the crossing is what the statute expressly says shall be regulated by the courts, and this with a view to avoid danger and protect the older franchise from injury by the younger one. The act of 1889 gives the right to cross at grade, but then we are met by the act of 1871, which says the court shall, by its process, prevent it, if an overhead crossing be reasonably practicable. This leaves only for the court the physical problem to be solved, by the inference warranted from the character of the two roads, the business done upon them, the topography of the territory, and like facts. To go outside of this class, and determine the reasonable practicability of a grade crossing, because of the absence of corporate power to invade private rights, would necessarily lead us to authorize a disregard of the act of 1871, or into supplying in the act of 1889 a power which the legislature has not granted. The commonwealth has given to electric railway companies the right to lay their rails on the streets and highways, with the consent of the municipal authorities, and, impliedly, power to injure private property along such highways, with the consent of the owners; for, while the statute as to the last named is silent, the constitution is very expressive. But, if the consent of either be denied, we can neither authorize the companies to disregard the law, nor supply a power which as yet they have not. We are of the opinion the superior court and the court below erred in importing into and determining the issue by a wholly irrelevant fact. We may say here that, if the act of 1889 does not confer upon electric railway companies those full powers necessary to their construction and corporate prosperity, the legislature is the

body to which application should be made for more extensive grants. And we may further say that, after ample time for the most thorough consideration, we are determined to unflinchingly adhere to the rule announced in *Perry County Railroad Extension Co. v. Newport & S. V. R. Co.*, 150 Pa. St. 193, 24 Atl. 709; *Pennsylvania R. Co. v. Braddock Electric Ry. Co.*, 152 Pa. St. 116, 25 Atl. 780; and subsequent cases.

Our conclusion on this question relieves us from the consideration of the many others raised by the numerous assignments of error. That part of the decree of the common pleas and the superior court vacating the injunction as to the Wyoming avenue crossing, and authorizing at that point a grade crossing, is reversed; and it is now ordered that the *Scranton & Pittston Traction Company*, its officers, agents, servants, and successors, be, and hereby are, perpetually enjoined from constructing or operating at grade a crossing over the roadbed of the appellant, described in the bill, answer, and decree as the "Wyoming Avenue Crossing." It is further ordered that appellee the *Scranton & Pittston Traction Company* pay the costs of these proceedings. As to so much of the said decrees as enjoins the said *Scranton & Pittston Traction Company* from constructing and operating a grade crossing at Spring street, and directs that said crossing shall be under the roadbed of the *Delaware & Hudson Canal Company*, etc., the same is affirmed.

SCHWAB v. GINKINGER.

(Supreme Court of Pennsylvania. April 19, 1897.)

CONTRACTS—PAROL EVIDENCE—PENSIONS—GIFTS
—VALIDITY—WITNESSES—COMPETENCY.

1. In an action by an administratrix to recover the proceeds of a pension check payable to deceased, and alleged to belong to him at his death, defendant claimed the right to retain the money, and introduced a writing as follows: "And the said [deceased] further agrees that if his said son [defendant] shall provide for him just and right during his natural life, that the balance remaining of his estate shall be for his compensation, etc., in getting said pension, etc." Plaintiff contended that the agreement was void under the pension law, which imposes a limit on the fee chargeable for prosecuting a pension claim. *Held*, that the writing required explanation, and hence it was error to reject parol evidence that deceased gave the check to defendant solely in consideration that defendant should provide for him during the rest of his life, and not as compensation for getting the pension.

2. Where a pensioner of the United States gave a pension check for an amount exceeding \$25, in consideration that the donee would provide for him during the rest of his life, and for his burial on his death, the transfer was not invalid under the pension law, providing that the fee for prosecuting a pension claim shall not exceed \$25.

3. A gift by a pensioner of his pension money, amounting to more than \$25, though the reason of it was the donee's services in obtaining the pension, was not invalid under the pension law declaring that any person instrumen-

tal in prosecuting any claim for pension, who shall directly or indirectly receive any greater compensation for his services than \$25, is guilty of a misdemeanor.

4. In an action by an administratrix to recover the proceeds of a pension check payable to deceased, and alleged to belong to him at his death, defendant claimed the right to retain the money under an agreement with deceased, which agreement plaintiff claimed violated the pension law limiting the fee for prosecuting a pension claim to \$25. *Held*, that defendant was incompetent to testify whether he took charge of deceased's application for pension, whether he received the pension check, and what the agreement was between him and deceased with reference to the proceeds of the check.

Appeal from court of common pleas, Northampton county.

Action by Elouise E. Schwab, administratrix of Samuel Ginkinger, deceased, against Allen Ginkinger. From a judgment for plaintiff, defendant appeals. Reversed.

The charge of the trial court (Hon. W. W. Schuyler, P. J.) was as follows:

"The plaintiff is the administratrix of Samuel Ginkinger, deceased, and the present action has been brought to recover the sum of \$1,750.73, with interest, less certain credits, which sum represents the amount of a pension check issued to the decedent, and by him indorsed and delivered to the defendant. The defendant, who is a son of the decedent, admits having received the proceeds of this check, but claims the right to retain them under a written agreement, the material part of which is as follows: 'And the said Samuel Ginkinger further agrees that if his said son, Allen, shall provide for him just and right during his natural life, that the balance remaining of his estate shall be for his compensation in getting said pension.' But the plaintiff contends that this agreement is void, as being in contravention of an act of congress, which, after limiting the fees for the prosecution of pension claims to \$10, unless a larger fee, not exceeding \$25, is agreed upon, provides as follows: 'Any agent, or attorney or other person instrumental in prosecuting any claims for pension, who shall directly or indirectly contract for, demand or receive or retain any greater compensation for his service or instrumentality in prosecuting a claim for pension than is herein provided, or for payment thereof at any other time, or in any other manner than is herein provided, or who shall wrongfully withhold from any pensioner the whole or any part of the pension allowed and due such pensioner, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall for every such offence be fined not exceeding \$500, or imprisoned at hard labor not exceeding two years, or both in the discretion of the court.' We think this position well taken. This power of disposition which an owner has over his own property, while very broad, is not absolute. He may not give it away to the prejudice of his creditors; and we take it to be too plain for argument that he cannot make a valid gift of it to a person for-

bidden by statute to receive the gift. That is this case. The facts are undisputed. The money in controversy—which is the balance after providing for the decedent 'just and good'—far exceeds the legal fees allowed for prosecuting pension claims. The defendant has this money in hand and claims to 'retain' it 'for his compensation in getting said pension.' To permit him to do so would be in violation of the act of congress both in its letter and spirit. I therefore instruct you to render a verdict in favor of the plaintiff."

Specifications of error: "(1) The court erred in charging the jury as follows: 'I therefore instruct you to render a verdict in favor of the plaintiff.' (2) The court erred in directing the jury to render a verdict for the plaintiff. (3) The court erred in sustaining the objection of the plaintiff to defendant's offer to prove by A. Menline, one of the subscribing witnesses to the agreement, just what occurred at the signing; that the father wanted Allen to have this money, and that Allen was not demanding it as compensation. The bill of exceptions is as follows: 'Defendant proposes to prove by this witness that Samuel Ginkinger voluntarily offered to give the balance of the money which he received from this pension check to his son, Allen, upon the agreement, provided his son, Allen, should provide for him just and right during his natural life; and that Allen said he did not want it; and the father thereupon said that he got the money; that it belonged to him, and that he should have it,—that is, that Allen should have it; it was right that it should go to him; that his other children didn't provide for him. By Mr. Howell: Objected to as incompetent and irrelevant, as to the terms upon which the money was given to Allen must be found in the written agreement itself. By the Court: The objection is sustained, and bill sealed for defendant.' (4) The court erred in sustaining plaintiff's motion to strike out the testimony of George H. Young, one of the subscribing witnesses to the agreement which had been admitted without objection, and in striking out the same. The testimony that was stricken out was as follows: 'Q. What did Allen say to him? A. Well, Allen said to him first, "Here is your check for this money for your pension." And he said: "I don't want it. I want you to have it." Al. said: "Here is your check. I have no business with it." "I want you to have it, and take care of it." "Well," Al. said, "I can't draw the money for you, or take care of it, unless something is done." I said he could do it by power of attorney. He said he wanted him to have it, and I went down to the office and drew it, and he said, "I want you to keep me, and provide for me, and bury me when I am dead; and the balance you are to have;" and the old man gave him a power of attorney and draw the money, and then use it, and have an agreement to that effect. So I went down to the office, and drew it, and I went back again.

Then I read it over to him, and the old man said: "That is all right; that is what I want; I want to have it that way," and he made his mark, and those two people witnessed it. Q. Now, at the time when this paper was signed, did Allen say, in the first place, to his father, that he didn't want it? A. He said: "I don't want this money. It don't belong to me." Q. Did the old gentleman give any reason why he wanted Allen to have it? A. He said, "Through you I got the pension," and he said the rest never done anything for him, and he said, "I want you to have it as long as I live, and after I am dead I want you to bury me, and the balance you can have." By Mr. Howell: The plaintiff now moves to strike out all that portion of George H. Young's testimony which relates to any conversation or statements made by Samuel Ginkinger previous to or at the time of the signing of the agreement and power of attorney offered in evidence, and relating to his treatment by his children, and statements as to by whom he had been cared for. By Mr. Stewart: To which the defendant objects. By the Court: The objection is overruled, and bill sealed for defendant. Let the evidence be stricken out. By Mr. Stewart: We also object to this action of the court in striking out this testimony. By the Court: Objection overruled, and bill sealed for defendant. (5) The court erred in excluding the testimony of the defendant, Allen Ginkinger, as to what took place at the signing of the agreement, there being two other living witnesses to what happened at that time. The bill of exceptions is as follows: 'By Mr. Stewart: I propose to ask the witness whether he took charge of the application for a pension, whether he received a pension check, and what the agreement was between him and his father with reference to the proceeds from this check. By Mr. Howell: Objected to, as incompetent and irrelevant, and because the evidence offered are matters occurring between the decedent and the witness prior to the death of the decedent, and is against the interest of the estate. By the Court: The objection is sustained, and we will give the defendant a bill.'"

The following is the supposed letter of attorney referred to in the opinion:

"To All Persons Whom These Presents Shall Come, Greeting: Whereas, Samuel Ginkinger, invalid, of the city of Easton, Pa., thus this day make, constitute, and appoint my son, Allen Ginkinger, of Easton City, Pa., by virtue of the power and authority given to me by these presents, and I do make and appoint and substitute the said Allen Ginkinger to be my true and lawful attorney to do, execute, and perform all such acts, deeds, matters, and things as shall and may be requisite and necessary to be done and performed for effecting the purposes and objects in the said letter of attorney contained as fully and effectually, in all respects and to all intents and purposes, as I myself might or could do, in virtue of the

power and authority aforesaid, if personally present, hereby ratifying and confirming all and whatsoever my said substitute may law-
fully do by virtue hereof. Samuel X Gink-
mark.

kinger. [Seal.] Attest: Geo. H. Young. Conrad Miller. A. Menline."

"State of Pennsylvania, County of Northampton—ss.: On the 1st day of April, A. D. 1890, personally appeared before me, an alderman in and for said county and state, Samuel Ginkinger, and by due course of law acknowledged the foregoing indenture to be your act, and desired the same to be recorded according to law. Witness my hand and seal this 1st day of April, A. D. 1890. Geo. H. Young, Alderman. [Seal.]"

Indorsed on said letter was this agreement, viz.:

"And the said Samuel Ginkinger further agrees that if his said son, Allen, shall provide for him just and right during his natural life, that the balance remaining of his estate shall be for his compensation, etc., in getting said
his
pension, etc. Samuel X Ginkinger. Attest:
mark.

Geo. H. Young. Conrad Miller. A. Menline."

Russell C. Stewart, for appellant. A. B. Howell, for appellee.

GREEN, J. This is an action to recover money alleged to be in the hands of the defendant, but belonging to the plaintiff's intestate at the time of his death. It is not an action upon a written instrument of any kind. The testimony to show that the defendant had money in his hands belonging to the plaintiff's intestate was entirely and exclusively in parol. In order to understand the case at all, it was absolutely necessary to hear that testimony, and to have it heard and considered by the jury. When the learned court below excluded the testimony of Menline, and struck out the testimony of Young, it rejected evidence which was indispensable in determining what money it was, and how much there was of it, and what the circumstances were in which the money was received, which the plaintiff claims belonged to her intestate, and was received by the defendant. There was a little testimony left on the record—that of Miller—which was not excluded, probably because its exclusion was not asked, and that testimony throws some light on the subject of contention. But the same considerations which make that testimony competent and permit it to be adjudged conclusively require the admission of the rejected testimony, because it is pertinent, material, and altogether essential to a just determination of the merits of the controversy. Without the parol testimony, there is but little more than mere chaos in the contention of the parties. There are but two written papers in the case. Both were in-

troduced by the defendant. One of them has no legal meaning whatever, and the other is unintelligible without the help of the parol testimony. The supposed letter of attorney is evidently a blank form for a substitutionary letter of attorney authorizing another attorney to act in place of the one first appointed. The blank is inaccurately filled, and the whole only authorizes to be done those things which are specified in an original letter of attorney, which never existed, so far as any testimony on this record is concerned. As it was executed by the principal, and not by the attorney originally constituted, it is impossible to resist the conclusion that there never was any other letter of attorney than such as this paper is. It contains no authority to do any specific thing. Nevertheless it did suffice to get the pension check from the official whose business it was to pay it out. The only other paper in the case is a paper in the following words: "And the said Samuel Ginkinger further agrees that if his said son, Allen, shall provide for him just and right during his natural life, that the balance remaining of his estate shall be for his compensation, etc.,
his
in getting said pension, etc. Samuel X
mark.

Ginkinger. Attest: George H. Young. Conrad Miller. A. Menline." It will be observed at once that this paper does not purport to be a complete agreement, nor to represent all the terms of any agreement. It says, "And the said Samuel Ginkinger further agrees." What was the precedent part of the agreement to which this paper was the "further" part of the whole agreement? Where is it to be found? Not in any preceding written agreement, for there is none. From the testimony of Young it appears that this paper was written on the back of the supposed letter of attorney, but as that instrument contained no terms of any agreement, and only purports to authorize the doing of something which is not defined in any manner whatever, it cannot be regarded as being the other and preceding part of the second paper. It is manifest from reading the rejected testimony that it contains the only supplementary matter to which the written paper can possibly refer. In the light of that testimony, it is easily understood. Without it, the paper is unintelligible. It is evident, therefore, that the whole of the actual contract between the parties, being partly in parol and partly in writing, must all be considered, in order to determine what the contract really was. The principle that a contract which is partly in writing and partly in parol becomes all parol, is too familiar to require the citation of authorities. But in this case the application of the written paper to the subject of contention requires the help of the parol testimony. Thus the paper says that the balance of the in-

testate's "estate" shall belong to the defendant, if he shall provide for his father "just and right during his natural life." Whether this comprehends the pension money only, or other estate also, requires the help of parol testimony. In any point of view, we think it was error to reject the offer of proof by the witness Menline, and we therefore sustain the third assignment of error. For the same reason we sustain the fourth assignment for the striking out of the testimony of Young. With this testimony before the jury, the question would be, what was the contract between the parties? If the jury should find that it was a contract for the care, protection, and maintenance of the intestate during the remainder of his life, and his burial after his death, and for this purpose the intestate gave to the defendant the money which he received for his pension, there is nothing unlawful in such a contract. The money belonged to the intestate. He could do as he pleased with it. And if it pleased him to give it to the defendant, who was his son, in consideration of his agreement for his support and maintenance during his life, he was perfectly at liberty to do so. There are plenty of such cases in the books. We do not discover the least evidence of imposition, undue influences, or even ordinary solicitation on the part of the defendant, to induce his father to make such an arrangement. On the contrary, all the testimony shows that at first the defendant declined to take the money, and it was only when his father insisted upon his taking it, and entering into the arrangement for his support and maintenance, that he yielded.

Nor do we think that the prohibitory provision of the pension law is applicable to the case as it now appears upon the testimony. There is no evidence whatever of any agreement for compensation on the part of the defendant for his services in obtaining the pension, nor was there any proof of any demand or claim of any kind for any compensation whatever. On the contrary, the witness Miller being asked: "Q. Tell to the jury what was said at the time by you and by Allen and by Samuel," replied: "A. When he handed Mr. Allen Ginkinger the check he said, 'I want you to take this money, and keep it.' He said: 'I have no more use for it. If you keep me until I die, the balance shall be yours.' He says: 'The rest of my children didn't care for me. I cannot go to their house, and they can't have none of my money.' Q. What did he say about Allen? A. He said: 'Allen is the only man that cares for me, and looks after my interest. He got my pension. He shall have the money that remains after I am dead.'" The witness Young said, "Well, Allen Ginkinger handed a check to the old man, his father, and the old man told Al. that he wanted him to take care of it and draw the money, and then Al. said he couldn't do it, and the old

man said he wanted him to draw the money; and I was requested to draw up a power of attorney, and he acknowledged it, that Al. should draw the money and take care of it. * * *

Q. You say the old gentleman stated in the presence of Al. that he was to take care of it? A. 'Al.,' he said, 'here is your check, I have no use for it, you take the money.' He said: 'I don't want your money. I want you to take it.'" On being recalled he was asked: "Q. What did Allen say to him? A. Well, Allen said to him first, 'Here is your check for this money for your pension.' And he said: 'I don't want it. I want you to have it.' Al. said: 'Here is your check. I have no business with it.' 'I want you to have it, and take care of it.' 'Well,' Al. said, 'I can't draw the money for you, or take care of it, unless something is done.' I said he could do it by a power of attorney. He said he wanted him to have it, and I went down to the office and drew it, and he said, 'I want you to keep me, and provide for me, and bury me when I am dead, and the balance you are to have.' * * *

Q. Did the old gentleman give any reason why he wanted Allen to have it? A. He said, "Through you I got the pension," and he said, "The rest never done anything for me," and he said, "I want you to have it as long as I live, and when I am dead I want you to bury me, and the balance you can have." This is practically all of the testimony on this subject, and we really cannot see anything in it that is violative of the prohibition of the pension law. Not only was there no agreement, demand, or request by the defendant for any compensation for his services in getting the pension, but he delivered the check to his father, and declined to take it back, or to keep the money when he was requested to do so by his father. It was only when his father repeatedly expressed his strong desire for him to keep him, and provide for him during his life, and bury him after death, that he yielded to his father's wish, and agreed to do as his father requested. There was nothing said about his having the money as a compensation for his services in getting the pension, and it is quite manifest that when the scrivener put into the written paper the words "in getting said pension," etc., he did so without any instructions from either the father or son to that effect. But, even as they are there expressed, it is a mere redundancy, as the preceding part of the paper expressly says that the balance of the money was to belong to the son as compensation for his providing for his father during his life. If it is viewed as a mere gift, and the obtaining of the pension was the reason of the gift, it would not be in violation of the pension law. This was expressly decided in the case of *U. S. v. Brown*, 40 Fed. 457. The court said: "If she gave him the money of her own free will, without any demand on his part, it not

being withheld or retained by him against her wish, wholly out of gratitude to him for a friendly service, not induced by the fact that a promise or undertaking exists by which he should be compensated for his services; or by his setting up and insisting upon such a promise or understanding; or, in the absence of it, by his claiming some merit or desert on his part for such service; in other words, if the money was paid to him without any demand, request, urgency, or action on his part by her, of her own motion,—he has not violated the section." Surely this is sound doctrine and good sense. Unless a person who has received a pension is to be denied the common right of property which is accorded to all other persons of disposing of their own as they see fit, it is not possible to doubt the correctness of the above ruling. It is strictly applicable to the facts of the present case, as we understand them upon the testimony now on record. We think these views control the disposition of the cause. We sustain the first and second assignments. The fifth assignment is not sustained. The relevant matter under the offer must be regarded as having occurred between the dead father and the son, and not between the son and some other living and competent person. Judgment reversed, and new venire awarded.

THOMPSON v. OCEAN CITY R. CO.

(Court of Chancery of New Jersey. April 21, 1897.)

INJUNCTION—PRACTICE—EVIDENCE—AFFIDAVITS—ACCEPTANCE OF STREET.

1. Though rule to show cause why injunction should not issue may be granted, in emergency cases, on bill not sworn to as to all the facts, and supported by affidavits which do not contain strictly legal evidence as to some of the facts, complainant cannot, on return of the rule, stand on them alone.

2. Where complainant's right to an injunction against construction of a railroad in front of his lots rests on the fact of his land abutting on a certain street, and the existence of the street, according to the bill, arose from a certain map made by his predecessors in title, and by a sale of the lots by reference to the map, existence of the map at some time is an essential fact in the proof of the existence of the street, or of an easement, over the locus in quo, attached to complainant's lots, and the bill and a supporting affidavit furnish no evidence of this, though the bill states the platting on the map, and the filing thereof in the county clerk's office, and affiant deposes generally, with respect to the charges of the bill, that the same are true so far as the acts and deeds relate to complainants,—no allusion, however, being made in the affidavit to the map, and complainant's reliance for his rights in any property outside the descriptive limits of his grant being on the acts of his predecessors in title.

3. There is no evidence that an ordinance ever existed, no copy thereof being produced, and reference thereto in the supporting affidavit to the bill for injunction being only by way of recital.

4. An ordinance, passed by the common council of a borough, authorizing a railroad company to construct its road along a certain ave-

nue, being ultra vires, is not an acceptance by the borough of the avenue as a street.

Action by Lewis Thompson against the Ocean City Railroad Company. Heard on rule to show cause why an injunction should not be allowed restraining defendant from constructing its road along Haven avenue, in Ocean City, in front of complainant's property abutting on said street. Rule discharged.

The bill sets out that the Ocean City Improvement Company became seised of a tract of land, including the locus in quo, and plotted the same into streets and lots upon a map which is filed in the Cape May county clerk's office; that one of these streets was named "Haven Avenue," and is 60 feet in width, and runs from Great Egg Harbor Inlet, which was the northerly limit of the company's land, southerly a long distance; that Haven avenue is crossed by parallel streets numbered consecutively from First street, near the inlet, to Fifty-Ninth street, at the other end of Haven avenue; that certain lots were conveyed by the improvement company to one Wheaton, four of which lots were conveyed by Wheaton to one Gleason on June 10, 1896, who conveyed the same lots to the complainant on June 27, 1896; that these lots were conveyed by reference to the plan of lots upon the said map, and two of the lots were particularly described as lying on the northwesterly side of Haven avenue with a frontage of 80 feet on the avenue, and the other two were described as lying upon the southeasterly side of Haven avenue, with also 80 feet frontage upon the same. In 1892 the borough of Ocean City was created, and included within its territory the lands of the improvement company. The Ocean City Railroad Company was incorporated June 8, 1896, under the general railroad act. The bill charges that the borough of Ocean City passed an ordinance purporting to confer on the railroad company the right to lay its tracks longitudinally along Haven avenue, that this ordinance was vacated by the supreme court upon certiorari, and that this company is about to construct its road through the said avenue in front of complainant's tract. The only important affidavit annexed to the injunction bill is that of Isaac E. McClain. He deposes that he has had read to him the bill of complaint, and knows the contents thereof, and that the same is true so far as the acts and deeds relate to the said complainant, and he believes them to be true so far as they relate to the acts and deeds of others. Especially is it true that Lewis Thompson is the owner of the premises in the said bill described, and in the possession thereof, and that he became seised thereof by virtue of the deed therein recited, and that the ordinance passed by the mayor and common council of Ocean City, authorizing the Ocean City Railroad Company to lay its tracks longitudinally in and along Haven

avenue, was taken to the supreme court of the state of New Jersey by writ of certiorari duly allowed; that judgment has been entered setting aside the said ordinance; that the said Lewis Thompson has not at any time, to deponent's knowledge, consented to the building and construction of the railroad along Haven avenue within the borough of Ocean City, and that the same is now being constructed against his wishes, objections, and consent; that the said Ocean City Railroad Company has commenced to build and construct its railroad in the said avenue, running thereon at or near Fifty-Second street; that deponent believes that it is the intention of the said company to push its work to completion unless restrained by an order of this court; that the route of the said railroad, as appears by the map on file in the office of the secretary of state, as said railroad places it, is on said Haven avenue, from First street to and including the point where they are now at work; that deponent believes that, if the said railroad is allowed to proceed with its work, said Thompson will suffer irreparable wrong and injury; that his property will be greatly depreciated by reason of such railroad; and further deposes that Thompson is temporarily absent from his place of residence, and will be for several days, and that deponent has full authority to act for him in the premises. The remaining affidavit is by Michael Gleason, who conveyed the premises to Lewis Thompson, and says that he never gave any consent to the railroad company to lay its tracks along Haven avenue. On this bill and the affidavits annexed, a rule to show cause was allowed. Upon return to the rule no answering affidavits are produced, but the defendant's counsel rests his objections against making the rule absolute, and allowing a preliminary injunction, entirely upon the ground that the special affidavits to the bill are insufficient to support such an allowance.

Henry M. Snyder and Samuel H. Grey, for complainant. Robert H. McCarter, for defendant.

REED, V. C. (after stating the facts). It is first objected that the affidavit is defective in its failure to show that Thompson is the owner of the four abutting lots. It is secondly objected that it fails to show that such a street as Haven avenue was ever dedicated in the manner charged in the bill, namely, by the plotting of lots and streets upon a map, and by a sale of some of the lots by reference thereto. It is thirdly objected that there is no proof that the route of the railroad runs along the alleged Haven avenue. It is fourthly objected that there is no legal proof of the acceptance of an avenue, if dedicated, or of the existence of an ordinance granting privileges to the railroad company, or of the vacation of such ordinance by the supreme court.

It is an established principle in this court, in matters of injunction, that all the facts necessary to sustain the injunction must be verified by positive proofs. *Perkins v. Collins*, 3 N. J. Eq. 482; *Youngblood v. Schamp*, 15 N. J. Eq. 42; *Holdrege v. Gwynne*, 18 N. J. Eq. 26. The rule laid down in *Reboul's Heirs v. Behrens*, 5 La. 79, is that the affidavit must be such as to submit the party to the penalty of perjury if the facts sworn to appear to be otherwise. This obvious rule was reiterated in *Catland v. McDonald*, 13 La. Ann. 44. In *Nusbaum v. Stein*, 12 Md. 315, a party had sworn that a debt was due to him on four promissory notes, which notes were in his possession, and it was held, following the case of *Bank v. Poultney*, 8 Gill & J. 332, that the deponent making no exhibition of the notes, his affidavit could not be regarded as proof of the debt. *Campbell v. Morrison*, 7 Paige, 158, was a case decided by Chancellor Walworth on appeal from the vice chancellor, from whom an injunction was asked by a judgment defendant to restrain proceedings against him upon the judgment. The injunction was asked for on the ground of newly-discovered facts that showed usury in the transaction out of which the judgment had sprung. The chancellor held that the existence of the judgment and execution need not, in that case, be sworn to positively, because they were records to which both complainant and defendant were parties, but that this was an exception to the general rule that when an injunction was asked for against third parties, if the complainant did not know personally the facts constituting the ground of complainant's case against such third persons, he should annex to the bill the affidavit of those from whom the information was derived. There was no assertion by Chancellor Walworth that certified copies of the record of the judgment and execution should be annexed to the affidavit; but, if the rules of evidence pertaining to the trial of causes are to be applied to affidavits to injunction bills, it would seem that nothing short of an examined or certified copy of such record would be adequate proof of its existence. It would seem that the same rule must be applied to distinguish between testimony that is admissible and testimony that is nonevidential, whether such testimony is found in affidavits to be used as a ground for obtaining an injunction, or the testimony is produced in open court by the examination of witnesses to support any litigated fact. In *Railroad Co. v. Stewart*, 19 N. J. Eq. 343-349, there was an exception taken to a schedule annexed to the bill, which schedule contained the depositions of a witness taken in another suit. The object of the affidavit was to support a bill for an injunction. Chancellor Zabriskie struck the schedule out, because it was not shown that the testimony was taken in a suit which was pending, and also because a certified or sworn copy of the deposition was the best evidence. On appeal this view was affirmed.

the chief justice remarking: "I am not aware that there is any relaxation of the rules of evidence with respect to affidavits annexed to injunction bills."

But it can be urged with force that, if this degree of strictness is to be exacted with every application for a preliminary injunction, it will destroy in many instances the efficacy of the injunctive power, the exercise of which, if not summary, is often useless. In respect to such insistence the remarks of Chancellor Walworth in *Campbell v. Morrison*, 7 Paige, 158, are pertinent: "In such cases, upon a bill, sworn to by the complainant, charging the facts upon his information and belief, and showing why it is impossible to procure the affidavit of the person from whom he derived his information and who knew the facts charged, the injunction master, instead of allowing a general injunction, should give the defendant an opportunity to be heard by directing an order to show cause as authorized by rule 32. In cases of emergency, where serious injury would probably be done to the complainant before a reasonable time to show cause would expire, the master, upon a bill thus framed, may allow a temporary injunction in the meantime." Under the rules of this court, particularly rule 122 respecting rules to show cause in injunction matters, this, I think, has been the practice in this state. It is proper, in emergent cases, to grant such rules upon testimony which seems the best that can be obtained at the moment, where a condition of affairs appears which demands an ad interim stay to prevent probable irreparable mischief until strictly legal and plenary testimony can be produced at an early day. Such a rule was granted in this case. But, as already remarked, on the return of the rule, the complainant stands upon the affidavits originally annexed to the bill, and the defendant puts its case upon the insufficiency of those affidavits. The rule to show cause, therefore, must be dealt with according to the position so assumed by the respective parties. The sole affidavit having any importance whatever is that of McClain. Now, it is to be observed that the complainant's right to an injunction rests upon the fact that the complainant owns land abutting upon a street known as "Haven Avenue." The existence of this street, according to the charges in the bill, arose from the plotting of certain lots and of Haven avenue upon a certain map made by the improvement company, the predecessors in title of the complainant, and by a sale of the lots by reference to said map. It is obvious, therefore, that the existence of this map at some time is an essential fact in the proof of the existence of this street, or of the existence of an easement over the locus in quo attached to the complainant's lot. Now, there is not the slightest allusion to this map in the affidavit of McClain. It is perceived, therefore, that it is not a question whether the map can be proved otherwise

than by the production of the map itself or by a sworn copy. There is no attempt to prove it at all. The bill, it is true, states the plotting upon the map and the filing of the map in the Cape May county clerk's office; but in respect to the general charges of the bill McClain generally deposes that the same are true so far as the acts and deeds relate to the complainant. This general affidavit does not touch the acts of the predecessors in title of the complainant, and it is their acts upon which the complainant relies for his right in any property outside the descriptive limits of his grant. So there is, in my judgment, no evidence of the existence of Haven avenue, or of the existence of any easement over land adjoining that of the complainant.

But, if the creation of the map had been proven, there are other obstacles standing in the way of an injunction. There is no legal evidence that the borough of Ocean City ever recognized the existence of a street called "Haven Avenue" in a way that implies an acceptance of the same as a street. The acceptance of the street is alleged to spring out of the passage of an ordinance conferring upon the defendant the right to run its railroad longitudinally along that street. Now, in regard to the existence of such an ordinance, this is what McClain has to say in his affidavit: "The ordinance passed by the mayor and common council of Ocean City, authorizing the Ocean City Railroad Company to lay its tracks longitudinally in and along Haven avenue, was taken up to the supreme court of New Jersey by a writ of certiorari, and judgment has been entered in said court vacating and setting aside the said ordinance." There is no copy, either certified or examined, of the ordinance produced, and its existence is alluded to only by way of recital. There is, therefore, no evidence that such an ordinance ever existed. Concerning the judgment of the supreme court setting aside said ordinance, it is to be observed that it stands in the same attitude in respect to insufficiency of proof as the ordinance itself. But, if the ordinance had been proved, this defect of proof in regard to the judgment would not matter, for this court would itself judge of the validity of the ordinance as a question arising in connection with the other equitable relief prayed.

But, further, if the ordinance and the judgment of the supreme court had been proved, I am of the opinion that its passage would not have been an act of acceptance by the borough of Haven avenue as a street. It may be conceded that, when the mayor and members of the common council voted for or approved the ordinance, each had in mind the existence of a street known as "Haven Avenue." But the individual recognition of the existence of a street by members of a common council cannot be regarded as a municipal acceptance of that street. While it is true that an acceptance need not be evidenced in any formal way, yet, if the act re-

lied upon as constituting the acceptance is a legislative act, it must be evidenced with legislative formality. It must be either by ordinance or resolution passed at a legal meeting of the members of the legislative body. Now, the act of the borough legislature in this instance was a complete nullity. It was *extra vires*. It has no legislative quality whatever. The mere fact, therefore, that the members intended to do something which, if they had had the power to do, would have implied that Haven avenue existed as a street, can amount to no more than that each individual had this in mind, but that they, as a legislative body, failed to express it. Now, it is true that without an acceptance, assuming the proof of dedication to be complete, the complainant would have an easement still in the *locus in quo*, and easements of this kind, under certain conditions, equity will protect against invasion. But where it does not appear that the easement is seriously impaired by obstructions put in the way of access to complainant's land, courts of equity, particularly as against public or quasi public enterprises, hesitate to interfere. *Wakeman v. Railroad Co.*, 35 N. J. Eq. 496; *Booraem v. Railroad Co.*, 40 N. J. Eq. 557, 5 Atl. 106; *Dodge v. Railroad Co.*, 43 N. J. Eq. 351, 11 Atl. 751. Indeed, where the trespass is upon an accepted street, an injunction will not be granted where the injury is slight compared to the inconvenience of the public, or where there is left a complete remedy at law. *Higbee v. Transportation Co.*, 20 N. J. Eq. 435; *Railroad Co. v. Prudden*, Id. 530. But whether, if the existence of a street in front of complainant's property was proven, an injunction should issue, under the conditions displayed by the affidavits in this case, need not now be decided. Upon the other grounds stated, the rule to show cause must be discharged, and the writ refused.

**CONSOLIDATED TRACTION CO. v.
THALHEIMER et ux.**

(Court of Errors and Appeals of New Jersey.
March 1, 1897.)

STREET CAR—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

1. The occurrence of a "lurch" or "jerk" of a street car, of sufficient violence to throw off the car a passenger who had notified the conductor of her desire to get off at Fifth street, and who, after the conductor called out "Fifth street," had arisen, and gone to the rear door, in preparation for alighting, justifies an inference of some breach of the duty owed to her by the carrier, and falls within the maxim, "*res ipsa loquitur*."

2. A passenger on a street car who, on being notified that the car is approaching the point where he desires to leave it, gets up, and goes to the door of the car, while it is in motion, for the purpose of being ready to alight, is not necessarily guilty of negligence. Such conduct is not *per se* negligent. Whether it is so or

not is for the jury to find under the circumstances.

McGill, Ch., and Gummere, Van Syckel, and Nixon, JJ., dissenting.

(Syllabus by the Court.)

· Error to circuit court, Essex county.

Action by Albert Thalheimer and wife against the Consolidated Traction Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Joseph Coult, for plaintiff in error. Samuel Kalisch, for defendants in error.

MAGIE, J. The judgment in this case was recovered by Albert Thalheimer and his wife against the Consolidated Traction Company, for damages sustained by each of them from an injury to Mrs. Thalheimer, for which the jury found the traction company to be liable. The questions raised by the assignments of error can all be considered under the assignment which challenges the correctness of the refusal of the trial judge to nonsuit the plaintiffs below. When the motion to nonsuit was made, the only evidence of the liability of the traction company was that given by Mrs. Thalheimer. If believed, the evidence established the following facts: That Mrs. Thalheimer was a passenger in a street car operated by the traction company, and running upon Orange street, in the city of Newark; that she notified the conductor of the car that she desired to alight therefrom at Fifth street (which crossed Orange street); that, when the car approached Fifth street, the conductor called out the name of that street; that she got up from her seat, while the car was still in motion, and walked to the rear door of the car, which was open, and when she arrived at the door, and was just coming out of it, she was thrown into the street by a movement of the car, which she called a "lurch" or a "jerk," and described as of sufficient force to "throw her right off." The fall produced serious injury. The motion to nonsuit was put upon two grounds: (1) That the evidence failed to show any breach of the duty which the traction company owed to its passenger, Mrs. Thalheimer; and (2) that, if such breach of duty could be inferred, the evidence disclosed that she had contributed to her injury by her own negligence.

After the motion was denied, the traction company gave evidence which, if believed, showed that Mrs. Thalheimer fell upon the street after she had safely alighted from the car, and which might justify the inference that her fall was due to the inequalities of the surface of the street, which was paved with cobble stones. Upon an application for a new trial, a serious question would be presented as to the weight of this conflicting testimony; but upon error the weight of testimony cannot be considered. Our review is limited to the consideration of the question whether Mrs. Thalheimer's evidence, if credence were given to it, was sufficient to estab-

lish the liability of the traction company to answer for her injury.

The contention that the evidence in question was insufficient to show a breach of the duty which the traction company, as a carrier of passengers, owed to Mrs. Thalheimer, cannot, in my judgment, prevail. That duty has been described in this court as calling for a high degree of care. *Railway Co. v. Lee*, 50 N. J. Law, 438, 14 Atl. 963. As street cars run up on rails fixed and leveled in the highway, and not permitting lateral motion, and are provided with brakes which, when applied quickly, or when, after being applied, are released quickly, before the momentum of the car has been overcome, produce known mechanical effects upon persons on the car, the occurrence of a lurch or jerk of the violence described fairly justifies an inference that either the tracks were improperly laid, or were out of order, or the brakes were improperly handled. At all events, the fact that such a lurch or jerk occurred as would have been unlikely to occur if proper care had been exercised brings the case within the maxim, "*res ipsa loquitur*," as expounded in the court of errors in *Bahr v. Lombard*, 58 N. J. Law, 233, 21 Atl. 390, and 23 Atl. 167, and in this court in *Electric Co. v. Sweet*, 57 N. J. Law, 224, 30 Atl. 553. The case last cited was reversed by the court of errors (31 Atl. 721), but the opinion on this subject was not there questioned.

The contention that the evidence showed that Mrs. Thalheimer was guilty of contributory negligence is no better founded. When notified that the car was near the place where she wished to get out, she arose, and went to the door of the car, as thousands of passengers in such cars daily and hourly do. Her movement was made in preparation for speedily leaving the car. Such conduct is not negligent *per se*. *Nichols v. Railroad Co.*, 38 N. Y. 131; *Wylde v. Railroad Co.*, 53 N. Y. 156. It may be questioned whether the evidence of her movement would justify an inference of negligence, but, at the most, it was a question for the jury whether, in preparing to leave the car, Mrs. Thalheimer was acting without proper care. No error being discovered in the conduct of the case in the trial court, the judgment should be affirmed.

MCGILL, Ch., and GUMMERE, VAN SYCKEL, and NIXON, JJ., dissent.

KETLINE v. STATE.

(Supreme Court of New Jersey. Feb. Term, 1896.)

LOTTERIES — INDICTMENT — OMISSION OF DATE — AMENDMENT.

Where, through oversight, the date was not inserted in an indictment for an offense against the act relating to lotteries, it was proper to permit the state to amend by insert-

ing it on the trial, under 1 Gen. St. p. 1123, pl. 42, 43, declaring that no indictment shall be insufficient for omission to state the time at which the offense was committed, where time is not of the essence of the offense, and permitting an amendment to be made in such case.

Error to court of quarter sessions, Camden county.

One Ketline was convicted of an offense against the act relating to lotteries, and brings error. Affirmed.

Argued November term, 1895, before BEASLEY, C. J., and MAGIE and LUDLOW, JJ.

John J. Crandall, for plaintiff in error.

BEASLEY, C. J. The defendant was convicted of an offense against the act relating to lotteries. At the trial the counsel of the defendant moved to quash the indictment for the reason that the date of the commission of the offense was not stated therein; a blank space for the insertion of such time appearing on the face of the indictment, which, by oversight, had not been filled up. The motion was overruled, and the state was permitted to supply the omitted date by amendment. The court is of opinion that the judicial course taken at the trial was wholly unobjectionable. The date was a mere form, in no wise incorporated with the crime as a constituent part of it. Such a slip as this was cured by the provision in the act relating to criminal procedure, which declares "that no indictment for any offense shall be held insufficient for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense." 1 Gen. St. p. 1123, pl. 42. The forty-third section of the same statute authorizes amendments to be made in such instances. Let the judgment be affirmed.

WEBER et al. v. STATE.

(Court of Errors and Appeals of New Jersey. March 1, 1897.)

RECOGNIZANCE — DISCHARGE.

Entry of nolle prosequi by order of court on motion of the prosecutor does not discharge from liability sureties on recognizance conditioned that accused will first appear, and stand to abide "the order and judgment of the court in the premises, and, in the second place, will not depart the said court without leave," it appearing that he did depart the court without leave.

Dixon, Barkalow, Dayton, and Hendrickson, JJ., dissenting.

Error to court of general quarter sessions, Hudson county; Hudspeth, Judge.

Action by the state against Charles Weber and others on a recognizance. Judgment for the state. Defendants bring error. Affirmed.

A defendant in a criminal proceeding, being charged on an indictment, pleaded not guilty, and the plaintiff in error entered with him into a recognizance in the usual form for his appearance, etc. This suit was brought

on this recognizance, the alleged breach being the nonappearance of the defendant. At the trial the minutes of the criminal court were produced, and upon them these three entries relative to this case appeared, to wit: "Oct. 23/94. On motion of the prosecutor, C. H. W., a nolle prosequi is entered in this case." "Nov. 7/94. The above nolle prosequi is erased by order of the court." "Jany. 7/95. The above bail is declared forfeited by the court, on motion of the assistant prosecutor, J. N. N., the defendant failing to appear for trial." In the present action on the recognizance, the trial court ordered a judgment in favor of the state. The case is before this court on writ of error.

Randolph, Condict & Black, for plaintiffs in error. C. H. Winfield, for the State.

BRASLEY, C. J. (after stating the facts). This writ of error rests upon the assumption that when, in the criminal court, an order was entered in the minutes, that put an end to the then pending prosecution; that thereby the obligation of the recognizor was conclusively discharged. In the brief of counsel the problem is thus formulated: "The entry of a nolle prosequi by the order of the court on motion of the prosecutor is a discharge of the bail." But this court is of opinion that this contention is a manifest fallacy. In order to sustain the proposition, it would be necessary to suppress an important and clearly expressed stipulation in the recognizance itself. As appears from the pleading in the case, this instrument now in question is in the proper and customary form, and imposes a twofold obligation; that is to say, that the defendant in the indictment will first appear and stand to and abide "the order and judgment of the court in the premises, and, in the second place, will not depart the said court without leave." In the present instance this latter stipulation was admittedly violated, as there is no pretense that the withdrawal of the defendant from the court had been judicially sanctioned. And it is also to be noted that this engagement that the defendant will not depart the court without leave is not merely ancillary to the promise that he will abide the judgment of the court, but it is an additional and independent term of the contract. In its absence, our criminal procedure would be radically imperfect. It is intended to provide, and does provide, for the occasion when a particular form of prosecution may be terminated, but when, in another mode, the prosecution is to be continued. In the case before the court a nolle prosequi was entered, the effect of which, if it remained in force, was to vacate and annul the then existing indictment, but it did not conclude the prosecution for the offense, for another indictment could have been found. And if, in that condition of things, the prosecutor had stated to the court that the state in-

tended to present the matter to the next grand jury, it is obvious that the court, if applied to, would not have ordered an exoneration to have been entered in the bail piece. The importance, therefore, of the requisition, that the defendant in the prosecution cannot be discharged until he has obtained formal judicial consent to such result, is plainly apparent. In the present instance there is much reason to believe that, if the motion had been made to discharge the prisoner on the ground that a nolle prosequi had occurred, such motion would have been rejected, inasmuch as the rule for judgment on the abandonment of the existing procedure was ordered to be erased from the minutes, the implication being that the entry had been made by mistake, or without authority. If this were a case in which a judgment would put an end absolutely to the prosecution for the offense, such as would ensue on a verdict of acquittal or conviction, an entirely different question from that we are now considering would have been presented, for, in view of such a final determination, the stipulation not to depart from the court without leave would have been bereft of all substantial force. What the effect of such a course of law would be it is not necessary to consider. All that the court at present decides is that the cessation of the criminal proceeding in a certain form leaving a potentiality of its further prosecution in a different method does not ipso facto discharge a defendant from the obligation of his recognizance. As it appears from the record before us that the defendant did depart the court without leave, the recognizance was thereby forfeited, and the judgment should therefore be affirmed.

NIXON, BARKALOW, DAYTON, and HENDRICKSON, JJ., dissent.

BARR v. VOORHEES et al.

(Court of Errors and Appeals of New Jersey.
April 3, 1897.)

DISCOVERY IN EQUITY—UNSATISFIED JUDGMENT— APPEALABLE ORDER.

1. In proceedings in chancery in aid of an unsatisfied judgment and execution (1 Gen. St. p. 389, §§ 88-94), an interlocutory order for discovery should specify the place for defendant's appearance.

2. In such proceedings an interlocutory order forbidding payment or transfer by or to a judgment debtor can only be supported by allegations of a specific debt or trust, proved by oath.

3. An order containing such a prohibition is appealable.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill by John S. Voorhees and Theodore B. Booraem against Henry J. Barr. From an order of the court, defendant appeals. Reversed.

This appeal is taken by a defendant to a bill in chancery from the following order made ex parte upon the filing of the bill: "It appearing to the court that the said complainants have filed their bill of complaint herein, setting forth that they are the owners of a judgment recovered against the defendant, Henry J. Barr, in the inferior court of common pleas of the county of Middlesex, and that an execution against the property of the said defendant has been issued thereon and returned wholly unsatisfied, leaving an amount remaining due exceeding one hundred dollars, exclusive of costs, and praying the aid of this court in the premises; and upon reading the said bill, verified according to law: It is on this 12th day of December, 1896, ordered that the said defendant appear and make discovery on oath concerning his property and things in action, before James H. Van Cleef, Esq., one of the masters of this court, on the 17th day of December, instant, at the hour of ten o'clock in the forenoon; and the said Henry J. Barr is hereby restrained from transferring any property, money, or thing in action belonging to him, or held in trust for him, except where such trust has proceeded from some person other than the said defendant, and except such property as is now reserved by law, until the further order of the court in the premises." The only verification of the bill was as follows: "John S. Voorhees and Theodore B. Booraem, the above-named complainants, being each duly sworn according to law, on their several and respective oaths say that they have read the foregoing bill of complaint, and that the matters and things therein contained, so far as they relate to their own acts, are true; and, so far as they relate to the acts of others, they believe them to be true."

Alan H. Strong, for appellant. John S. Voorhees, for respondents.

COLLINS, J. (after stating the facts). The order appealed from can find no support elsewhere than in those provisions of the chancery act that authorize proceedings in aid of unsatisfied judgments at law. They are sections 88-94, p. 380, 1 Gen. St. That statute will not sustain the order. The direction to appear and make discovery is void, because no place is specified for that purpose, as required by section 90. It is argued that the order may be helped by the subpoena ad testificandum authorized for witnesses under section 92, but we hold otherwise. The express provision as to a defendant excludes any inference, by construction, that he is a witness. There is sound reason for the requirement that the order shall name time and place for the defendant's appearance. The court, and not the complainant, should decide what is reasonable in that regard. A complainant ought not to have the power arbitrarily to compel the defendant to travel to

a distant part of the state. Witnesses may safely be left to ordinary subjection to subpoena. The prohibition of transfer of property is unwarranted. Such a prohibition, under the statute, cannot be general, but must be directed to a specific debt or trust, pointed out in the bill, and proved by oath to exist. Verification on belief is sufficient for an order for discovery, but not for an order forbidding transfer or payment. Whether an order simply requiring a defendant's appearance for discovery is appealable, we do not decide. The order appealed from must be wholly reversed.

CONSOLIDATED TRACTION CO. v. HAIGHT.

(Court of Errors and Appeals of New Jersey. March 8, 1897.)

STREET RAILWAYS — COLLISION WITH VEHICLE — CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS.

1. A trial judge, although requested by counsel, is not required to charge abstract legal principles not applicable to the facts appearing in evidence.

2. In the case of a trolley car overtaking another vehicle directly in a line with its progress, and a possible obstacle in its way, a proper regard for the rights of others requires that the car be reduced to such control that it may be brought to a standstill, if necessary, before reaching the obstructing vehicle.

3. Such timely warning of the approach of a trolley car must be given as will enable others to avoid any danger from it.

4. It is the duty of others not to obstruct the track, but a violation of such duty does not necessarily constitute such contributory negligence as will relieve the trolley company from responsibility for an accident which might have been avoided by the exercise of proper care.

5. It is not, under all circumstances, negligence per se not to look and listen before crossing a trolley track

(Syllabus by the Court.)

Error to supreme court.

Action by Albert Haight against the Consolidated Traction Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Depue & Parker, for plaintiff in error. Samuel Kallsch, for defendant in error.

DAYTON, J. September 8, 1894, an electric car of the Consolidated Traction Company, going along Henderson street, in Jersey City, collided with the rear part of a truck moving ahead of it. The collision threw down Albert Haight, who was riding on the truck, causing him damages, for which suit was brought against the company in the Essex circuit. The assignment of errors in the trial, to which the attention of this court is directed, embraces that of a refusal to nonsuit, and a large number of objections to the charge of the presiding judge. It is clear that the court below did not err in refusing a nonsuit. There was conflicting testimony as to negligence, in the occurrence, both of the defendant and the plaintiff, which evidence it was exclusively the province of the

jury to consider and determine upon. The only question remaining to be decided by this court is whether the judge, at the trial, correctly stated to the jury the law, or refused, upon request of counsel, to state all the law applicable to the case.

A judge is not required to charge every abstract legal principle which may be suggested by counsel, unless applicable to the facts appearing in evidence. Nor is a judge required to adopt the form or the words, or the collocation of phrases, in which a request to charge is framed; and on a request embracing several distinct legal propositions, if any one of the set be improper, a general exception to the refusal to charge will be unavailable. *Gardner v. State*, 55 N. J. Law, 17, 28 Atl. 30; *Traction Co. v. Chenoweth* (N. J. Err. & App.; Nov. 16, 1896) 35 Atl. 1067.

Carefully examining each one of the 20 assignments of error alleged to have occurred in the charge of the judge, we are unable to find any one of them sufficiently supported. The charge, considered as a whole, and not by mere excerpts separated from their surroundings, stated the law applicable to the facts clearly and comprehensively.

The errors upon which counsel for the defendant seem chiefly to rely are, first, that stated in the twenty-second assignment, which objected to the charge of the judge that if the truck was visible upon the track from a distance of 500 or 600 feet, being subjected to the risk of danger, it was the duty of the motorman to use all means in his power to bring the car to a standstill. But this statement must be considered in connection with the subsequent application of the law, that "if it appears as the result of the evidence in this case that, immediately upon discovering the wagon or truck of the plaintiff approaching the tracks, the motorman in charge of this car did apply his brakes, and did make every effort to prevent a collision, then the company is without fault." There was nothing in the above statements to mislead the minds of the jury. It was simply that at whatever distance from the truck, whether 600 or 60 feet, if the truck was visibly subjected to risk of injury by further advance, it was the duty of the motorman to make every effort to stop his car. Many elements must be considered to determine the risk, as, for instance, the speed of the car; the condition of the tracks; the efficiency of the brakes, or the reverse, upon the car. It would be a strained construction of such a phrase to understand that whenever, and under any circumstances, a car approached within 600 feet of a wagon on the track, it must immediately come to a standstill. By the language used the jury were substantially instructed that the true rule in regard to trolley cars, as in regard to all other vehicles, should be applied; that when overtaking another vehicle directly in the line of their progress, and a possible obstacle in their way, a proper regard for the rights of others re-

quires that the car be reduced to such control that it may be immediately brought to a standstill, if necessary. In the case of *Hicks v. Railroad Co.*, 124 Mo. 115, 27 S. W. 542, cited by defendant's counsel as deciding the above rule to be too broad, the car was slowly and carefully following behind a buggy upon the track; and the court said there was no danger of collision in moving the train slowly and cautiously, and not negligently near to the buggy. In the case before us the car rushed along without diminished speed, so far as the evidence shows, until within a few feet of the truck, and did not approach it slowly and cautiously, with a view to avoiding a possible collision, as was its duty in the exercise of reasonable care. The rights of a street-railway company in a public highway, and its obligations, modified by its limitations to the use of a fixed line of track, are the same as those of the driver of any other vehicle; and both of them, in approaching near to, or attempting to pass, the other, directly in its path, are required, in the exercise of reasonable care, to keep themselves, so far as consistent with a legitimate use of the street, under such control as will enable them, without willful negligence on the part of others, to avoid collision and damage.

Another of the numerous assignments of error claimed that the trial judge was in error when charging the jury that "It was the duty of the defendant corporation to give timely warning,—timely signals indicating the approach of its cars,—so that the persons who were using that portion of the highway covered by the tracks might have timely warning to enable them to avoid danger from the approaching cars." This statement of the law is in accord with the rule laid down in the case of *Traction Co. v. Chenoweth* (decided by this court in its term of June last). It is the only rule consistent with the general principle to be applied to all vehicles traveling upon the public highway. The street trolley has no special right of way accorded to it by law, and the duty imposed upon other vehicles is equally imposed upon it. No vehicle can, without reasonable notice of its approach (what is reasonable notice is a question for the jury), violently run into, or force from its way, another, having a legitimate right upon the street, without becoming responsible for any damage which may result. In this connection the additional assignment of error may be considered, namely, that the judge refused to charge that, if the motorman gave timely notice, he had a right to assume that the driver of the truck would turn out in time, and it was only when it became apparent to him the latter did not intend to do so that it became his duty to check the speed of the car. To maintain such a doctrine would be to hold that, if audible and sufficient notice was given by a car, it rested solely in the discretion of the motorman to determine when he should begin to exercise care to avoid a collision; and the whole

question would be taken out of the domain of issues to be decided by the jury, as to whether or not reasonable care had been exercised, which is the true rule of law and test of responsibility.

The alleged error in refusing to charge that it was the duty of the driver to look behind from time to time, as well as to listen, so that, if the car is near, he may turn off and allow it to pass without undue slackening of ordinary speed, involves the assumption of many premises and circumstances, the nonexistence of which would make the application of such a rule illegal and inequitable. In the case of *Traction Co. v. Scott* (N. J. Err. & App.; June 15, 1896) 34 Atl. 1094, it was held that the rule requiring one to look and listen before crossing a steam railway, in order to be in the exercise of ordinary care, does not apply with equal force to one crossing the track of a street railway in a city street, where the company and the public stand upon an equal footing in the use of the highway, and that failure to do so was not necessarily, under all circumstances, negligence per se.

The second, third, fourth, fifth, sixth, eighteenth, and nineteenth assignments are based upon the refusal of the trial judge to charge the jury as requested upon the duty of the plaintiff below to yield the right of way to the defendant. It has already been decided in this court, in the case of *Railway Co. v. Preston*, 35 Atl. 1119, that it is the duty of the driver of other vehicles not to obstruct the tracks of the trolley company, but at the same time it was held that neglect to fulfill this duty did not necessarily relieve the company from responsibility for injury caused by want of care on their part. The offending driver may be punished by action at law, and the obstruction removed by police interference; but the illegal act of the injured party does not always absolve the company from its duty so to act as, if possible, to avoid collision and harm to others. The trial judge covered the points contained in the several requests upon which the above assignments of error are based by instructing the jury that other vehicles are subject to a duty "to yield to the rights of the company in the use of their tracks, when they have occasion to use them, and under a duty to make no unnecessary obstruction to the passage of the cars of the company." The charge of the trial judge stated the law correctly and sufficiently, and the judgment under review should be affirmed.

KELLY v. BRENNAN et al.

(Court of Chancery of New Jersey. April 15, 1897.)

POWER OF ATTORNEY—REVOCATION—AGENCY.

1. The demand by the principal for the return of a written power under which an attor-

ney in fact was acting, and its surrender and withdrawal without any explanatory words or further instructions, must be held to be a revocation of the power.

2. A contract made by the principal agreeing to sell property, the subject-matter of the agency, prevents a subsequent contract for sale made by the agent, though on the same day, from having any force.

(Syllabus by the Court.)

Bill by Lizzie Kelly against Mary S. Brennan and George W. Crosby for specific performance. Bill dismissed.

This bill is filed by the complainant, Lizzie Kelly, wife of Samuel H. Kelly, against the defendants, Mary S. Brennan and George W. Crosby, for the purpose of compelling the specific performance of a contract claimed by the complainant to have been entered into by the defendant Brennan for the sale of lands in Atlantic City by the action of her agent David Giltinan. The defendant Crosby is made a party in respect to a contract which he entered into with the defendant Brennan for the purchase of this land. The written agreement for sale on which the complainant claims is in the words and figures as follows: "Atlantic City, N. J., November 23rd, 1895. Received of Samuel H. Kelly the sum of \$250, on account of purchase of property on corner of Pacific and California, 175 feet on Pacific, same on Monterey, fronting on California. Price of same, \$20,000. To be paid in cash, \$5,000. Balance on mortgage, \$15,000, at 6%. Settlement to be made thirty days after date, said property being now owned by Mary S. Brennan. David Giltinan, Agt. for Mary S. Brennan." The bill claims that Samuel H. Kelly, mentioned in the agreement, was acting in purchasing the land for and in behalf of his wife, the complainant, Lizzie Kelly; and that, after the above receipt had been given by Mrs. Brennan's agent, the defendant Crosby, being informed of the complainant's purchase, and with the purpose of defrauding her of the benefit of her bargain, made a contract with Mrs. Brennan herself on the 26th day of November, 1895, with actual notice of the record of the contract of the complainant; that on the 23d day of December, 1895, the complainant made a tender to the defendant Brennan of the balance of the purchase money and a deed for execution, which she refused to execute, giving as her reason that Crosby had agreed to make a greater cash payment, and that Giltinan, who claimed to act as her agent in making the contract to convey to the complainant, did not have the power to make any such contract. The bill prays for answer without oath.

The defendant Mary S. Brennan files her several answer, denying that Giltinan was her agent for the sale of the premises, and denying that he had any authority to sell them, declaring that she had in July, 1895, authorized Giltinan in writing to sell the property subject to her approval, and that subsequent-

ly, in August, 1895, she revoked even that authority; so that on November 23, 1895, Giltinan was not her agent, and had no authority to sell the property and bind the defendant in any way. She denies that her contract with Crosby was made on the 26th of November, 1895, and says that on November 21, 1895, she gave to Crosby an option to purchase the lands, to be exercised by him on or before November 25, 1895; that on November 23d, in the afternoon, the option was exercised by Crosby through his agent Devine, who then paid the defendant \$500, and the defendant then gave him a receipt in the words and figures as follows: "Rec'd, Nov. 23—95, from M. A. Devine, \$500.00 on acct. of purchase of land cor. Pac. & Cal. Ave., 175x150, as per verbal agreement; the price, \$20,000, 1/2 cash. M. S. Brennan." The defendant further states that on the 25th of November, 1895, and before she had any knowledge of the sale claimed to have been made by Giltinan to the complainant, she entered into the following supplemental agreement with Crosby for the sale of the premises in question, which agreement is in these words: "Memorandum of Sale. Owner, Mary S. Brennan; purchaser, Geo. W. Crosby. Property, northeast corner of Pacific and California avenues, same being 175 feet on Pacific avenue, 250 feet on California avenue, to Monterey Ave. Terms: Twenty thousand (20,000) dollars, ten thousand (\$10,000) dollars to be paid in cash, and the balance to remain in mortgage. The owner to furnish a good title to the land through the West Jersey Title & Guarantee Company of Camden, N. J. Devine and Wootton to receive 2% commission for the amount of the sale. Delivery on or before December 31, 1895. The above parties do hereby agree to and with their heirs and assigns to abide by said above terms and agreement for time as above, and the said owner hereby acknowledges the receipt of five hundred (\$500.00) dollars in payment of above consideration. Signed and sealed this 23d day of November, 1895. Mary S. Brennan. [Seal.] George W. Crosby. [Seal.] Witness: N. H. Brennan, as to Mary S. Brennan. M. A. Devine, as to George W. Crosby."

The defendant Crosby files his separate answer, and denies that he made his agreement to purchase after having been notified that the complainant had entered into an agreement for a like purchase. He denies that he did anything for the purpose of cheating or defrauding the complainant, but admits that he purchased the property from the defendant through his agents Devine and Wootton, and declares that he had no notice of any agreement by complainant with Mrs. Brennan for the purchase of the premises, and says that his own effort to secure the same was in good faith, without any notice of any equity of the complainant in that matter. He further denies that he ever saw any con-

tract which was entered into between the complainant and Mrs. Brennan.

By the evidence submitted at the hearing, it appears that on the 4th of July, 1895, Giltinan prepared a paper authorizing him to sell the premises in question as Mrs. Brennan's agent. This authority is in these words: "July 4, 1895. I hereby authorize David Giltinan, as my agent, to sell, *subject to my approval*, the lands owned by me on California, Pacific, Atlantic, and Iowa avenues, in Atlantic City, New Jersey, his commission on sale being two per cent. Mary S. Brennan. Witness: Mary A. Brennan." The defendant Brennan signed this paper, and, under the authority thereby given, Giltinan solicited purchasers for the property, and entered into conference with Samuel H. Kelly, the husband of the complainant, for the sale of the premises. Shortly after this paper had been given, some time about the middle of July, Mrs. Brennan sent her attorney, Mr. Ferris, to Mr. Giltinan, who stated to Giltinan (as Giltinan swears) that Mrs. Brennan had been annoyed by parties in Atlantic City "as to the danger that she was in by Giltinan having full power of attorney to do as he pleased with her property; that he (her attorney) wished as her counsel to look over the papers." Giltinan says that he found the paper, gave it to Mrs. Brennan's attorney, and he then inserted the words "subject to my approval," now found therein, which I have underscored in the above copy, and Giltinan further says that he then told the attorney that he "wanted nothing unless it was approved." Mr. Giltinan says that the attorney brought the paper back, and called his attention to the words, "subject to my approval." Sometime afterwards (shown by the testimony of Mr. Ferris to have been on the 10th of August, 1895) Mr. Giltinan says that Mr. Ferris again applied to him for the paper of authorization, stating that the lady was subjected to the same annoyance by persons who were trying to get the property away from him (Giltinan), and took the paper away, and Giltinan never saw it afterwards. He says the attorney told him nothing in regard to any change of sentiments or instructions. Mr. Ferris (Mrs. Brennan's attorney) swears that when he took away the power of attorney on the 10th day of August, 1895, he told Mr. Giltinan that Mrs. Brennan had withdrawn her property from the market, and had desired him (Ferris) to obtain the paper which he had given to Giltinan, and also his bill: that Giltinan said he would let him have it the next day, which he did, and said he had no bill. Mr. Giltinan says that the statement of withdrawal did not include the premises on the corner of California and Pacific avenues, which are now in question; but Mr. Ferris denies this, and says that he did not except the corner piece at California and Pacific avenues. He says that he told Giltinan that Mrs. Brennan had made an absolute

withdrawal, but that he supposed that if she got her price she would sell it; but this, he says, was given as his opinion, and not by her direction. Mrs. Brennan testifies that after the return of the paper she did not give Mr. Giltinan any authority to sell the property. Mr. Giltinan continued to receive offers for the premises, and finally, on the afternoon of November 23, 1895, on his return from Philadelphia by the train, leaving that city at 2 p. m., he accepted one made by Kelly, at \$20,000, and received \$250 cash, and at his office in Atlantic City gave him the receipt above set forth; and on the same day, November 23d, wrote to Mrs. Brennan that he had succeeded in getting Kelly to give \$20,000 for the property, \$5,000 cash and \$15,000 on mortgage, "the settlement to be made within thirty days, if you approve. This is the highest price you mentioned to me that you would take. He has paid \$250 on account;" and he stated that "the reason of accepting of this amount was as he [Kelly] was leaving here to go to Michigan on the early train on Monday, to remain three weeks." Mrs. Brennan in reply, under date of November 28th, wrote to Giltinan that "the lot is sold, money paid on the agreement, before Mr. Kelly thought of it. I think you have forgotten August 12, '95, that I withdrew those lots from the market. I think that if any business was to be transacted I should have been acquainted with it." The testimony of Godfrey and Kelly shows that they went to Mrs. Brennan to make a tender of the balance of cash and a mortgage, and to request her to make a deed to Mrs. Kelly in accordance with Giltinan's receipt. Whether a formal tender was made is disputed, but there is no dispute that Mrs. Brennan told them she had already sold the property to Dr. Crosby, that she had no business relations with Mrs. Kelly, and referred them to her attorney.

The transactions of the defendant Crosby were carried on directly with Mrs. Brennan herself by Mr. Devine, the attorney for Crosby. Mr. Devine testifies that he had advised Crosby to purchase the tract of land in question; that the matter had been in conversation between him and Crosby for some ten days or two weeks prior to the time when he purchased; that he (Devine) called upon Mrs. Brennan in Philadelphia, and made her an offer for the property, and also for other property, and asked for an option, which Mrs. Brennan refused to give in writing, but said she would give the refusal of it,—that is, she would not sell the land for any price without advising with Mr. Devine. In the conversation between them the property now in question was referred to as the Pacific avenue end, and the figure named as the price for that portion was \$20,000. When Devine reported this conversation to Crosby, he authorized him to purchase the Pacific end at the price named. Mr. Devine had fur-

ther conference with Mrs. Brennan in Philadelphia, on one or two occasions seeking to get her to accept a lower price for the property than \$20,000. On Saturday, the 23d of November, 1895, Mr. Devine called at her office, and again sought to purchase the property at a less price, which Mrs. Brennan refused to accept. At 1:30 in the afternoon of that day he again saw Mrs. Brennan at her Philadelphia office, and agreed to pay her price. He gave her a check for \$500, which he had taken with him for the purpose on account of the purchase money, and took her receipt set out in her answer. On the same day, after this transaction was concluded, the witness Devine saw Mr. Giltinan on the ferryboat crossing to Camden. Mr. Giltinan in his testimony states that he saw Mr. Devine on the boat, and came over on the same boat with him to Camden, and that he left Philadelphia on the 2 o'clock train for Atlantic City; that Kelly was waiting for him. They went to Giltinan's office in Atlantic City shortly after the arrival of the train, and Giltinan then and there gave to Kelly the receipt which the complainant claims is her contract for the purchase of this lot. Devine, who made the final bargain for Crosby with Mrs. Brennan, and paid her the \$500 on account of the purchase money, swears it was done on Saturday, November 23, 1895, about half past 1, in time for him to take the 2 o'clock afternoon train for Atlantic City, and that after he had made the payment and consummated the deal he saw Giltinan on the ferryboat going over to Camden. Devine returned to Atlantic City on Saturday, and showed the receipt to Crosby, who was not satisfied with the fulness of it. The more elaborate contract of Mrs. Brennan with Crosby, above set forth, was then drawn up, and Crosby signed it on Saturday evening, November 23d, and the next day (Sunday) Devine heard from Crosby that Kelly also claimed to have purchased the lot on Saturday. Devine then went to Philadelphia, on Sunday afternoon, and, taking the supplemental contract with him, obtained Mrs. Brennan to execute it on Monday morning, November 25, 1895, at about 8 o'clock. Mrs. Brennan testified that when Devine, Crosby's agent, made his offers, there was no one else in negotiation for the purchase of the property, nor for a month before that time, and that the receipt memorandum was made and signed, and the \$500 hurriedly paid, in order to enable him (Mr. Devine) to catch the train on the 23d of November, 1895, and that the more formal contract of the same date (Exhibit C5) was actually signed on the following Monday, November 25th, and that both were made before any word had been received by her from Giltinan about the sale; that she had at that time no other offer pending for the property, and that she considered that when Devine gave her the \$500 that was the sale, and bound her. This was on Sat-

urday, November 23, 1896, when the informal receipt was given to Devine in Philadelphia, and before Giltinan had returned to Atlantic City on the same day, and necessarily before he met Kelly at the station in Atlantic City, and went to his office with him, and there gave Kelly his receipt.

Godfrey & Godfrey and Howard Carrow, for complainant. C. L. Cole and Thomas El. French, for defendant.

GREY, V. C. (after stating the facts). There are two questions of fact in this case on which the several parties are at variance, the settlement of which will determine their rights. The complainant asserts that she became the equitable purchaser of the lot in question by a memorandum of sale obtained from Mr. Giltinan, the authorized agent of the defendant, Mrs. Brennan. She also alleges that the defendant Crosby knew she had obtained this contract, and, in order to cheat her of her bargain, afterwards entered into a subsequent contract with Mrs. Brennan herself. The complainant prays that the specific performance of her contract obtained through the agent may be decreed.

As to the first point, the dispute turns upon the assertion on the part of the complainant of Mr. Giltinan's authority to bind Mrs. Brennan by a contract of sale, and a denial by the defendant Mrs. Brennan that he had any such power. The original employment of Mr. Giltinan was in writing, and made him Mrs. Brennan's agent to sell the property, fixing his commission. She subsequently, as Mr. Giltinan testifies, became disquieted (whether reasonably or not is of no consequence), and caused the words, "subject to my approval," to be inserted in the written memorandum employing him. Mr. Ferris, Mrs. Brennan's attorney, who attended to this change, says it was done about the middle of July. Shortly after this, about the middle of August, she, by her attorney, withdrew this paper altogether from Mr. Giltinan. Mr. Giltinan continued to receive offers and to discuss the sale of the property with Mrs. Brennan for some time after the withdrawal, reporting offers, which were not accepted. But, if it be assumed that Mrs. Brennan allowed Mr. Giltinan to retain any authority to sell, the real question on this branch of the case is, what was the character of that authority at the time he contracted with Kelly? That it was originally in writing and unlimited all agree. That it was modified is also undisputed. The reason for the insertion of the words, "subject to my approval," was stated by Mr. Giltinan himself to be the annoyance which Mrs. Brennan suffered because of the representations of parties in Atlantic City "as to the danger she was in by my having full power of attorney to do as I pleased with her property." This makes it obvious that Mrs. Brennan was unwilling to allow Mr. Giltinan an absolute power to make

a sale of her lands, and that the limitation requiring her approval was necessary to satisfy her mind. By the change, this written authority was so restrained that if Mr. Giltinan undertook to sell as Mrs. Brennan's agent he was thereafter obliged to subject his action to her approval. After this he testified that the same reasons led to the second call of Mr. Ferris (Mrs. Brennan's attorney), when the latter took away the paper, now one of limited authority only. Mrs. Brennan is thus shown to have been unwilling that Mr. Giltinan should exercise the authority of an agent, even subject to her approval. Mr. Giltinan claims that the taking away of the paper authority was a withdrawal only of the Atlantic and Iowa avenues lot, and not of the California and Pacific avenues lot, now in question. But the paper, as charged by Mrs. Brennan, authorized him to sell both these tracts subject to Mrs. Brennan's approval, one no more and no less than the other. When it was taken away by Mr. Ferris (Mrs. Brennan's representative), Mr. Giltinan testifies that Ferris "made no comments and no remarks, and told me nothing in regard to any change of sentiments or instructions." I think it must be taken that the withdrawal of this paper, which Mr. Giltinan defines in its original form to have been a full power of attorney, made an end of Mr. Giltinan's authority to sell any of the land described in it. The demand by the principal for the absolute delivery of her letter of attorney, and its surrender by the agent, must be held to be a revocation. But even if this taking away of the written authority is held not to have removed the California and Pacific avenues lot from Mr. Giltinan's control, whatever power he retained under it must certainly have been subject to her approval under the previous modification.

Mr. Giltinan, however, says that he afterwards had several interviews with Mrs. Brennan, the last in October, 1895. At this interview he testifies Mrs. Brennan told him she had withdrawn the Atlantic avenue lots from the market for the present, that she preferred selling the place now in dispute, and she would take \$20,000 for it, and told him to sell if he could get \$20,000. This is the same price she had named to him about July 1, 1896, when Mr. Doyle introduced him to her. Without admitting the full revocation of his previous power, it is under this latter verbal authority that Mr. Giltinan claims he acted for Mrs. Brennan when he sold to Kelly. Mrs. Brennan was asked: "Q. After the return of that paper, what authority, if any, did you give Mr. Giltinan to sell this property? A. Not any." She further says, on cross-examination: "I told Mr. Giltinan that I wanted \$20,000, but I didn't recognize Mr. Giltinan as agent after I withdrew that." "I said I wanted \$20,000, but I did not say he must get it any more than any one else." It is to be observed that Mrs. Brennan and Mr.

Giltinan appear to be in direct contradiction, each of the other. He claims that her direction to him created an unlimited power to bind her by written contract for sale whenever he could get \$20,000 for the property. She declares that all she said to him was that her price was \$20,000, but she did not give Giltinan any authority to sell, nor recognize him as her agent to bind her to a sale, after she withdrew the written appointment. The complainant offered several persons who had conversations with Mrs. Brennan, some of them after the middle of August, when the written authority was withdrawn, who testified that Mrs. Brennan described Mr. Giltinan as her agent, and Mr. Kelly testified that she made substantially the same statement to him in October, 1895. None of these statements imputed to Mrs. Brennan was of a specific character, to define the nature and extent of the authority which Mr. Giltinan might have to act for Mrs. Brennan. The claim by the complainant is that they amount to an admission by Mrs. Brennan that Giltinan was her agent with power to bind her by a contract for sale. Mrs. Brennan's declaration is that, after she withdrew the written authority, Mr. Giltinan had no other right to represent her than the other person had who knew her price and brought her a purchaser. The witnesses who most accurately know what authority Mr. Giltinan had from Mrs. Brennan were of course these two persons themselves. It is in my view undisputed that Mrs. Brennan, in the summer of 1895, withdrew a written power which did confer upon Mr. Giltinan precisely the authority to act for her which it is now asserted she renewed by parol. It is also clearly shown that she took this power away because she was unwilling that Mr. Giltinan should be able to dispose of her property, even subject to her approval. No reason is given why this deliberate act of Mrs. Brennan, done through her legal adviser, should have been nullified by herself, unadvised, and the power renewed by parol, without any limitation whatever. By a letter from Mrs. Brennan to Giltinan dated August 31, 1895, she writes in reply to a letter from him: "I will not listen to an offer of that kind, only what I said." In another, dated October 15, 1895, she writes, evidently in reply: "The other lot from Atlantic to Pacific I do not care to sell at present. I prefer to sell from Pacific to Monterey, on California Ave., if I get what I ask at present; if not, I will wait or divide off in lots." This is not the correspondence of a principal with an agent who is informed of the principal's price and purpose, with power to bind her to a sale, but is evidently a letter of information to an inquirer who is seeking to find out whether an owner will sell, and, if so, what lands. Evidently Mrs. Brennan believed that her approval was yet necessary to enable a sale to be made. Mr. Giltinan's letter to Mrs. Brennan, written November 23, 1895, immediately after he had given the memorandum of sale to

Mr. Kelly, shows that at that time he stated the matter to Mrs. Brennan as if his action were still subject to her approval. He writes: "I have succeeded in getting Mr. Kelly to give \$20,000 for the piece of land owned by you on Pacific avenue to Monterey, \$5,000 cash, and \$15,000 on mortgage at 6 per cent., payable in one or three years, the settlement to be made within thirty days, if you approve." He immediately explains that this was the highest price she had named; that Kelly had paid \$250; and that the reason he accepted this was that Kelly was about to go away for several weeks. Thus, in the very letter in which he announces to Mrs. Brennan the sale to Kelly, he submits the matter to her approval, and excuses himself for taking a cash payment because of Kelly's intended sudden departure. This is the first letter written by Mr. Giltinan to Mrs. Brennan which in any way assumes to act for her in any capacity regarding the sale of the lot. At once on receipt of it Mrs. Brennan wrote him in reply: "Respecting the lot in Atlantic City, the lot is sold; money paid on the agreement, before Mr. Kelly thought of it. I think you have forgotten August 12, '95, that I withdrew those lots from the market. I think that if any business was to be transacted, I should have been acquainted with it." Mr. Giltinan was recalled to the stand after all these proofs were in. He was again examined in relation to the insertion by Mr. Ferris in July, 1895, of the words, "subject to my approval," in the written power. He testified that on that occasion, speaking to Mr. Ferris regarding the interpolation of these words, "I told him I wanted nothing unless it was approved." Although there is some contradiction in the evidence, I think the weight of it goes to show that if Mr. Giltinan on November 23, 1895, when he gave Kelly his memorandum of sale, had any authority from Mrs. Brennan to act as her agent, it was only subject to her approval, which his sale to Kelly never received, as she disapproved it at once, on notice of it.

Upon the second point, as to the priority of the agreements, the complainant claims that her memorandum of sale was first made and obtained, and that Crosby's was afterwards procured to cheat her of her bargain. The evidence shows that Crosby's agreement was obtained by a negotiation made directly with Mrs. Brennan in person, at her Philadelphia office, by Mr. Devine, Mr. Crosby's agent, at half past 1 o'clock in the afternoon of November 23, 1895; that at that time Mr. Giltinan, through whose alleged agency complainant claims her contract, was in Philadelphia, whence he returned that afternoon by the 2 o'clock train to Atlantic City, where, on the arrival of the train, he met the husband of the complainant, Kelly, and at half past 3 in the afternoon gave him the receipt, and accepted the \$250, which constitute the evidence of the complainant's claim. There is no dispute between the parties as to the

order of time in which the events narrated happened. Irrespective of questions as to the existence or extent of Mr. Giltinan's authority to act as agent of Mrs. Brennan in the premises, and to bind her, without her previous approval, by a contract to sell, it appears that Mrs. Brennan had herself entered into a contract with Crosby to sell him the property, and had accepted \$500 payment on account of the purchase money, before Giltinan, acting as her agent, had made any agreement whatever with Mr. Kelly, or had even heard from him that he was willing to pay the full price. The letters and telegrams and checks produced support the statement that the sale by Mrs. Brennan to Crosby's agent preceded the sale by Giltinan to Kelly beyond any doubt whatever. When Mrs. Brennan, the principal, contracted with Crosby, that act of itself stripped her agent, if she had one, of all power to make another contract in derogation of that entered into by his principal. The agent could have no greater authority than the principal, and, the latter having disposed of the subject-matter of the agency, the power of the agent to act any further in the premises was at once ended. When Giltinan, as agent for Mrs. Brennan, undertook to deal with Kelly, the lot had already been sold by Mrs. Brennan, and partly paid for, and consequently this later transaction was of no force.

The complainant's charge against the defendant Crosby is that he, knowing of the complainant's previous purchase, entered into a pretended contract on the following day to buy the property from Mrs. Brennan; and her prayer is that her contract with Mrs. Brennan, obtained as set out in the bill from Mr. Giltinan, may be specifically enforced by a conveyance, etc., upon payment of price, etc., mortgage made, etc. Crosby denies this charge by his answer, and sets up his own agreement made with Mrs. Brennan by his agent Devine as prior in point of time, and without notice of any agreement of complainant. The issue presented between these parties is, then, simply and only whether Crosby, after complainant had obtained her agreement, and having knowledge of this fact, secured another from Mrs. Brennan in favor of himself. The complainant thus bases her whole complaint against Crosby solely upon her alleged priority in securing her own contract. The review of the evidence above given shows that the agreement which Devine, Crosby's agent, procured for him in Philadelphia was in fact made before the contract between Kelly and Mr. Giltinan in Atlantic City, though on the same day. The supplemental and fuller agreement with Crosby was signed by him on the same day in Atlantic City, and perfected on the following Monday in Philadelphia by Mrs. Brennan. It is also shown that the Kelly contract, by reason of the lack of authority of Mr. Giltinan at the time of making it to bind Mrs. Brennan, is of no force to enable

the complainant to maintain her bill and entitle her to the relief she asks against either defendant. I will advise a decree dismissing the complainant's bill, with costs.

CONSOLIDATED TRACTION CO. v. BEHR.

(Court of Errors and Appeals of New Jersey.
April 19, 1897.)

COLLISION WITH ELECTRIC CAR — NEGLIGENCE —
QUESTION FOR JURY — CONTRIBUTORY NEGLIGENCE
— IMPUTED NEGLIGENCE — INSTRUCTIONS —
OBJECTIONS NOT RAISED BELOW.

The plaintiff, a girl of 19, was sleeping at night upon a bed made of boards and blankets upon a market wagon driven along a public highway by her father, who walked by the side of his horse. While crossing the tracks of a street railway, a nut came off one of the axles, to seek which the father left the wagon standing with a rear corner projecting over the rail of the car track. An electric car coming from the opposite direction struck this corner and knocked the wagon some distance, throwing plaintiff to the ground.

1. *Held*, that the question whether the motor-man exercised reasonable care to foresee and avoid the collision was properly left to the jury.

2. *Held*, that the question whether the plaintiff's being asleep was per se negligence that contributed to her injury was not raised when no request to that end was made at the trial, and no exception taken to the submission of the question to the jury in the charge of the trial court.

3. *Held*, that a plaintiff in error will not be permitted to raise in this court a point not taken at the trial of the cause.

4. *Held*, that all requests that sought to impute to the plaintiff the negligence of her father in his management of his team were properly refused.

5. *Held*, that a request to the court to charge "that the plaintiff, in order to recover, must establish affirmatively that she was guilty of no negligence that contributed to the injury," was properly denied.

6. *Held*, that a request to charge "that the plaintiff must take the same precaution in crossing the tracks of the street railway, before driving upon the track, as is required of pedestrians," was properly refused.

7. *Held*, that a request to charge that plaintiff was guilty of contributory negligence if she failed to look or listen before driving on the track of the street railway was rightly refused.

8. *Held*, that while it is error in a trial judge to refuse to charge what the law is upon the points at issue, when so requested, he is not required to charge what the law would be upon an assumption that certain specified facts constituted the whole case.

McGill, Ch., and Gummere, Van Syckel, and Nixon, JJ., dissenting.

(Syllabus by the Court.)

Error to circuit court, Essex county.

Action by Edith Behr against the Consolidated Traction Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Edith Behr, a girl of 19, accompanied her father to market on the night of September 9, 1895. Behr left his farm at 11 o'clock with two wagons loaded with marketing. The one in advance, in charge of Behr's son and two hired men, was followed by the one upon which the plaintiff rode, which was in charge of Behr himself. In this order the teams

traversed the public road leading from Elizabeth to Newark; Behr walking by the side of his team; the plaintiff sleeping upon the wagon. This wagon and the extemporized bed upon which the plaintiff slept are described in the testimony. The box of the wagon was "not very wide, but on top there was a railing such that a peach basket fitted into it, and this made the top about three or four feet wider." The bed was made of boards laid over the baskets, upon which blankets were placed when they were taken off the horses. This was done that the girl might be rested when the market was reached. The highway was used by defendant company with its tracks. At a point about opposite to Trowbridge's Hotel the "knocking of a wheel" apprised Behr that a nut had dropped from one of the axles, to find which he went back, first calling to his son to stop. As Behr's wagon stood, the hind part of it was over the car track. "I thought to cross that track," was Behr's testimony, "but couldn't cross, because I see that the wheel falls down on one side." Behr found the nut, and was returning to his wagon when a car coming towards the teams escaped the first, but collided with the second, wagon, knocking it three or four feet off the track. By this collision the plaintiff, while still asleep, was thrown to the ground, and suffered injury, for which she recovered upon the verdict of a jury.

Joseph Coult, for plaintiff in error. Samuel Kallsch, for defendant in error.

GARRISON, J. (after stating the facts). The question of contributory negligence was submitted to the jury by the trial court in these words: "The only question is, does the evidence satisfy you that the plaintiff was herself negligent? The evidence is that the plaintiff, shortly after leaving her house, made use of a bed—to use that term—which had been provided for her on top of this wagon, and there remained sleeping until the happening of the accident. Any act aside from that showing negligence on the part of the plaintiff I cannot recall. Was that a negligent act? The father had charge of the horse; was walking, driving the animal. Is there any evidence of negligence in that fact? If there is; if you find that the fact that the plaintiff went to sleep upon a wagon being driven along the public highway, with her father walking on the ground, having charge of the animals, and her brother and another man being immediately in advance; if the evidence satisfies you that that was negligence on the part of the plaintiff,—then, undoubtedly, it was an act contributing to the happening of this injury, and the plaintiff would not be entitled to your verdict. But unless you are so satisfied, under all the circumstances of the case, there would be nothing in that to disqualify the plaintiff from recovery."

No exception to the charge was taken; nor was the trial court at any time asked to make any ruling with respect to the negligence of the plaintiff in going to sleep. In fact, the case is barren of any mention whatsoever of the circumstance that the plaintiff was asleep, excepting as it appears in the language of the charge above given, where it was permitted to go unchallenged to the jury.

It is now argued that the plaintiff should have been nonsuited because she was asleep, or that a verdict upon that ground should have been directed for the defendant.

That a plaintiff in error will not be permitted to raise in this court a point not taken at the trial is too well established to warrant an extended citation of authorities. *Meador v. Cornell*, 58 N. J. Law, 375, 33 Atl. 960; *Potts v. Evans*, 58 N. J. Law, 384, 34 Atl. 4.

The course pursued at the trial makes it quite clear that early in the case the defense was placed upon the ground of the imputability to the plaintiff of the negligence of her father, and later was rested upon the contention that the plaintiff was, in legal contemplation, the driver of the vehicle. Thus, the motion to nonsuit, apart from the claim that the defendant was not negligent, was put solely upon the ground that the father's conduct contributed to the collision, while at the close of the testimony no ground at all was assigned for the direction of a verdict.

Twenty-five requests to charge were handed to the court, but in none of them is the remotest reference made to the fact that the plaintiff was asleep. In fine, the matter was never alluded to during the entire trial.

The court was asked to charge that if the plaintiff was negligent, and drove out from behind a wagon directly upon the track of an approaching car, and so close to it as to make a collision imminent, she could not recover; also, that if she drove upon the tracks of the defendant, and attempted to drive across the tracks directly in front of an approaching car, she was guilty of contributory negligence; also, that if the plaintiff, in driving upon the track where the collision occurred, did not first glance in the direction from which she might expect a car, she cannot recover; also, that she must affirmatively establish that she was guilty of no negligence that contributed to the injury.

These requests were all properly denied—First, because they rested upon the false assumption that the plaintiff was the driver; and, second, because the trial judge was not required to charge what the law would be if certain isolated facts constituted the entire case. *Fath v. Thompson*, 58 N. J. Law, 180, 33 Atl. 391.

Upon the points at issue the charge was direct, and not excepted to by the defendant.

A further request to charge was in these words:

"The court is further requested to charge that the plaintiff must take the same precau-

tion in crossing the tracks of the street railway before driving upon the track as is required of pedestrians."

The doctrine embodied in this request is clearly erroneous; for a vehicle that is crossing the tracks of a street railway in front of an approaching car has a temporary right of way that alters, for the time being, the relative duties of the two users of the highway, and gives rise to rules of conduct differing from those that exist between a pedestrian and an approaching car.

The remaining request is as follows:

"The court is further requested to charge that if the plaintiff failed to look or listen before attempting to cross or drive upon the track of the street railway, and if she had taken that precaution she would have prevented the collision, the plaintiff is guilty of contributory negligence, and cannot recover."

Inasmuch as the plaintiff neither attempted to cross or to drive upon the track at all,—since she was not the driver, and was not even seated beside him,—this request does not appear to have any pertinence to the case. If pertinent, the instruction was clearly erroneous, for the reason that one who is being carried as the plaintiff was is not charged, irrespective of circumstances, with the absolute duty to look and listen. Whether this plaintiff was negligent in not looking and listening, under the circumstances of the case, was left to the jury.

Finding no error in the conduct of the trial judge, the judgment of the circuit court is affirmed.

McGILL, Ch., and GUMMERE, VAN SYCKEL, and NIXON, JJ., dissent.

BACON et al. v. DEVINNEY.

(Court of Chancery of New Jersey. April 19, 1897.)

RESULTING TRUST—PAYMENTS FOR WIFE—PLEDGE OF PERSONALTY—RIGHTS OF HEIRS—
PAYMENT OF DEBTS.

1. When the husband and wife both make payments to meet the dues of building association stock standing in the name of the wife, the presumption is that his payments were gifts to her, and a resulting trust in favor of the husband because of his payments will not arise until this presumption is rebutted by evidence sufficient to establish such a trust.

2. The heirs of a deceased wife have, as against her surviving husband, an equity to have stock, pledged by her in her lifetime for the payment of a mortgage on her lands, applied to satisfy the mortgage, before recourse is had to the lands.

3. They have a right to require that her personal estate which comes to the hands of her surviving husband shall be applied to the payment of the wife's debts, of which the wife's bond, secured by a mortgage on her lands, may be one, before recourse is had to her lands.

4. An attempt to obtain the release of the stock from the pledge, so that the mortgaged premises may be made primarily liable, will be restrained by injunction.

(Syllabus by the Court.)

Bill by Richard S. Bacon and others against Hubert Devinney and the Franklin Loan & Building Association of Salem. The defendant Devinney alone answers. Decree for complainants.

Sarah B. Devinney was in her lifetime the wife of the defendant Hubert Devinney, and sister of the complainants. She died intestate, and they filed this bill as her heirs at law. The bill alleges that, prior to her marriage, she was the owner in her own name of two shares of stock of the Franklin Loan & Building Association of Salem; after her marriage she acquired two more shares; that she had a trade and occupation, and worked at the same, and received the income for her own use, and paid for the shares, up to the time of her death, from her own earnings. On the 23d day of September, 1885, she took title to a house and lot in Salem, by conveyance to her in fee simple in her own name. She borrowed \$700 from the building association, and on the 24th of September, 1885, she and her husband, Hubert Devinney, gave a bond to the association to secure the payment of \$700 and interest thereon, and secured the payment of the bond by a mortgage (on the house and lot purchased by her) made by her and her husband to the building association. At the time of obtaining the loan, Mrs. Devinney pledged, as collateral security for its payment, the four shares of stock of the association above named, according to the terms of the constitution and by-laws of the association, by which each member is entitled to borrow \$200 for each share of stock which he may hold. The two shares of stock first purchased by Mrs. Devinney matured and were credited on the bond at the valuation of \$200 each, leaving the balance still due on the bond \$300. After this, on the 20th of October, 1891, Mrs. Devinney, while seised of the house and lot, died intestate, never having had any child of her marriage with the defendant Hubert Devinney, and leaving, her surviving, her husband, and also three brothers, Richard S. Bacon, Joseph H. Bacon, and Daniel D. Bacon, the complainants in this suit. These three brothers were her only heirs at law. The bill alleges that Mrs. Devinney, up to the time of her death, regularly met the monthly dues and interest on the stock out of her own earnings, and that, after her death, the complainants permitted her husband to occupy the premises and receive the rents, and that, since the death of the wife, he has paid the dues and interest, and has occupied the premises, and received the rents. In October, 1896, Devinney applied to the board of directors of the building association, requesting them to assign the mortgage made by him and Mrs. Devinney, and now reduced to a principal sum of \$300, to a person to be named by him, and thus released the stock held by the association as collateral for the payment of the mortgage. The bill further states that the board of di-

rectors granted the request of Devinney, and passed a resolution in accordance with his wish, and that they were about to transfer the mortgage unless restrained by this court. The complainants allege that the transfer with the purpose named would deprive them of the benefit of the pledge of the stock for the payment of the loan, and subject the real estate which they have inherited from their sister, Mrs. Devinney, to the full payment of the remaining mortgage indebtedness, in violation of the scheme of loan and of the agreement under which it was made. The complainants claim that they are entitled to the benefit of this agreement and scheme of loan, and to the collateral pledged for the loan. They ask that the building association may be enjoined from making any assignment without the consent of the complainants. The defendant Hubert Devinney is the only one who answers. His answer substantially admits the statements set forth in the bill, except that he denies that Mrs. Devinney always paid the monthly dues from her own separate funds, and he says that the dues thereon were for the most part paid by himself or with his earnings, from the time of their marriage up to the time of Sarah Devinney's death, on October 20, 1891; and since that time, the defendant says, he paid all of the dues, and has paid the insurance, taxes, and repairs on the property. The defendant further states that in 1874, just prior to their marriage, Sarah Devinney (then Sarah Bacon) took out three shares of stock in the association, and that he and his wife paid the dues on this stock until 1883, when one share was sold, and the two other shares, in 1886, were credited on the mortgage. The defendant alleges that he earned considerable sums of money from 1874 to 1886, and that he gave all his earnings to his wife, to be applied to her housekeeping expenses, and to the payment of the building association dues. He states that he had not made actual application to have the mortgage assigned, and that he had only made inquiry for that purpose; but he declares that in good faith such a transfer should be made, and that he will make a formal application for such transfer, unless restrained by this court from so doing.

William T. Hilliard, for complainants. J. W. Acton, for defendant.

GREY, V. C. (after stating the facts). This cause has been presented on final hearing, on bill and answer. There is but little variance between the allegations of the bill and those of the answer, the only matter of substance being the statement in the bill that the decedent Mrs. Devinney paid the dues, etc., for the shares of the stock pledged, up to the time of her death, from her own earnings. The husband defendant denies that she always paid these dues from her own separate funds, and says they were for the most part paid by himself, or with his earnings, up to

the time of her death, and since that time he has paid them all, and also the insurance, taxes, and repairs of the property. So far as the answer denies the allegations of the bill, it must be taken at this hearing to be true. The defendant does not deny the statement in the bill that since his wife's death he has had the use of the property without paying any rent. It nowhere appears in the bill or answer that the defendant supposed, believed, or understood that Mrs. Devinney, in receiving title to the lands in her own name, was acting in bad faith towards him, or that he had any agreement with her, or that he had given any direction to her that she should hold this title for his use. He joined in the making of the bond and mortgage, and he must thereby have had actual knowledge that the title to the premises stood in Mrs. Devinney's name, and not in his. The law casts upon him knowledge of the fact that when the title stood in her name, and there were no children of the marriage, it would upon her decease intestate descend to her heirs at law, and nothing in the answer shows that he had any other expectation. What he seeks by his answer is not to have the title to the premises declared to have been mistakenly conveyed to his wife, or to have been conveyed to her in trust for him, but a decree that the stock which had been pledged by the assent of himself and of his wife, in her lifetime, to the association, for the payment of a mortgage debt, may be permitted to be diverted, and, by the plan set out in the bill, changed from the pledge made of it by the parties at the time of the original agreement. The substantial facts set forth in the bill are not disputed in the answer. The denial goes only to refute the statement that Mrs. Devinney paid for all the dues and interest out of her own separate estate, and to declare that the defendant Hubert Devinney in great part paid for the dues and interest on the stock; but there is no denial that, in making these payments, the defendant Hubert Devinney knew that they were relieving the title standing in the name of his wife from the charge of the mortgage debt. The admissions in the pleadings show that the husband and wife arranged that this title to the lands should stand in the name of the wife, and the funds of both were used indiscriminately to pay off the principal and interest of the mortgage debt; without any understanding or agreement that the payments of the husband should secure to him any rights in the property. The answer, in stating the disposition he made of his earnings, admits that he "always gave all his earnings to his wife to be applied to her housekeeping expenses, and to be applied to the payment of the building association dues." This is not the language which would be used if the statement was intended to indicate that the moneys were paid on an understanding or belief that a trust for his benefit was to arise from their

payment. He knew this money would aid to relieve his wife's land of the charge of the mortgage, and he gave it to her for that purpose. Under these indefinite circumstances, when the husband made some payments out of his separate estate, and the wife some out of hers, and there is no evidence that the money was paid on any agreement or belief that the husband was to be benefited, no trust arose in his favor; nor could he rightfully claim to be entitled, either at law or in equity, to any interest in the property, the title to which he knew stood in his wife's name when he made the payments. In cases where the parties stand in such intimate relationship to each other, the presumption is that the payments were intended to be a gift, until by satisfactory proof the contrary is established. If they had been strangers, the payments made by one, and title granted to another, with no explanatory circumstances attending the transaction, would raise a presumption of a resulting trust in favor of the person paying the consideration. But where the relations of the parties are those of husband and wife, or parent and child, the presumption is that the payment was a gift, until overcome by proof. The proof necessary to overcome this presumption must be as satisfactory and explicit as that required to establish a resulting trust. *Peer v. Peer*, 11 N. J. Eq. 432; *Read v. Huff*, 40 N. J. Eq. 233.

At the time the stock was pledged, Mrs. Devinney was the holder, not only of the title to the stock, but also of the title to the lands mortgaged. Her husband joined her in the bond and mortgage, and obviously knew of the pledge of the stock. She had a right to dispose of this property in this way, and those who succeed to her rights in the stock, and to the title to the lands, receive what they get, subject to such charge and disposition as she in her lifetime had made of them, respectively. The rights of her husband are to take the ownership of the stock subject to the pledge. The rights of her heirs at law are to take the ownership of the land subject to the mortgage, and with the benefit of whatever contract touching the payment of the mortgage debt was outstanding and existent at the time of the death of the deceased. What is claimed by the defendant is the right, by the plan indicated in the bill (the purpose to carry which into effect is substantially admitted in the answer), to take away from the complainants the benefit of the bargain made by the decedent in her lifetime, by which the stock stood primarily pledged for the payment of the mortgage debt.

The principle controlling this case has been established in New Jersey in the court of errors in the case of *Herbert v. Association*, 17 N. J. Eq. 497, where a member of a building association had secured a loan by a mortgage, and also by the assignment of 10 shares of the stock, and subsequently conveyed the premises. Judgments were afterwards re-

covered against the mortgagor, and the 10 shares of stock were levied on. The court held that the equity which the grantee of the mortgage had acquired, as against the mortgagor and the association, to have the assets so marshaled that the debt due the association should be paid primarily out of the shares of stock, was not impaired or affected by the intervention of the judgment creditors; and it further held that the right of the creditor who is entitled to have the assets of the debtor marshaled is absolute against the debtor himself, and cannot be taken away by the action of subsequent creditors. The superior equity supported in the case cited was that of a grantee to have a mortgage, subject to which he bought, first satisfied out of shares of stock pledged with the mortgage as collateral security for the mortgage debt. The right was sustained against creditors of the pledgor who had acquired a lien. In the case in hand the heirs at law insist upon their right as against the administrator or surviving husband of the intestate who made the pledge. In principle, the equities in the case cited and that under consideration are the same. The lien of the creditors' levy in the case cited gave them no more and no less rights than were outstanding in the pledgor, and the interest which the administrator took from his decedent pledgor in the case now under consideration was that which she held at the time of her death. The administrator or executor takes subject to charges created by the pledgor decedent in his lifetime. *Glaholm v. Rowntree*, 6 Adol. & El. 710, where the point was fully discussed in the king's bench, on the question of the liability of executors to account for assets pledged by the testator. In *Association v. Hawk*, 27 N. J. Eq. 355, stock pledged to secure a first mortgage was, as between the association and a second mortgagee, applied to pay the first mortgage, before recourse was had to the land, and the levy of an execution against the pledgor's interest did not bar this equity. So in *Sheron v. Acton* (in this court; opinion filed Jan. 6, 1890; not officially reported), 18 Atl. 978, the same equity was supported in favor of a second mortgage, against an assignee for benefit of creditors. But, accepting the right of the husband under an administration to take *jure mariti* the personal estate of his deceased intestate wife, he must apply these assets to the satisfaction of his wife's debts, and he can take only the surplusage. What he gets on her death intestate, leaving assets, is a right to take her personal estate, with a liability to account only to creditors. *Heard v. Stamford*, 3 P. Wms. 409; *Kent, Comm.* 145. Even if there were not special pledge of this stock to pay the building association debt, it must be applied, as a part of the intestate's personal property, to pay her debts, of which the bond to the association is one. The personal estate of the decedent is the primary fund for the payment of debts. This is the common-law rule, and in our state it

has been frequently enforced. The heir at law has enforced it against the executor. *Keene v. Munn*, 16 N. J. Eq. 398; *Krueger v. Ferry*, 41 N. J. Eq. 432, 5 Atl. 452.

The answer of the defendant admits that it is his purpose, and he claims his right, to procure the mortgage upon the complainants' property to be so transferred that the stock pledged for the payment of the same debt may be released, and thus to defeat the pledge of the stock made by the decedent, and make the land, and not the personal property, the primary fund out of which the debt of the decedent must be paid. I will advise that the defendant be enjoined from this course, in accordance with the prayer of the complainants' bill.

LENNON v. HEINDEL et al.

(Court of Chancery of New Jersey. April 15, 1897.)

EXECUTION SALE—SETTING ASIDE.

1. That property sold on execution for only \$6,200, when worth from \$9,000 to \$15,000, is not of itself ground for setting aside the sale.

2. Execution sale of land described in two parcels will not be set aside because the property was sold as a whole; there having been no preparation or request of the sheriff, for sale by the parcel.

3. Execution sale will be set aside at suit of execution debtor, and of a judgment debtor not protected by the sale, though induced to believe it would be; two persons having dissuaded others from bidding, and one of them having bid it off under an arrangement that he should get it as cheap as possible, and the other (who, before such arrangement, had intended to bid) should give him an advance of \$700 on the purchase price, which he did, and it having sold for \$6,200, when worth from \$9,000 to \$15,000.

Bill by Thomas P. Lennon against Sixtus Heindel and the Second National Bank of Hoboken. Heard on bill, answer of Heindel, answer and cross bill of the Second National Bank, and replication thereto by Heindel, and evidence. Decree for complainant.

Charles L. Corbin and John W. Queen, for complainant. William D. Edwards and Frederick Frambach, for defendant Heindel. Russ & Heppenheimer, for defendant bank.

PITNEY, V. C. The object of this bill is to set aside a sale of lands of the complainant made by the sheriff of Hudson county under divers executions in the sheriff's hands against the complainant. The Second National Bank of Hoboken was made a party defendant because it holds a judgment against complainant, which was cut off by the sale, and by its cross bill, incorporated in its answer, joins in the prayer of the bill that the sale may be set aside. The bill sets up that the complainant in October, 1891, became the owner of five lots of land situate in Bergen township, Hudson county, containing in the aggregate about 3½ acres, and that in August, September, and December,

1893, and January, 1894, several judgments were entered against him in the circuit court of the county of Hudson, and in the supreme court, amounting in the aggregate to about \$3,000; that executions were duly issued on these judgments; that those issuing prior to November, 1893, were delivered to Edward P. Stanton, sheriff of Hudson county, and those issuing after that time were delivered to John J. Toffey, sheriff of the same county; that Sheriff Stanton advertised under his executions, but that the judgments and executions were assigned to the defendant Heindel before the sale, and the sale dropped, and that afterwards, in December, 1893, Sheriff Toffey advertised under the executions then in his hands (being three in number) for the 1st of February, 1894; and that the sale was adjourned by Sheriff Toffey from time to time until April 26, 1894, on which day it was sold to Heindel for the sum of \$900; that the deed was made on the 28th of April, and delivered to Heindel. The bill was filed on the 28th day of May, 1894. The facts of the case are as follows:

The complainant is a building contractor, and apparently an active business man. He has a brother, Edward, who has been a dealer in real estate, and had a sister, a Mrs. Cavanagh, who died in 1893. The complainant, Thomas, and his brother, Edward, are bachelors; and they lived for many years with their sister, Mrs. Cavanagh (until her death), and her husband and her daughters, upon the premises in question. They consist of two dwellings, a stable, and 3½ acres of land, situate at a place called "Hudson Heights," on the Palisades, immediately back of Bulls Ferry, in Hudson county. The premises were at first owned by Edward Lennon. He became embarrassed, judgment went against him in 1891, and the premises were sold at sheriff's sale, and purchased by Thomas, the complainant. Edward later conveyed to Thomas by deeds. Subsequently Thomas became embarrassed, and in the fall and winter of 1893-94 several judgments were entered against him. These judgments were subject to two mortgages,—one for \$3,000, which was a first incumbrance, and one for \$500, which intervened between the judgments. Executions on two of the judgments were in the hands of Sheriff Stanton, whose term expired in the fall of 1893, and three or four later executions were in the hands of Sheriff Toffey, who succeeded Stanton. In this state of affairs, the premises were advertised for sale by Sheriff Toffey for February 1, 1894. The judgment against Edward, under which the premises were sold, and bought by Thomas, in 1891, was for a comparatively small amount; and the indications are that the consideration named in the deeds—\$3,000—was not paid, and that, subject to whatever he paid on the judgment, Thomas held the premises in trust for his brother, Edward. No direct issue was made on this subject either in the pleadings

or at the hearing. The last judgment against Thomas was in favor of the Second National Bank of Hoboken, recovered after the advertisement by Sheriff Toffey, except one or two docketed judgments from justices' courts, upon which execution was issued and delivered to the sheriff, but not mentioned in the advertisement. The prior executions against Thomas were issued by Mr. Smythe, an attorney living in the neighborhood, and the creditors were rather urgent for their pay. In the meantime Mr. Thomas Lennon was trying to obtain loans upon the premises, but the amount required to clear off all the incumbrances was a little more than a careful investor would be inclined to loan upon it. Adjournments were had from time to time in order to give Mr. Lennon an opportunity to make arrangements for a loan. In the meantime Mr. Cavanagh, his brother-in-law, commenced an intrigue to have the property brought to a sale, and bought in by somebody and held for the benefit of his daughters, who seem to have been estimable persons, and to have had friends in the neighborhood. In this intrigue, Cavanagh, who lived on the premises, discouraged all persons who came to look at them, or talked of loaning money or buying them at sheriff's sale, and applied to the defendant Heindel to assist him (Cavanagh) by buying in the property cheap, and holding it for the joint benefit of Heindel and Cavanagh's family. He says that Heindel gave him distinct encouragement that he would do this. Heindel rather denies it. But the evidence of Heindel's friend Fahbeck tends to corroborate Mr. Cavanagh. Thomas Lennon also applied to a Dr. De Graff, a person of means in the neighborhood, to assist him, either by loaning money, or buying in the premises at sheriff's sale and holding them for him (Thomas). He swears, in substance, that he procured from Smythe a statement of the amount due upon all the liens, and had several interviews with De Graff and several with Smythe, and one with De Graff and Smythe together, in which latter interview the matter was discussed, and the amount necessary to cover the claims was mentioned, and that he (Lennon) expressed a wish to have the property bid up to enough to cover all liens, including the bank judgment; that Smythe and De Graff objected, and advised him to cut off the bank, but that he persisted; and that finally, when they parted, it was understood that the bank's claim was to be protected, and that he (Lennon) so informed Mr. Rabe, the president of the bank, before the sale. At the hour fixed for the sale, Mr. Rabe was in the sheriff's sales room on other business, but left just before these premises were put up for sale, in the confident supposition that, if the property was sold, his judgment would be covered and protected. In this connection is to be considered the evidence of Edward Lennon, who, as we shall see, attempted to assist his brother,

Thomas, in protecting the property, and who swears that on the morning of the sale, in a conversation with Mr. Smythe about the sale and the proposed purchase by Mr. Heindel, he inquired if the bank had notice that it was to be sold without further adjournment, and that Mr. Smythe said to him, "Keep quiet about that, and let the bank take care of itself, and you will have so much the less money to pay."

Edward Lennon, as we have seen, attempted to assist his brother to find some person either to make a loan to pay the judgments, or to buy the property in at their amount and hold it for the benefit of his brother. And he heard through his nieces that Mr. Heindel was inclined to assist peculiarly, but did not understand until just before the sale that Cavanagh's plan was to have Mr. Heindel buy it in for the benefit of the nieces, cutting off Thomas and Edward. Edward called on Heindel a few days before the sale, and Heindel gave him no encouragement. In the meantime Thomas Lennon applied to a Mrs. Butts, a French lady of some means, who lived in the neighborhood, and who was a friend of the Misses Cavanagh, and asked her to loan the money in order to save the property. She undertook to do so, and swears—and I am inclined to believe her—that, if she had had time enough, she could have procured the money. She had already learned from the Misses Cavanagh that Mr. Heindel was their friend, and that he talked of buying the property in to hold for their benefit. Mrs. Butts called upon Mr. Smythe to know how long the sale could be postponed in order to give her an opportunity to raise the money, and was informed by him that Mr. Heindel was making preparations to buy it; and she, supposing that Mr. Heindel was buying it in the interests of the Misses Cavanagh, was entirely satisfied, and dropped the matter. She swears that Smythe asked her why she bothered herself with helping the Lennons, and spoke discouragingly of her doing so. Mr. Heindel, having had his attention called to the property by Cavanagh and his daughters, looked into it, and concluded that, if he could buy it cheap enough, he would purchase it on his own account, and spoke to Mr. Smythe, the attorney for the creditors, and asked him to act for him; but Mr. Smythe, finding that he spoke English imperfectly, sent him to Mr. Frambach, his present solicitor. Mr. Frambach examined the title and the amount of the incumbrances, and prepared to bid; and Mr. Smythe learned through Mr. Frambach or Mr. Heindel that the latter was ready to bid enough upon the property to cover all of Mr. Smythe's clients' liens. About this time a Mr. Fahbeck intervened. He lived in the neighborhood, and had a judgment for \$700 against Edward Lennon, which he desired to secure; and he believed or suspected that the property really belonged to Edward, although the title was in Thomas. He called upon Mr. Heindel,

and made a proposition to him that he would buy it for as low a price as he could, and then sell it to Heindel for \$700 advance, or enough to cover his judgment. Heindel agreed to this, upon condition that the price did not exceed a certain amount. Then Fahbeck heard that Dr. De Graff thought of buying the property. The fact that De Graff had been applied to by the Cavanaghs, or by one of the Lennons, to assist them with money, came in some way to Fahbeck's ears. He called upon De Graff to dissuade him from bidding, and told him what he desired to do, and brought Heindel to see him, to assure him (De Graff) that he and Heindel had made an arrangement to buy the property, by which Fahbeck would secure his judgment against Edward Lennon. The result of the interview was that De Graff agreed not to bid on the property, or to interfere with the plans of Fahbeck and Heindel. Adjournments of the sale had been had from time to time, upon the written consent of all the judgment creditors, and, a day or two before the sale, Edward Lennon called upon Mr. Smythe for another adjournment; and Smythe sent him out to procure the consents of all the judgment creditors, and told him that he must also have Mr. Heindel's consent, because he was ready to bid enough to secure Smythe's clients, and he did not wish to lose him as a purchaser. Edward got the consent of all the judgment creditors but one, who had been paid his judgment by a joint defendant, and so the strict terms made by Mr. Smythe were not fulfilled. Nevertheless he applied to Heindel for his consent, upon the supposition, as he swears, that Heindel was to lend the money to pay it all, and Heindel refused. This was on the morning of the sale. An interview was had between Heindel, Fahbeck, Smythe, and Lennon, in which Fahbeck declared that he was going to buy the property in at a low price, so as to save his judgment against Lennon; and the result was a complete refusal on the part of Smythe to consent to another adjournment. Edward Lennon, however, swears that he understood from Smythe that Heindel intended to buy the property in for the benefit of him (Edward Lennon), after paying the judgments; and Lennon gives this as an excuse why he did not go to the sale, or pay any further attention to it. He swears that Smythe advised him to keep away. This statement of Lennon is denied by Heindel and Smythe and Fahbeck, but I am satisfied that Smythe did at least encourage Edward to stay away from the sale. The sale took place, the property being bid up to \$900, which was enough to cover all the executions in Sheriff Toffey's hands, except that of the bank, and was bid off by Mr. Frambach, as attorney for both parties; the arrangement being that the deed should be made to Fahbeck unless Heindel paid him the \$700. Heindel paid Fahbeck \$700, and the deed was thereupon made to Heindel. The cost of the premises to Hein-

del, including all taxes and previous incumbrances, with interest, but not including the amount paid his counsel and Fahbeck, was less than \$6,200. The value of the property is put by the best witnesses for the defendants at \$9,000 or \$10,000. Others, for the complainant, put it as high as \$15,000.

Four grounds are relied on for the setting aside of the sale: First, that it was sold at too great a sacrifice; second, that the property had been laid out in parcels, and should have been sold in parcels; third, surprise on the part of Thomas Lennon, Edward Lennon, and the president of the bank; and, fourth, an illegal combination between Fahbeck and Heindel to prevent bidding on the property.

With regard to the value of the property, the price obtained was not so much below what it was actually worth as to induce the court to set the sale aside, if that circumstance stood by itself. There is no pretense but that the property was advertised according to law, and the various adjournments were obtained at the request of the defendants in execution. When the property was finally sold, there was substantially no advertisement of it; but that is the complainant's fault, in asking for adjournment. However, the smallness of the price is not to be lost sight of, when we consider the other grounds relied upon.

The second ground is that the property should have been sold in parcels. I think this ground fails, for two reasons: First, I am not sure that it would have sold for more if it had been sold in parcels, though it is probable that it would. Second, no serious request of the sheriff was made; no preparation or surveys or plots were made. The property was described in two parcels, but it was not suggested that it should have been sold in the parcels thus designated. And, if the defendants in execution had wished the property sold in parcels, they should have got up a scheme, maps, and plots, and requested the sheriff to make the sale in that way.

Next, third, as to surprise: I think, undoubtedly, the president of the bank was surprised. He is a business man. He says that he did, indeed, have collateral for the loan, but that the collateral was of no value, and that he relied upon Thomas' credit as the owner of this real estate, and had confidence in him, and that he was assured by Thomas two or three days before the sale that neither he nor his solicitors, Messrs. Russ & Heppenheimer, need pay any attention to it; that the sale would either be adjourned, or his judgment would be protected. Now, in this connection comes the evidence of Mr. Thomas Lennon, which has not been denied by Mr. Smythe or De Graff, that the question of whether or not the bank's judgment should be protected in the arrangement they had on foot was discussed, and Mr. Smythe and Dr. De Graff insisted at first that it should not be protected, but finally it was agreed between them that it should be protected. Then we have the

evidence of Edward Lennon that Mr. Smythe advised him not to trouble himself about the bank's judgment, but to cut that off by the sale. And in this connection is the evidence of Mr. Smythe that he urged on the sale, and declined to consent to an adjournment, because he was anxious that his clients should have the benefit of Mr. Heindel's proposed bid. He swears that they were not able to protect themselves by buying in this property. Now, it strikes one at once that Mr. Smythe, in his anxiety to protect his clients, would naturally apply to the bank, which was presumably rich and able to protect itself, and induce the officers of the bank to attend the sale and bid the property up to reach the executions. Instead of doing that, he did not inform Mr. Rabe, whom he must have seen in the sales room,—Mr. Fahbeck says that he saw him there,—but allowed him to leave the room without calling his attention to the sale which was about to take place, and asking him to protect his (Smythe's) clients. These little circumstances, together with several other small matters that cropped out in the evidence,—his discouraging Mrs. Butts in her offer to assist,—satisfy me that Mr. Smythe, though he disavows being retained by Mr. Heindel to examine the title, etc., was, in fact and in effect, using his position to assist Mr. Heindel and Mr. Fahbeck to do precisely what they did do,—buy in that property for enough to cover his clients' claims, and cut off the bank, for the benefit of Mr. Fahbeck.

But, without deciding at present whether or not there is enough in these circumstances to give the complainant and the bank relief, I pass to the fourth reason, which must be considered in connection with the other matters already mentioned: The amount actually paid by Mr. Heindel to Mr. Fahbeck was \$700 more than the amount of his bid. That \$700 should have been bid upon the property openly, and paid to the sheriff, to be applied upon the bank's execution. Instead of that, it was diverted and turned over to Mr. Fahbeck; and that was the result of a distinct, deliberate, previous arrangement, for which Mr. Fahbeck justifies himself on the ground that he had a judgment against Edward Lennon, who was the equitable owner of the property, and therefore, in equity, was entitled to obtain it. But the net result is that both the judgment of the bank against Thomas Lennon and of Fahbeck against Edward Lennon are still outstanding and unsatisfied. No cross bill is filed to set aside the conveyance by Edward to Thomas, or to adjust the equities between them. No proof has been offered upon which the court would base a decree that Edward Lennon was the equitable owner, as against Thomas, and that Thomas had not paid Edward as much for the property as it was worth, or upon which Mr. Fahbeck could have sustained a bill in equity to set aside the conveyances under which Thomas acquired the title from Edward. The whole case, in that respect, rests upon suspicion and inference,

which are insufficient to sustain a decree. The result of the sale is a distinct injustice to Thomas Lennon, the complainant, in that it leaves the judgment against him in favor of the bank unpaid, to the extent at least of \$700, the actual amount bid by Heindel for the property, and is also an injustice to the bank, which was cut off by the sale. Such transaction will not stand the test of examination in a court of equity. It was condemned by Chancellor Halsted in *Manufacturing Co. v. Edsall*, 5 N. J. Eq. 249, at page 314, and by Chancellor Runyon in *Morris v. Woodward*, 25 N. J. Eq. 32, and again by the same learned judge in *Van Dyke v. Van Dyke*, 31 N. J. Eq. 176. These cases rest on well-settled principles. The case is not within the principle of the exceptional cases cited by defendants' counsel in support of combinations by parties to buy at public sales. Taking all the circumstances into consideration,—the price bid, as compared with the actual value of the premises; the fact that the real price paid was \$700 more than the bid, this result being the product of an unlawful contract to stifle bidding; the indications that there was management to prevent the bank from bidding, and the direct proof of management to prevent De Graff from bidding; the fact that the president of the bank had some assurance that its judgment was provided for, and therefore did not look after the sale,—I conclude that justice requires that it should be set aside. I will hear counsel as to the terms upon which relief should be granted.

GARRETSON et al. APPLETON.

(Court of Errors and Appeals of New Jersey. Nov., 1895.)

RIGHTS OF WIFE — DIRECTING VERDICT — OBJECTIONS NOT RAISED BELOW.

1. A wife cannot join with her husband, or sue in her own name for the care, attendance upon, and nursing of a sick boarder of her husband, in his household, though the services were her own exclusively.
2. A request to charge that plaintiff has not made out his cause of action, and that the verdict be directed for defendant, is insufficient, where it does not state the point or matter of law relied on as a ground for the direction.
3. An objection not raised below cannot be considered on appeal.

Affirmed by divided court.

Error to supreme court.

Action by Christina Appleton again John G. Garretson and others, executors of Peter Van Pelt. Defendants bring error. Affirmed.

Alan H. Strong, for plaintiffs in error. James Parker, for defendant in error.

LIPPINCOTT, J. This action was brought in the name of a married woman, who is the defendant in error, against the executors of the testator, for services which she alleges she rendered to him during an illness of his. The facts as they appeared in the case demonstrate clearly that the contract

for such services, which were the care, attendance upon, and the nursing of the testator, was made with the husband of the defendant in error. The deceased engaged board with the husband. The husband was living in a house which was rented of the deceased. He was not engaged in the business of keeping boarders, nor was his wife engaged in such business. Deceased's bargain with the husband was to pay so much per week for the board, and any other expenses incurred he would be willing to pay for. This, in substance, was the contract. The defendant in error, in the management of the household affairs in the house of her husband, beyond the services rendered to the deceased as a boarder, gave to him her personal care, attendance upon him, and nursing during a long and serious illness, and up to the date of his death. The character of the disease of the deceased made this nursing absolutely necessary, and the character of the services in the nursing and care of him was of an arduous, exacting, and sometimes of a repulsive character. After his death the defendant in error presented a claim for this care, attention, and nursing, in her own name, and, the executors refusing to pay the same to her, she commenced this action against them. In the trial below the only questions which seemed to be litigated were, in the first place, the existence of any contract, express or implied, to pay for these services; secondly, the question of reasonableness of the charges made by the defendant in error; and, thirdly, the question whether the deceased had made payment before his death, and whether the defendant in error, joining with her husband, had receipted and released the claim made for the services rendered. All these questions were properly submitted to the jury, and the determination of them was against the plaintiffs in error. Under these circumstances, it is clear that no right of action was in the wife for any claim for such services. If any right of action existed it was in the husband alone, and, in any event, she must have joined her husband in the action; and therefore it is contended that the judgment of the supreme court, affirming this judgment on the ground that the wife was the meritorious cause of action, must be reversed, which would carry with it the reversal of the judgment rendered in the Middlesex common pleas, which was the court in which the trial with the jury was had and in which final judgment was entered.

It may be conceded that no right of action existed in the wife; that suing alone, when her husband should be joined, upon proper pleading or exception, the error is fatal; and she is suing without any cause of action, and should fail. In this case she sued without any cause of action, and if the question of her right to recover had been properly raised in the trial court, and proper exceptions taken to its rulings, the judgment

of the trial court should have been reversed. I fully and entirely concur in the opinion of Mr. Justice DEPUE in this case, under the facts, that no right of action existed in the defendant in error, and I agree with the statement of principles contained in his opinion on this subject.

But the question of whether a right of action existed in the defendant in error was neither raised nor considered by the trial court. There is an entire silence of the record upon the question of whether she was the proper plaintiff in the action. Whether she could or could not join with her husband in the maintenance of this action is a question which seems neither to have been raised nor discussed. The question of whether the plaintiff, as a married woman, was carrying on a separate business of her own, in the course of which her services were rendered to the deceased, was not once mooted to the court or jury. Whether she was working as a wife in the ordinary management of the household of her husband in which the deceased was a boarder, or whether upon her own account, was a question not at all presented to the trial judge, either upon an objection to the evidence, or upon motion to nonsuit, or in any request to instruct the jury. In fact, no motion to nonsuit was made at the close of the case of the plaintiff. Several unimportant objections to the admission of certain evidence were made, principally to the evidence as to the value of the alleged services of the plaintiff as a nurse and attendant upon the deceased; and it may be noted that these services were of such a character as to merit the attention of the counsel and court, to the exclusion of other considerations which might have arisen in the case. The evidence on the part of the defendant was wholly directed to the character of the services, and to establish the fact that they had been paid for; that these were voluntary services on the part of the plaintiff; and also to the establishment by proof that the claim for such services, if it ever existed, had been released by the plaintiff and her husband. After the close of the case several requests were made to the court to charge. One was that the jury must find an agreement, either express or implied, on the part of Van Pelt to pay for the services rendered, before a recovery could be had; that, if the services were rendered in expectation of a legacy from the deceased, there could be no recovery; that a certain paper in evidence as an exhibit was, under the circumstances, a bar to the action, and that the paper was an assurance by the plaintiff to Van Pelt that no claim for services would be made against his estate after his death, and estopped the plaintiff from a recovery; that it was understood between the parties that no claim should be made for such services,—all of which requests were properly dealt with by the court. Up to this point no intimation, express or implied, had been given to the

court that the defendants relied upon the fact that the plaintiff was a married woman. At this point the counsel for defendants called the attention of the court that there was still another request written on the margin of the paper upon which counsel had written his other requests. This request was that the plaintiff had not made out a cause of action upon which she could recover, and further requesting the court to direct a verdict for the defendants. No ground for this direction was assigned, before that time or then, and the reply of the court to this request shows distinctly that its mind was upon the issues hitherto raised in the case upon questions of fact, and discussed, and not upon the question of whether the right of action was in the wife. Counsel immediately after this reply, upon the retirement of the jury, took an exception to the refusal to charge this request, without at all intimating the ground upon which the exception was taken. The grounds of the other exceptions to the refusals to charge, either in the requests themselves or in the exceptions, are fully stated; and it must be a necessary conclusion that neither court nor counsel understood that within any of the objections and exceptions during the trial, or in any of the requests to charge or exceptions to the instructions given, was included the question of the plaintiff's right to recover because she was a married woman and could not maintain the action in her own name. The case was not tried upon this basis, and such an objection nowhere appears in the record, and it is not contended that, as matter of fact, it was ever brought to the attention of the trial court. It is now for the first time alleged as cause of error.

The case furnishes an apt subject for the application of the principle that exceptions will not be considered by this court unless they were alleged in the court below and entered upon the record. Parties cannot be allowed to so change the basis of action and defense, and, after having tested the procedure and opinions of the trial court in all other respects, take advantage of points not taken, noticed, or decided by the trial court. That this is now the settled rule of law in this state cannot be disputed. To have a trial conducted upon any other principle would be manifest injustice, not only to the court, but also to the parties to the action. The objection must be made reasonably clear, in substance, to the court, whether the reason be demanded by the court or not. It is not sufficient to say that the court can, if it desires, call for the ground of exception. The objection or exception taken should contain the ground or reason; otherwise it may very well be understood that the objection is made upon the basis upon which the cause has been tried, and upon and for no other reason. Any other course is not only unjust, but utterly misleading, to the court as well as to the other side. Parties to a cause on trial must take the perils

of the concealment of their aims. They are entitled at any time to bring to the attention of the court a fatal objection, but, if they conceal it from the court, the risk is irremediable in its results. It is a fundamental rule in the administration of justice in courts of law that the point must be clearly stated in which the judge is supposed to err. 3 Bl. Comm. *372. There can be no error alleged, unless either in the objection or the exception the point of law be stated, and certainly without this the exception cannot be allowed or disallowed, because there can be no matter to the exception. In *Coxe v. Field*, 13 N. J. Law, 215, 218, the court says: "The statute evidently requires that the exception so alleged and written should be to some opinion, either declared or refused to be declared by the court below, for the higher court is to allow or disallow the exception according as the opinion delivered was right or wrong." And again "A bill of exceptions is a statement of the point on which the court below gave an opinion, and, if it gave none, how can the higher court say that it gave an erroneous one?" In this case the request was that the court direct a verdict for the defendants. This request is made a part of the exception, and neither in the request nor exception was the ground of the coverture of the plaintiff or any other ground stated as a bar to the recovery. "It is clear that it is not competent for the plaintiff in error to draw in question on a bill of exceptions points not raised nor objected to on the trial. Every motive of policy and convenience forbids. Having failed to do this, all such objections are waived." *Allen v. Smith*, 12 N. J. Law, 159, 168. The doctrine that there must be a substance to the exception is fully supported by all the authorities. "No bill of exceptions is valid which is not for matter excepted to at the trial and ascertained before the verdict." *Walton v. U. S.*, 9 Wheat. 651. It would appear to be a test to ascertain what question was presented to the judge upon which his opinion was taken and to which the exception was addressed. It is well settled that only the points on which exceptions were taken are open to examination on error. *Smith v. State*, 23 N. J. Law, 712, 717. If the matter was not raised and considered by the court below, then it cannot be examined upon error. *Oliver v. Phelps*, 20 N. J. Law, 180. The ground of exception must be stated, and the attention of the court called to the specific point. *Id.* Chief Justice Hornblower, in this latter case, aptly expresses the rule applicable when he says: "Surely, it will not be pretended that it is sufficient for a party to say, 'I object,' and then, if the judge overrules the objection, to take a bill of exceptions, and thereupon to assign and maintain error for reasons which, if they had been presented to the judge, might have changed his opinion or the ground of objection which might have been obviated at the moment. Such a doctrine would imply omniscience in a judge, or, at least, instant

and intuitive perception of the law in every case. It is not sufficient for a party to say, 'I except to the charge,' and then assign error upon any clause and sentence of the charge. The exceptant must point out and call the attention of the judge to the part or parts of the charge to which he excepts, and then give him an opportunity of correcting himself or of explaining and obviating the objection."

In the case now in hand every issue except that of coverture of the plaintiff had been stated and tried. That issue had not been stated, and there was nothing in the case up to this point from which it even could be implied that the question of coverture had been or was to be raised. When the request for direction was made, the mind of the judge was upon the issues raised in this case, and not upon the question of coverture as a bar to the action. The request, in any event, was not sufficiently specific as to statement of a reason to call for an exception, upon its refusal by the judge, upon any issue which had been presented; and much less was it sufficient, and much less would it be calculated, to call the mind of the judge to the question of the coverture of the plaintiff as the ground of direction against her. Upon a motion to nonsuit in the court below, every point ruled on must be specifically stated, and none other will be considered. The motion must disclose the grounds, to be entitled to consideration. *Insurance Co. v. Barraciff*, 45 N. J. Law, 543. And certainly a request for a direction of a verdict at the close of the case must state the ground upon which it is made, that the attention of the trial court may be drawn to it in order that he may perceive or not whether it is within the issues tried in the case or whether it is founded upon some point heretofore not controverted. Every objection to be entertained in this court must have been taken, considered, and decided by the court below. *Jersey Co. v. Davison*, 29 N. J. Law, 415; *Hoey v. Lewis*, 39 N. J. Law, 501, 507. The exception must be precise. *Conover v. Inhabitants of Middletown Tp.*, 42 N. J. Law, 382, 383. The point must be embraced in the exception taken below. *Railroad Co. v. Page*, 41 N. J. Law, 183. For further illustrations of the principles applicable, see *Engle v. State*, 50 N. J. Law, 272, 13 Atl. 604; *Elliott, App. Proc.* §§ 325, 326, 327. The case of *Packard v. Railway Co.*, 54 N. J. Law, 553, 25 Atl. 506, in this court, has been cited as establishing a contrary principle, but an examination of the case at once reveals that the statement and grounds of exception could serve no purpose of information to the trial court, for the reason is that in that case the exception was to a proposition of law which the court had asserted independent of any formal request to charge, and to which the exception was specifically addressed. The attention of the trial court was called directly to the point of law in the charge to which the exception

was taken. The exception was to the very point and matter of law upon which it was contended the court had ruled erroneously, and no more definite or specific manner of calling the attention of the trial court to the alleged error could have been used. But in the case now here for determination the court was requested to charge that the plaintiff had not made out any cause of action upon which she was entitled to recover, and requesting the court to direct a verdict against her. In this request the specific ground should have been stated, and without it the request was so general that the attention of the trial court was not at all drawn to the point of the objection. The reply of the court at once sustains this position, and it is evident that the request was entirely indefinite and misleading. For these reasons the judgment should be affirmed.

DEPUE, J. This suit was brought by the defendant in error, Christina Appleton, to recover for services in nursing, attending, and taking care of the testator during his illness. She brings the suit in her own name. The plaintiff is, and was at the time these services were rendered, a married woman living with her husband. The husband and wife lived in a house that was rented by the husband from the deceased. The deceased became a boarder at the house in June, 1891, and continued to board there until October, 1892. At the time he became a boarder he was very sick with a disease which subsequently caused his death. He was then under the care of a physician, who attended him all the while he was at the husband's house. He became an inmate of the house under a contract made with the husband alone. The husband, in answer to the question, "Did he make any arrangement with you for nursing him?" testified that "he said he would pay so much a week for board, and any other expense incurred he told me he would be willing to pay for it." The four dollars a week for board was paid regularly. As was said in the memorandum of affirmance in the supreme court: "The wife had nothing to do with this contract; it was made with the husband, and inured to his benefit. The plaintiff nursed in his sickness the boarder of the husband, and in doing this she performed the duty of a wife." The judgment was affirmed in the supreme court, on the ground that the wife, as the meritorious cause of action, was a proper party to be joined with her husband as plaintiff, and that the omission of the husband occasioned a nonjoinder, which could not be taken advantage of under the general issue. The authority cited for the position that the wife, as the meritorious cause of action, may be joined as plaintiff with her husband, was 1 Chit. Pl. 30. The passage in Chitty referred to is as follows: "In general, the wife cannot join in an action upon a contract made during marriage as for her work and labor.

* * * But where the wife can be considered as the meritorious cause of action, as if a bond or other contract under seal or a promissory note be made to her separately or with her husband, or if she bestow her personal labor and skill in curing a wound, etc., she may join with her husband or he may sue alone." The authorities cited by Mr. Chitty for the proposition that where the wife bestows her personal labor or skill in curing a wound, etc., she may, as the meritorious cause of action, be joined with her husband in the action, are: 2 Sid. 128; Cro. Jac. 77; 2 Wils. 424; Bac. Abr. tit. "Baron and Feme," K. In the case cited from Cro. Jac. 77 (*Brashford v. Buckingham*), the action was brought by husband and wife on a promise made to the wife to pay her a certain sum in consideration that she should cure a wound, etc., and the action was held properly brought, for the reason that it was grounded upon a promise made to the wife. The case cited from 2 Sid. 128 (*Fountain v. Smith*) was an action by husband and wife, where the consideration moved from husband and wife and the promise was made to both. In the case cited from 2 Wils. 424 (*Weller v. Baker*), which is known as the "Tunbridge Wells Case," the action was in trespass on the case in tort to recover damages for an injury by the defendant's disturbing the dippers in the exercise of their right or employment, and the joinder of husband and wife was justified for the reason that the action "was not grounded on any contract, express or implied." 2 Wils. 414, 422, 427. The passage in Bacon's Abridgment is as follows: "If A., in consideration that B., a feme covert, will cure a certain wound, assumes and promises to B. to pay unto her ten pounds, * * * she may join with her husband in an assumpsit for this money." And in the note to that passage by the English editors it is stated, with a citation of authorities, that "without an express promise the action does not lie, for the fruit and labor of the wife belong to the husband, for which only he shall bring the action." 2 Bac. Abr. 58. None of the cases cited by Mr. Chitty sustain the view that, upon a meritorious consideration passing from the wife during coverture, she may join in the action, unless there is also an express contract with her. The cases in which the wife is allowed to join with the husband as plaintiff in an action *ex contractu*, on a consideration arising during coverture, are those in which there was an express promise to the wife to pay her, and quite uniformly the decision was in express terms grounded upon such a contract. *Pratt v. Taylor*, Cro. Eliz. 61; *Brashford v. Buckingham*, Cro. Jac. 77; *Buckley v. Collier*, 1 Saik. 114; *Dunstan v. Burwell*, 1 Wils. 224; *Yard v. Eland*, 1 Ld. Raym. 368; *Philliskirk v. Pluckwell*, 2 Maule & S. 393; *Nurse v. Wills*, 4 Barn. & Adol. 739; *Id.*, 1 Adol. & E. 65; *Bollingbroke v. Kerr*, L. R. 1 Exch. 222.

The leading cases on this subject are *Brashford v. Buckingham* and *Buckley v. Collier*, *supra*. In the first of these cases, as already stated, the joinder of the wife was justified for the reason that the action was grounded upon a promise made to the wife, and upon a matter arising upon her skill and upon a performance to be made by the wife personally. In the other case husband and wife joined in the suit, declaring that the defendant, being indebted to them for work done by the wife in making him a peruke, promised to pay generally, and had not paid. The declaration was held bad on demurrer, the court saying that the case differed from *Burcher's Case*, in that there was in that case an express promise to the wife; "but here is no express promise laid to the wife; here is nothing but a promise in law; and that must be to the husband, who must have the fruits of the wife's labor, for which he must bring a quantum meruit." The cases are collected in an elaborate note to Chitty's *Blackstone*. The rule there stated is that husband and wife may join in all cases where the cause of action would survive to her, or where she is the meritorious cause of action, and there has been an express contract with her. 1 Chit. Bl. 360, note 44.

The rule of the common law has not, as applied to the circumstances of this case, been altered or modified by the married woman's act. The plaintiff was not carrying on a separate business in the course of which she rendered these services. Section 4 of the married woman's act relates only to wages and earnings acquired or gained in an employment, occupation, or trade in which the married woman is employed and which she carries on separately from her husband. *Revision*, p. 637. Nor is this case within the principle stated by Chancellor Zabriske in *Peterson v. Mulford*, 36 N. J. Law, 481, 487. The language of the chancellor is as follows: "Though the earnings of a wife are not within the provisions of the married woman's act, yet, in a series of decisions in this state arising out of the spirit of that act, and in accordance with its provisions, it has been held that the earnings of a married woman, working on her own account by her husband's permission, or earned in working for herself without his permission, if given to her by him, are her separate property, and within the provisions of that act." The services the plaintiff rendered to the deceased were not performed when she was working on her own account or working for herself. In rendering those services, as was said in the supreme court, she performed the duty of a wife. The services, though unusual, were within the range of her domestic duties in caring for a sick man whom the husband had taken to board under a contract with him to pay for such services. Nor is the objection to the form of the action in any sense merely technical. The suit should have been brought

by the husband. The deceased having contracted with the husband, his executors are entitled to have the litigation disposed of in an action in which the husband alone is the party, subject to such defenses as are available in such a suit.

The plaintiff not being a proper party to be joined with her husband in the suit, the case is not one of nonjoinder of a plaintiff within the statute, which is not available under the general issue. Mr. Dicey, in discussing the results of errors as to the joinder of parties in actions by husband or wife, makes this classification: (1) If a husband sues alone where the wife must be joined, the error is fatal; (2) if a wife sues alone where she either must or may be joined, the only result is to expose her to a plea in abatement; (3) if a husband sues with his wife where she neither must nor may be joined, the error is fatal. The author adds in a note that, if the wife sues alone in a case where she cannot be joined as plaintiff, she is suing without any cause of action, and must fail. Dicey, *Parties*, 185, 186, and note.

Among the requests to charge was a request that the court instruct the jury that the plaintiff had not made out any cause of action upon which she was entitled to recover, and that the jury be directed to find in favor of the defendants. This request was proper, and the refusal to comply with it was error.

It is contended that, although the judicial action of the trial court was erroneous, the error is not available upon the bill of exceptions taken. In this view I cannot concur. It appears on the record that the trial judge, in his charge to the jury, said: "I am requested to charge that the plaintiff has not made out any cause of action upon which she is entitled to recover, and that the jury be directed to find in favor of the defendants. That is a matter for you (the jury) to determine. You are the judges of the facts in the case, and not the court, and from the whole evidence you must ascertain—First, whether she performed these services for Van Pelt; and, secondly, you must determine the value of them, and then you must determine whether she released all her right to it by her receipt introduced in the case. You are to determine what her services were, and so say by your verdict. I am requested by plaintiff's counsel to charge that, if the jury find from the evidence that plaintiff rendered services to the deceased as a nurse, she is entitled to recover the value of such services. I have so charged." To the refusal to charge as above requested, and to the part of the charge above set out, the defendant excepted in express terms, quoting the language of the request to charge and of the charge delivered; and the bill of exceptions concludes as follows: "Each of which said exceptions so prayed to the charge as given, and to the failure to charge as requested, as aforesaid, was allowed, and is hereby sealed accordingly."

It is settled in this court that a general exception in the form of the exceptions allowed and sealed in this case will draw into review the ruling excepted to without the grounds of exception being set out in the bill of exceptions. *Packard v. Railway Co.*, 54 N. J. Law, 553, 558, 25 Atl. 506; *Crater v. Binninger*, 33 N. J. Law, 513. In *Crater v. Binninger* the objection on which the judgment was reversed did not appear to have been mooted at the trial, and although, as the court said on page 519 of the report, the probability was that the matter thus escaped the attention of the counsel, jury, and court, the judgment was nevertheless reversed, on the ground that the bill of exceptions allowed and sealed disclosed a general exception to the charge on the subject to which the objection related. I think the judgment should be reversed.

The court being equally divided, the judgment below was affirmed.

GARRISON, LIPPINCOTT, LUDLOW, BOGERT, SIMS, and SMITH, JJ., for affirmance. THE CHANCELLOR, DEPUE, GUMMERE, MAGIE, BROWN, and TALMAN, JJ., for reversal.

DURYEE, Com'r of Banks and Insurance, v. UNITED STATES CREDIT-SYSTEM CO.

(Court of Chancery of New Jersey. April 6, 1897.)

RECEIVERS—PROPERTY SUBJECT TO TAX LIEN—ENFORCEMENT—STATUTES—REPEAL.

1. Where property coming into the hands of a receiver is subject to a lien for taxes, for the enforcement of which no specific remedy is provided by statute, the chancery court, of which the receiver is an officer, has jurisdiction, by reason of his possession of the property, to provide payment of the taxes, as a preferred claim, out of the proceeds of the property.

2. The lien given by Act 1888, p. 119, c. 87, directing assessment of personal tangible property used in connection with any business, and providing that the tax "shall remain a lien on the same for * * * one year from date of assessment,"—at date of which act assessment of taxes was made as of the first Wednesday in April (P. L. 1868, p. 852), and warrants were authorized to be issued for taxes remaining unpaid on January 20th (Act March 25, 1869, § 5),—is not repealed by Act May 16, 1889, § 4, directing that assessments of taxes shall be considered as made on the third Wednesday in January, "and shall constitute a lien as now provided by law, on and from that date," though the effect of this is to make the lien expire one year from the third Wednesday in January, and render impossible enforcement of the lien by warrant under the act of 1869.

3. The lien on personal property for a tax assessed against it is not lost by failure to take steps necessary to make the tax a lien on lands of the property owner, which, together with the personal property, it owned when it became insolvent.

Bill by George S. Duryee, commissioner of banks and insurance, against the United States Credit-System Company. The receiver

er of defendant disallowed a claim of the city of Newark for taxes, and the city appeals. Heard on petition, answer, and stipulation. Determination of receiver overruled.

Sherrerd Depue and O. W. Riker, for city of Newark. Howard W. Hayes, for receiver.

EMERY, V. O. This is an appeal by the city of Newark from the disallowance of a claim for taxes presented to the receiver of the United States Credit-System Company, an insolvent corporation. The claim was presented as a preferred claim, but was disallowed by the receiver as not being a valid claim, either preferred or general. The receiver, by virtue of his appointment, became entitled, under the statute (section 66, Corporation Act 1896; section 72, Act 1874; Revision, p. 189), to the possession of all the goods and chattels of the insolvent corporation, including the personal, tangible property in the possession of the company, on September 4, 1894, the date of his appointment. The effect of this appointment, as settled by the case of *Button Co. v. Spielmann*, 50 N. J. Eq. 120, 24 Atl. 571, affirmed on appeal 27 Atl. 1033, is to fasten upon the property of the insolvent corporation its debts payable in the course of distribution. Before the appointment of the receiver, taxes for the year 1894 had been assessed against this personal, tangible property which came to the receiver's possession, for the sum of \$980; the assessment being made under the law of 1888 (page 119, c. 87), directing that all personal, tangible property used in connection with any business shall be assessed within the taxing district where the business is carried on, "and shall remain a lien on the same for the term of one year from date of assessment." At the time of the passage of this act the assessment of taxes was made as of the first Wednesday in April (P. L. 1868, p. 352); and by the supplement, March 25, 1869 (P. L. 1869, p. 672, § 5), warrants were authorized to be issued for taxes remaining unpaid on January 20th. The taxes are payable October 30th, and, under these laws, warrants for unpaid taxes on personal, tangible property might be issued on January 20th, and the personal property thus taxed, as well as other personal property, levied upon and sold under the warrant, previous to the expiration of the year during which the lien continued. Sale before the expiration of the lien is necessary in order to preserve the lien, provided the sale under warrant of the property subject to the lien is the authorized method for collecting the tax. *Johnson v. Van Horn*, 45 N. J. Law, 136, 140; *Kirkpatrick v. City of New Brunswick*, 40 N. J. Eq. 46, affirmed on appeal 41 N. J. Eq. 347, 73.

now provided by law, on and from that date," etc., and all inconsistent acts were repealed (section 6). The effect of this act of 1889, as I construe it, was to make the lien for the taxes in question expire one year from the third Wednesday in January of the year of the assessment; this year expiring in the present case on January 16, 1895. The issuing of the warrant was the method which had been expressly provided by statute for the collection of the tax, and up to the passage of the act of 1889 this method was practicable. But as the warrant could not issue until January 20th in any year, and the lien on personal property for the tax of 1894 expired four days previously, it is manifest that by the act of 1889 it became impossible to enforce the lien for taxes for the year 1894 by this method. In some years the warrant could be issued before the third Wednesday of January, but in no year could sale be made under the warrant before the expiration of the lien. The lien of the taxes, so far as it was imposed on personal property, therefore, could not be enforced by the procedure of the warrant. Counsel for the receiver contends that this indirect repeal of the method for enforcing the lien, by warrant for the collection of the same, had the effect of destroying the lien. The argument is that taxes are not debts, and that, independent of remedies expressly provided for their collection, they are not enforceable either as debts or liens, and that, there being here no remedy against the property, there is no lien. Upon the other hand, it is claimed (1) that taxes are debts, recoverable as such where no other method of collection is provided; and (2) that, even if they are not debts recoverable by suit, yet, if the taxes have been expressly declared by the statute to be liens on property, this statutory lien is enforceable through the aid of a court of equity, if no other method of enforcing it against the property is provided by statute or the courts of law.

The case of *City of Camden v. Allen*, 26 N. J. Law, 398, settles the rule that, where a specific method is expressly provided by statute for the recovery of taxes, they must be collected in this mode, and cannot be recovered as debts in an action of debt. This case has not since been questioned, but it does not reach the point now at issue, which is whether a lien for taxes expressly fixed on property by statute can be enforced if the statute provides no method for the enforcement of the lien. And Chief Justice Green expressly says in his opinion (*supra*, page 400) that if a tax should be imposed, and no method be provided by law for its recovery, a resort to legal proceedings would be necessary, and a method of recovery would be found. And on the point of lien now involved the courts of several states hold that a lien for taxes given by statute may be enforced in a court of equity, where no mode for its enforcement is given by the statute. 2 *Desty, Tax'n*, p. 734, note 10. But this statutory lien for taxes is strictly

legal, rather than equitable, in its nature; and, if there be no other method expressly provided for enforcing the lien by legal process, it is not at all clear that the supreme court cannot enforce the appropriation of the property subject to the lien, either by mandamus, or by the issuing of process of execution for sale to pay the lien, analogous to the process of *levari facias* for this purpose out of the exchequer. 2 Tidd, Prac. 1042. Or perhaps the lien might be enforced by *scire facias*, the assessment of taxes being in the nature of a record or judgment. *City of Camden v. Allen*, 28 N. J. Law, 400. Whenever there is a legal, as distinguishable from an equitable, right, without a specific legal remedy, the general rule is that a mandamus will be granted. *Rex v. Marquis of Stafford*, 3 Term R. 646, 651. And this principle was applied in *Person v. Railroad Co.*, 32 N. J. Law, 441, to the collection of a tax, where there was no other adequate remedy for collecting the tax, and a mandamus was issued. In the absence of a decision, therefore, by the courts of law, that they are powerless to enforce this legal statutory lien for taxes, I shall not undertake to assert the general equitable jurisdiction to enforce the lien upon the ground that there is no remedy for its enforcement in the courts of law. But, without undertaking to decide this question, it seems to me that this court has, in the present instance, a clear source of jurisdiction, arising from the possession by its officer, the receiver, of the assets of the corporation, including the property subject to the lien, for distribution under the corporation act. Where the receiver of this court, under authority of statute and under the direction of the court, has assumed the possession of all the personal property of the insolvent corporation, this court is bound to give effect to the liens which existed as liens on the property when its receiver took possession. *Doane v. Insurance Co.*, 45 N. J. Eq. 274, 282, 17 Atl. 625. And effect is generally given to such statutory liens, in practice, either by providing for their payment by the receiver as preferred claims, or by allowing the claimant, on application to the court, to enforce his lien in the courts, and by the proceedings in which they would clearly be enforceable had no receiver been appointed, and making the receiver a party to such further proceedings, where this is necessary. The rights of creditors and of the lien claims here are to be settled according to the liens, as of the time when the receiver took possession; and, inasmuch as the taxes were then liens on the property, the city had the right to apply for an appropriation of the property by the receiver to pay this lien, as soon as by the statutes it became payable.

The lien being expressly imposed by statute upon the property which came to the receiver's hands, I see no escape from the payment of the taxes out of the proceeds of the property subject to the lien, on the application to this court, except upon the theory that the express statutory lien given by the act of 1888

has been repealed, in effect, by the act of 1889. An express repealer is not claimed, but is based on the fact that one is to be implied from the effect of the act of 1889 on the previous methods for enforcing the lien. And this effect on the procedure is not the result of legislation directly regulating the procedure, and thus of a character to show an intention to affect the lien itself, but is an indirect effect, resulting from provisions regulating the procedure, which were not directly connected with the subject-matter or object of the repealing act; this being merely to change the date of assessment. The implied repeal of the lien results from the conflicting provisions of the laws regulating the procedure to enforce the lien. In this condition of the statutory law relating to the lien for taxes, and the procedure on it, I think it is my duty to adhere to the express and positive provisions creating the lien, and to carry these into effect in this case as still existing, rather than to consider the lien destroyed because the original method of enforcement has been rendered impracticable by subsequent indirect legislation. To construe the statutes which indirectly repeal the effective proceedings for enforcement of the lien as also having the effect to repeal the express lien seems to me to be sacrificing substantial rights to the preservation of forms of proceedings. My impression is that even a formal, direct repeal of the proceedings for collection by warrant, without substituting others, would not, merely of itself, have had the effect of destroying the previous express lien, and that this lien, so long as it existed, could still have been made effective by proceeding either at law or in equity. And where the property is in the control of the officer of the court, expressly subject to the lien, the fact that the lien cannot be otherwise made effective than by the action of this court is no sufficient reason, as it seems to me, for holding that it is not valid. In *Wood v. Carriage Co.*, 49 N. J. Eq. 433, 24 Atl. 228, the statutory lien of the landlord for one year's rent was enforced by directing the receiver to pay it, although no distress had been made. It appears by the written stipulation in this case that the formalities necessary to make the tax in question a lien upon the lands of the insolvent corporation have not been taken, and it is therefore argued that the lien against the personal property has been lost. But, even if the lien against the real estate has thereby been lost, it cannot follow that this loss of one of the two liens given by statute discharged the other lien. No such penalty can be justly imposed; certainly not in favor of the debtor, who still remains the owner of both the properties originally subject to the lien. To discharge the personal estate of the debtor from the lien simply because the real estate is discharged would deprive the city of the benefit of one of the two liens expressly given, and for the sole purpose of relieving the owner from a just burden. The determination of the receiver is

therefore overruled, and the claim for taxes will be paid out of the proceeds of the personal property on which it was a lien as a preferred claim.

I have disposed of the case upon the provisions of the corporation law as it existed on the date of the receiver's appointment, and without considering the effect of two other laws since passed. One of these—the revision of the corporation act, taking effect July 4, 1896—now provides, as to the distribution of assets (section 86): "After the payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority, the creditors shall be paid proportionately," etc. This provision for the payment of liens seems to cover the present express statutory lien, and to supply an express method for its enforcement, and to be within the power of the legislature. The other statute is the act of March 26, 1896 (P. L. 1896, p. 181), which provides that the receiver shall take and hold all personal property of the insolvent corporation, subject to all unpaid taxes, and shall, out of the first moneys received, pay all said unpaid taxes, with interest, etc. There is more question whether this act is intended to be retrospective. But without deciding as to the effect of either of these acts, upon the present application, I dispose of the question upon the status of the rights existing under the acts in force at the time of the receiver's appointment.

ENGLISH v. MAYOR, ETC., OF CITY OF WILMINGTON.

(Court of Errors and Appeals of Delaware.
Nov. 2, 1896.)

MUNICIPAL CORPORATIONS—ASSESSMENTS—CONSTITUTIONAL LAW.

1. Act April 29, 1891, providing that the cost of constructing a complete sewer system for a city shall be assessed on all property adjoining a sewer, or with access thereto, at a fixed and uniform rate per foot of frontage, and per square foot of area to a certain depth, is a valid exercise of legislative discretion in assessing benefits.

2. It is no objection to such an assessment that the amount thereof is based on an estimate of the cost of the sewer system.

3. The statute does not deprive the assessed abutters of their property without due process of law because it does not provide for notice and hearing before the assessment is levied.

4. The legislature may, without notice to the property owners to be assessed, fix the amount per foot of frontage and square foot of area which property adjoining a sewer shall be assessed for its construction.

Cullen, J., dissenting.

Case reserved from superior court, New Castle county.

Certiorari by Henry C. English against the mayor and council of the city of Wilmington. Heard on case stated and questions of law reserved by the superior court. Opinion certified.

Hugh C. Browne, Peter L. Cooper, Walter H. Hayes, and James H. Hoffecker, Jr., for plaintiff. Robert G. Harman, City Sol., and Horace G. Knowles, for defendant.

NICHOLSON, Ch. This case came up from the superior court in and for New Castle county on a case stated and questions of law reserved for a hearing before all the judges in the court of errors and appeals. It was a certiorari to the board of directors of the street and sewer department of the city of Wilmington, brought to test the validity of a sewer assessment that had been made a lien upon lands and building of the plaintiff situated in the city of Wilmington at the northwest corner of Gilpin avenue and Adams street. It appears from the agreed statement of facts and the record that prior to the 25th day of July, 1892, the board of directors of the street and sewer department of the mayor and council of the city of Wilmington constructed, in accordance with the general system of sewerage for the city of Wilmington prepared on or about December 10, 1890, "a lateral sewer along said Gilpin avenue from a point where it intersects with said Adams street to a point near where said avenue intersects Van Buren street, being a distance of six hundred and seventy feet." On the 27th of July, 1892, in pursuance of a resolution of the said board, "a paper writing purporting to be a certificate of sewer liens on Gilpin avenue between Adams and Van Buren streets was filed with the secretary of said board for collection"; said paper containing, inter alia, the following:

Feet Front.	Amt.	Sq. Ft.	Amt.	Total Asset
117 ft. 6 in.	\$58 75	11,888	\$113 88	\$172 63.

The lot of land of the plaintiff abutting upon that portion of Gilpin avenue in which the said sewer was constructed measured 117 feet and 6 inches, and on Adams street measured 100 feet. The clerk of said board transcribed the above entry in a book called "Sewer Lien Book" on the same day, to wit, July 27, 1892, and within 90 days thereafter a bill for said sum of \$172.63 was mailed or delivered to the plaintiff, which was the first notice he had of said assessment. The said sum of \$172.63 has not been paid, nor any part thereof; and on December 20, 1895, the mayor of Wilmington issued his warrant, under the seal of said city, directed to said board, commanding them to levy the said sum, interest and costs, on the grounds and buildings of the plaintiff. In pursuance of the said warrant the board advertised the said property for sale on December 21, 1895, and on December 20, 1895, the plaintiff sued out of the superior court of the state of Delaware in and for New Castle county (he having first entered into a recognizance in the sum of \$800, approved by the prothonotary of the said court) a writ of certiorari against the mayor and council of Wilmington. The assessment was made under an act of the

legislature passed April 29, 1891, which provided for the construction by the mayor and council of Wilmington, through the agency of the board of directors of its street and sewer department, of a complete system of sewerage, to be extended, as the public necessity might require, over the whole city of Wilmington. This act determined how the cost should be borne, as between the public and the estates benefited, providing that two-fifths should be paid for by municipal taxation out of the annual appropriation for streets and sewers, and three-fifths should be paid for by the abutting property upon the streets or highways in which the sewers might be constructed at the time of completing such sewers; the whole cost, approximately estimated in advance, to be apportioned "to each lineal foot of sewer to be built" in accordance with the plan adopted, and "apportioned alike upon each and every size of sewer, be it a lateral or trunk sewer." The act also fixed the basis of apportionment as between the individuals benefited, the abutting property owners, providing as follows:

"Sec. 3. All assessments shall be made upon the properties abutting upon that portion of any street or highway, lane, or alley, in which any public sewer may be constructed under this provision, at the rate of fifty cents for each front foot of such property upon such street, highway, lane, or alley, and one cent for each square foot of such property upon such street, highway, lane, or alley, and a line not exceeding one hundred and fifty feet distant from and parallel with the line of such street, highway, lane or alley: provided, however, that where any property is situated between two streets or highways, the area upon which said assessment of one cent per square foot is made shall not extend to more than one-half the distance between such streets or highways: and provided, also, that when any property is situated at the corner of two streets or highways, or otherwise so situated as to be assessed for the expenses of building a sewer on one of such streets or highways, that portion of such property assessed for a sewer in one of such streets or highways shall not be liable to be assessed upon its area for the cost of constructing a sewer in the other of such streets or highways, but only for one-half of its side frontage upon such streets or highways: provided, however, that said side frontage is one hundred and fifty feet or less: and provided also that no property or portion of property shall be assessed for the construction of any sewer, unless such property or some portion thereof shall abut and be bounded upon the street on which said sewer shall have been constructed, or unless such property or a portion thereof has a right of access to said street or highway by a private alley, or desires to use said sewer before a sewer is constructed upon the street or highway upon which said property abuts, in which case the said property shall be liable for the same as-

essment as though the sewer was constructed in the streets or highways upon which said property abuts, and the said property shall not be liable for any further assessments for sewer purposes."

It further establishes by section 4 the right of the assessed land to connect with such sewers, and in section 6 provides for the same assessment upon lands abutting upon streets wherein sewers had been constructed previous to the passage of the act.

The agreed statement of facts contains also the following, inter alia: "(1) That on or about the 10th day of December, A. D. 1890, with a view to the passage of the present sewer law, the street and sewer department prepared a system of sewerage for the entire city. It did this in the following manner: (a) It made two maps, showing the sewerage of the whole city, of which that marked 'A' is one. (b) It then ascertained the total cost of the entire system for the whole city, which it found to be \$1,741,000. (c) It then ascertained the building area of the whole city, and, finding that the streets of said city comprised one-fifth of said area, placed one-fifth of said cost upon the city; and finding, further, that the construction of manholes and inlets and their appurtenances would cost one-fifth of said amount, also placed this additional one-fifth upon the city, or a total cost of two-fifths of said amount upon the city. The other three-fifths was to be borne by the property owners. (d) It then found that three-fifths of the whole amount was equivalent to fifty cents per front foot, and one cent per square foot, and in this manner the present rate was fixed. One typical section of the above plan was then taken, said section being marked 'B,' in which the streets were all laid out and the building areas well defined. The whole cost of the construction of the sewerage system in this typical section was then approximately determined, and found to be \$340,528. The whole area of this section was then measured from the data upon the plan, and was found to be 15,535,115 square feet. The whole area of the streets was then found upon the same data to be 3,107,023 square feet, or one-fifth of the whole area of the typical section. The frontage assessable was found to be 174,729 lineal feet. This typical section of the above plan, cost, etc., embodying the above principle, which is shown by exhibit marked 'E,' with maps, data, and general information, were then laid before the legislature, and the whole system fully explained to said body, after which, and in accordance with which, the legislature then passed the present law. (2) The total cost of constructing the above system of sewerage for the whole city was worked out by sections, of which that marked 'D' represented sections H, K, and I. The other sections were worked out in the same manner, and after the report of the same was printed, in compliance with the orders of the said department, and said report read before the said board, and adopted by it, destroyed, said report being marked 'D.' (3)

The sewer on Gilpin avenue was ordered to be built by a resolution of the board of directors of the street and sewer department bearing date the 24th day of May, 1892."

The questions reserved for the decision of the court include certain alleged departures from the statute itself in the course of the proceedings, but the principal questions are raised by the objections to the constitutionality of the act. It is said, first, on the part of the complainant, that the act "is unconstitutional, because it authorizes and directs an arbitrary sum of money to be imposed or assessed on property abutting on any street in which a sewer may be constructed, irrespective of the cost of said sewer, and without reference to any benefits, special or otherwise, conferred on said property by the construction of said sewer"; and, further, that "the act arbitrarily exacts fifty cents a lineal foot, and one cent a square foot to the depth of one hundred and fifty feet," and, "if the amount thus raised is in excess of the cost of the sewer, as to the excess it is the taking of private property without consent and without compensation." Second, that the legislature had no right "to determine the amount of money which the plaintiff was to pay towards the cost of constructing said sewer on Gilpin avenue, without notifying him of their intention to do so, and thereby giving him an opportunity to be heard in the matter." And that the act is unconstitutional, if it provides "that the board of directors of the street and sewer department should act in making assessments for the cost of construction of sewers without notice to the owner of the property on which a lien was to be created, and without giving him a hearing, or at least an opportunity to be heard."

It is not open to doubt, nor is it questioned in this case, that it is within the power of the legislature to require that the expense of constructing drains, sewers, and the like should be met, in whole or in part, by local assessments made upon persons or property benefited or deemed to be benefited. "Legislation of this character, both in respect to its justice and constitutional validity, has been extensively discussed by the judicial tribunals of nearly every state in the Union. The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvement is a branch of the taxing power, or included within it; and the many cases which have been decided fully establish the general proposition that a statute authorizing the municipal authorities to open or establish streets, or to make local improvements of the character above mentioned, and to assess the expense upon the property which, in the opinion of the designated tribunal or officers, shall be specially benefited by such street or improvement, in proportion to the amount of such benefit, or upon the abutters in proportion to benefits or frontage or superficial contents, is, in the absence of some special

constitutional provision, a valid exercise of the power of taxation. Whether the expense of making such improvement shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment should be upon all property found to be benefited, or alone upon the abutters according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency, unless there is some special restraining constitutional provision upon the subject. Whatever limitation there is upon the legislative power of taxation (which includes the power of apportioning taxation) must be found in the nature of the power and in express constitutional provisions." 2 Dill. Mun. Corp. (4th Ed.) § 752. The foregoing quotation from Judge Dillon's excellent work presents, with clearness and precision, the general propositions established by the innumerable decisions upon the general subject of assessment for local improvement; and he has cited and commented upon, in his notes to the passage above quoted, a vast number of authorities, including nearly all those that have been cited in this connection in the able and elaborate briefs of the learned counsel in this cause. A leading case, cited with approval in numberless cases, and quoted at great length in Cooley's Constitutional Limitation, is *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 420, decided in 1851. In this case Judge Ruggles says (page 426): "It must be conceded that the power of taxation and of apportioning taxation, or of assigning to each individual his share of the burden, is vested exclusively in the legislature, unless this power is limited or restrained by some constitutional provision. The power of taxing and the power of apportioning taxation are identical and inseparable. Taxes cannot be laid without apportionment, and the power of apportionment is therefore unlimited, unless it be restrained as a part of the power of taxation." In the same case (page 432) the learned judge also says: "The difference between general taxation and special assessments for local objects requires that they should be distinguished by different names, although both derive their authority from the taxing power. They have always been so distinguished, and it is therefore evident that the word 'tax' may be used in a contract or in a statute in a sense which would not include a street assessment, or any other local or special taxation, within its meaning. Several cases are found in which it has been adjudged to have been so used. But in no case has it been adjudged that street assessments are not made by virtue of the legislative taxing power." In this state there is no express constitutional provision upon the subject of taxation, and no cases have arisen here directly involving the questions raised by the case before us, although the leading principles illustrating

the nature and extent of the power of taxation, and the limitations upon its exercise inherent in its nature, have been admirably set forth by Judge Grubb in the opinion delivered by him in the well-known case of *Friesleben v. Shallcross*, 9 Houst. 99, 19 Atl. 576.

It is altogether too late in the development, both by legislation and elaborate judicial decisions, in states other than our own, of the general principles controlling local assessments for local improvements, for it to be necessary or proper for me to enter into a more elaborate or detailed review of the multitude of authorities sustaining the general propositions already laid down. It is well-settled law (1) that the whole subject of taxing districts belongs to the legislature; (2) that the apportionment between the public and the local owners is within the power of the legislature; (3) that the legislature may fix upon the basis of apportionment between individuals. In fixing upon the basis of apportionment, the two methods between which a choice is commonly made in statutes providing for local assessments are: (1) An assessment made by assessors or commissioners appointed for the purpose under legislative authority, who are to view the estates, and levy the expense in proportion to the benefits which, in their opinion, the estates, respectively, will receive from the work proposed; (2) an assessment by some definite standard fixed upon by the legislature itself, and which is applied to estates by a measurement of length, quantity, or value. *Cooley, Tax'n*, p. 448. The principle is the same in either case, and is concisely expressed by Chief Justice Shaw in one of the early American cases (*Wright v. City of Boston*, 9 Cush. 241) in language which has been universally quoted, both with and without crediting him with it. He says: "Those who enjoy the benefit shall equally bear the burden." And again: "The benefits actually or presumptively received support the tax." And elsewhere in the same case, which was a sewer case: "The potentiality of receiving a benefit from a sewer is the thing to be charged with the tax." It is obvious that the essential difference between the two methods of apportionment is that when the legislature adopts the latter method it decides itself the proportion in which the estates, respectively, will be benefited; as when it determines that the frontage or area of abutting lots, or both combined, shall constitute the measure of a sewer assessment. If the legislature has exercised its power *bona fide*, it must necessarily have considered all the circumstances surrounding the particular case, and have decided that, all things considered, such a measure would prove as nearly just and equal in its actual operation as any practicable method could be. In the case before us the latter method is the one adopted, and the mode by which the legislature arrived at the basis of apportionment fixed upon by it is fully ex-

plained by the agreed statement of facts already cited, and the act itself, which begins with the following preamble: "Whereas, it is apparent that the city of Wilmington stands in great need of a thorough system of sewers that will be extended over the entire city, providing not only for the present but for the future. Whereas, a proper regard for the health of the inhabitants of the city as well as their property and business interests, requires that this work be speedily undertaken. Whereas, a plan of a well-defined system has been prepared under the direction of the board of directors of the street and sewer department, and an approximate estimate of the cost of building the same has been duly made: Now, therefore," etc.

Regarding the whole contemplated system of sewerage as one complex whole, the legislature determined that equity and fairness demanded that the whole city should be made a single taxing district for the purpose of defraying the cost, so that the burden could be distributed equally throughout the whole territory to be benefited, no property to bear its share of the burden until it should possess "the potentiality of receiving a benefit" from the system by having a link of that system placed in front of it. As this great work—the complete sewerage system upon the plan adopted and laid before them by the street and sewer department—would not be finished for many years, it necessarily followed that, if the cost of the whole was to be so assessed, it must be the estimated cost. An approximate estimate of the cost of the completed work, based upon elaborate calculations as described in the above statement of facts, had been prepared and submitted to the legislature by the street and sewer department, together with calculations and maps of the area and frontage of the lots within the city, and the area of the streets, and the cost of furnishing the streets with manholes and inlets. Using these calculations and figures, the legislature determined that, as between the public and the estates benefited, two-fifths of the estimated cost should be borne by the public, i. e. by general municipal taxation; and then employing the method of apportionment, as between individuals, commonly known as the combined frontage and area system (*Cleveland v. Tripp*, 13 R. I. 60, and cases there cited), they arrived, by a simple arithmetical calculation, at the result that the share of three-fifths of the estimated cost (\$1,741,000) to be assessed upon each front foot of land within the taxation district amounted to 50 cents, and the share of three-fifths of the same to be assessed upon each square foot of area amounted to 1 cent. Judge Cooley sums up so admirably the grounds upon which the courts would undertake to decide that the legislature had exceeded its authority in such exercise of the taxing power that I will quote and adopt his language.

as follows: "It is conceded that the legislative judgment that a certain district is or will be so far specially benefited by an improvement as to justify a special assessment is conclusive, and that its determination as to what shall be the basis of the assessment is equally conclusive. To invoke the intervention of a court for relief against the results of its conclusion is to invoke the judicial authority to give its judgment controlling effect over that of the legislature, in a matter of the apportionment of a tax, which by concession on all sides is purely a matter of legislation. This is confessedly inadmissible in any case where the legislative power has not been exceeded by an apportionment merely colorable. An assessment so grossly and palpably unjust and oppressive as to give demonstration that the legislative judgment had never determined the case on the principles of taxation must always be open to correction. A man's property is not to be taken from him with impunity, and without redress, by simply calling the appropriation an 'assessment,' when it is not such in its elements." *Cooley, Tax'n*, pp. 459, 460. In the act under consideration it is clearly the opinion of the court that the legislature had acted within their legitimate sphere, so far as the objections hitherto considered are concerned, which cannot be sustained either on principle or authority. The following are some of the cases in which the courts in other states have sustained similar statutes, for the method of apportionment adopted by the legislature in this case seems to have become increasingly popular of late years throughout the Union: *Cleveland v. Tripp*, 13 R. I. 60; *Magee v. Com.*, 46 Pa. St. 358; *Stroud v. City of Philadelphia*, 61 Pa. St. 255; *In re Washington Ave.*, 69 Pa. St. 352, 361; *Palmer v. Stumph*, 29 Ind. 329; *Allen v. Drew*, 44 Vt. 174; *Ernst v. Kunkle*, 5 Ohio St. 520; *Upington v. Oviatt*, 24 Ohio St. 232; *Parker v. Challiss*, 9 Kan. 155; *Motz v. City of Detroit*, 18 Mich. 495; *State v. Fuller*, 34 N. J. Law, 227; *City of St. Louis v. Clemens*, 49 Mo. 552; *Elmery v. Gas Co.*, 28 Cal. 345; *Chambers v. Satterlee*, 40 Cal. 497, 514; *People v. Lynch*, 51 Cal. 15; *City of St. Louis v. Oeters*, 38 Mo. 456; *Selby v. Commissioners*, 14 La. Ann. 434.

In the case of *Thomas v. Gain*, 35 Mich. 156, decided in 1870, which was cited in the argument as the strongest case against such an apportionment, *Cooley, C. J.*, in an elaborate opinion which reviewed the more important cases up to that date, held a certain sewer assessment, apportioned by superficial area alone, invalid, but he distinguishes as follows: "In what has been said it is not intended to decide or to intimate that a sewer tax may not, under some circumstances, be lawful though apportioned by the area of the lots assessed. If, under the law providing therefor, the assessment were confined exclusively to the lots lying contiguous to each other, and on or near the streets in which the

sewer was to be constructed, and all properly urban lots, or, as they are sometimes designated, 'inlots,' as distinguished from the outer lands of a town, which receive only slight and indirect benefit from such improvement, and if the law also provided for private drains into the sewer as matter of right on the part of the proprietors of the lots assessed, the case would be so different from the one now before us that much of what we have said could have no application. We confine our discussion strictly to the record before us, and to the act under which this assessment was laid, not caring to enter upon any discussion of hypothetical cases which may never arise, or which, if they do arise, can better be considered when their special features are presented for consideration." It is only necessary to submit the provisions already set forth of the act under consideration to the tests here applied, to observe that they contain all the essential features of a valid act which these tests suggest.

With regard to the objection that the assessment is based upon an approximate estimate of cost made in advance, and that it might happen that the actual cost would be less than the sum so estimated and collected, it may be remarked that this has been uniformly held to be no cause for invalidating any assessment, for obvious reasons of public policy, and the necessity for such estimates in every branch of taxation. *Davidson v. City of New Orleans*, 96 U. S. 97.

The ground is now clear for the consideration of the remaining and more important objection to the constitutionality of the act, viz. the want of notice; it being strongly urged and ably argued by counsel that the want of notice is fatal to the validity of the assessment on the fundamental principles of civil liberty, and more especially because of the due process of law clause in the fourteenth amendment to the constitution of the United States. Whenever the first method of assessment above referred to is adopted by the legislature, viz. an assessment made by assessors or commissioners, appointed for the purpose under legislative authority, and who are to view the estates, and levy the expense in proportion to the benefits which, in their opinion, the estates, respectively, will receive from the work proposed, it is now unquestioned and unquestionable that an opportunity for a hearing is absolutely necessary to the validity of the assessment. That is so clear that it is remarkable that it should have been litigated at so late a date as the well-known New York case of *Stuart v. Palmer*, 74 N. Y. 183. The question has been repeatedly discussed, however, when the second method has been adopted; that is, when the legislature, as in this case, itself fixes upon some definite standard, which is applied to estates by a measurement of length or quantity or by a value independently fixed. In such cases it is argued that nothing remains to be done to fix upon each individual the amount of his as-

assessment except to make a mathematical calculation, and as a hearing, or an opportunity for a hearing, would therefore be useless and futile, the maxim, "*Cessante ratione, cessat et ipsa lex*," would apply. It seems impossible to find any valid distinction between the unquestioned power of the legislature to impose, without notice, or opportunity for a hearing, such taxes as poll taxes, license taxes (not dependent upon the extent of the individual's business), and, generally, specific taxes on things or persons or occupations, and their power to impose, in the same manner, that kind of tax called "special assessment for local improvement," subject, of course, to the limitations already set forth, which are inherent in the nature of the taxing power, and have been already dwelt upon at great length. In the case of the taxes first above enumerated the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. But the supreme court of the United States is the tribunal to which we must look for the authoritative construction of the fourteenth amendment to the United States constitution and its application to this question of notice. There is a series of decisions of that court, bearing more or less directly upon this question, which are referred to and reviewed in every well-considered case upon the subject. It will not be necessary, however, to cite or review them all, for they are all reviewed fully in the two cases from which I shall quote at length. In *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 4 Sup. Ct. 663, decided in October, 1883, Mr. Justice Field, in defining "due process of law," says: "What constitutes that process it may be difficult to define with precision so as to cover all cases. It is no doubt wiser, as stated by Mr. Justice Miller in *Davidson v. New Orleans*, to arrive at its meaning 'by gradual process of judicial inclusion and exclusion as the cases presented for decision shall require, with the reasoning on which such decision may be founded.' 96 U. S. 97, 104. It is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and, wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights. *Hurtado v. People*, 110 U. S. 516-536, 4 Sup. Ct. 111, 292." He further says in the same case: "Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him,

such as poll taxes, license taxes (not dependent upon the extent of his business), and, generally, specific taxes on things or persons or occupations. In such cases the legislature, in authorizing the tax, fixes the amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is therefore invaded. Thus if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping an hotel or restaurant, or selling liquors or cigars or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing." In this case the reason for the requirement of notice is well illustrated, and also the limitation of the requirement to cases in which notice could be of some conceivable use,—to cases where, if a hearing were had, there would be something to hear and determine. The familiar illustrations, taken from species of taxation with which we are all familiar, make clear the analogies which have guided legislatures in apportioning assessments for local improvements directly by mathematical calculation, and without opportunity given to property owners for a hearing as to the amount of each individual's assessment.

The next supreme court case I desire to consider (*Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921) is directly in point, and requires elaborate consideration, for it will be impossible to correctly interpret a decision which is the final authority upon the point under consideration, unless we thoroughly understand the peculiar circumstances of the case, and what was actually decided, without which the mere language and dicta will be sure to prove misleading, as we think has been already shown in a case decided not long since in a neighboring state. The facts of the case of *Spencer v. Merchant* were these: A New York statute of 1869 (chapter 217), as amended by the statute of 1870 (chapter 619), provided for laying out a street in continuation of Atlantic avenue, in the city of Brooklyn, by three commissioners, who, after notice of 20 days, should award the damages to the landowners, and assess the amount of the award and the attendant expenses upon the lands, lying within 300 feet on either side of the avenue, which, in their judgment, should be benefited by opening and extending it, and report such award and assessment to the court for confirmation, after public notice, that all persons having

objection to it might be heard before the court, etc. This statute, as amended, then went on to provide that, upon the confirmation of the report as to the opening of the street, the commissioners should be authorized to enter upon the land taken, to cause it to be regulated, prepared, and graded for public travel, and to assess the expense of such regulating, grading, and preparing for travel upon the lands and premises which in their judgment should be benefited by such improvement, in proportion to the benefit accruing to them by reason thereof, the district of assessment to extend back as provided theretofore in the act. But it omitted to provide for any notice to the property owners of this assessment for regulating, grading, and preparing for travel, or any opportunity for a hearing. The sums so assessed upon some lots were paid, but the sums assessed upon other lots remained unpaid, the owners contesting the validity of the assessment. On June 18, 1878, the court of appeals of New York declared that assessment void because no notice or opportunity for a hearing had been given. This was the well-known case of *Stuart v. Palmer*, 74 N. Y. 183, already referred to. On January 29, 1879, the comptroller of the state canceled the unpaid assessment, and charged the county with the amount, together with the interest. Thereupon a statute of 1881 (chapter 689) directed that a sum equal to so much of the original assessment so unpaid and so canceled as remained unpaid should be levied on the lots, the assessment made upon which under the original act had not been paid, together with interest and a proportionate part of the expenses. The lots so assessed (being those only whose owners had contested the original assessment which had been held void) were isolated parcels, not contiguous, and many of them not fronting on the avenue. Most of the territory benefited as fixed in the statute of 1869, and a great portion of the original assessment, were not included in the statute of 1881, nor directed to be taken into consideration in making the new assessment. But this assessment included a proportionate part of the expenses of the former assessment which had been declared void by the court of appeals. As between the individual owners of the group of lots upon which this assessment was laid, the amount assessed upon the group was to be apportioned by a board after notice and an opportunity for a hearing. This act was held constitutional by the New York court of appeals (*Spencer v. Merchant*, 100 N. Y. 587, 8 N. E. 682), and a writ of error was sued out, the error assigned being that the statute and the proceedings thereunder were in violation of the constitution of the United States, and were void, for the reason that they deprived the plaintiff and the other persons assessed thereunder of their property without due process of law. The particular point raised by the case, as stated by Judge Finch, of the New York court

of appeals (and his language was adopted by Justice Gray, who delivered the opinion of the majority of the United States supreme court), was as follows: "The precise wrong of which complaint was made appears to be that the landowners now assessed never had an opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid." 125 U. S. 354, 8 Sup. Ct. 921. The nature and extent of the taxing power is discussed at some length, and the series of United States supreme court decisions, upon the subject to which we have already referred, is cited, and then Justice Gray says: "In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction. In section 4 of the statute of 1869, the assessment under which was held void in *Stuart v. Palmer*, 74 N. Y. 183, for want of any provision whatever for notice or hearing, the authority to determine what lands, lying within three hundred feet on either side of the street, were actually benefited, was delegated to commissioners. But in the statute of 1881 the legislature itself determined what lands were benefited and should be assessed. By this statute the legislature, in substance and effect, assumed that all the lands within the district defined in the statute of 1869 were benefited in a sum equal to the amount of the original assessment, the expense of levying it, and interest thereon; and determined that the lots upon which no part of that assessment had been paid, and which had therefore as yet borne no share of the burden, were benefited to the extent of a certain portion of this sum. That these lots as a whole had been benefited to this extent was conclusively settled by the legislature. The statute of 1881 afforded to the owners notice and hearing upon the question of the equitable apportionment among them of the sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute, and that was all the notice and hearing to which they were entitled." In thus holding that the legislature, without notice, could conclusively settle that the lots upon which no part of the void assessment had been paid, and which, as we have seen, were "isolated parcels not contiguous, and many of them not fronting on the avenue," should be assessed a certain portion of a certain sum imposed upon all the lots within the district created by the act under which the void assessment was made, it would seem that the supreme court necessarily implied that the legislature could also have conclusively settled, if it had seen fit so to do, the portion of that portion which each one of the selected

lots should be assessed; provided that, under the general laws of New York, it would have been possible for the lot owners to contest the constitutionality of the act. It is impossible to conceive of any objection to the power of the legislature to fix without notice the amount of the assessment upon the individual lots of such a selected group of lots which would not apply with equal force to fixing it upon such a group. If it could distribute the amount between different groups of lots, why could it not distribute the amount apportioned to a group, between the individuals of a group? It is true that in the concluding paragraph of the clause above cited Justice Gray refers to the notice and hearing granted to the individual lot owners, but it is to be remembered that the mode of apportionment between them was according to the judgment of commissioners as to the amount of benefit, which necessarily depended upon and required a hearing, and the bearing of such a hearing upon the point decided by the court would seem to be indicated by the concluding sentence of the above-quoted clause, in which Justice Gray says: "It thus enabled them to contest the constitutionality of the statute, and that was all the notice and hearing to which they were entitled." But under the laws of this state any property owner whose rights were affected by the statute now under consideration could at the proper time test the constitutionality of the act, and, further, could institute proceedings for the correction of injustice, fraud, or error in making the mathematical calculations required. Thus are also met the requirements laid down by the supreme court in the case we have already cited of *Davidson v. City of New Orleans*, 96 U. S. 97.

The Rhode Island courts have sustained statutes almost identical with this one. *Cleveland v. Tripp*, 13 R. I. 60, already cited, being the leading case. And in *Gillette v. City of Denver*, 21 Fed. 823, a sewer assessment case, where the assessment was imposed upon the property within the district according to the area, and the objection was raised that no notice was provided, and there was therefore no due process of law, Circuit Justice Brewer said (page 824): "Now, in this case, the tax is laid by the area; no question of value, no matter of judgment,—a mere mathematical calculation; and of what earthly profit could it be to a taxpayer to have notice of that calculation? He can make it himself. He cannot correct by testimony the judgment of anybody; it is as exact and settled as anything can be." In the state of Maryland the majority of the court in the case of *Ulman v. Mayor, etc.*, 72 Md. 587, 20 Atl. 141, and 21 Atl. 709, have reversed a series of prior decisions, viz.: *Mayor, etc., v. Scharf*, 56 Md. 50; *Mayor, etc., v. Johns Hopkins Hospital*, 56 Md. 1; *Mosle v. Mayor, etc.*, 61 Md. 224; and *Alberger v. Mayor, etc.*, 64 Md. 1, 20 Atl. 988,—and base their opinion appar-

ently upon certain expressions about notice employed by Justice Gray in the above-cited case of *Spencer v. Merchant*. But the court take occasion to say (page 595): "Some cases have held that where the apportionment has been made by the legislature it is final; but, without pausing to discuss this proposition, it is only necessary to say that those cases are not applicable here, for the very obvious reason that the act of 1874 (the act before them) has made no such apportionment."

Some objections have been made by counsel for the plaintiff that the proceedings of the defendant were not in certain respects in accordance with the provisions of the act, but after examination we are unable to find any irregularity, and consider, in view of the authorities and reasoning we have already set forth at length, that 19 Del. Laws, c. 200, does not conflict either with the provisions of the constitution of the state of Delaware, or with the fourteenth amendment of the constitution of the United States, and is in all respects constitutional. We are of the opinion that the assessment and men aforesaid ought not to be reversed, canceled, or annulled, and we shall therefore so certify to the superior court for New Castle county. All the judges concurred in the above opinion, with the exception of CULLEN, J., dissenting, but who expressed no dissenting opinion.

SANNER et al. v. STATE, to Use of GISRIEL.

(Court of Appeals of Maryland. April 1, 1897.)

CRIMINAL LAW—INFORMERS—WHO ARE.

Where a person told the marshal of police that he thought a policy business was carried on in a certain building, and, in consequence, the police raided the premises, and found there the appliances for such business, and certain persons, whom they arrested, and from some of whom was obtained evidence of the guilt of two, who pleaded guilty and were fined, such person, as informer, was entitled to one-half the fines, under Code, art. 27, § 176, enacting that if any person shall keep a house for selling lottery tickets he shall be subject to a penalty of \$1,000, one-half of which shall go to "the informer."

Appeal from superior court of Baltimore city.

Action by the state, to the use of William Gisriel, against Isaac S. Sanner and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, and BOYD, JJ.

W. Pinkney Whyte, for appellants. Geo. R. Galther, Jr., and Edward T. Jones, for appellee.

BRYAN, J. Elijah Johnson and Nathaniel Diggs were each indicted in the criminal court of Baltimore on the charge of keeping

a room for the purpose of selling lottery tickets, and, having pleaded guilty, were each fined a thousand dollars. Gisriel alleged that he was the informer in the two cases, and that he was therefore entitled to one-half of the amount of the fines, by virtue of article 27, § 176, Code. He therefore brought an action on the official bond of Sanner, the sheriff, to the use of himself as equitable plaintiff. Having recovered judgment, the sheriff and his sureties appealed. The evidence showed that Gisriel called on the marshal of police, and told him that he had rented out the upper story of the house in which he conducted his business, and that for several days he had noticed at noon and in the afternoon a large number of white and colored persons going to the place, and that he thought that the policy business was carried on there. The evidence also showed that he gave the marshal a description of the building, telling him of the exits and entrances, and that in consequence of this information the marshal ordered the place to be raided by the police, and that they found a number of persons in one of the upper rooms, and some of the equipments and appliances used in carrying on the policy business; that all persons found there were arrested; that they found Johnson and Diggs locked up in a room, and they were also arrested; that evidence of the guilt of these men was obtained from persons arrested at the time, and that they were subsequently indicted, and pleaded guilty, and were fined a thousand dollars each, which fines were paid to the sheriff; and that a demand was made on the sheriff in behalf of Gisriel, by his attorney, for the payment of a moiety of these fines, and that he refused to pay it. The evidence also showed that the marshal received his first information about the character of the raided place from Gisriel, and that before that information he had never suspected it to be a policy shop, or heard of its being suspected as such. We must decide, on the supposition that this evidence is true, whether Gisriel is entitled to the one-half of the fines which the statute gives to the informer. It enacts that if any person shall keep a house, office, or other place for the purpose of selling lottery tickets, he shall be subject to a penalty of a thousand dollars, to be recovered by indictment, or by action of debt in the name of the state, one-half of which shall go to the informer. It is impossible to mistake the meaning and intention so plainly expressed. Experience had shown that there were difficulties in the way of detecting and punishing this offense. The legislature desired to increase the facilities for discovering when it had been committed by offering rewards to those who were aware that the law had been violated, provided they would give information to the proper legal authorities. The informers were not required to take part in arresting offenders; neither was it necessary that they should be

witnesses at their trial. It does not increase the reputation of public trials for purity and justice when the witnesses are to receive rewards in case of the conviction of the accused. Of course, under this statute, the reward could not be payable except in case of conviction. But when conviction has taken place, and judgment has been rendered, and the fine paid, the only question in respect to the reward is the ascertainment of the informer. Now, Gisriel made known to the marshal of police that which convinced him that the place in question was "a headquarters of policy," as he expressed it in his testimony. Gisriel described the house minutely and particularly, so that every precaution might be taken to prevent the escape of the occupants, and he sent a police force, which entered the rooms, and arrested a number of persons who were apparently engaged in and about the policy business, as it is termed in the evidence. Two of the persons arrested agreed to become witnesses, and they accused Johnson and Diggs, who, on being indicted, pleaded guilty. Manifestly, the arrested persons who became witnesses were not the informers. Without the knowledge communicated by Gisriel, the arrest could not have been made. The communication was made to the marshal for that purpose. After the arrest, everything else followed as might have been expected. The arrested persons were anxious to save themselves, and readily gave their evidence against the men who had charge of the business. The consequence following directly, by regular consecutive steps, from Gisriel's information was the prosecution and conviction of the accused. If a man should say to the sheriff a murder has been committed in a certain house, describing it accurately, and the murderer and the body of his victim are both in a room in the upper part of the house, would he not have all the attributes of an informer, although he might not know the name either of the accused or the deceased? Would the fact that he might not have such personal knowledge of the matter as was necessary to make him a competent witness have any weight in determining the value of the information which he had given? What the executive authorities of the law require in the matter of arrests is knowledge that a crime has been committed, and knowledge of the place where the offender may be found. When a person furnishes this knowledge in advance of all others, he becomes entitled to the reward promised to an informer, provided a prosecution and the conviction of the accused ensue, founded on his information. Under a statute like the one now before us, where the informer is to be paid a portion of the fine, it is, of course, necessary that the fine should be paid by the convicted party. Gisriel's communication to the marshal was as full, as distinct, and as accurate as could have been required by an intelligent officer, and it resulted, by a natural and or-

inary succession of events, in the conviction of those who were violating the law. The instructions given by the trial court are in accordance with the views which we have expressed. Judgment affirmed.

SHAFFER v. SHAFFER et al.

(Court of Appeals of Maryland. April 1, 1897.)

EXMORTUOS—SETTLEMENT—CONCLUSIVENESS—RELEASE—ESTOPPEL—JURISDICTION OF ORPHANS' COURT.

1. Where the distributees under a will filed a petition in the orphans' court, alleging errors in the executor's account in respect to a personal claim of the executor after it had been duly passed and approved, and the balance appearing therein had been distributed, the burden was on them to establish such errors.

2. Where, on payment to them of their respective shares, distributees executed and acknowledged releases, attested and under seal, discharging the executor from all claim on account of the settlement of his account, such releases operated as estoppels in pais.

3. The orphans' court had no jurisdiction to inquire into the consideration, or to pass on the validity, of such releases.

Appeal from orphans' court, Frederick county.

Petition by Martin T. Shafer and others against Peter W. Shafer, as executor of Peter Shafer, deceased. From orders in favor of petitioners, the executor appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Wm. P. Maulsby, J. S. Newman, and C. W. Ross, for appellant. G. H. Worthington, for appellees.

ROBERTS, J. Peter Shafer, Sr., late of Frederick county, in this state, died in the month of July, 1895, leaving a last will and testament, which has been duly admitted to probate in the orphans' court of said county, and letters testamentary thereon were by said court granted to Peter W. Shafer, the executor therein named, who has accepted the trust, and in due course of administration has passed his first account in said court. After the settlement of said account, certain of the distributees under the said will, who are the appellees here, filed their petition in said court, alleging certain errors in said account, and asking that the same be corrected. Upon this petition the court passed an order requiring the appellant to answer the same, and reserving the questions raised by said petition until the presentation of the appellant's final account as executor. The appellant filed his answer within the time required by said order, admitting certain facts as stated in said petition, and denying almost every material allegation contained therein. General replication was filed, and testimony taken against the protest of the appellant. Whereupon the court below passed an order, concurred in by two of the judges, rescinding and annulling

the order approving and passing the first account of the appellant as executor, so far as it relates to the allowance of the appellees' claim for the sum of \$1,000 for services rendered the testator in his lifetime, and the sum of \$150 paid for professional services claimed by the appellant to have been rendered the estate in the settlement thereof. All three judges concurred in the passage of an order charging the executor with the sum of \$745, being the amount claimed to be due from the executor's daughter, Eva L. Shafer, which he had returned as "Desperate." As to the first item of \$1,000, the same having been regularly proven and passed by the court below on the 7th of November, 1895, and indorsed, "Will pass when paid," the same was thereupon entered upon the "Claims Docket" of said court, and allowed in said first account. On the 27th of November, 1895, the appellant, acting in pursuance of an order of said court, gave the usual notice to the legatees and distributees under said will, by publishing the same in the Daily News, a newspaper published in Frederick county, for two successive weeks prior to the day named, that a meeting would be held under the direction and control of said court at the office of the register of wills of Frederick county, at 10 o'clock a. m. on said day, for the payment of all legacies, and for distribution among the residuary legatees of the balance due them under said will. The two other claims objected to will be hereafter considered, but what we desire to say concerning the executor's claim will be in great measure applicable to all the objections urged against the first account as stated. When the appellant executor had stated said account, and distribution had been made, and the same was "approved, passed, and admitted to record," by the order of said court, it became possessed of certain attributes, and was prima facie evidence of the verity of the facts contained therein, which the court had by its order sanctioned; and beyond all peradventure the onus probandi rests upon those who seek to maintain the affirmative of the allegations contained in the petition. To support a different theory of practice to be observed by the orphans' courts of this state would be to reverse many of the decisions heretofore announced by this court, affirming a practice founded in reason and resting upon authority. As sustaining these views we refer especially to *Owens v. Collinson*, 3 Gill & J. 25-27; *Spedden v. State*, 3 Har. & J. 251; *Ruby v. State*, 55 Md. 484-490; *Wilson v. McCarty*, Id. 277-281; *Scott v. Fox*, 14 Md. 388; *Stratton's Case*, 46 Md. 554. The claims of executors and administrators stand on the same footing with those presented by other creditors of deceased persons. *Levering v. Levering*, 64 Md. 309-413, 2 Atl. 1. In this case the claim of the executor was passed after proof, and without objection, and it is clear, we think, beyond question, that the appellant received the amount of his claim in full on the 27th of November, 1895; and, to establish

this fact, we do not consider it was necessary for him to have drawn a check in his representative capacity, payable to himself in his individual capacity. He had in hand ample funds with which to pay it, and he swears that he did pay it, and this we think conclusive of it, as there is no proof to the contrary. It was not, however, for him in the first instance to establish such a fact, but the burden was upon the appellees to support such contention. The burden was equally upon the appellees to disprove by competent testimony the correctness of the appellant's claim. The law has left the appellant in a proceeding like this to act upon the defensive, and, until the appellees have successfully assailed his claim, he is entitled to remain silent, and need offer no further evidence to sustain it. *Stevenson v. Schriver*, 9 Gill & J. 336. After a most critical examination of the testimony taken under the petition of the appellees, we have found no satisfactory legal proof which sustains the allegations of the petition. Nearly all the witnesses who have testified in support of the facts alleged in the petition are interested as legatees under said will, and whose testimony relates almost exclusively to the fact that they did not know that the claim of the executor for \$1,000 was allowed in his first administration account; that they went to the office of the register of wills of said county to get the money which they were entitled to under the distribution made; that they signed a paper (the same being a release, which will be hereafter considered) they did not read or hear read; but that they did not, in signing said paper, intend to approve of the allowance of the claim of the executor for services, or to assent to the payment of the counsel fee. But there is a total absence of any proof which legally tends to show that any item of the administration account was unjust, false, or fraudulent or improperly allowed. This, we think, was essential in support of the appellees' contention. While orphans' courts in this state are courts of competent jurisdiction, they exercise only a special limited jurisdiction, and are confined strictly to the letter of their authority. They must exercise only the powers conferred on them in accordance with the law, and the facts necessary to clothe them with jurisdiction must affirmatively appear upon the face of their proceedings. They must not be treated as matters of inference or presumption. *Norment v. Brydon*, 44 Md. 112; *State v. Warren*, 28 Md. 338; *Townshend v. Brooke*, 9 Gill, 90; *Lowe v. Lowe*, 6 Md. 352; *Michael v. Baker*, 12 Md. 158; *Snively v. Beavans*, 1 Md. 208; *Williams v. Holmes*, 9 Md. 289; *Spencer v. Ragan*, 9 Gill, 482; *Yeaton v. Lynn*, 5 Pet. 224. Speaking of controversies similar to the one now under consideration here, Mr. Justice Irving, delivering the opinion of this court in *Bantz v. Bantz*, 52 Md. 689, 690, said: "The orphans' court is the proper and primary tribunal (although sometimes a court of equity is invoked) to determine all such

controversies, and this court has repeatedly said that, so long as an estate is open (which means not finally closed and settled), the accounts of the executor and administrator in that court are subject to revision and correction as to any matter discovered to be in error. *Edelen v. Edelen*, 11 Md. 415; *Stratton's Case*, 46 Md. 551.

The simple passage of a claim against the estate, or the passage and approval of an account retaining for it, does not establish the correctness of either. The most that it accomplishes is to protect the administrator or executor, if he actually pays it without knowledge of its incorrectness. Passage of a claim by the orphans' court does not bind the executor to pay it. He may still resist it, and the claimant is put to his proof. Here the claim for services is preferred by the executor against the testatrix, with no one to object but the petitioners. He is his own paymaster, and because he has chosen to put it into his accounts, and gotten the ex parte approval of the orphans' court to it, it is clear that he ought not, until the estate is wholly closed, to be regarded in the same light as if, on the faith of the court's approval, he had paid a stranger his claim against the estate; but the persons interested in the estate, and its distribution, ought to be permitted, in a proper way, and within proper time, to make their objections to the propriety of his claim. We think this application was within proper time. The claim alluded to was only passed by the court three days before the passage and approval of the first administration account. The case of *Bantz v. Bantz*, supra, from which we have just quoted, was much relied upon by the appellees in support of their argument in this court, both oral and written, but it is in no respect in conflict with the numerous decisions announced by this court relating to the same subject. The appellees have sought to relieve themselves of the onus probandi, and we but reassert the doctrine heretofore maintained, when we say that they cannot contest an administration account without assuming to themselves the position which ordinarily adheres to the plaintiffs in any action. They assert that the account is erroneous, and they must establish the truth of their charge. On the day upon which the legatees met at the register's office the first administration account had been stated, and, after payment of costs, charges, and expenses, and the several claims proven against the estate, including \$1,000 to the executor for his personal services, and \$150 for professional services, there remained a balance for distribution of \$54,527.60, which was on that day distributed to those entitled thereto under the provisions of said will. Upon this occasion nearly all of the residuary legatees were present, and each was paid the amount distributed to him. The administration account was on the desk of the register within reach, and easily accessible to all, who

could, if they had desired, have examined the same. Releases had been prepared by the deputy register of wills, and, when the said legatees were severally called to receive the amount distributed to each, a release was executed and acknowledged before the register of wills, and a check was delivered by the appellant to such legatee. These releases are very similar in form and substance. There is but small difference in the phraseology of any of them, and, for the purposes of this opinion, we will treat them as substantially the same. They read as follows: "Know all men by these presents, that I do hereby acknowledge that I have received from Peter W. Shafer, executor of the last will of Peter Shafer, Sr., deceased, the full and just sum of eighteen hundred and sixty-two dollars and ninety-two cents (\$1,862.92), being in full of the balance due me on settlement of said executor's first account, exhibited and passed the orphans' court for Frederick county on the 7th day of November, 1895, and hereby release, exonerate, acquit, and forever discharge the said Peter W. Shafer, executor as aforesaid, his heirs, executors, or administrators, from all claims or demand whatsoever on account of said settlement as aforesaid, either in law or equity." All of the releases are under seal, and signed, attested, and acknowledged before the register of wills of said county, and have been offered in evidence by the appellant in the trial below.

We come, now, to the consideration of the legal effect of these releases, and the relation which they hold to the questions to be determined on this appeal. The appellant contends that these papers cannot be construed as mere receipts, but are drawn with all the formality of deeds, executed, attested, and acknowledged as such; that they are absolute, and operate as estoppels in pais; that they, in express terms, refer to the first administration account as settled by said executor, "and release, exonerate, acquit, and forever discharge him from all claim or demand whatsoever on account of the settlement of said account, either in law or equity"; and as such we must regard them, as the case is presented by this appeal. The court below had no jurisdiction to inquire into their consideration, nor to pass upon or determine their validity. That duty belongs to another jurisdiction, and was no part of the jurisdiction which the court below sought to exercise. While the petition does not allege that these papers were obtained by fraud practiced upon the appellees, yet, if it did, the legal effect would not be different. There is nothing in the proof offered which would justify any such charge. Fraud is not a presumption, but is a fact to be shown by legal and competent evidence, as any other fact proven. It proves nothing in support of a charge of fraud that a releasor, who could both read and write, failed to read the contents of a release, when he, and 20 others on the same

day, at about the same time, were engaged in the execution of similar releases, without giving the slightest attention to their contents. The proof in this case goes no further, and thus fails in its purpose. Spitze v. Railroad Co., 75 Md. 162-171, 23 Atl. 307. The order of the court below requiring the debt of Eva L. Shafer for \$745, returned by the appellant and marked "Desperate," to be "corrected, made collectible, and charged against the executor," is without the slightest proof to support it, and, having been objected to, the objection should have been sustained. It is wholly unnecessary that we should discuss this testimony in detail, or make anything more than a general reference to it. It is sufficient to say that it is wholly irrelevant, depending in great measure on hearsay, and legally insufficient to sustain the proposition it was offered to support. It follows from what we have said that the court below has committed error in the passage of both the orders appealed from, and therefore both orders must be reversed. Orders reversed, with costs.

BRODIE v. MITCHELL et al.

(Court of Appeals of Maryland. April 1, 1897.)

ADMINISTRATION CUM TESTAMENTO ANNEXO—
RIGHTS OF WIDOW.

A widow, by renouncing right to administer when it is supposed her husband died intestate, is not, on discovery of will, and renunciation of right by executor, deprived of her right to administration cum testamento annexo, and to notice of grant of letters, as provided in Code, art. 93, §§ 31, 33, 34.

Appeal from orphans' court, Baltimore county.

Petition by Rachel B. Brodie for revocation of letters of administration cum testamento annexo on the estate of John Brodie, deceased, granted to W. Frank Mitchell and Henry S. Jean, and for grant of letters to petitioner. Petition dismissed, and petitioner appeals. Reversed.

Argued before McSHERRY, O. J., and FOWLER, PAGE, BOYD, and RUSSUM, JJ.

John I. Yellott, for appellant. W. Frank Mitchell, for appellees.

RUSSUM, J. This appeal is taken from an order of the orphans' court of Baltimore county refusing to revoke letters of administration cum testamento annexo, which had been granted to the appellees upon the estate of Dr. John A. Brodie, and dismissing the petition of the appellant, asking the revocation and the grant of letters to her. Dr. John A. Brodie died in the month of June, 1896, apparently intestate, leaving a widow (the appellant), but no children. The appellant, the person entitled to administer the estate, renounced her right thereto, and, at her request, letters of administration were granted to her brother, George P. Stanfield, who proceeded

to settle the estate. In October, 1896, Dr. Eldert, of the state of New York, presented in the orphans' court a paper writing purporting to be the will of Dr. John A. Brodie, made some years before, in the state of New York, where Dr. Brodie then resided. This paper writing was admitted to probate, without contest, and Miss Elizabeth Eldert, the executrix named in the will, filed her renunciation of the right to administer, and requested that letters of administration with the will annexed be granted to the appellees, with which request the orphans' court complied, without any notice to the appellant, the widow. The appellant then appeared in court, and objected to the grant of letters cum testamento annexo to the appellees, and filed her petition, asking that the order granting letters to the appellees be revoked, and that they be granted to her, as being the first entitled under the statute, which right was denied, and her petition dismissed.

The contention of the appellees is that, under section 38 of article 93 of the Code of Public General Laws, the widow was not entitled to notice of the grant of letters with the will annexed, because she had renounced her right to administer upon the estate when she supposed her husband had died intestate, and the orphans' court could therefore proceed as if she were not entitled. This contention cannot be maintained. Section 34 of article 93 provides that, "where letters of administration with the will annexed are to be granted, the residuary legatee or legatees shall be preferred to all except a widow," and that, "before administration shall be granted to any other person," the court is required to proceed "in the manner directed by law, with respect to executors within the state." The "manner directed by law" is to be found in sections 31 and 33 of the same article. The language of section 34 necessarily imports that the persons entitled shall have a day in court, to make application. It was never intended that the orphans' court might appoint whom they pleased, and when they pleased, administrator cum testamento annexo, without notice or opportunity to those entitled of making application. The appellant, Mrs. Brodie, having the right to letters of administration with the will annexed, she could not be deprived of it, except by her renunciation; and the duty of the orphans' court was to summon her. Every reason that can be assigned for requiring notice to the parties entitled in the first instance applies with equal force to the second. *Thomas v. Knighton*, 23 Md. 318; *Georgetown College v. Browne*, 34 Md. 456; *Wilcoxon v. Reese*, 63 Md. 542. The appellant never relinquished her right to administer the will, but promptly insisted on it. The orphans' court, in appointing the appellees, upon the nomination and delegation of the executrix named in the will, exceeded its authority. The right to administer is a valuable right, and cannot be delegated. *Stocksdale v. Conaway*, 14 Md. 99, and cases

there cited; *Thomas v. Knighton*, 23 Md. 318. For these reasons, the order of the orphans' court for Baltimore county refusing letters of administration c. t. a. on the estate of Dr. John A. Brodie, and dismissing the petition of the appellant, must be reversed, and the cause remanded for further proceedings in accordance with this opinion; costs to be paid out of the estate.

GUSDORFF v. SCHLEISNER.

(Court of Appeals of Maryland. March 31, 1897.)

PARTNERSHIP—DISSOLUTION—EQUITABLE RELIEF—PLEADING—INJUNCTION.

1. Meaning sought by a bill to be placed on a partnership agreement on which the bill is founded, which is exhibited with the bill, being negatived by the agreement, is not admitted by demurrer to the bill.

2. One partner may sue the other in covenant, without an account stated, the partnership articles being under seal, and a covenant or agreement in them being violated; so that there is no necessity for equitable relief.

3. In a suit by one partner to compel the other partner to make payment according to partnership articles, and to have the partnership dissolved, and its affairs wound up by a receiver, defendant cannot be enjoined from withdrawing his own money from banks in which it is deposited.

Appeal from circuit court of Baltimore city.

Suit by Lewis A. Gusdorff against Solomon Schleisner. Demurrer to bill was sustained, and complainant appeals. Affirmed.

Argued before MCSHERRY, O. J., and BRYAN, BRISCOE, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Charles W. Field and Isidor Schoenberg, for appellant. Isidor Rayner and M. Sonnehill, for appellee.

ROBERTS, J. The facts out of which this controversy arises are substantially that on the 6th of February, 1896, Lewis A. Gusdorff, the appellant, and Solomon Schleisner, the appellee, agreed in writing, under seal, to become partners in the general merchandising business for the term of three years, commencing on the 1st of July, 1896, and ending on the 30th day of June, 1899; that, by the terms of said agreement, the respective sums which each partner was to contribute to the partnership capital were expressly stipulated, as well as the times when said sums were to be paid; that by the fourth paragraph of said contract of partnership it was agreed "that the capital of said partnership shall consist of the sum of thirty thousand (\$30,000) dollars, which shall be brought in by the said partners in the following proportions, namely: The sum of ten thousand (\$10,000) dollars by the said Solomon Schleisner, and ten thousand (\$10,000) dollars by the said Lewis A. Gusdorff; and the said sums so advanced by the said partners shall be paid into the Third National Bank of Bal-

timore, to the credit of said partnership, on or before the fourth day of August, eighteen hundred and ninety-six; and the said Lewis A. Gusdorff shall contribute an additional ten thousand (\$10,000) dollars to said partnership on or before the thirty-first day of December, eighteen hundred and ninety-six, by depositing the same in the bank aforesaid, to the credit of said partnership." And, further, by the eighth paragraph of said agreement, it was agreed "that said partners shall not, without the consent in writing of the other, employ any of the moneys, goods, or effects belonging to the said partnership, or engage the credit thereof, in any matter or thing except on the account of or for the use and benefit of the said partnership; nor shall said partners, by himself, or with any other person or persons whomsoever, during the continuance of the said partnership, directly or indirectly, engage in any other mercantile pursuit, but his time and attention shall be devoted to the partnership which are by these articles formed." The bill prays for relief as follows: (1) For a dissolution of the co-partnership existing between the appellant and the appellee; (2) for a specific performance in part of the articles of co-partnership, to the effect that the appellee be required to contribute to the co-partnership capital the sum of \$8,000, in accordance with the terms of said agreement; (3) for the appointment of a receiver to take charge of the partnership assets; (4) for the writ of injunction to restrain the appellee from withdrawing from certain banks named in the bill his personal funds standing to his credit therein, and from disposing of any of the partnership assets in any manner whatever. Upon filing the bill, an injunction was issued, and a receiver appointed. The appellee answered the bill, denying all its material allegations, and demurred to the jurisdiction of the court below to grant specific performance of the contract of co-partnership, and to restrain the appellee from withdrawing his individual deposits from the banks named in the bill. The court sustained the demurrer and dissolved the injunction, and, from the action of the court below, this appeal is taken.

The appellant, in his printed brief, says: "The only contest raised by the demurrer to this bill, and decided by the court below, is as to the power of the court to issue an injunction restraining Schleisner from drawing his \$8,000, or thereabouts, out of bank and converting it to his own use, until the further order of the court; and that is the sole question for this court to decide." In passing upon this contention, it will be necessary for us to examine briefly some of the other questions named in the bill, as throwing light upon the proposition conceded to be the leading and only inquiry on this appeal.

There is exhibited with the bill a duplicate of the articles of co-partnership, certain paragraphs of which we have set out in this

opinion, that the same may assist in the presentation of the object and purpose sought to be accomplished by the bill. The truth of the facts set out in the bill, where they are properly pleaded, will not be questioned; but, where the bill alleges a fact expressly negatived by the contract of partnership filed with the bill, such representation of fact cannot be said to be properly pleaded, nor is it entitled to be accepted as true. On the contrary, the bill and exhibit, being read and construed together, show very clearly that "said partners shall not by himself, or with any other person or persons whomsoever, during the continuance of the said partnership, directly or indirectly, engage in any other mercantile pursuit, but his time and attention shall be devoted to the partnership which are by these articles formed." So that the meaning sought to be placed upon the clause of the articles of co-partnership just quoted is not, even for the purposes of pleading, to be considered as admitted, for the manifest reason that the concession of the allegation contained in the bill would be an express denial of the clause just referred to. Such a construction cannot be permitted, as the co-partnership agreement is the sole foundation upon which the bill rests and from which the proceeding takes its source. According to the statement of facts contained in the bill, no benefit can now reasonably be expected to result to either party by the specific performance of the contract of co-partnership, as it is conceded that the appellee is so far physically disabled from disease as to be incapable of engaging in any business, or the supervision of the same; and it is further admitted by the appellant that in consequence of his being engaged in other business, as a member of the firm of Gusdorff Bros., he is unable to give his personal attention and supervision to the business of the firm of Sol. Schleisner & Co. So that we are here confronted with a state of case in which neither partner is able to manage the affairs of the firm, notwithstanding the articles of co-partnership stipulate that, "during the continuance of the partnership, neither party shall, directly or indirectly, engage in any other mercantile pursuit, but his time and attention shall be devoted to the partnership which is by these articles formed." It is a universal rule of equity that he who asks for a specific performance must himself be in a condition to perform. *Morgan v. Morgan*, 2 Wheat. 290. Mr. Pomeroy says it is well settled, as a general rule, that an agreement to enter into a partnership, which would be literally performed by executing the partnership articles, or to carry on a partnership already established, will not be specifically enforced. *Pom. Spec. Perf. Cont.* § 390; 2 *Lindl. Partn.* (5th Ed.) 476; *Fry, Spec. Perf.* (3d Am. Ed.) 681; *Scott v. Rayment*, L. R. 7 Eq. 112; *Buck v. Smith*, 29 Mich. 166; *Meason v. Kaine*, 63 Pa. St. 335; *Sichel v. Mosenthal*, 30 Beav. 371.

The first item of relief prayed for is that the existing partnership between the parties to this proceeding be dissolved, and this is asked by the appellant upon the admitted fact that the appellee's physical condition is such that it is impossible for him to engage in any business, and, as conceded by the bill, the appellee, upon ascertaining the condition of his health, informed the appellant "that the only course to pursue would be to wind up the business at once," etc., suggesting an assignment for the benefit of creditors as the best thing to do. The various sums of money which the appellee had deposited in the banks heretofore mentioned were still in those banks at the time the bill was filed, and would necessarily have passed into the hands of any trustee named by said partners for the benefit of the firm's creditors; but this proposition was declined by the appellant, who preferred the appointment of a receiver and the granting of an injunction, and, as a result, this bill was filed. The bill contains no allegation of the insolvency of the appellee, and it is a reasonable inference that, if he had been insolvent, the appellant would not have entered into a co-partnership with him for the term of three years, commencing on the 1st day of July, 1896, and which employed a capital of \$30,000. The bill was filed on the 19th of August, 1896, 50 days after the partnership was to become an active business concern. Each partner, prior to the 4th of August, 1896, contributed to the capital of said partnership the sum of \$2,000, and neither partner has made any further contribution to the capital, although the appellant claims to have been always ready and willing to contribute such sum or sums as he had contracted to pay; but it is charged that the appellee has failed to contribute the amount which he has, by the terms of said contract, agreed to pay, although repeatedly requested so to do; and it is further charged that the appellee has incurred, or sought to incur, on the credit of said firm, liabilities to a large amount, and that the appellant has always been able and willing to comply with his part of said articles of co-partnership. The facts thus enumerated sufficiently explain the character of the controversy. Speaking of a proceeding of this nature, Mr. Justice Martin, delivering the opinion of this court in *Geiger v. Green*, 4 Gill, 475, said: "It is an acknowledged principle, in the exercise of that branch of equity jurisprudence which respects the specific performance of contracts, that it is not a matter of right in the parties, but the application is addressed to the sound and reasonable discretion of the court. It is granted or withheld according to the circumstances of the case, and a court of equity must be satisfied that the contract sought to be enforced is fair and just and reasonable, and equal in all its parts, and founded on an adequate consideration, before the court will interpose with this extraordinary assistance." Measured by the requirements of this rule, should this applica-

tion recommend itself to the favorable consideration of a court of equity? We think not. The bill fails to satisfactorily show that the appellant is without a full and adequate remedy at law, or that the appellee is unable to respond in damages for such loss as the appellant may have sustained by the conduct of the appellee in failing to keep and observe the articles of co-partnership. Nor is the appellant entitled to relief in this proceeding because of the failure of the appellee to give to the partnership affairs his personal attention and supervision, since, in this particular respect, the appellant is equally at fault in the observance of the terms of his contract. It may be contended that one partner cannot sue the other at law in an action of account, unless there be an account stated; yet it is equally so that he may in covenant, if the articles be under seal, and any covenant or agreement in them be violated. *Wadsworth v. Manning*, 4 Md. 70.

In conclusion, and as decisive of the question which the appellant charges is "the sole question for this court to decide," we think the court below correctly determined that it had not jurisdiction to restrain the appellee from dealing with his individual deposits as his own property. In *Spiller v. Spiller*, 3 Swanst. 567, the bill prayed specific performance of an agreement to sell certain copyhold premises. Lord Eldon, delivering the opinion of the court, said: "I wish it to be understood as my opinion that, in general, on a bill for the specific performance to sell, the plaintiff is not entitled to restrain the owner from dealing with his property. A different doctrine would operate to control the rights of ownership, although the agreement was such as could not be performed." We think the rule thus announced equally applicable to the case at bar. There is nothing in this case to justify the granting of the writ of injunction, and we have, after the most careful examination, failed to discover a single authority sustaining any such view. As a consequence of the reasons heretofore assigned, the order of the court below sustaining the demurrer to the bill of complaint, and dissolving the injunction, is hereby affirmed, with costs. Order affirmed, with costs.

FORD v. STATE.

(Court of Appeals of Maryland. April 1, 1897.)
LOTTERY LAWS—CONSTRUCTION—CONSTITUTIONALITY.

1. Laws 1894, c. 310, § 178, declaring that if any one have in his possession any book, list, or slip or records of the numbers drawn in any lottery, or of any lottery tickets, or of any money received or to be received from the sale of any lottery tickets, he shall be liable to indictment, provided that this shall not apply to one having possession of such articles for the purpose of procuring or furnishing evidence of violations of the lottery laws, makes possession the offense, without regard to the person's knowledge of what the articles are.

2. Laws 1894, c. 310, § 178, making possession of certain articles connected with a lottery an offense, without regard to the person's knowledge of what the articles are, is within the police power, and does not deprive accused of liberty without due process.

Appeal from criminal court of Baltimore city.

Thomas M. Ford was convicted of a violation of the lottery laws, and appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, RUSSUM, and BOYD, JJ.

Thos. C. Ruddell and B. Chambers Wickes, for appellant. Atty. Gen. Clabaugh and Henry Duffy, for the State.

BOYD, J. The appellant was indicted in the criminal court of Baltimore city for violating the lottery laws of this state. There are five counts in the indictment, to the fourth and fifth of which demurrers were filed, which were overruled. The traverser then filed a special plea to the fourth and fifth counts, which was demurred to by the state, and the demurrer sustained. The case was then submitted to the court on a plea of not guilty, and the traverser was found guilty on the fourth and fifth counts, and not guilty on the others. During the progress of the trial, he offered certain evidence which was ruled out, and an exception was taken to that ruling. Although the rulings of the court on the several demurrers, and on the admissibility of the evidence offered, are all before us, the principal questions involved in them are the construction and constitutionality of section 178 of chapter 310 of the Laws of 1894. The portion of that section with which we are particularly concerned on this appeal is the provision that, "if any person shall have in his possession in this state any book, list, slip or record of the numbers drawn in any lottery, whether in this state or elsewhere, or any book, list, slip or record of any lottery ticket or anything in the nature thereof, mentioned in this section, or of any money received or to be received from or for the sale of any such lottery ticket, or thing in the nature thereof as aforesaid, [he] shall be liable to indictment, and upon conviction shall be, in the discretion of the court, fined any sum not exceeding one thousand dollars, or shall be imprisoned for a period not exceeding one year, or shall be both fined and imprisoned: provided, however, that this section shall not apply to any person who may have possession of any of the articles herein mentioned for the purpose of procuring or furnishing evidence of violations of any of the provisions of the laws relating to lotteries." An examination of our statutes will show numerous efforts on the part of our legislatures to prevent the lottery business from being carried on in this state. Most of the provisions in our present Code looking to that end were in the Code of 1860, and

some of the statutes therein codified had been passed many years before that date. Under that Code it was, and still is, a violation of law to draw any lottery, to sell lottery tickets, policies, certificates, or anything by which the vendor or other person promises or guarantees that any particular number, character, ticket, or certificate shall in any event, or on the happening of any contingency, entitle the purchaser or holder to receive money, property, or evidence of debt. If any person kept a house, office, or other place for the purpose of selling such tickets, policies, certificates, etc., he was subject to a penalty of \$1,000, as was the owner of the house or office who permitted it to be used for such purpose. Then section 178 of article 27 of the Code imposed a like penalty on any person who brought into this state any such lottery tickets, policies, certificates, etc.; and other provisions, with heavy penalties attached, are in the Code, looking to the suppression of this great evil, but it still existed. The legislature of 1894 went a step further, and added to section 178 the provision above quoted, whereby the mere possession of the articles named therein is made a crime, unless it be for the purpose of procuring or furnishing evidence of violations of any of the provisions of law relating to lotteries. The language of this section is too plain to admit of any discussion as to its meaning. When considered in connection with the previous legislation on this subject, it is evident that the legislature found that the statutes in force were not sufficient to prevent the lottery business in this state; and it was therefore made a crime for any one to have any of the articles named in his possession, unless it be for the one purpose provided for by the statute,—procuring or furnishing evidence of violations of the law. It will be necessary, then, for us to determine whether such legislation is a valid exercise of the powers vested in the state. It cannot now be denied that laws and regulations necessary for the protection of the health, morals, and safety of society are strictly within the legitimate exercise of the police powers of the state, provided, of course, that such regulations be reasonable. Such laws are not prohibited either by the federal constitution or that of this state. The cases of *Singer v. State*, 72 Md. 464, 19 Atl. 1044; *McAllister v. State*, 72 Md. 390, 20 Atl. 143; *Long v. State*, 74 Md. 563, 22 Atl. 4; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273; and *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 902, 1257,—will illustrate the application of the doctrine, without incurring this opinion with the citation of the numerous other decisions on the subject.

If it be necessary to refer to any authority to show that the laws for the suppression of lotteries are regarded by the courts to be in the interest of the morals and welfare of the people, the cases of *Ballock v. State*, 73 Md. 1, 20 Atl. 184, and *Stone v. Mississippi*, 101 U. S. 814, will suffice to give the views of the

supreme court of the United States and of this court on that subject. There probably never was a time in the history of this state when it was more necessary than the present to use all legitimate means to stamp out this and kindred evils, which are demoralizing so many who might otherwise be useful and honest citizens. The man that is always looking for greater returns than his investment or efforts justify is generally a useless, if not a dangerous, member of society, and a lottery is said to be "a game in which small sums are ventured for the chance of obtaining a larger value." It is not difficult to see why one given up to that sort of business soon becomes worse than useless to his community. The tendency is to make him idle, and idleness easily begets crime. Families are deprived of the comforts and sometimes necessities of life which are due them, because those who should provide them either squander their means in pursuit of such gains, or have had their powers of earning paralyzed by the pernicious habit of this form of gambling. In view of the disastrous effect on those dealing with lottery tickets, and upon the community where such business is conducted, there can be no doubt about the right of the legislature to prohibit any one from having them in his possession, if that be reasonably necessary for the suppression of the evil. As the statute makes it a crime to have them in possession, the purpose for which the traverser had them is wholly immaterial; and, inasmuch as the legislature did not make the crime dependent upon the knowledge of the party as to what the articles were, it was unnecessary to allege in the indictment that the traverser had them in his possession knowingly, willfully, or in any other words that would impute knowledge of the fact that they were some of the articles prohibited by the law. The allegations in the indictment were clearly sufficient.

But it is contended that, if that be conceded, the effect of the statute was simply to shift the burden to the traverser, and he could still prove that he did not have knowledge of what the articles were, and hence was not guilty of a violation of law, and that, if the statute must be so construed as to deprive him of that right, then it is in conflict with the constitutions of the United States and of this state. This question was intended to be raised by the special plea filed and the offer of testimony stated in the bill of exceptions. The plea alleges that the defendant "was in possession of policy books and slips, as stated in said indictment, but also says that he is in no way engaged in the policy business, and that he was not aware that the papers, books, and other articles which were found in his possession were policy or lottery slips, that the said articles were given to him to carry to a certain place, and that he was then taking them to that place without knowing what said articles were." The proffer of evidence as stated in the bill of exceptions was that said

articles were given to him by a man who asked him to deliver them to another man, and that he did not know what said articles were, and had no knowledge that they were policy books or anything connected with said business. It would, of course, be no excuse if the traverser did not know that the law prohibited the possession of these articles. He is, on the contrary, presumed to know that it did. Would, then, his ignorance of the fact that what he had in his possession were policy books and slips, excuse him? It is argued that to hold it would not might result in the conviction and punishment of innocent people; that some one might find on the street a book or list of lottery tickets, and not know what it was, but be convicted simply because he had it in his possession. We are not informed by the record how the books, lists, slips, and records named in the indictment are made, and what they embrace, but in the supplemental brief the learned counsel for the traverser have undertaken to explain them; and we cannot imagine how any one finding either of them on the street would be induced to take it into his possession unless he knew what it was, for it seems to be merely a collection of figures and letters, so arranged as to be utterly unintelligible to any one not learned in the business, and to an innocent person would certainly not be suggestive of any value. If any one be so unfortunate as to find one, and, while satisfying his curiosity as to what it is, a police officer overtakes him, it will be time enough to determine whether he had it in his possession, within the meaning of the statute. But if, after a person has undoubtedly gotten into his possession one of the prohibited articles, he is to be permitted, notwithstanding the language of the statute, to prove that he found it, or did not know what it was, it will make the statute practically useless; for, if he swears that such was the case, it will generally be impossible for the state to prove the contrary, and will be a great temptation to perjury, not only to the accused, but to others who might come to his assistance. If a reputable person satisfies the prosecuting officer that he came into possession of it in an innocent way, it is not likely the prosecution would be continued; or, if the court be informed of such facts, it could take it into consideration in imposing the penalty, and could fine him 15 cents or less, which would relieve him of the costs. Courts can and frequently do consider facts in imposing penalties that would not bar a prosecution. If, for example, the court is satisfied that the accused was ignorant of the statute under which he was arrested, and if, prior to the passage of the statute, what is therein prohibited was not unlawful, the court might take the fact that he was ignorant of it into consideration in passing sentence, but still he could be lawfully convicted. So far as the justice of the case is concerned, it would not be more inequitable to punish one for having

in his possession what is prohibited, when he did not know that he had it, than to punish him when he did not know it was prohibited, although he knew he had it. But he is presumed to know the law, and is therefore punished for its violation, although only unlawful because the statute says so; and why should he not be presumed to know that he had what the law prohibited from being in his possession?

In *State v. Baltimore & S. S. Co.*, 13 Md. 181, the statute under consideration provided "that it shall not be lawful for any slave to be transported on any railroad, or any steamboat, etc., without a permission in writing from the owner of such slave." The defense was that the company, or its agents, had no knowledge that the negro was on board, and had no intention to violate the law, but the court held that the liability could be enforced without reference to such circumstances. Tuck, J., in delivering the opinion of the court, said: "If the legislature deemed it expedient, in view of the grievance complained of, to hold persons responsible for transporting negroes, whether they were instigated by a criminal intent or not, they had the power to do so. Such acts may produce mischief in individual cases, but the inconvenience and injury would be much more general if, in every case of this kind, the party charged could defend himself by offering evidence that he did not know the negro was on board of the boat, and that reasonable diligence had been used to prevent such persons from coming on board. The law would scarcely afford any protection to slave owners." In *Carroll v. State*, 63 Md. 551, this court said: "As ignorance of the existence of such law will not excuse, so also ignorance of a fact necessary to be known to avoid a violation of law will not excuse." In that case there are quotations from 3 Greenleaf on Evidence (section 21) that "where a statute commands that an act be done or omitted which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation." Again: "Such is the case in regard to fiscal and police regulations, for the violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law in those cases seems to bind the party to know the facts and to obey the law at his peril." The court refers to a note in Greenleaf, where the rule "is said to apply to the sale of any articles the sale of which is prohibited, and it has been held to be no excuse that the vendor did not know it was a prohibited article." Some of the cases cited in that opinion are very applicable to this case. Laws of this character have been sustained in numerous decisions, some of which were much more likely to work hardship in individual cases than this statute. In *Ex parte Holcomb*, 2 Dill. 392, Fed. Cas. No. 6,598, the defendant was held liable for hav-

ing in his possession miniature photographs of United States treasury notes. Laws prohibiting persons from having game in their possession during specified periods have generally been upheld, although the decisions have differed as to whether the statutes applied to game received from beyond the state prohibiting the possession. *Dickhaut v. State* (decided by this court at the present term) 37 Atl. 21; *Phelps v. Racey*, 60 N. Y. 12; *State v. Randolph*, 1 Mo. App. 15; *Roth v. State*, 51 Ohio St. 209, 37 N. E. 259; *Magner v. People*, 97 Ill. 320; and other cases cited in *Dickhaut v. State*, supra.

Some of the cases construing statutes against carrying concealed weapons, regulating the sale of intoxicating liquors, oleomargarine, milk, etc., might be cited as tending to sustain the position taken by the state in this case; but it is unnecessary, as many of them can be found in the note to section 21, 3 Greenl. Ev. (15th Ed.). It is proper to say, however, that such statutes are dealing with articles that may, under certain circumstances and conditions, be lawfully used; yet the supreme court of the United States and other courts in numerous cases have held that the articles could be seized and destroyed by the proper authorities, on the principle that the constitutional right of the individual to hold property is subject to those reasonable regulations which are necessary for the common good and general welfare, especially such as affect the health and morals of the people. The policy books and slips found in the possession of the traverser could only be put to one legitimate use in this state,—procuring or furnishing evidence of the violations of the lottery law; and it is not contended he had them for this purpose.

But it is contended that the statute deprives the accused of the right of trial by jury, and of his constitutional guaranty that he be not deprived of his liberty without due process of law. But the fallacy of the argument is in assuming that it does interfere with those rights. He had the perfect right to prove either that the articles charged in the indictment were not found in his possession, or that those found were not such as the law prohibited him from having. That is the issue made by the statute. It does not deprive him of the presumption of innocence to which he is entitled, but it does make it a crime for him to have in his possession that which is of no lawful use in this state, and which injuriously affects the morals and interferes with the welfare of the people; and it is evident that the statute has made the mere possession of the articles a crime, because that is the most effectual way to break up the lottery business. The importance of placing the construction we do on the law could not be better illustrated than by what we find in this case and that of *McNeal v. State*, 37 Atl. 1116, which were argued together. The pleas and the evidence offered in the two cases are identical. It may be possible, even if not very probable,

that both received the forbidden articles under exactly similar circumstances; but, if that be so, it looks as if those engaged in the business have, for the purpose of shielding themselves and avoiding detection in the delivery of them, resorted to this method of doing so. If the police authorities ascertain who the agent for selling the tickets is, he might be detected in delivering them, so he would call some one to his assistance; and, according to the contention of the appellant, if the latter does not know what they are, but they are simply "given to him by a man who asked him to deliver them to another man," then he cannot be convicted, although he have his pockets full of some of the articles prohibited by law from being in the possession of any one. Such a construction of the law would render its enforcement very difficult, if not impossible. It is safer to give the language of the legislature its ordinary meaning, and construe it to mean what it says. We do not fear that the innocent will thereby suffer, but, if there be any such danger, it is for the legislative, and not for the judicial, branch of the government to correct any defects that may be found, from experience, to exist in the statute, and we find no such objection to it as would give the court the right to declare it invalid. The judgment must be affirmed. Judgment affirmed, with costs.

BALDWIN v. TRIMBLE.

(Court of Appeals of Maryland. April 1, 1897.)

DEED—CONSTRUCTION—ABANDONMENT OF ROAD—
—ESTOPPEL—DEED OF TRUST—LIMITATION.

1. A deed conveying land bounded on one side by O. street, and lying on both sides of the L. road, "including such parts of said L. road as may lie between said parcels of ground * * * whenever O. street * * * is opened for travel and said L. road is closed," does not attempt to create an estate in fee in futuro, but transfers all the estate the grantor has in the roadbed, subject to the easement in the public so long as the road remains open.

2. The public is estopped to claim any easement in a road in a city where, there being no further use for it, by reason of new streets, it has for years been abandoned, and closed to travel by permanent structures built across its entire width.

3. Foreclosure of a deed of trust given as security is barred, more than 20 years from maturity of the notes secured by it having elapsed without recognition of its being a subsisting lien.

Appeal from circuit court of Baltimore city.

Suit by William H. Baldwin, Jr., against Frank W. Trimble. Bill dismissed. Complainant appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BRYAN, PAGE, BOYD, and FOWLER, JJ.

R. W. Baldwin, for appellant. J. J. Alexander and Carville D. Benson, for appellee.

McSHERRY, C. J. The appeal in this case is from a pro forma decree which dismissed a

bill of complaint that had been filed to procure a specific performance of a written contract for the sale of land. The defense relied on in the answer is that the appellant's title to a small portion of the property is not merchantable, and three reasons are assigned in support of this position. The property comprises nearly all of one-half of a city block in Baltimore, and fronts 162 feet on Federal street, about 315 feet on Carter alley (including in this distance a road hereafter referred to), 27 feet on Oliver street, and 215 feet on Barclay street, the southwest corner of the parallelogram formed by these three streets and this alley being excluded. The appellant holds title under two deeds,—one assigning the leasehold interest, the other conveying the reversion. In both deeds the entire parcel is conveyed in two lots of unequal size, which are separately described,—the larger one as lying on the north side of Lanvale road, and the smaller one, opposite the southeastern part of the larger, as on the south side of the same road. This Lanvale road ran in a north-westerly direction between the two lots, intersecting Carter alley and Barclay street, and diagonally crossing Oliver street; and in the various deeds relating to these two lots that part of the road lying between them is, in terms, conveyed, or attempted to be conveyed, in these words, immediately following the description of the lots themselves, viz.: "Including such parts of said Lanvale road as may lie between said parcels of ground above described, whenever Oliver street aforesaid is opened for travel, and said Lanvale road is closed." Oliver street has long been opened, graded, and paved, and is now a public thoroughfare; and for more than 25 years Lanvale road, though never formally discontinued as a highway by ordinance of the mayor and city council, has in fact been disused and abandoned as a road, and has actually been closed by buildings constructed across it for nearly its entire length; and that portion of it lying between the two lots in question has been obstructed and rendered impassable by the dumping of sand and earth thereon by the appellant since his alleged acquisition of title to it under his deeds. It is now urged that the appellant acquired, under the conveyances alluded to, no title to the small portion of Lanvale road lying between his two lots; and whether this is so depends on the construction that must be given to the deeds. And it is further insisted that the title to the whole road is still in the public, because the road has never been lawfully closed as a highway, and that, not having been so closed, no title by prescription to any part of it can be acquired by an individual. These are two of the reasons or grounds upon which the appellee relies to sustain his position that the title is not merchantable. The remaining objection arises in this way: James Baynes was at one time the owner of the leasehold in this property. In 1861, being indebted to sundry persons, he executed a deed of trust, assigning the lease-

hold interest to Charles M. Wethered, to secure the payment of these debts. The debts were evidenced by promissory notes, all of which matured prior to October 19, 1861. The deed of trust provided for an extension of 18 months, so that all the notes had become due by the latter part of April, 1863. The deed stipulated that the trustee should hold the property as security for the enumerated notes, and, "after the payment of the same, in trust for the said James Baynes"; and it contained a power, given to the trustee, to make sale upon default in the payment of the notes, and upon the request of a majority of the creditors. No sale was ever made by the trustee under this deed, and he is now dead, and it does not appear that any new trustee has ever been appointed. There is no evidence that any of these notes remain unpaid, and about 34 years have now elapsed since the note running the longest, with the 18 months' extension added, matured, and more than 80 years have expired since all the notes were barred by limitations. The trustee did not reconvey the property to Baynes; but Baynes, on January 23, 1870, assigned the same leasehold interest to the National Union Bank of Maryland, by way of mortgage, to secure the payment of borrowed money. The debt to the bank not being paid when due, a decree directing a sale was, under the terms of the mortgage, signed on December 22, 1871; and in January following the leasehold interest was sold under that decree to the appellant, to whom the trustee, William Woodward, executed a deed in January, 1873. This is the deed under which the appellant acquired title to the leasehold interest. Subsequently,—that is to say, on the 3d of October, 1888,—the reversion was sold under a decree in another equity proceeding, and on the 20th of the succeeding month was conveyed to the appellant by Robert C. Thackery, trustee; and this is the deed under which the reversion passed to the appellant. It is, however, now contended that by reason of the outstanding deed of trust to Wethered from Baynes, dated in 1861, no title passed to the bank under the mortgage of 1870, and consequently that nothing was conveyed by the deed executed by Woodward, trustee, under and pursuant to the decree of foreclosure. This is the third objection relied on to show that the appellant's title is defective.

The two objections first stated, being somewhat interwoven, may be considered together. The intention of the parties to an instrument, as gathered from its four corners, and from such foreign circumstances as may, under recognized rules of interpretation, be invoked, must control and define its meaning, unless some fixed, unbending canon of construction or some settled and inflexible rule of property intervenes to frustrate or defeat that intention. This is such an obvious and elementary principle that neither discussion nor adjudged cases need be resorted to for its demonstration. Now, it seems perfectly clear

that the grantors in each of the deeds wherein the language heretofore quoted, respecting the consequence of Lanvale road, has been used, did not, by employing that language, attempt the creation of an estate in fee to begin in futuro, as is insisted was the effect of the deed from Thackery, trustee, but, on the contrary, they undertook to transfer and convey all the estate which they possessed in the road-bed subject to the easement in the public so long as the road remained opened. By these conveyances no title was retained in the grantors, but their entire estate vested in the several grantees, the title to the bed of the road being held subordinate to the public easement so long only as that easement should continue. Consequently, upon the cessation of that easement from any cause, the title to the bed of the road became as absolute as though no easement had ever existed. Giving to the language of the various deeds this, its manifest meaning, it becomes merely a question of fact as to whether Oliver street has been opened for travel, and a question of law as to whether, under the circumstances set forth in the record, Lanvale road has been closed. There is no dispute that Oliver street has been duly opened, graded, and paved (the record is explicit on that subject), and we need not pause to say more on that feature of these objections. That Lanvale road is physically closed, and has been so for 25 years past, is equally free from doubt; but whether this actual obstruction of it, under the circumstances and for the length of time indicated, is a legal closing, binding on the public as an abandonment of the road, is what has been, and still is, denied.

This question is one by no means free from difficulty, or unperplexed by conflicting decisions. There is a line of cases, proceeding upon the maxim, "*Nullum tempus occurrit regi*," which holds that the rights of the public to a street or thoroughfare cannot be barred by nonuser, and that every act of asserted ownership, such as occupancy, hostile to the public use, is a nuisance, which can never ripen into a private right by mere efflux of time; while another series of cases, founded on the assumption that limitations run against the state, or else that the maxim above cited does not apply to municipalities, holds that the same acts of adverse user and possession which would extinguish a private easement will likewise destroy the easement of the public in a street or highway. The precise question, as we now have it presented, has not heretofore arisen in Maryland,—at least, our investigations have not discovered, nor have counsel in their arguments referred us to, any adjudication thereon,—though there are three cases decided by this court which explicitly hold that no right to maintain a public nuisance in the form of an encroachment on the highway can be acquired by prescription. To these cases we shall have occasion to allude in a moment. In California, Louisiana, Mississip-

pl, New Jersey, New York, Pennsylvania, and some other states it has been held that the right of the public to the use of a highway cannot be lost by mere nonuser or lapse of time, though coupled with occupancy by individuals for purposes other than and inconsistent with those of a thoroughfare; and the doctrine, in its broad terms, is maintained in many opinions of great force. *People v. Pope*, 53 Cal. 437; *Orens v. City of Santa Barbara*, 91 Cal. 621, 28 Pac. 268; *Mayor, etc., of Thibodeaux v. Maggioni*, 4 La. Ann. 73; *City of Vicksburg v. Marshall*, 59 Miss. 563; *Mayor, etc., of Jersey City v. Morris Canal & Banking Co.*, 12 N. J. Eq. 547; *Burbank v. Fay*, 65 N. Y. 57; *Com. v. Moorehead*, 118 Pa. St. 344, 12 Atl. 424. On the other hand, in Arkansas, Illinois, Kentucky, Massachusetts, Michigan, Missouri, Vermont, and other states, the converse is asserted; and it is held that notorious and uninterrupted possession by a private individual, under a claim of right of land dedicated to a city for public streets, for the period of the statute of limitations, will bar the city to claim its use. *City of Ft. Smith v. McKibbin*, 41 Ark. 45; *City of Peoria v. Johnston*, 56 Ill. 45; *Dudley v. Trustees of Frankfort*, 12 B. Mon. 610; *Cutter v. Cambridge*, 6 Allen, 20; *Gregory v. Knight*, 50 Mich. 61, 14 N. W. 700; *St. Charles Co. v. Powell*, 22 Mo. 525; *Cincinnati v. Evans*, 5 Ohio St. 594; *Knight v. Heaten*, 22 Vt. 481. This subject is ably and elaborately discussed, and the adjudged cases are collected and classified in a learned and carefully prepared note to *Malre v. Kruse* (Wis.) 26 Lawy. Rep. Ann. 449 (s. c. 55 N. W. 389).

The second of these conflicting propositions is not only not sustained by any adjudication in Maryland, but is directly in antagonism to what we apprehend to be the law of this state; while the first is wholly inapplicable to the case at bar, for the simple reason that the title of the appellant to the road does not depend on prescription as against the public, but upon his deeds and the fact of an abandonment of the public easement, whereby the rights of the public over the road were extinguished. While an encroachment on a highway is conclusively settled in Maryland to be a public nuisance, which can never grow by prescription into a private right (*Philadelphia, W. & B. R. Co. v. State*, 20 Md. 157; *Northern Cent. Ry. Co. v. Mayor, etc., of Baltimore*, 21 Md. 93; *Ulman v. Avenue Co.*, 83 Md. 130, 34 Atl. 366), yet it may be true, and in perfect harmony and accord with that doctrine, that cases concerning public streets can arise of such a character, and be founded upon such an actual and notorious abandonment of the highway by the public, that justice requires that an equitable estoppel shall be asserted even against the public in favor of individuals. In that event, such cases, as observed by Judge Dillon, "will form a law unto themselves," and will "not fall within the legal

operation of limitation enactments. * * * There is no danger," he continues, "in recognizing the principle of an estoppel in pais as applicable to such cases, as this leaves the court to decide the question, not by the mere lapse of time, but by all the circumstances of the case, to hold the public estopped or not, as right and justice may require." 2 Dill. Mun. Corp. (2d Ed.) § 533. And this proposition is supported by *Goodrich v. Milwaukee*, 24 Wis. 422; *Lane v. Kennedy*, 13 Ohio St. 42; *Com. v. Miltenberger*, 7 Watts. 450; *Logan Co. Sup'rs v. City of Lincoln*, 81 Ill. 156; *Platt Co. v. Goodell*, 97 Ill. 84; *Simplot v. Railroad Co.*, 16 Fed. 350; and, while not decided, is implied in *Mayor, etc., of Baltimore v. Frick*, 82 Md. 86, 33 Atl. 435.

Now, the facts in the record before us are sufficient, in our opinion, to create an equitable estoppel against the public to reassert a right to the use of Lanvale road, for the private rights that have grown up in consequence of an abandonment and total discontinuance of the road by the public are of more persuasive force than those of the public. There is no evidence that this road was ever laid out by the municipal authorities, or that it was ever accepted by them, or kept in repair at the public expense. The city has opened, graded, and paved streets, some intersecting the road, some running parallel to it; and, there obviously having been for one-quarter of a century no longer any occasion for its use as a highway, it was, if ever claimed by the public at all, finally abandoned, not because encroached on by abutting proprietors, but because no longer needed by the public. Being no longer needed, and no longer used, it was actually closed to travel, and permanent structures were built across its entire width for a distance of seven squares of its length. Building across it went on for years, and it is entirely closed on the west side of Barclay street, opposite these lots, by dwelling houses. There seems to have been no objection to the erection of buildings across the road, and it would be inequitable in the extreme to permit the public to reassert a claim to a bed of the road, after having actually abandoned it altogether, and to subject every individual who has innocently and in good faith expended money in the construction of buildings upon it to an indictment for maintaining a public nuisance, and to the penalty of removing the buildings themselves, when there is no longer the slightest need for the road; the wants and the convenience of the public having been long ago fully provided for by paved and graded streets. If ever there was a case where the doctrine of equitable estoppel ought to prevail against the public, it certainly is the case at bar; and we accordingly hold, not that the appellant has acquired by prescription a right to that part of Lanvale road between his two lots, but that having title thereto under his deeds, subject to an easement in the public, and

the easement having been abandoned, so that the public are equitably estopped to reclaim it, his title to the parcels of the road claimed by him is merchantable.

There is nothing in this view that conflicts in any way with the cases in 20, 21, and 83 Md. (34 Atl.), hereinbefore referred to. The first of those cases was briefly this: The Philadelphia, Wilmington & Baltimore Railroad Company, in constructing its railroad, crossed a county road below the grade of the latter, and was required to build a bridge over its tracks to connect the two roads of the intersected county road. The company built the bridge of considerably less width than the county road. More than 20 years afterwards the railroad company was indicted for obstructing the county road, by having built the bridge too narrow, and it pleaded that the bridge had been erected and maintained for more than 20 years. But this court held that the narrowing of the road by the construction of the bridge (which was a part of the road) was a public nuisance, and that there could be no right by prescription to maintain a public nuisance. The case in 21 Md. arose on a bill in equity to restrain the railroad company from laying certain of its tracks on some of the streets of Baltimore city without the sanction and consent of the municipal authorities. And the case in 83 Md. (34 Atl.) grew out of an attempt by an abutter on a thoroughfare to claim part of the width of the street. These cases are very different from this, where the evident and notorious abandonment of the road by the public as a road, and its physical closing, with the knowledge of the municipal authorities, induced innocent parties to assume that it was no longer a highway, and, upon that well-founded assumption, to expend money in making permanent improvements upon and across it. In the three cases just alluded to, the highways were not abandoned by the public as highways, they never being openly used as such; and there was in each case simply an attempt, in spite of the public user, to claim, by adverse possession, a part of the width of the streets or road at the very time the streets and the road were being used continuously by the public as thoroughfares. These were cases of encroachment upon subsisting highways, not cases of abandonment of the highways at all. Here, however, private rights have grown up in consequence of and founded on an abandonment by the public; but in the other instances, there being no abandonment whatever,—in fact, on the contrary, a continuous assertion of right in the public by actual user,—no private rights in conflict with the rights of the public could or did accrue. The acts complained of in 20, 21, and 83 Md. (34 Atl.) were public nuisances, and so continued to be, and out of those nuisances no adverse individual rights arose.

We now come to the third and last objection, and but a few words will be required

to dispose of it. The deed of trust dated in 1861 was, in legal effect, a mortgage to secure certain named debts; it was nothing more. Even a deed absolute on its face will be treated as a mortgage whenever necessary to give effect to the manifest intention of the parties to it. *Baughner v. Merryman*, 32 Md. 185. There can be no doubt from the face of the deed that the obvious and single purpose of the parties to it was to secure, under it, the payments of the debts particularly specified in it. Notwithstanding, then, its form, it must be treated as the parties to it intended it should be interpreted, and therefore must be given the effect of a mortgage, and must be held to be subject to all the conditions that would be applicable to it had it been a formal, technical mortgage. Now, every note mentioned in the deed has been barred by limitations for more than 30 years; and, while that fact alone would not defeat a right to foreclose a mortgage (*Railroad Co. v. Trimble*, 51 Md. 111), still, if the mortgage itself securing the notes is also barred, no decree can be procured upon it when a defense of limitations is made. Twenty years have been adopted by the courts of this state as the period which bars the right of foreclosure; and as thirty years have intervened between the maturity of the mortgage and now, without recognition of its being a subsisting lien, the bar is absolute and complete. *Grook v. Glenn*, 30 Md. 55; *Frazier v. Gelston*, 35 Md. 298.

This disposes of all the objections that have been interposed to the appellant's title, and it will be seen from the views we have expressed that we are of opinion the title is merchantable. It follows, then, that the pro forma decree must be reversed, and the cause must be remanded, that a decree conforming to this opinion may be passed. Decree reversed, with costs above and below, and cause remanded.

HAVERFORD LOAN & BUILDING ASS'N OF PHILADELPHIA v. DOUGH- ERTY et al.

(Supreme Court of Pennsylvania. April 12, 1897.)

TENANTS IN COMMON—CONTRIBUTION—SUB- ROGATION.

A tenant in common made a loan, giving mortgage security on the entire property, and at his direction the mortgagee paid out of the loan a prior mortgage on the property, both supposing the mortgagor was owner. *Held*, that the mortgagor was entitled to contribution, and to subrogation to the mortgage paid off; and that the second mortgagee succeeded to this right of subrogation.

Appeal from court of common pleas, Philadelphia county.

Suit by the Haverford Loan & Building Association of Philadelphia against Susie Dougherty and others for subrogation to a mortgage and other equitable relief. Bill dismissed. Plaintiff appeals. Reversed.

Wm. C. Stoever and John G. Johnson, for appellant. Isaac S. Sharp, for appellees.

MITCHELL, J. Thomas Dougherty, supposing that under the will of Frances Dougherty he was the owner of the entire premises, mortgaged them to the appellant for \$2,200, and the appellant, also supposing him to be owner, loaned him the money, but at his request applied part of it to the payment of a prior mortgage to the Fire Association, one of defendants. It is now conceded that by the true construction of the will of Frances Dougherty, Thomas was not the owner of the whole, but only of an undivided fifth, as tenant in common with his four children. Under these circumstances it is entirely clear that Dougherty, having relieved the common estate of an incumbrance, was entitled to contribution from his co-tenants, and might have enforced his claim by subrogation to the rights of the mortgagee under the discharged mortgage. It is also laid down generally in the textbooks that he acquired a lien against the shares of his co-tenants. The most accurate and painstaking of recent writers states the rule thus: "If one tenant removes a mortgage, tax lien, or other incumbrance upon the property, he may be regarded as subrogated to such lien to secure contribution from his co-tenants, or as having an equitable lien upon their interest of the same character as that removed." 2 Jones, Real Prop. § 1863. See, also, 7 Am. & Eng. Enc. Law, tit. "Joint Tenants," 4. As to the existence of a lien by the mere force of the claim for contribution or reimbursement the law of this state is not so clear. Our reports are rather notably bare of authorities on the subject. No Pennsylvania cases are cited by the learned counsel for appellant, nor have I been able to find any exactly in point. In *Huston v. Springer*, 2 Rawle, 97, and *Gregg v. Patterson*, 9 Watts & S. 197, the reasoning of the court seems to tend against a general lien, though what was decided in the former was that a lien for repairs could not be enforced against a subsequent purchaser for value of the other shares, and in the latter case it was held that a tenant in common who had paid the whole purchase money and entered supposing his title to be in severalty, might retain exclusive possession until reimbursed his overpayment. We do not need, however, to decide at present the abstract question of the existence of a lien, or its precise character and limits, as all our cases agree that there is the right of contribution, and that it is enforceable by subrogation. An instructive case is *Watson's Appeal*, 90 Pa. St. 426, where two tenants in common made a mortgage to secure certain bonds. The mortgagee assigned the bonds, and then purchased the interest of one of the tenants in the land, covenanting to hold him harmless from the bonds. Subsequently the mortgagee reacquired the bonds, assigned them again, and finally paid them. It was

held that he was a co-tenant of the other mortgagor, and entitled to all the securities and remedies given by the mortgage, to enforce contribution from his co-tenant. "On the conveyance by Wonderly of his interest in the land to Nichols the latter became a tenant in common with Potter. * * * The covenant of Nichols obligated him to protect Wonderly from all liability on the mortgage and bonds, but not to protect or relieve Potter therefrom. It follows, when Nichols paid and took up the bonds which he and Potter were jointly obligated to pay, he thereby acquired a right to collect the one-half thereof out of the estate of Potter. He was not driven to an action to enforce this right, but was entitled to all the securities and all the remedies given by the mortgage,"—citing *Wright v. Sewing-Machine Co.*, 82 Pa. St. 80, and thereby assimilating the rights of tenants in common to the rights of co-sureties, as to whom it was said in the last case: "An actual assignment is unnecessary. The right of substitution is the substantial thing; the actual substitution is unimportant. The right of substitution being shown, and the surety having paid the debt, he succeeds by operation of law to the rights of the creditor."

It being thus clear that Dougherty had the right to be subrogated to the mortgage of the Fire Association to the extent of his claim for contribution against his co-tenants, the next question, did the appellant succeed to his right? is more difficult; but the equity is so strong that, in the absence of any intervening interests, we think it should prevail. Appellant was not a mere volunteer. It paid at the request of Dougherty, the debtor. If it had paid with its own money, on such request, there could have been no doubt of its right to subrogation. It paid with money which was his, but which became his only by virtue of a loan from appellant on the faith of the security he offered, which was his interest in the land. The fact that such interest was less than both parties believed should not, in equity, prevent the operation of the pledge to the full extent of such interest as he actually had. That this is giving effect to the intention of the parties does not admit of doubt, nor that a formal subrogation would have been made had it been supposed to be needed. No one is injured. The Fire Association has received its money, and has no longer any interest in the mortgage, and the other defendants, the co-tenants, are merely left where they originally were, without deriving an unjust advantage from an accident. The cases relied upon by the referee below are not in conflict with the present view. In *Webster & Goldsmith's Appeal*, 86 Pa. St. 409, all that was decided was that the judgment confessed to secure one creditor against a liability which had been subsequently extinguished could not be assigned as an existing security to another creditor for a different debt, to the prejudice of intervening judgments. It is true that Woodward, J., says that with the payment of the

first note "all the uses of the judgment would have been served," and that when it was renewed without Banker's indorsement the judgment given to secure him was dead; but this was said with reference to the rights of other creditors, for later in the same paragraph he says, "If the rights of Adams and Baur were alone involved, there would be no objection to their agreement that it [the judgment] should retain or regain its original efficacy." In *McCleary's Appeal* (Pa. Sup.) 12 Atl. 158, and *Campbell v. Association*, 163 Pa. St. 609, 30 Atl. 222, the instruments in favor of which subrogation was sought were frauds upon the debtor, and he had had no part in the satisfaction of the prior incumbrances. Both cases were decided on the principle that subrogation is not decreed in favor of a mere volunteer. In the present case the appellant was not a volunteer, but paid the first mortgage on the express direction of the debtor, and with the intention of both parties that the appellant should be secured by the land. "A person who has lent money to a debtor for the purpose of discharging a debt may be subrogated by the debtor to the creditor's rights; and if the party who has agreed to advance the money for the purpose employs it himself in paying the debt and discharging the incumbrance on land given for its security, he is not to be regarded as a volunteer. He is not, after such an agreement with the debtor, a stranger in relation to the debt, but may, in equity, be entitled to the benefit of the security which he has satisfied with the expectation of receiving a new mortgage or lien upon the land for the money paid." *Dix. Subr.* 165. "When the holder of a junior mortgage discharges the lien of a senior incumbrance upon the property, he thereby becomes entitled to all the benefits of the security represented by the lien so discharged." *Beach, Mod. Eq. Jur.* § 804. "When on the foreclosure of a second mortgage it appears that the loan by the second mortgagee was made on an agreement with the mortgagor that it should be applied to extinguish the first mortgage, and that part of the loan was actually so applied, the second mortgagee is entitled to a decree subrogating him to the rights of the first mortgagee on payment of the balance due on the mortgage." *Id.* § 806. "Where money has been loaned upon a defective mortgage for the purpose of discharging a prior valid incumbrance, and has actually been so applied, the mortgagee may be subrogated to the rights of the prior incumbrancer whom he has thus satisfied, there being no intervening incumbrances." *Sheld. Subr.* § 8. The present case comes clearly within these rules. Decree reversed, bill reinstated, and it is now ordered and decreed that the satisfaction of the mortgage of \$1,700, now reduced to \$1,600, to the Fire Association, be canceled, and that the said mortgage shall be held a valid lien to the use of the appellant upon the whole premises; and, further, that the second mortgage of \$2,200, with interest, be a valid junior lien upon the undi-

vided estate of Thomas Dougherty in the said premises. Costs to be paid by the appellees other than the Fire Association.

IN RE HOWELL'S ESTATE.

Appeal of CAMPBELL et al.

(Supreme Court of Pennsylvania. April 12, 1897.)

TRUSTS—ACCUMULATIONS—INCOME UNDISPOSED OF.

1. In 40 years the net accumulations of a trust fund set apart to provide an annuity as directed by a will amounted to only \$6,068, and resulted solely from prudent management. *Held*, that such accumulations were not within Act April 18, 1853, which prohibits accumulations of income from being added permanently to, and taking the destination of, the original trust estate, where the will contained no direction to accumulate the income, and indicated no intention to make accumulations in violation of such act.

2. Where a trust fund is set apart to provide an annuity as directed by a will, accumulations of income lawfully retained until the death of the beneficiary to meet contingencies pass under the intestate law, and do not follow the trust fund.

Appeal from orphans' court, Philadelphia county.

Adjudication of the account of the Provident Life & Trust Company, as trustee under the will of Robert Howell, deceased, of a fund set aside by his executors to provide for the payment of an annuity to deceased's widow. From the order of distribution, Emily Howell Campbell and others appeal. Affirmed.

The opinion of the orphans' court is as follows (Hanna, P. J.):

"Robert Howell bequeathed to his executors 'such a sum of money as will yield a net yearly income of \$2,500, in trust, * * * to pay over the whole of said net yearly income' to his wife for life, and, if she should die childless, then to pay \$10,000 thereof to her appointees by will, and the residue to such of his nephews and nieces as should be living at her death. He left his residuary estate in trust for his grandchild for life. The widow died without issue, having first appointed the said sum of \$10,000 to her executors. The question is as to the disposition of interest which has accumulated upon the trust fund. It was claimed, respectively, by the representatives of the widow, by the nephews and nieces, and by the residuary legatee. Of course, the only alternative to the proposition that the testator intended to give an annuity of \$2,500 is that he intended the gift of a variable sum, which was to be determined by the executors. To be entirely safe, and without any fraud whatever, they might have set apart an amount which, calculated at one per cent. per annum, would realize \$2,500, but which, as a matter of fact, might easily earn five times as much. In that case, if the income was the measure of the gift to the widow,

and not simply the pledge for her annuity, she would be entitled to \$12,500, instead of \$2,500, per year. The testator might have said that the retained sum must yield at least \$2,500 annually, and then his intention to give his wife any excess of income beyond that limit might be plausibly argued. But he did not so say; and, when he directed his executors to pay over 'the whole of said net yearly income,' he meant the net yearly income of \$2,500, of which he had just spoken.

"Was the surplus income an accumulation which came under the ban of the act of 1853? The evil which the statute sought to avoid was the capitalizing of income, an evil which existed in Carson's Appeal, 99 Pa. St. 325, and Grim's Appeal, 109 Pa. St. 391, 1 Atl. 212, where the donor, in one case, and the testator, in the other, distinctly directed the interest to be invested. But in this case no thought of an accumulation was in the mind of the testator, and it was equally foreign to the purpose of the executors. The latter set apart a fund of \$41,729.25, which, at a lower rate than six per cent. would not have yielded the annuity, and so close was their estimate that in forty years the net accumulations amounted only to \$6,058.14, a yearly average of \$121.16. Indeed, a deficit of \$1,815.66 actually occurred. Unless the act is too rigid to bend, some play ought to be allowed to the discretion of the accountants, and a fraction of income might be retained, as a matter of prudence, to meet the contingencies of re-investments and of temporary declines in values. These small savings, which are liable at any time to be absorbed in maintaining the fund, cannot with propriety be regarded as accumulations such as the act was intended to destroy. The case cannot be compared with McKee's Appeal, 96 Pa. St. 277, because there the annuity was based upon a fund which was so inordinately large that its surplus income amounted in fifteen years to \$100,000. The exact point, however, has been decided. In Eberly's Appeal, 110 Pa. St. 95, 1 Atl. 330, the trust had run for fifteen years, and the accumulations were in excess of \$5,000. Sterrett, J., said: 'If the estate is disposed of so or in such manner that accumulations clearly beyond what may be reasonably required to fully and effectually carry out the provisions of the trust must necessarily exist, it amounts to an implied direction to accumulate. But, in determining whether the excess of income over and above disbursements and expenses at any given time is an accumulation, within the meaning of the statute, or not, regard must be had to the trust property and the duties imposed upon the trustees. * * * Care must be taken not to strip the trustee of a contingent fund, upon which he may be required to draw to meet the exigencies of the trust.' The force of this reasoning was exemplified in the case before us, when the court ordered \$1,800 to be paid out of the

surplus income to make good a deficit in the revenues of previous years.

"We think that the accumulations were not within the prohibition of the act. To whom shall they be awarded? If they are the subject of an intestacy, they belong to the next of kin. If they form part of the residue, they belong to the residuary legatee. If, again, they are accretions to the fund which was set apart for the annuity, they follow the ownership of the fund. We have little doubt that they fall into the residue. The residuary clause carried with it whatever had not been already given by the will; and this was true of the excess of income above \$2,500 in any year. Respecting this, as the testator must have known that it would be likely to accrue, he could not have intended to die intestate. The legacy of \$10,000 bears interest from the date of death of the widow, the donee of the power. It accrued under the will of the donor of the power, and he had died many years before. It is proper to say that the demand for interest was not made before the auditing judge. The exception on this point is sustained, and the remaining exceptions are dismissed."

John G. Johnson, for appellants. James P. Townsend and George B. Johnson, for appellee.

FELL, J. The assignments of error relate to the order of the orphans' court awarding to the granddaughter of the testator (who was his residuary legatee, and in case of intestacy would have been his sole heir) the accumulations of the income of a fund set apart by the executors to provide an income for life for the testator's widow. The testator died in 1856. He bequeathed to his executors "such a sum of money as will yield a net yearly income of \$2,500, in trust to place the same at interest, and keep it invested, * * * and to pay over the whole of the said net yearly income" to his wife for life. He directed that upon the death of his wife his executors or trustees for the time being should pay \$10,000 of the trust fund to her appointees, and that the residue of the moneys so held by them in trust should be paid to such of the children of his brothers and sisters as might be living at the time of the decease of his said wife. He gave the residue of his estate in trust for the benefit of his granddaughter, the appellee. In 1860, with the approval of the orphans' court, the sum of \$41,729.75 was allotted to the trustees for the benefit of the widow, and it has since been held by them. This trust fund has been so managed that the accretions to principal are \$2,604.98, and the surplus income in 1890 amounted to \$7,873.80. It was reduced before the death of the widow, in order to supply deficiencies in annual income, to \$6,058.14, which is the fund now in dispute. The will contains no

direction to accumulate the income, and it indicates no intention to make accumulations in violation of the act of 1853. The surplus resulted from prudent management, and its retention by the trustees was a wise provision to meet deficiencies during the life of the widow. This subject is so fully and satisfactorily treated in the opinion of the learned judge of the orphans' court that its further consideration by us is unnecessary.

It is of course conceded that, when the policy of the law is violated by a direction to accumulate, no effect should be given to the intention of the testator, and the distribution should be in accordance with the statute, without regard to the will; but it is contended that, in the distribution of accumulations which have been lawfully retained until the death of the life tenant to meet contingencies, the real intent of the testator with regard to them should be followed, although it would result in the increase of the trust fund by accumulations,—that is, that, as accumulations may be retained to provide a contingent fund, they may be added to and made a part of the trust fund from which they arise, if such is the testamentary intent. The fault of this contention is that there can be no real intent to accumulate beyond the limits prescribed, which is not an unlawful intent. Either the testator made no provision for the excess of income that might remain after the payment of the annuity, in which event the excess would go as in case of intestacy, or he must be regarded as having attempted to provide for accumulations in a manner forbidden by law. A temporary accumulation, which forms a reasonable contingent fund, in anticipation of a decrease of income, whether it arise from fortuitous causes in the management of the trust or from testamentary design, may lawfully be retained. In *Re Hibbs' Estate*, 143 Pa. St. 224, 22 Atl. 883, it was said by the present chief justice: "There are two classes of cases in which the question of accumulation has been raised in this court since the passage of the act of 1853: (a) That in which the manifest purpose of the testator was to add such accumulations permanently to, and make them take the destination of, the original trust estate (In *re Washington's Estate*, 75 Pa. St. 102; *McKee's Appeal*, 96 Pa. St. 277; *Carson's Appeal*, 99 Pa. St. 325; *Grim's Appeal*, 100 Pa. St. 391, 1 Atl. 212); and (b) that in which the accumulations were intended to be temporary, and in the interest of judicious management (*Eberly's Appeal*, 110 Pa. St. 95, 1 Atl. 330). The first came plainly within the prohibition of the statute; the second did not. The purpose of the statute was to prevent permanent accumulations, not to interfere with judicious management." This construction, without violating the statute by permitting accumulations to be added to the principal of the

fund, permits the temporary withholding of the surplus income in aid of the judicious management of the trust. As accumulation, except within the limits fixed by the act, is prohibited, any direction to accumulate, or any provision or plan by which it is sought to accomplish it, directly or indirectly, is unlawful. There cannot be an intent to accumulate beyond the prescribed limits in order to increase the corpus of the estate or of a trust fund carved out of it, which is not an unlawful intent. When, by chance or design, the income is increased to an amount in excess of present demands, the surplus is retained only in order to provide for future deficiencies. The intent to provide for these contingencies within reasonable limits may be sustained, but the intent to add the increase to a permanent fund cannot be. It is therefore unimportant to consider whether there was an actual intent which, if found, could not be carried into effect.

As the testator left the whole of his estate in trust, and disposed of the entire income for the benefit of his widow and grandchild, there is no ground for the inference of an actual intent on his part that any of the income as income should go to his nephews and nieces during the life of the widow. They were to receive nothing until her death, and they were not themselves ascertained. An intention to provide after the death of the widow for the devolution of the whole fund, principal and accumulated income, held by the trustees to secure and protect her annuity, is within the prohibition both as to time and as to parties; and any such attempt, as was said in *McKee's Appeal*, supra, "is so diametrically opposed to the intent and spirit of the statute, that it cannot be sustained." The right to the surplus income vested, as it accrued, in the testator's grandchild, subject to the right of the widow to have it retained by the trustees for the judicious protection of her annuity. The facts in this case so closely resemble those in *Re Rhodes' Estate*, 147 Pa. St. 227, 23 Atl. 553, that, in the application of the principle under consideration, the cases may be considered as identical. In the opinion in *Re Rhodes' Estate*, filed in the orphans' court, and adopted by this court, it was said by Penrose, J., in speaking of the distribution of surplus income which accumulated during the life of the widow: "It could not go to the residuary legatees, for their rights do not begin, nor, indeed, are they themselves ascertained, until the death of the tenant for life. It could not be held in the meantime, for accumulation, directly or indirectly, is forbidden by the act of assembly, except during an existing minority, and for the benefit of the minor. Necessarily, therefore, not having been disposed of by the testator, it passes under the intestate law." The order of the orphans' court is affirmed, at the cost of the appellants.

HASSON et al. v. KLEE.

(Supreme Court of Pennsylvania. April 26, 1897.)

ADVERSE POSSESSION—PRESUMPTION OF DEED—
INTERRUPTION OF STATUTE.

1. Where M. went into possession of land, claiming it as his own, and for six years used it and paid the taxes thereon, during which time it was generally reputed to belong to him, and then it was sold as his property at sheriff's sale, and the purchasers entered and held it under the sheriff's deed, and they and those claiming under them for 15 years held peaceable, continued, adverse, and exclusive possession, and paid the taxes, the execution and delivery of a deed to M. from the last preceding grantee will be presumed.

2. Act April 13, 1859 (P. L. 603), declaring that no entry on lands shall arrest the running of limitations, unless ejectment shall be commenced therefor within one year thereafter, relates to an entry during the running of the statute, and the proceedings necessary to make the entry arrest, from its date, the running of the statute.

Appeal from court of common pleas, Allegheny county.

Ejectment by James B. Hasson and others against Benjamin Klee. Judgment for plaintiffs. Defendant appeals. Reversed.

The third assignment of error is as follows: "The court erred in refusing the defendant's third point, which was as follows, to wit: 'Third. That if the jury find that as early as 1860 Edward McQuade was in possession of the two lots of ground in dispute, claiming to own the same, and was assessed and paid taxes thereon from 1860 to 1866, and that said lots were generally known in the community, or reputed, to belong to him, the same Edward McQuade, and by him were used for drove-yard purposes during that period, and that subsequently, to wit, January 25, 1866, Greenwald and Kahn purchased said lots at sheriff's sale for the sum of \$2,050, and thereupon entered upon and took possession of said property, and held the same by virtue of said sheriff's deed, and that they, and those claiming under them, from that time down until the institution of this suit, have held peaceable, continued, adverse, and exclusive possession of said lots, were assessed and paid taxes and street improvements thereon, and exercised such other and further acts of ownership as the character of the lots warranted, then, after twenty-one years of such possession and exercise of ownership, to wit, after 1881, the law will presume the execution and delivery of the deed to Edward McQuade for the property from the last preceding grantee, and supply its omission. Answer. This point is refused.' And for a further answer to the said point the court said: 'Answer. I am not willing to say that without you can supply that omission,—without proof of the deed's execution and loss; but the facts stated in the point have all been suggested as proper for your consideration, to determine the other question, viz. whether or not there has been ad-

verse possession of these lots for the requisite period of time to give title by the statute of limitations; and I say in answer to this point, "This point is refused." And it is on the ground of the last clause that I refuse it.' By Mr. Langfitt: 'Without refusing the facts? By the Court: 'No; I do not refuse the facts, but the conclusion that it proves the deed, which I say has not been proven from the testimony, in my judgment.' "

S. Schoyer, Jr., J. A. Langfitt, and William Kaufman, for appellant. J. J. Miller and D. C. Nevin, for appellees.

MCCOLLUM, J. The court should have affirmed the defendant's third point. It was a correct statement of the presumption arising from the facts recited in it. A possession like that described in the point is in conformity with a deed or conveyance of the land, and inconsistent with title in a party cognizant of it. Hence the presumption of a grant. In *Kingston v. Lesley*, 10 Serg. & R. 383, Tilghman, C. J., said: "The rational ground for presumption is when the conduct of the party out of possession cannot be accounted for without supposing that the estate has been conveyed to the one who is in possession." In support of the proposition involved in the defendant's point, it is sufficient to refer to the following cases: *Taylor v. Dougherty*, 1 Watts & S. 324; *Orr v. Cunningham*, 4 Watts & S. 294; *Baskin v. Sechrist*, 6 Pa. St. 154; *Strimpfer v. Roberts*, 18 Pa. St. 283; *Warner v. Henby*, 43 Pa. St. 187. It may be said that the refusal of the point was not prejudicial to the defense. But this is by no means clear. The explanation by the court of its refusal to affirm the point not only expressly denied the existence of the presumption claimed as arising from the facts stated in it, but impliedly denied the sufficiency of the facts to give title by the statute of limitations.

The defendant was entitled to an unqualified affirmance of his sixth point. The point was based on section 1 of the act of April 13, 1859 (P. L. 603), which declares that "no entry upon lands shall arrest the running of the statute of limitations unless an action of ejectment shall be commenced therefor, within one year thereafter." The point was "that no entry upon the property in dispute by the plaintiff, or those under whom he claims, during the period in which the property was in actual possession of the defendant, or those under whom he claims, would arrest the running of the statute of limitations, where such entry was not followed within one year by suit for possession"; and the answer to it was, "This point is affirmed; that is to say, if they acquired twenty-one years' adverse possession at any time prior to 1863, it would be a bar to recovery." The answer indicates a misapprehension by the court of the meaning of the point, and of the purpose of the act of 1859. Of course, an entry upon the

property by a party whose claim was barred by the statute of limitations would not reinvest him with title thereto. No legislation was needed to establish or enforce this proposition. The act of 1859, on which the sixth point was based, manifestly relates to an entry during the running of the statute of limitations, and to the proceedings necessary to make such entry arrest, from the date of it, the running of the statute. As the plaintiff's testimony tended to show entries upon the property at different times by the plaintiff, or those under whom he claims, the point was pertinent, and should have been affirmed without any misconstruction or qualification of it.

If the ruling of the court in the rejection of the defendant's evidence as to the general report or rumor of title was an error, it was cured by the subsequent reception of the rejected evidence. The admission of evidence which was subsequently stricken out on the motion of the defendant does not appear to afford any substantial ground for reversing the judgment. The same may be said of the general charge. As we have already seen, the answers to the defendant's third and sixth points were erroneous and misleading, and, as they denied to him the benefit of the instructions he sought and was clearly entitled to, we are constrained to reverse the judgment. We therefore sustain the third and ninth specifications of error. Judgment reversed and venire facias de novo awarded.

COMMONWEALTH v. ZACHARIAS.

(Supreme Court of Pennsylvania. April 26, 1897.)

DRUGGISTS—REGULATION—CERTIFICATE OF COMPETENCY.

To support a conviction under Act May 24, 1887, as amended by Act June 16, 1891, declaring that no person shall carry on "as manager * * * any retail drug or chemical store," it must appear that the store carried on by defendant was a retail store, and that defendant conducted the same as manager; a passive part ownership being insufficient.

Appeal from superior court.

Samuel M. Zacharias was convicted of unlawfully carrying on as manager a retail drug and chemical store, and appealed to the superior court, which reversed the judgment, and the commonwealth appeals. Affirmed.

The jury found a verdict of guilty and specially found the following facts, agreed upon as a special verdict: "That the defendant, Samuel M. Zacharias, at and before the bills of indictment were found, was part owner of the three drug stores, at Forty-Fourth and Girard avenue, Forty-Second and Westminster streets, and Forty-Fifth and Brown streets, in the city of Philadelphia, commonwealth of Pennsylvania. That as such he was part owner of the stock and fixtures of said stores, and received from the

sales there made a proportion of the profits. That he employed in the stores regular registered pharmacists to sell drugs and medicines, and to put up prescriptions, to whom he paid salaries. That the defendant himself did not in any way put up prescriptions, or personally sell the drugs, but that the said defendant has never passed an examination before the state pharmaceutical board. Neither has he received a certificate therefrom, either as a registered manager or a qualified assistant." The court allowed a motion in arrest of judgment to be filed, and upon argument overruled the same, and sentenced the defendant. On reversal by the superior court the commonwealth assigned error that such court erred in reversing the judgment, and in deciding that Act May 24, 1887, as amended by Act June 16, 1891, under which defendant was convicted, was unconstitutional.

J. Campbell Lancaster, Samuel A. Boyle, and Geo. S. Graham, Dist. Atty., for the Commonwealth. Charles E. Pancoast and John G. Johnson, for appellee.

WILLIAMS, J. This was a proceeding by indictment in the quarter sessions. The defendant was charged with a misdemeanor. The duty of proving the guilt of the defendant under the provisions of the act of June 16, 1891, was on the commonwealth, and the defendant entered upon his trial clothed with the presumption of innocence. In criminal proceedings the presumptions continue to favor the defendant, while guilt must be shown by competent evidence. What was shown in this case appears by the special verdict, which presents the facts on which the defendant was held guilty. By turning to the statute, we can at once determine the sufficiency of the special verdict. The statute forbids any person to "open or carry on, as manager," in the state of Pennsylvania, any retail drug or chemical store, or to be engaged in the business of compounding or dispensing medicines, without having obtained a certificate of competency and qualification so to do from "the state pharmaceutical examining board, and having been duly registered as herein provided." The special finding of facts is defective in at least two particulars: It does not find that the defendant was engaged in carrying on any retail drug store in any capacity. It is the retail drug store alone that the statute is directed against. Again, the verdict does not ascertain that the defendant was conducting a drug store "as manager." Yet it is the "management" of the drug store that the statute seeks to regulate. The obvious purpose of the statute is to protect the public by requiring of one who manages such a business an adequate knowledge of the powerful medicines he deals out to customers. All that the special verdict finds against the defendant to justify his conviction, is that he was a part owner in three drug stores, and received part

of the profits made by them; that he employed registered pharmacists to sell the drugs and put up the prescriptions; and that he, who was not a registered pharmacist or assistant, sold no drugs and compounded no prescriptions. Whether he has any actual contact with the business; exercised any control, as manager, over it, or any supervision over the purchases made for it,—does not appear. In the absence of proof, the contrary is to be assumed. It is thus apparent that the verdict of guilty cannot be supported by the special verdict, and must fall. This case is ruled by *Com. v. Johnson*, 144 Pa. St. 377, 22 Atl. 708. The constitutional question raised over the exception in behalf of the widows, administrators, and executors of registered pharmacists is not necessarily involved in this case. The general scope and provisions of the act of June 18, 1891, are within a proper exercise of the police power. Their object is the protection of the public health. The requirement that one conducting such a trade should have such chemical and pharmaceutical knowledge as to qualify him to handle intelligently the dangerous commodities in which he deals is reasonable. It can be supported without regard to the exception which is a repeal, pro tanto, of the prohibition which it was the purpose of the statute to make. The exception makes a discrimination between equally unqualified parties, giving to one exemption from the operation of a rule enforced against the other. This is not protection to the public, but rank injustice to individuals. There is no more reason why the administrator or widow of a pharmacist should be permitted to manage a business of which he or she knows nothing than why any other administrator or widow should be allowed to do so. If the reason of the exception is sympathy for a widow, then all widows are *prima facie* equally entitled to sympathy, and have the same reason to claim exemption from the operation of the law. The exception would seem to fall squarely under the rule laid down in *Sayre Borough v. Phillips*, 148 Pa. St. 488, 24 Atl. 76. It is a discrimination made between those who are equal under the law. It is an arbitrary gift to one, and an arbitrary denial to another, which cannot be upheld. It declares that all widows except the widow of a pharmacist shall be subject to the prohibition of the statute. All administrators and executors, except they represent the estate of a deceased registered pharmacist, shall be within the prohibition. They must show their qualifications to conduct the trade, or retire from it. If, however, the deceased proprietor was competent under the law, his widow, administrator, or executor may conduct the business, no matter how grossly incompetent he or she may be. But this question is not before us in this case. The assignments of error to the judgment of the superior court are not sustained, and the judgment of the court is now affirmed.

DONAHUE v. KELLY.

(Supreme Court of Pennsylvania. April 26, 1897.)

NEGLIGENCE—ACTS DONE UNDER IMPENDING DANGER—GASOLINE.

1. Under Act May 15, 1874, § 1, providing that no gasoline, or any burning fluid, the fire test of which is less than 110° Fahr., shall be "sold or offered for sale" as an illuminator for consumption in the state, the proprietor of a business house is not guilty of negligence in having on his premises gasoline which he uses in a lamp, where it is not less than 110° Fahr., or it is not sold or offered for sale by him.

2. An employé in a restaurant picked up a gasoline lamp which had become improperly ignited, to carry it outside. While proceeding to the door, he was severely burned, and threw the lamp, causing it to explode. *Held*, that his employer was not liable, as for culpable negligence, to a third person injured by such explosion.

Appeal from court of common pleas, Philadelphia county.

Action by Terence J. Donahue against Thomas C. Kelly for personal injuries caused by defendant's negligence. Defendant was the proprietor of a restaurant in which a gasoline lamp became improperly ignited; and one of his employés, who endeavored to carry it outside, was burned, and threw it, thereby causing it to explode and injure plaintiff. From a judgment of nonsuit, plaintiff appeals. Affirmed.

W. F. Harrity, James M. Beck, and John T. Murphy, for appellant. Andrew J. Maloney, for appellee.

GREEN, J. It is beyond all question that the cause of the unfortunate injury suffered by the plaintiff was the act of Claggett in throwing the burning lamp. That he was trying to throw it out of the door was affirmatively proved by the plaintiff's witness Monaghan, and was not at all disputed. In the passage of the lamp through the air, it exploded, according to the testimony of Monaghan, and the burning fluid falling upon the plaintiff caused his injury. It is suggested by the learned counsel for the plaintiff that the defendant was negligent in merely having the gasoline on his premises, under the provisions of the act of May 15, 1874, and that this would be sufficient to support the allegation of negligence upon which the right of recovery is based. But an examination of the act does not support the contention. The first section provides that "no refined petroleum, kerosene, naphtha, benzole, gasoline or any burning fluid, be they designated by whatsoever name, the fire test of which shall be less than 110 degrees Fahrenheit, shall be sold or offered for sale as an illuminator for consumption within the commonwealth of Pennsylvania." It is very plain that this section can have no application to the facts of this case. There was no proof that this gasoline was of less than 110° Fahr., and there was no evidence that the defendant

either sold or offered for sale this or any other gasoline. He was therefore not subject to the terms of this section. Section 8 provides that "all benzine, naphtha or any hydro-carbons created in the manufacture of refined oil from crude petroleum, or otherwise manufactured, shall be inspected and branded 'benzine,' and shall not be kept for sale or used in any way for giving light to be burned in lamps." This section does not include gasoline, nor refer to it in any way. There was no evidence to prove that the gasoline used by the defendant was explosive, within the prohibition of the act, or that it was necessarily dangerous for use in lamps. The fifth section of the act merely provides penalties for violations of the provisions of the act. It is apparent, therefore, that the charge of negligence, for the purposes of recovery in this action, cannot be sustained by the application of the act in question.

The question then recurs, was the defendant liable, as for culpable negligence, on account of the act of his employé in throwing the lamp as he did? It is not to the purpose that the jury might have found the defendant guilty of negligence for the several reasons mentioned in the argument for the appellant, because the plaintiff's injury was the manifest result of the throwing of the lamp, and not of any of the other matters suggested. The inquiry is thus narrowed by the actual state of the testimony, which is entirely undisputed. The principles which control the judicial contemplation of such an act are extremely simple, and thoroughly well settled. The testimony, all of which was introduced by the plaintiff, clearly shows that the act of the employé who threw the lamp was done at a moment when he himself was in flames, and as an indispensable and urgent act of self-preservation. He was endeavoring to remove the lamp from the room,—an entirely proper and commendable action. To do this, he had taken it in his hands, and was proceeding towards the door, when the flames emitted from the burning fluid attacked him, and threatened him with most serious, and possibly fatal, results. To escape from this calamity, he instinctively threw the lamp from him, but not until he was severely burned. Such an act, done in such extreme circumstances, is not to be adjudged by the rules which are applicable ordinarily to acts done in cool blood, with time and opportunity for the party to consider the consequences and the methods of the act he is about to do. The decisions of this and other courts are very numerous, in the application of the principle to cases in which persons suddenly placed in positions of peril and impending danger do things which ordinarily would be acts of negligence. The same principle applies where innocent third persons sustain injuries from acts done in similar circumstances. The doctrine is well expressed in *Pollock on Torts* (Ed. 1887, star page 149), thus: "As to injuries received by an inno-

cent third person from an act done in self-defense, they must be dealt with on the same principle as accidental harm proceeding from any other act lawful in itself. It has to be considered, however, that a man repelling imminent danger cannot be expected to use as much care as he would if he had time to act deliberately." A suitable illustration of the doctrine is to be found in the case of *Brown v. French*, 104 Pa. St. 604, where we held that one who, in a sudden emergency, acts according to his best judgment, or who, because of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence. Such act or omission, if faulty, may be called a mistake, but not carelessness. The plaintiff's husband, in this case, attempted to cross the Ohio river, in a skiff, at a dangerous place, and lost the control of his boat, which fouled a barge in tow of a steamer. Efforts were made by one of the steamer's crew to rescue him, but they were unavailing, and he was drowned. His wife brought an action against the owners of the steamer for damages for her husband's death, alleging negligence in the efforts made to save him. *Gordon, J.*, delivering the opinion, said: "Nevertheless, as we have said, an attempt was made to save his life. Unfortunately, it was unsuccessful; and it is now said that the effort was misdirected, or not properly seconded by the pilot of the steamer; that the boat ought to have been backed. Well, let it be so,—that by a maneuver of that kind this man's life could have been saved; does it follow that it was an act of carelessness not to have done so? Certainly not. Here was an accident sprung upon the pilot, for which he was wholly unprepared. In order to avoid the consequences of it, he must first understand accurately its nature and probable effect. He must then determine what was best to be done, and this determination must be had in view of all the circumstances by which he and his craft were surrounded. All this required time, but the time allowed in this case was too short for any but an exceptionally active mind to entertain and execute a successful plan of rescue. Under such circumstances, we cannot agree that a mistake in judgment is an act of carelessness." Just so in the present case. When *Claggett*, in his effort to remove the lamp, discovered that he was himself in flames, and therefore cast it from him, towards the door, his act must be regarded as being done upon a sudden and unexpected emergency, subjecting him to imminent peril. He had no time to consider what was best to be done, or how he could best avoid doing injury to others. His instinct of self-preservation prompted him to cast from him the implement which threatened his life, and for so doing he is not to be charged with an act of negligence as to others. In the celebrated case of *Scott v. Shepherd*, 2 W. Bl. 892, 1 Smith, Lead. Cas. (9th Ed.) p. 737, commonly called the

"Squib Case," it was agreed by all the judges that the intermediate throwers of the squib, between the first thrower and the plaintiff, were not liable for the injury to the plaintiff, because their acts were done in self-defense. De Grey, C. J., said: "It has been urged that the intervention of a free agent will make a difference, but I do not consider Willis and Ryal as free agents, in the present case, but acting under a compulsory necessity, for their own safety and self-preservation." In 16 Am. & Eng. Enc. Law, 396, it is said: "There is no liability for an injury inflicted by one person upon another, even though the injured person be free from fault, if the cause of the injury was unusual, and one which reasonable and careful human foresight could not have foreseen as such, and which, under the circumstances, such care and foresight could not have guarded against. Such an injury, without any want of ordinary care upon the part of the person inflicting it, is considered an inevitable accident,"—citing many cases in the notes. In the case of *Brown v. Kendall*, 6 Oush. 292, the plaintiff's and the defendant's dogs were fighting. The defendant was beating them, in order to separate them, and the plaintiff was looking on. The defendant retreated backwards from before the dogs, striking them as he retreated, and as he approached the plaintiff, with his back towards him, in raising the stick over his shoulder in order to strike the dogs, he accidentally hit the plaintiff in the eye, inflicting a severe injury. It was held that the act of the defendant was a proper and lawful act, and if he used all proper precautions necessary to the exigency of the case, and, in raising his stick to strike the dogs, he accidentally hit the plaintiff in the eye and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie. It would be very easy to multiply citations to the same effect, but it is quite unnecessary. The controlling principle applicable to all is thoroughly familiar, and is not disputed. In our opinion, it controls the determination of the present case. Judgment affirmed.

WILTBANK v. TOBLER et ux.

(Supreme Court of Pennsylvania. April 26, 1897.)

MARRIED WOMEN—SURETYSHIP.

Under Act June 8, 1893, § 2 (Purd. Dig. p. 1299, pl. 24), declaring that a married woman may not become accommodation indorser, maker, guarantor, or surety for another, a married woman is incapacitated to enter into one of the prohibited contracts, and hence she cannot bind herself as surety, though the debt be contracted by her principal for the benefit of her separate estate.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by Thomas S. Wiltbank, executor of Samuel J. Tobler, deceased, against George Tobler and Cornelia V. Tobler, on a note made by defendants jointly to the order of plaintiff's testator for \$2,652. From a judgment for plaintiff, defendant Cornelia V. Tobler appeals. Reversed.

The defendant George Tobler borrowed from the plaintiff's decedent, Samuel J. Potts, at various dates between August 12 and November 21, 1892, various sums of money, aggregating \$2,696, and gave him notes and duebills for the same. The note dated August 12, 1892, for \$1,000, is signed by George Tobler, and is drawn to the order of Samuel J. Potts, and is indorsed by the defendant Cornelia V. Tobler. The note of August 15, 1892, for \$525, is signed by George Tobler, and drawn to the order of Samuel J. Potts, and is indorsed, first, by Cornelia V. Tobler, and second, by Samuel J. Potts. The remaining duebills are all signed by George Tobler alone, and his wife's name does not appear in connection with the same. On May 24, 1893, this indebtedness, with interest thereon to that date, was all put in two notes. One thereof was dated May 24, 1893, at four months, for \$2,600, and signed by George Tobler and Cornelia V. Tobler, and payable to the order of Samuel J. Potts, and indorsed as follows: "Pay to the order of Thomas S. Wiltbank. Samuel J. Potts;" and further indorsed: "This note is renewed by one of \$2,348, and one of \$252, payable at four months from date, 9/27/93. Thomas S. Wiltbank." The other of said notes given on May 24, 1893, was at four months, to the order of Samuel J. Potts, and signed by George Tobler and Cornelia V. Tobler, and was for \$256.60, indorsed: "Pay to the order of Thos. S. Wiltbank. Samuel J. Potts;" and further indorsed: "This note is paid in cash, 9/27/93." On September 27, 1893, the defendants, George Tobler and Cornelia V. Tobler, executed their two promissory notes,—one thereof being at four months, to the order of Samuel J. Potts, for \$2,348, and indorsed: "Pay to the order of Thos. S. Wiltbank. Saml. J. Potts. Renewed 1/27/94, all in one note;" the other thereof being at four months, to the order of Samuel J. Potts, for \$252, and indorsed: "Pay to the order of Thos. S. Wiltbank. Samuel J. Potts. Renewed 1/27/94, all in one note." On January 27, 1894, the defendants executed their promissory note, at four months after date, to the order of Samuel J. Potts, for \$2,652, which was the renewal of the two last above mentioned notes, together with four months' interest, \$52, and is the note in suit. This note is indorsed for collection: "Thos. S. Wiltbank, Executor of Samuel J. Potts, Deceased." At the trial of the case the plaintiff, while admitting that the note sued upon was the last of the series of renewals hereinbefore stated, and represented the money loaned upon the notes and duebills made by George Tobler, gave evidence tending to show that at the time

the first joint note was signed by Mr. and Mrs. Tobler, May 24, 1893, she had admitted that she had got the benefit of the money loaned to her husband, and that it had been used to pay taxes, interest, and repairs on her property, and that, therefore, having received the benefit of the money, she was liable for it. The defense contended that, inasmuch as the original loans had been made on the credit of the husband, and not on the credit of her separate estate, her declaration that she had received the benefit of the money did not create any liability upon her, as it was not a contract within the scope of the several acts of assembly authorizing a married woman to make contracts binding upon her separate estate, and that she was but surety for her husband, and therefore expressly prohibited from making such a contract, and that there was no consideration for the note sued upon so far as Mrs. Tobler was concerned, and that, under all the evidence in the case, the verdict should be in her favor. Points were presented to the court, which were refused, raising these questions. The court left it to the jury to say whether or not the money was loaned to Mrs. Tobler on the credit of her separate estate, and the defense contended that there was no evidence in the case that justified the submission of this question to the jury, and that the court ought to have given a binding instruction to the jury to find a verdict for the defendant Mrs. Cornelia V. Tobler.

M. Hampton Todd, for appellant. A. S. L. Shields, for appellee.

GREEN, J. It is beyond all question that the consideration for which the first of the large notes was given, the one of May 24, 1893, for \$2,600, was the several notes of the appellant's husband given at different dates prior to that time. Mrs. Tobler indorsed two of them, but on the others her name did not appear. These four duebills and two notes were aggregated into one new note for \$2,600, at four months, dated May 24, 1893. When that fell due two new notes were given, one for \$2,348, and the other for \$252, dated September 27, 1893, and at their maturity, on January 27, 1894, the note in suit was given for \$2,652, the aggregate of the principal and interest of the last two preceding notes. All of these last-mentioned notes were signed by George Tobler and Cornelia V. Tobler. No new or fresh consideration of any kind, other than the preceding notes, appeared in the case in any way. On the face of the papers, therefore, the note in suit was signed by Mrs. Tobler as surety for her husband. She was not the maker of any of the original notes which were signed by her husband alone, and she was indorser only on the two upon which her name did appear. The present action, it must be borne in mind, is not an action to recover for money loaned. It is an action founded exclusively upon the note of January 27, 1894. It is true the amended statement of the plaintiff's cause of action con-

tains an averment that the note was given to secure a loan of \$2,652, which was made by Potts to Mrs. Tobler for the payment of interest, taxes, and repairs of her separate real estate, but the action is nevertheless upon the note as the note of the wife. Under the act of 1848, it was repeatedly held that a married woman could not give a valid obligation for money loaned, although the loan was made for the express purpose of enabling her to pay for land, or for the removal of liens, or the payment of repairs or taxes, or for improvements of her separate real estate. *Glyde v. Keister*, 32 Pa. St. 85; *Brunner's Appeal*, 47 Pa. St. 67; *Kelper v. Helfricker*, 42 Pa. St. 325; *Schlosser's Appeal*, 58 Pa. St. 493; *Sellers v. Heinbaugh*, 117 Pa. St. 218, 11 Atl. 560. In *Glyde v. Keister* the bond was given for necessities, and we held it was void, although she would be liable for the debt if contracted directly by her. In *Brunner's Appeal* the bond was given for the improvement of her real estate, in *Kelper v. Helfricker* for money borrowed for the purchase of land, and in *Schlosser's Appeal*, for the extinguishment of a lien; but all were held void, because, as the law then was, a married woman could not give a valid bond. In *Sellers v. Heinbaugh* (decided in 1897) a married woman was bound, with sureties, for the payment of money borrowed and used for the repair and improvement of her separate real estate. The sureties paid the bond, and brought an action against their principal to recover the money paid by them as her sureties, and we held there could be no recovery. All of those decisions proceeded upon the idea that the married woman could not make a valid obligation for any of the several purposes mentioned, and therefore she was not liable. It was the want of the contractual capacity to make such an instrument that relieved her of any obligation. Since the acts of 1887 and 1893 her contractual capacity has been very greatly enlarged, and we have cheerfully held her bound by her contracts to the full extent of her liability under those acts. But the liability set up in the present case is still subject to statutory prohibition. The act of June 8, 1893, § 2 (*Purd. Dig.* p. 1299, pl. 24; *P. L.* 344), which is the source of her present contracting power, also contains a peremptory prohibition in the following words: "But she may not become accommodation indorser, maker, guarantor, or surety for another." This species of liability she is still unable to incur, and hence her inability to make such contracts must be adjudged upon the same principles and authorities that were applicable prior to the new legislation. Governed by those principles, and acting upon those authorities, there is no room for any argument or discussion upon the question of her liability. As there was not then, and is not now, any contracting capacity upon which such a liability can be founded, it does not exist. In *Patrick v. Smith*, 165 Pa. St. 526, 30 Atl. 1044, this view was enforced where a very ingenious method

of evading the act was devised. But we looked beyond the method, and refused to enforce the liability of indorsement by the wife of a draft in favor of her husband, although she drew the proceeds of the draft from the bank, which discounted it by her personal check in favor of her husband, and subsequently gave her own note for the unpaid part of the draft, and again drew the proceeds by her personal check in favor of her husband. Our Brother Dean, delivering the opinion, said, speaking of the act of 1893: "This act declared a married woman might bind herself by many contracts which theretofore she could not legally make, yet it expressly continued her disability to become an accommodation indorser, guarantor, or surety for another. * * * Formerly her capacity to contract was exceptional and her disability general. Now her disability is exceptional and her capacity general. * * * Her liability is not determined alone by the form of the obligation; if the object was to evade the disability created by the statute, the fact, not the form, will determine her liability. * * * The whole transaction was a transparent device adopted by the plaintiff and the husband to evade an express statutory enactment,—to create by form a liability where by law none in fact existed." In the present case there was no device of any kind by which to avoid the effect of the statute. The liability sought to be enforced is a direct contract of suretyship, and upon such a contract there is no liability, unless we choose to set aside the positive terms of an express statute, which, as a matter of course, we will not do. The case of the plaintiff is not helped in the least degree by the effort to show that the debt was contracted for the benefit of the wife's separate estate. Some of the cases already cited were far more meritorious than this in this respect. Nevertheless we held uniformly that there could be no recovery, for the fundamental reason that there was no capacity to make the particular instrument which was sought to be enforced, although there was capacity to incur the kind of indebtedness for which the instrument was given. As this is a proceeding to enforce the payment of an instrument which is in itself a contract of suretyship only, we are obliged to hold that there can be no recovery. The case of *In re Spotts' Estate*, 156 Pa. St. 281, 27 Atl. 132, has no application. The recovery there was based upon a direct loan of money to the wife, for which, of course, she was liable. The assignments of error are all sustained. Judgment reversed.

CONSHOHOCKEN TUBE CO. v. PHILADELPHIA & R. R. CO. et al.

(Supreme Court of Pennsylvania. April 26, 1897.)

GARNISHMENT—INDEBTEDNESS OF GARNISHEES—QUESTION FOR JURY.

Where defendant in garnishment discloses an indebtedness for goods furnished on order

sent to defendant in judgment, but there was an uncertainty as to whether, under the evidence, the goods were in fact furnished by such defendant, and whether the garnishee was not indebted to third parties for such goods, it made an issue for the jury, and it was error to direct a verdict against the garnishee for only a portion of the goods so delivered to it.

Appeal from court of common pleas, Philadelphia county.

Action by the Conshohocken Tube Company against the Iron Car Equipment Company, in which the Philadelphia & Reading Railroad Company, and Joseph S. Harris and others, receivers, were summoned as garnishees. From a judgment entered on a verdict directed by the court in favor of plaintiff, and against the garnishees, for part only of the amount claimed by plaintiff to be due from the garnishees, plaintiff appeals. Reversed.

Henry M. Tracy and D. Webster Dougherty, for appellant. J. S. Clark and R. C. Dale, for appellees.

McCOLLUM, J. The Conshohocken Tube Company, having a claim against the Iron Car Equipment Company, issued a writ of foreign attachment for the collection of it, and summoned the Philadelphia & Reading Railroad Company and its receivers as garnishees. The plaintiff, having obtained judgment against the defendant, proceeded in due course to ascertain whether the garnishees were indebted to the latter, and, if so, in what amount. The garnishees, in their answers to the interrogatories filed by the plaintiff, admitted an indebtedness of \$4,935.65 for railroad supplies furnished on orders sent to and apparently filed by the defendant, but they also stated in their answers that they were informed that the orders were in fact filled, and the money due for the supplies furnished on them was claimed by the Railroad Equipment Company. Judgment was entered against the garnishees, and from it an appeal was taken to this court, where the judgment was reversed, "with instructions to the court below to discharge the rule for judgment against the garnishees, and proceed to determine the right of the claimant, the Railroad Equipment Company, to the fund attached, by an issue to be tried before a jury." *Conshohocken Tube Co. v. Iron Car Equipment Co.*, 167 Pa. St. 595, 31 Atl. 950. On the trial of the issue thus directed, the court below instructed the jury to render a verdict for the plaintiff for the sum of one hundred and fifty-six dollars. The case is now before us on appeal by the plaintiff, the Conshohocken Tube Company, from the judgment entered on the verdict. The plaintiff contends that the issue involved a question of fact, which should have been passed upon by the jury. This contention is well founded if the evidence warranted a verdict for a larger sum. It is quite clear from the answers to the interrogatories and the testimony of Jones that the garnishees understood

that the supplies were furnished by the Iron Car Equipment Company, and that the payments made to Post, Martin & Co. and to Post & Pomeroy on account were made to them as its agents. The bill of April 4, 1893, for \$156, and on which a recovery was allowed, was for supplies bought of the Iron Car Equipment Company, and was paid by the receivers to Post & Pomeroy on the 30th of August, 1894. The bills rendered against the receivers under date of July 26, 1894, for supplies furnished in 1893, and amounting to the sum of \$1,201.34, were made payable "to Post & Pomeroy, Ac. the Iron Car Equipment Company," and approved by the treasurer of said company. These bills, considered in connection with the contract or agreement of September 4, 1890, between the Iron Car Equipment Company and the Philadelphia & Reading Railroad Company, were certainly consistent with and corroborative of the understanding or belief of the garnishees that the supplies were furnished by the former. Nothing appeared in any of the bills rendered for supplies to indicate that they were furnished by another company or party. The only witness who testified in support of the claim of the Railroad Equipment Company to the fund attached was John D. Reynolds, "who was a clerk in the office of Post, Martin & Co., who were succeeded by Post & Pomeroy." His testimony was all there was in the case tending in any degree to show that the Railroad Equipment Company furnished any part of the supplies or was entitled to any part of the fund. It was in some respects self-contradictory and unsatisfactory. As it was the only support of the only claim which denied the plaintiff's right to the fund, it was for the consideration of the jury, in connection with the evidence tending to show that the supplies were furnished by, and the money due on account of them belonged to, the Iron Car Equipment Company, at the time the fund was attached. The learned court below therefore erred in the instruction complained of. Judgment reversed, and *venire facias de novo* awarded.

**PENNSYLVANIA CO. FOR INSURANCES
ON LIVES & GRANTING ANNUITIES
v. FRANKLIN FIRE INS. CO.**

(Supreme Court of Pennsylvania. April 19, 1897.)

**EQUITY—JURISDICTION—ADEQUATE REMEDY AT
LAW—LOSS BY FRAUD OF THIRD
PERSON—LIABILITY.**

1. Equity has jurisdiction of a bill against a corporation which has transferred on its books stock of plaintiff on the production of the certificates and forged powers of attorney, which bill prays for the cancellation of the transfer and the reissue of the stock to plaintiff, or, in the alternative, for payment to him of the value of the stock.

2. Where a father permitted his son, who assisted him in business, to have access to a vault in which were kept shares of stock held

by the father and another as trustees, and the son procured a transfer of the stock on the corporation's books by producing the certificates and forged powers of attorney from the trustees, the father is not bound to bear the loss, rather than the corporation, because of the rule that, where one of two innocent persons must suffer a loss from the fraud of a third, the loss must be borne by the one whose negligence enabled the third person to commit the fraud.

3. The fact that a father, as trustee of an estate, has authorized his son, in some instances, to write his name to powers authorizing a sale or transfer of securities, does not warrant the inference that such authority was given as to certificates of stock belonging to the estate, but having no connection with such other securities.

Appeal from court of common pleas, Philadelphia county.

Bill by the Pennsylvania Company for Insurances on Lives & Granting Annuities, trustee and administrator with the will annexed of the estate of Charles H. Baker, deceased, against the Franklin Fire Insurance Company, to cancel the transfer of shares of stock in defendant company, or for an order on defendant to pay to plaintiff the value of such stock. From a decree in favor of plaintiff, defendant appeals. Affirmed.

Arthur Biddle and George W. Biddle, for appellant. John Hampton Barnes, George Tucker Bispham, and John G. Johnson, for appellee.

DEAN, J. Charles H. Baker, a resident of Philadelphia, died in September, 1872, possessed of an estate valued at \$700,000. He disposed of it by a will, of which he appointed his widow, Elizabeth, and his two sons, John R. and Charles H., executors, and also constituted them trustees of a large residuary estate for his grandchildren. Charles H. died in 1887. Elizabeth, widow of testator, although living in 1890, at the commencement of these proceedings, owing to her advanced age and physical infirmities had for several years ceased to perform any duties as executrix or trustee; thus leaving the entire management to her son John R. Baker, who at that date (1890) had reached the age of 72 years. For the transaction of the business of the estate, an office was maintained in the city, which was occupied most of the time by John R. Baker, Jr., son of the executor. He was 38 years of age in 1890, the date of the filing of this bill, and for 8 years had assisted his father as an active agent in conducting the affairs of the estate. Although a member of the bar, he had never practiced. His principal business was that of a speculator and dealer in stocks, in which, so far as success is measured by quick and large gains in money, he had, for a time, been successful. The father reposed confidence in the son; gave him power of attorney to oversee and manage his bank accounts, as executor; also, to collect the income of the many securities of the estate. He also intrusted him with the key to the box in which the securities of the estate were kept. The box was in a safe of a trust company, to which the son had right

of access. The large speculations of the son in the stock market eventually turned out badly, and in the panic following the Baring failure in 1890 he was financially ruined, and fled the country. It was then discovered that he had, by means of false representations as to his authority, and by forgery of his father's name as executor to powers of attorney, appropriated and lost a very large part of the securities belonging to the trust estate. Among these were 50 shares of the capital stock of the Franklin Fire Insurance Company (this appellant), the market value of which, at that time being about \$400 per share. The certificates, numbered 6, 13, and 31, had been issued to Charles H. Baker in 1832, 1839, and 1840, and had stood in his name on the books of the company until 1890, when they were transferred by the company to bankers and brokers of John R. Baker, Jr.; the old certificates being taken up and canceled, and new ones issued by the company to the transferee. The authority to the company for the transfer was the production of the original certificates, accompanied by three powers of attorney purporting to be executed by Elizabeth Baker and John R. Baker, executors. These powers of attorney were forgeries. Upon petition of the surviving executors and trustees, the letters testamentary to them were on 8th December, 1890, vacated, and letters with the will annexed were issued to this plaintiff, who, on the facts stated, filed this bill against the company for a cancellation of the transfer, and the reissue to it of a new certificate for the 50 shares of stock, or for an order on defendant to pay to it the value of the same, with interest. The defendant, in answer, denied the fact of forgery, and the right of plaintiff, under all the facts, to a decree. The case was referred to John A. Clark, Esq., as master, who heard the testimony fully, and, on his findings of fact and conclusions of law, suggested a decree that defendant be ordered to deliver to plaintiff a new certificate for the 50 shares, or pay to plaintiff the value of the same, with interest from January 10, 1891. To this report numerous exceptions were filed by defendants, which were overruled by the court below, the report of the master confirmed, and decree made as suggested by him. From that decree we have this appeal. Appellant places of record 33 formal assignments of error, which, it is conceded in the argument, in substance, are covered by three propositions: (1) Equity was without jurisdiction to entertain the bill. (2) Defendant's action in making the transfer was caused by the gross and culpable negligence of John R. Baker, the executor and trustee. Therefore he should suffer the loss, if the powers of attorney were forged or fraudulent. (3) The evidence did not show the signatures of the executors, if written by John R. Baker, Jr., were so written without the authority of the executors.

As to the first proposition, unquestionably, plaintiff, on the facts, might have brought a

common-law action against the defendant, and have recovered the damages sustained by the unauthorized transfer of the stock; and, if the sole prayer for relief here was for a money decree, such remedy, by plaintiff's admission, would have been adequate, because equity, in granting the prayer, would give nothing further than the event of a common-law action. But this prayer is in the alternative. The primary relief sought by plaintiff is a restitution of the particular chattel of which the estate has been defrauded. The defendant is a trustee of the capital of all its shareholders. The evidence of such trusteeship to the contributor who has paid his money is the trustee's stock certificate. This paper defendant has illegally canceled and destroyed, thus severing all connection between the shareholder and the trustee, and depriving him of all rights and privileges as a shareholder. He does not want money, but insists on his rights under his contract of membership in the corporation, and the privileges, present and future, to which he is entitled by virtue of membership; and he asks this, not from strangers to his contract, who owe him no duty in this particular, but from his trustee, who, though bound to protect his right, yet has, without authority, destroyed the evidence of it. An action at law, in this view, would be an inadequate remedy, and he is not bound to resort to it. To oust jurisdiction in equity, "it [the remedy] must be complete; that is, it must attain the full end and justice of the case; it must reach the whole mischief, and secure the whole right of the party, in a perfect manner, at the present time and in the future." Story, Eq. Jur. § 33. And on this ground equitable jurisdiction, in suits by shareholders against the corporation, has, on like prayers, been frequently sustained, both in the English courts and our own. *Barton v. Railroad Co.*, 38 Ch. Div. 458; *Telegraph Co. v. Davenport*, 97 U. S. 360; *Conyngham's Appeal*, 57 Pa. St. 474; *Appeal of Brush Electric Co.*, 114 Pa. St. 574, 7 Atl. 794. We affirm the jurisdiction of equity in this case on the ground that defendant is a trustee for its shareholder, the estate of Charles H. Baker, as to these 50 shares of capital stock; that its legal duty was not only to properly manage and protect the amount of capital contributed by Charles H. Baker, but also to protect his title thereto, so far as to permit no fraudulent or unauthorized transfer of such title on its books, or any unauthorized cancellation of his certificate. In all of the cases cited by appellant where equity refused to take jurisdiction because there was an adequate remedy at law, the real contention was between antagonistic claimants to shares of stock on contracts of sale or transfer between the parties.

To sustain the second assignment, it is sought to bring the case within the principle that, "where one of two innocent persons must

suffer a loss from the fraud of a third, the loss must be borne by the one whose negligence enabled the third person to commit the fraud." In the leading case (*Young v. Grote*, 4 Bing. 253), decided 70 years ago, this rule was held applicable to a transaction between a bank and its customer. There the drawer of a check had signed a number of them, and gave them to his wife, to be by her filled in with the amounts to be paid different parties. She filled in one with the words, "fifty pounds, two shillings," in the middle of the line; "fifty" commencing with a small "f," with ample space before it for the words "three hundred and," which were fraudulently inserted by the party to whom the check was delivered. Being cashed by the banker, the court held the loss must fall on the customer, saying: "Undoubtedly, a banker who pays a forged check is, in general, bound to pay the amount again to his customer, because in the first instance he pays without authority; * * * yet, if it be the fault of the customer that the banker pays more than he ought, he cannot be called on to pay again." This case has been followed both in England and the United States; notably by this court in *Garrard v. Haddan*, 67 Pa. St. 82. But, while some of the decisions carry the rule beyond its original scope, the later ones restrict it to cases between a bank and its customers. *Young v. Grote* was reconsidered in *Scholfield v. Earl of Londonsborough* [1896] App. Cas. 514, and in *Bank of Ireland v. Evan's Charities*, 5 H. L. Cas. 409, and its authority limited to cases where the customer has misled his bank by want of ordinary caution in drawing his check, bill, or note. And doubtless the rule in some cases would apply to other than strictly commercial transactions. If, in the case before us, the father, being the individual owner of stock, had executed and delivered to the son powers of attorney authorizing its transfer, leaving blanks for the description of the stock, to be afterwards filled in by the son, with verbal directions for the transfer of a particular stock other than that of the Franklin Fire Insurance Company, and the son had fraudulently filled the blank with the description of the last-named stock, it might be truly said, the father's neglect having caused the loss, he alone should suffer. The signatures being genuine, the father alone could detect the fraud, and he having conferred on the son, as concerned third persons, unlimited power to defraud, in justice he alone should suffer. But the supposed case is not the one before us. The distinction between the one in hand and *Young v. Grote* is not only made clear by the recent limitation of that rule, but also because there never was a time when that principle was applicable to these facts. Under the rule of the company, the transfer could only be made under the authority of the owner, evidenced by a power of attorney, and on the production of the original certificate. Assuming, what was without doubt the fact, that both parties were innocent of any intentional

fault or neglect, what unintentional failure in duty caused the loss? Because, unless, in the particular transaction with reference to this defendant, the executor either did something he ought not to have done, or did not do something he should have done, there was no neglect. Tested by this standard, where was the neglect of the father? It is answered, he intrusted to his son the key of the box in which were the securities. But what business was that of defendant? The securities did not pass by delivery. Possession gave no title. So far as perpetrating a fraud was concerned, the manual possession of the son could cause inconvenience, but no loss to anybody. The criminal was powerless, without the signatures of his father and grandmother to the authority for transfer. The defendant was not the owner of the securities, and had no such interest in them as would warrant it in exacting from the executor vigilance. We are not now speaking of the liability of the father to his cestuis que trustent, the equitable owners. That arises wholly out of a fiduciary relation, and is tested by other rules. He occupied no such relation to this defendant. He was not trustee for it of this stock. He owed to it no other duty than he owed to the general public. We have never understood that the widest application of the principle of *Young v. Grote* warranted the general public in demanding that the owner of a chattel shall by his vigilance protect it from criminals, or, if he neglect to do so, shall suffer the loss; that is, if the owner of a stolen horse found him in possession of another, the one in possession could maintain his claim by answering: "I bought the horse, not knowing he was stolen, from your servant, to whom you intrusted the key of your stable. Your negligence in trusting a dishonest servant caused the loss, and therefore I will keep your property." Yet this is the logical conclusion, if *Young v. Grote* is applicable to these facts. While not intending to relax any of the rules which hold trustees to a strict accountability to the beneficiaries of the trust funds, we will not enlarge that liability so as to protect those who deal in the trust funds from the consequences of their own neglect. We are clear, the executor failed in no duty owing by him to this defendant, and it is by no means clear he was even negligent towards those for whom he was trustee. In the city of Philadelphia to-day, is there a single estate of the magnitude of this one, approaching a million of dollars, where the legal trustee or custodian of it does not necessarily, in performing his duties, act through agents, clerks, or secretaries, who must frequently have access to the securities, and opportunities for embezzlement? Without such aids, could any trustee of such large interests efficiently perform his duty? Every corporation assuming the duties of executor, trustee, or guardian of estates acts only through agents, from president to messenger boy; and it is within the physical power of each, at times,

to appropriate the trust securities. The legal trustee is an artificial person, who can act only through agents. Courts and testators, when exercising the power of appointment, endeavor to select a solvent corporation, conducted by reputable agents, but no further care can be exercised. Any one of these agents may act dishonestly; and, until we are endowed with prevision, no possible care can guard against all unfaithfulness. The father had confidence in his son's integrity and business ability, and intrusted to him largely the active management of this estate, but did not relinquish his own judgment or supervision. The son grossly betrayed the confidence reposed in him. This was discovered only when an examination of the security box demonstrated it was empty. There is no evidence that before this he had any reason to believe his son was not capable and worthy of trust. Up until the crash came, the son's integrity was not questioned by any one. Brokers, bankers, and this defendant accepted the forged papers, which they, from the very nature of the transactions, must have known effected an appropriation of the securities of the estate of Charles H. Baker for the benefit of John R. Baker, Jr., without a suspicion that the transfers were unauthorized by his father, the trustee, and without even inquiry as to the genuineness of the fraudulent powers. When all the business world with whom he was brought so closely in contact in his many dealings—a world whose perceptions were not dulled by affection, but sharpened by interest—thought he was honest, there is no reason for assuming the father should have deemed him otherwise. To our minds, no fault or neglect on the part of John R. Baker, the father, is shown; and, if there was such fault in trusting the son with the key to the box, that fault did not occasion the loss. The defendant suffers from the crime of a forger, made possible because the son could write his father's name, not because the father intrusted him with a key, and because, it, without inquiry, accepted forged signatures as genuine.

The third assignment, that the evidence does not show the signatures were written without the authority of John R. Baker, is in direct conflict with the finding of the master. A certain power of attorney for the transfer of city loans, to which was affixed what purported to be the signature of the father as executor, incorrectly described the loan in the body of the instrument. The transfer clerk of the bank called upon the father to have the description corrected, which was done, and the authority reaffirmed by the father after the correction. This was without examination of the signature to ascertain whether it was genuine, for its genuineness was assumed by both the bank officer and the executor. That the father, in view of the large number of papers he had signed authorizing transfers and changes of investments, might, without examination, fail to recollect that he had not signed this particular one, and assume the simulated

signature to be genuine, is altogether probable; and, in view of all the testimony relating to the transaction, the master so finds, and says: "There is no evidence in the case to show that John R. Baker ever authorized his son to sign his name to transfers of stock or bonds belonging to any estate for which he was trustee." It is only necessary to say that a perusal of the whole evidence amply warranted this conclusion. But even if the father had authorized the son, in some instances, to write his name to a power authorizing a sale or transfer of some other security, having no connection with these 50 shares of stock, that fact would not warrant the inference that such authority had been given in this case. The case of *Telegraph Co. v. Davenport*, 97 U. S. 369, has been cited by appellees as a case closely resembling this one in its facts; ruling that, even where the securities of a trust estate have been unlawfully transferred by a dishonest agent of a negligent trustee, such negligence does not estop the cestui que trust from successfully asserting in equity their right to the property. In view of what we have said, it is not necessary to discuss or decide this point, although the opinion of Justice Field in the case cited, and our own authorities (*Bohlen's Estate*, 75 Pa. St. 305; *Guillon v. Peterson*, 89 Pa. St. 163), would seem to sustain this view. The decree of the court below is affirmed. In thus affirming the decree, primary and alternative, we express no opinion as to whether, in an equity proceeding, it is all plaintiff might claim. It is sufficient to say, appellee has taken no exception to it.

CLAD et al. v. PAIST.

(Supreme Court of Pennsylvania. May 3, 1897.)

COURTS—JURISDICTION—INJUNCTION.

A court which has jurisdiction of the parties may enjoin a threatened trespass on land lying in another county.

Appeal from court of common pleas, Philadelphia county.

Bill by Valentine Clad and another to enjoin Charles Paist from obstructing a highway. From a decree dismissing the bill, complainants appeal. Reversed.

Thomas Diehl, for appellants. Charles C. Townsend and Charles R. Maguire, for appellee.

McCOLLUM, J. The learned referee prepared a report in which he recommended a decree in conformity with the prayer of the bill. After argument, on exceptions to the report, he concluded that as the right of way dedicated by the defendant to public use was in Chester county, where the plaintiffs resided, and the residence of the defendant was in Montgomery county, the court in which the bill was filed had no jurisdiction of the matters complained of in it. He a-

cordingly modified his report, and recommended a decree dismissing the bill, and dividing the costs between the parties. The learned court, on exceptions to the report as modified, held that the question of jurisdiction should have been decided in favor of the plaintiff. In so holding, the court was clearly right. The parties being within the jurisdiction of the court, the court will, under ordinary circumstances, grant relief even in reference to a subject-matter beyond the territorial cognizance of the court. *Penn. v. Lord Baltimore*, 1 Ves. Sr. 444; *Vaughan v. Barclay*, 6 Whart. 392; *Munson v. Tryon*, 6 Phila. 395; *Jennings Bros. & Co. v. Beale*, 158 Pa. St. 283, 27 Atl. 948; *Roper v. Roper*, 3 Tenn. Oh. 53; *Parkes v. Parkes*, Id. 647; *Wood v. Warner*, 15 N. J. Eq. 81; *Topp v. White*, 12 Helsk. 165; *Manufacturing Co. v. Worster*, 23 N. H. 462; *De Klyn v. Watkins*, 3 Sandf. Ch. 185. The case of *Morris v. Remington*, 1 Pars. Eq. Cas. 387, which was cited by the referee as warranting the modification of his first report, was clearly inapplicable to the case in hand, and not opposed to the rule under which the court had jurisdiction to enter a decree restraining the defendant from obstructing the highway mentioned in the bill. We need add nothing further to what was said by the court below respecting jurisdiction. The court, however, thought that the defendant was entitled to have the bill dismissed at the costs of the plaintiffs, because he averred in his answer to it that he did not intend to build a schoolhouse on the strip of land in question without their consent, and because, in its opinion, this part of his answer had not been overthrown by the evidence. This view of the case does not appear to have been suggested by any exception before the court, and it seems to have entirely overlooked or disregarded the referee's finding of facts. He distinctly found that, "prior to the filing of the bill, the defendant threatened to build a schoolhouse upon one end of the boulevard, which would materially affect its use as a highway, and would permanently injure the plaintiffs." Besides, the defendant's averment in this particular must be considered in connection with other averments in his answer and his testimony in the case. These, so considered, are clearly evincive of a purpose on his part to appropriate the strip of land in question for his exclusive benefit, in plain disregard of his dedication of it to public use, and of the representations on which he sold the lots to the plaintiffs. His testimony respecting dedication was uncorroborated, and flatly opposed by his own acts and the testimony of many respectable and disinterested witnesses. But it is not necessary to discuss or specifically refer to the evidence applicable to the issues of fact made by the bill and answer. We have read and considered the whole of it, and our conclusion is that it fully sustains the referee's finding of facts, and warrants and requires

a decree restraining the defendant from obstructing or interfering in any manner with the free use by the public of the boulevard or highway in question. Decree reversed, and record remitted to the court below, with direction to enter a decree in accordance with this opinion; the costs to be paid by the appellee.

ALLEN v. BOROUGH OF DU BOIS.
(Supreme Court of Pennsylvania. May 3, 1897.)

DEFECTIVE SIDEWALKS — CONTRIBUTORY NEGLIGENCE.

Whether plaintiff, in going on a sidewalk, knowing it was in a bad condition, the danger, however, not being obvious, instead of going in the road, or on the other side of the street, where there was no pavement, was guilty of contributory negligence, is a question for the jury.

Appeal from court of common pleas, Clearfield county.

Action by William Allen against the borough of Du Bois for injury from defective sidewalk. Judgment for plaintiff. Defendant appeals. Affirmed.

The opinion of the court below on discharging rule for new trial is as follows: "A careful investigation of this case, and an examination of the authorities bearing upon the question raised on the trial, satisfies us that it was a proper case to be determined by a jury. We believe the court could not have assumed the responsibility of determining it upon the law and facts without grave error. That the walk in question was out of repair, and had been in an unsafe condition for a long time, appears clearly from the evidence; and that sufficient time had elapsed to visit the borough officials with constructive notice also appears. It is the function of the jury to pass upon the question of the negligence of the defendant. The evidence of the plaintiff's intoxication was very slight, and there was very little, if anything, to warrant a jury in finding that he was guilty of contributory negligence by reason of the manner in which he passed over this board walk. So, there can be no complaint of the jury having found with him on those questions. Whether the plaintiff was warranted in undertaking to pass over the defective walk, in the light of the knowledge he had of its condition, is the only question upon which there can be any doubt; and we believe that was a question of fact for the jury, and not one of law for the court. There was no pavement on the opposite side of the street over which he could have gone. He could have avoided this pavement only by taking the wagon road around it. Had the danger been apparent to him, this would, of course, have been his duty. While he knew that the material of which the walk had been constructed was more or less rotten, and that some of the

boards had become loosened, yet it does not appear that there was manifest danger in attempting its passage. The walk had been in this condition for a long time. Others had been constantly using it, and no accidents had occurred, so far as we know. The boards were in place, and there was nothing to indicate to the plaintiff that he could not safely pass over it, as he had done many times before. We do not understand that it is, under all circumstances, the duty of a pedestrian to go out of his way to avoid a defective pavement. Such is unquestionably the rule where the danger is apparent. Where, however, as in this case, the risk is not obvious, it becomes a question of fact for the determination of the jury whether or not there is contributory negligence in the attempted passage. Believing, therefore, that to have withdrawn this question from the jury would have been error, and being convinced that every question of fact was fully and fairly submitted to them, we do not think it would be just to sustain this rule, and give the defendant a second chance before a jury. *Forker v. Sandy Lake Borough*, 130 Pa. St. 123, 18 Atl. 609, supports the conclusion we have reached. See, also, *Township of Kingston v. Gibbons* (Pa. Sup.) 6 Atl. 115. The rule for a new trial is discharged."

The following are the assignments of error: "(1) The court erred in not affirming defendant's first point: 'That if plaintiff, knowing the sidewalk to be in a bad condition at the time the accident happened, and went on the walk with that knowledge, he was guilty of contributory negligence, and is not entitled to recover.' (2) The court erred in not affirming defendant's third point, which point and the ruling thereon are as follows: 'That if plaintiff, knowing the walk to be in a bad condition, walked over the pavement in company with his son, and the son, lifting a loose board, tripped plaintiff, thereby causing the injury, plaintiff was guilty of contributory negligence, and is not entitled to recover.' Answer: 'Refused. Whether the plaintiff used due and proper care in passing over this walk I submit to you, and I refer you to what I have said in the general charge bearing upon this question.' (3) The court erred in not affirming defendant's fourth point: 'That, there being a safe way around the defective walk, the plaintiff was bound to use that way; and, if he took the walk, he was guilty of contributory negligence, and not entitled to recover in this case.' (4) The court erred in not affirming defendant's fifth point: 'From all the evidence, the verdict should be for the defendant.' (5) The court erred in his general charge to the jury, in stating that 'I cannot say to you that, at the point where the injury was received, the condition of this pavement was so dangerous as to be perfectly apparent to the public; that its condition was such that he ought to have, beyond doubt, foreseen that this injury would occur to him by an attempted passage over

it, and therefore should have taken the wagon road.' (6) The court erred in his general charge to the jury, as follows: 'It is contended by the defendant, further, that, even though you should find there was no contributory negligence in this plaintiff attempting to pass over that walk, yet he was negligent in the manner in which he attempted the passage, under the circumstances of the case, being acquainted, as he was, with the condition of the walk. That, again, is a question for you to determine. If he was justified in undertaking this passage, did he proceed over it carelessly? Would a prudent man have passed this place as he did? The defense contends that he ought not to have taken the inside; that it was because of his permitting his boy, who was with him, with a lantern, to take the outside of the pavement,—because of his taking the inner side,—that this injury occurred. It is perhaps true that, if the positions had been reversed, the injury would not have occurred to William Allen. It might have occurred to the boy, or it might not.'"

W. C. Pentz, for appellant. A. L. Cole and H. A. Moore, for appellee.

PER CURIAM. According to the practically undisputed evidence, the borough officials were grossly negligent in permitting the board walk in question to remain so long in an unsafe condition; and doubtless the jury had no difficulty in finding that defendant's negligence in that regard was the proximate cause of plaintiff's injury. But it is contended that the evidence of plaintiff's contributory negligence was such as to make it the duty of the court to withdraw the case from the jury, by directing a verdict for defendant. This position is untenable. While there was some testimony tending to show that plaintiff failed to exercise that degree of care that an ordinarily prudent man would have done in the circumstances, it was clearly for the consideration of the jury, and to them it was rightly submitted. The state of the evidence was not such as would have justified the court in declaring, as matter of law, that plaintiff was guilty of contributory negligence. The questions involved were both questions of fact, which the jury alone could legally determine; and they were accordingly submitted to them, with substantially correct and adequate instructions. Neither of the specifications of error is sustained. Judgment affirmed.

WRIGHT v. JORDAN.

(Supreme Court of Pennsylvania. April 26, 1897.)

LIMITATIONS—PAYMENT OF INTEREST—EVIDENCE.

Note in suit is sufficiently identified as that on which payment of interest was made within six years, so as to prevent bar of the statute, though plaintiff held two notes of de-

defendant, and the receipt for the payment recited merely that it was "on account of interest on note," plaintiff's evidence that payment of that date was for interest on note in suit being uncontradicted.

Appeal from court of common pleas, Philadelphia county.

Action by William Wright against Charles H. Jordan. Judgment for plaintiff. Defendant appeals. Affirmed.

Joseph P. McCullen, for appellant. Geo. W. Shoemaker and Mr. Hunn, for appellee.

GREEN, J. The learned judge of the court below instructed the jury that if they believed that interest was paid on the note in suit within six years from the time the suit was brought the plaintiff had a right to recover the amount of the note with interest to date. That this instruction was absolutely correct is not even questioned by the learned counsel for the appellant. The jury did believe that interest was so paid, and rendered a verdict for the plaintiff for the full amount of his claim. There is therefore no question in the case except whether there was sufficient evidence before the jury to justify them in rendering their verdict. A careful reading of the testimony convinces us that no other verdict would have satisfied the demands of the testimony. The facts testified to were entirely undisputed. There was no contradiction of the positive testimony of the plaintiff, that the last payment of interest on the note in suit was made on the 28th of April, 1887, which was less than six years before the action was brought. The written receipt for that payment was given in evidence, and it expressed on its face the fact that it was "on account of interest on note." This was not at all disputed by the defendant, although he was alive and competent to testify. But he now claims that there were two of his notes in the hands of the plaintiff at that time, each for \$10,000, and that the receipt does not identify the particular note on which the payment of interest was made. While it is true that the receipt does not in language describe the particular note on which the interest was then paid, the other testimony in the case proves most conclusively that it was paid on this identical note in suit. It is not at all necessary to repeat the testimony in detail. It was not contradicted in the least degree, either by the defendant or by any witness in his behalf. The plaintiff swore positively that the interest paid on April 28, 1887, was paid on this particular note, and the defendant did not pretend to deny or even dispute it. But the circumstances testified to by the plaintiff were quite as convincing as his positive testimony. Thus he testified fully that he had a note for \$10,000, given by the defendant in 1884, at four months, which was the last renewal of a note for the same amount originally given four and a half years before, and renewed every four months thereafter. The plaintiff and defendant had been

partners during that time, and dissolved their relation on June 6, 1885. On that date they had a settlement which showed an indebtedness of the defendant to the plaintiff of \$16,744.78, besides some securities which the defendant owed to the plaintiff. In making their settlement the new note, now in suit, was given payable in two years after date, the old note was to be given up, a duebill for the securities was given, and \$3,000 of Buffalo bonds were delivered by defendant to plaintiff. The defendant also agreed to pay the plaintiff \$10 a week on account of interest on the new note for \$10,000, the one now in suit. The plaintiff agreed to surrender the old \$10,000 note the next day, and undertook to deliver it, but, being unable to find the defendant, it was not then delivered, and afterwards, on account of other matters subsequently discovered, the plaintiff retained it. The defendant at once commenced paying interest on the new note in small sums of \$10 and \$20, and continued doing so until on April 28, 1887, the last of these payments of interest was made, and then the defendant told the plaintiff he would not pay him any more. This is the plain story of the interest payments as testified to by the plaintiff, and in no manner contradicted or denied by the defendant. It is useless to prolong the discussion. Not only was there ample testimony to justify the verdict of the jury, but any other verdict would have been in entire disregard of the whole weight of the evidence. The defendant, not contesting the truth of the testimony, argues that it was not sufficient to identify the particular note on which the interest payments were made, and cites the cases of *Landis v. Roth*, 109 Pa. 621, 1 Atl. 49, and *Burr v. Burr*, 26 Pa. St. 234, in support of his contention. It is only necessary to say that the facts of those cases have no analogy to the facts of this, and they are therefore not applicable. The difficulty in those cases was the absence of testimony identifying the debt as to which the payment was made, while here there is an abundance of testimony both positive and circumstantial, and of the most convincing character, fully identifying the note on which the payment was made. Judgment affirmed.

FULLAM v. ROSE.

(Supreme Court of Pennsylvania. May 3, 1897.)

EVIDENCE—CHECK TO BE USED AS TEST PAPER—
TRIAL—INSTRUCTIONS—EVIDENCE TO SUPPORT.

1. The statement of a witness that the signature to a check shown him "looks like" the signature of the person whose name is signed to it does not justify the admission of the check as a test paper.

2. In an action by an executor on a sealed instrument, merely produced by plaintiff, it was error for the court to state in the instructions that the paper "was found among the belongings of" testator.

8. It was error to charge that the omission from the inventory of the paper in suit was sufficiently accounted for by the statement of plaintiff's counsel "that it was a disputed matter, and therefore it was not counted among the assets," where there was nothing in the evidence on which to base the statement.

4. It was error to charge, after referring to the paper in suit as evidence in support of plaintiff's claim, that there was "in addition to that certain corroborative evidence which is based upon the assumed good character of" deceased, in the absence of testimony on which to base any assumption of deceased's character from which inferences in favor of plaintiff's claim might be drawn by the jury.

Appeal from court of common pleas, Philadelphia county.

Action by Richard Fullam, executor of the estate of Luke Otis, deceased, against Anna Maria Rose, on a sealed instrument acknowledging the deposit of money with defendant, payable on demand. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. C. Gallen and S. Davis Page, for appellant. James E. Gorman, for appellee.

STERRETT, C. J. This case was here three years ago on defendant's appeal from the former judgment, and is reported in 160 Pa. St. 47, 28 Atl. 497. Its salient features—especially as to questions of fact presented by the testimony in the court below—are substantially the same now as they were then, and hence special reference thereto, in this connection, is unnecessary. On the last as on the former trial, the right of the plaintiff to recover depended on questions of fact which it was the exclusive province of the jury to determine from the somewhat conflicting testimony before them. It was therefore the duty of the learned trial judge to fairly and impartially submit the case on all the evidence with such instructions as were calculated to guard the respective rights of both parties without unduly prejudicing the claims of either. The burden of defendant's complaint is that this was not done. Our consideration of the ruling complained of in the first specification, and of the entire charge, including the excerpts therefrom recited in the second to the sixth specifications, inclusive, has satisfied us that this complaint is not entirely unfounded. The check referred to in the first specification was erroneously admitted in evidence without proper proof of the signature of Luke Otis, deceased, the alleged drawer thereof, and was afterwards improperly used to the prejudice of the defendant. The check in question having been shown to Michael Rose, one of defendant's witnesses, on his cross-examination, he was asked: "Is that Luke Otis' signature?" His answer was: "It looks like it." Without asking him whether he believed the signature to be genuine or not, or offering any proof whatever as to its genuineness, the check was offered in evidence and admitted under ex-

ception. Subsequently it was used as a test paper for the purpose of contradicting and discrediting defendant's witnesses. In that part of the charge recited in the second specification, the court, in submitting the check to the jury, said, among other things: "The plaintiff puts in this check of Mr. Otis, and it is for you to make a comparison of those signatures." It is scarcely necessary to say that this was clearly erroneous, and manifestly prejudicial to the defendant. The answer of the witness that the signature shown him "looks like" the signature of Luke Otis, without more, was wholly insufficient to justify the admission of the check in evidence for any purpose, especially for the purpose of being used as a test paper. It was not even shown that the witness was sufficiently acquainted with the signature of Luke Otis to express any opinion as to the genuineness of the signature in question, nor was he asked to express any opinion on the subject. In the third specification the learned trial judge inadvertently stated to the jury that the paper sued on "was found among the belongings of" the plaintiff's testator. This was unwarranted by anything that appears in the testimony. The paper was produced by the plaintiff, but where it was found, or when it came into his possession, does not appear. In view of the fact that the inventory filed by plaintiff in the register's office contains no reference to the paper in question, and other circumstances relied on by the defendant, the misstatement of fact complained of cannot be ignored on the ground that it was harmless. The same mistaken assumption of fact is also involved in the sixth specification, where in the jury were, in substance, instructed that the omission from the inventory of the paper in suit was sufficiently accounted for by the statement of plaintiff's counsel "that it was a disputed matter, and therefore it was not counted among the assets." This statement of counsel appears to have been entirely gratuitous. We find nothing in the evidence on which to base it. It was doubtless suggested by him, as part of his own theory of the case, and as affording a possible explanation of the omission. But that did not justify submission of the alleged explanation to the jury, as was done. Causes should be tried on the evidence properly before the jury, and not upon theories of counsel, especially when they are unsupported by the evidence. In this case, the learned trial judge appears to have inadvertently given undue prominence and weight to such theories; and the effect was doubtless misleading and prejudicial to the defendant. Again, in that part of the charge recited in the fourth specification, the learned judge, after referring to the paper in suit as evidence in support of plaintiff's claim, proceeded to say there was, "in addition to that, certain corroborative evidence which is based upon the assumed good character of Luke Otis, the

deceased," etc. In the absence of testimony on which to base any assumption as to the character of Luke Otis, from which inferences in favor of plaintiff's claim might be drawn by the jury, this suggestion, as to "corroborative evidence," was erroneous as well as misleading. We also think that part of the charge covered by the fifth specification was uncalled for and unwarranted by any evidence in the case. On the whole, we have no doubt the defendant's case was unintentionally, but nevertheless seriously, prejudiced by the manner in which it was submitted to the jury. Her defense was payment, in support of which there was direct and positive evidence, corroborated by proof of the testator's admissions, and other facts and circumstances, some of which, at least, were clearly established by competent evidence. It is unnecessary to notice other features of the case, to which attention was called when the case was here before. In the hurry of trial they appear to have been overlooked by the court. As already intimated, the case was peculiarly one for the consideration of the jury. It was their duty to consider and pass upon the credibility of the witnesses, reconcile conflicting testimony, etc., and to that end it should have been submitted to them fairly and impartially. Judgment reversed, and a venire facias de novo awarded.

KEATING et al. v. JORDAN et al.

(Supreme Court of Pennsylvania. May 8, 1897.)

SCHOOL BOARD—RIGHT TO UNSEAT ABSENT MEMBERS—"REGULAR" MEETINGS.

Where a school board has no standing regulations as to the time for holding meetings, "every meeting held in succession from the first meeting for organization, by adjournment, to a time and place certain," is a regular meeting (Act April 11, 1862; P. L. 471); and absence of a director from two such meetings in succession, unless sick or out of the district, will authorize the board to declare his seat vacant, and appoint another in his stead (Act May 8, 1854; P. L. 618).

Appeal from court of common pleas, Luzerne county.

Bill by E. J. Keating and another against Patrick Jordan and others to enjoin defendants from acting as school directors and teachers in Pittston township school district, and from interfering with the teachers in possession of the school in said district. From a decree making the injunction permanent, defendants appeal. Affirmed.

The following is the opinion of the court below, on motion to continue preliminary injunction:

"The seats of Martin Howley, Patrick Jordan, and John Brown, three members of the school board of Pittston township, were on the 24th August, 1896, declared vacant, and other persons appointed in their stead. This action of the directors was taken in supposed

pursuance of the act of May 8, 1854 (P. L. 618), which, among other things, provides that 'if any person having taken upon himself the duties of his office as director shall neglect to attend any two regular meetings of the board in succession, unless detained by sickness or prevented by absence from the district, or to act in his official capacity when in attendance, the directors present shall have power to declare his seat on the board vacant, and to appoint another in his stead to serve until the next regular election.' It is not denied that Howley, Jordan, and Brown failed to attend the meetings of the board held on the 17th, 20th, and 24th of August, 1896. If these were 'regular' meetings in contemplation of law, then the action taken was within the jurisdiction of the directors, and their discretion cannot be impeached in this proceeding. All official deliberative bodies have the inherent right to assemble in pursuance of a previous adjournment. Where the record of minutes of a previous meeting shows an adjournment to a time and place certain, then such adjourned meeting will be considered regular.

"But it is claimed in the present case that the general rule applicable to deliberative bodies is qualified in the case of boards of school directors by the act of April 11, 1862 (P. L. 471), which, in section 3, provides that 'the term "stated meetings" or "regular meetings" * * * shall hereafter be taken to mean the first meeting thereof for organization after the annual election of directors or controllers, or the monthly or other periodical meetings held thereafter, in accordance with the standing regulations of the board.' This act, however, contains the following additional provision: 'But, if there are no standing regulations, then every meeting held in succession from the said first meeting for organization by adjournment to a time and place certain, and so entered on the minutes of the proper board, shall be to all intents and purposes regarded as a regular meeting.' 'The board of directors of the Pittston township district have never adopted any standing rule or regulation in reference to the time for holding regular monthly meetings. It seems to have been their practice to meet from time to time, at the call of the chairman. This is shown by the minutes. The meetings of the 3d of August, of the 17th, and of the 20th, all seem to have been held in a regular manner,—the first at the call of the chairman, and the others in pursuance of adjournment properly noted on the minute book. At the meeting on the 20th, there being but two directors present, an adjournment was ordered to the 24th, at 7:30 p. m., in the Morgan Lane schoolhouse. This also appears upon the minutes. It would seem, therefore, that the adjourned meeting held on the 24th of August, 1896, was regular in all respects; and it appears from the depositions that Howley, Jordan, and Brown were duly notified of the meeting,

but did not see proper to attend it. Upon the whole case as now presented, we consider it our duty to continue the injunction granted on the 4th of September, 1896, until further order; and it is so ordered."

M. N. Donnelly, James L. Lenahan, and C. Frank Bohan, for appellants. E. F. McGovern and John T. Lenahan, for appellees.

PER CURIAM. The office of school director was intended to secure a fair and an intelligent administration of the school laws in the interest of public education. When these officers cannot or will not discharge their duties, the law provides for their prompt removal, and the appointment of others better able or more willing to serve the public with fidelity. An examination of this case has satisfied us that a proper occasion for the exercise of this power of removal and appointment had arisen in Pittston township, and that it was exercised in a regular and valid manner. The learned judge of the court below has correctly ruled the questions presented at the trial, and the decree is affirmed; appellants to pay the costs of this appeal.

DORRANCE v. DORRANCETON BOROUGH et al.

(Supreme Court of Pennsylvania. May 3, 1897.)

STATUTES—SUBJECTS AND TITLES OF ACTS—REPEAL BY IMPLICATION.

1. Act May 16, 1891 (P. L. 75) § 9, authorizes municipal corporations to open streets on petition of abutting property owners. Section 10 prescribes in detail the procedure in such cases. Act May 22, 1895 (P. L. 106), is entitled "An act amending section 9 of an act entitled 'An act in relation to laying out, opening * * * streets * * *,' approved May 16, 1891, enabling municipal corporations to lay out, open, * * * streets or alleys upon petition or without petition of property owners," and it adds to section 9 the provisions that every such corporation shall have power, whenever the councils deem it necessary, to open streets without petition, provided that the ordinance authorizing it be adopted by a three-fourths vote of all the members elect of councils, and that no such ordinance be finally adopted in a less period than 30 days after its introduction, and that in the meantime copies of the ordinance be published. *Held*, that Act May 22, 1895, contains only one subject, which is expressed in its title.

2. Act April 3, 1851 (P. L. 320), which authorizes borough councils, of their own motion, to open streets, was repealed by implication by Act May 16, 1891 (P. L. 75) § 9, as amended by Act May 22, 1895 (P. L. 106), in so far as it is in conflict therewith, which latter acts authorize municipal corporations to open streets on petition of abutting property owners, and, whenever the councils deem it necessary, to open streets without petition, provided that in the latter case the ordinance authorizing it be adopted by a three-fourths vote of all the members elect of councils, and that no such ordinance shall be finally adopted in a less period than 30 days after its introduction, and that in the meantime copies of it be published.

Appeal from court of common pleas, Luzerne county.

Bill by Benjamin F. Dorrance against the borough of Dorranceton, J. Ford Dorrance, and others, councilmen, and George Evans, burgesses, of such borough, for an injunction. From a decree continuing a preliminary injunction until further orders, defendant borough appeals. Affirmed.

The opinion of the court below is as follows (Lynch, J.): "The bill praying for a preliminary injunction against the defendants to restrain them from opening Rutter street, in the borough of Dorranceton, over the land of the plaintiff, was filed on the 4th of January, 1897. The injunction was awarded. Depositions have been taken on the part of the plaintiff, who now asks the injunction be continued. The only question raised by the bill and argued at the bar is this: Is the ordinance opening and extending Rutter street valid? If so, the injunction should be dissolved. If invalid, it should be continued. It was conceded on the argument that Dorranceton was incorporated under the general borough law of 1851 and its supplements. I cannot agree with the learned counsel for the defense, who claimed that 'it takes both the ninth and tenth sections of the act of 1891 to get an ordinance for opening the street. The act of 1895 clearly intended to and does provide for the very things enacted in both sections.' The ninth section of the act gives municipalities power to open streets upon petition only, and the tenth section provides a method of practice and procedure. The amendment of 1895 gives authority to open when they shall deem it necessary, and also lays down the method of procedure. If I am correct in construing these acts, the argument that the act of 1895 is unconstitutional, because the subject thereof covers more than one subject, which is not clearly indicated in the title, is not sound. The council, at the time of the passing of the ordinance, was composed of eleven members. It received the votes of only six; was introduced into council, and put on its first reading, March 13, 1896, and was finally passed on the 8th of April. These proceedings, it is claimed, were all under the act of 1851, which gives the corporate officers power to survey, lay out, enact, and ordain such roads and streets as they may deem necessary. P. L. April, 1851, p. 320, § 2. It was decided in Hanover Borough's Appeal, 150 Pa. St. 202, 24 Atl. 669, that the power conferred by the act of 1851 'is not impaired by the act of 1891, providing for the passage of ordinances for such purposes, on the petition of a majority of the property owners' abutting on the line of the proposed improvement. The reason given is that the act of 1891 is an affirmative one, conferring additional and cumulative powers on municipalities of all grades, but repealing no prior statutes expressly, nor any portion thereof by implication, 'unless the system provided by it is so inconsistent with that previously existing as to make it impracticable for them to stand together.' The act of 1891 gave, in this particular, the authorities power to open streets within their limits, and to vacate the

same upon the petition of a majority in interest and number of owners of property abutting on the line of the proposed improvement. There seems to be no valid reason for holding that the mere increase of power took away what had previously existed, but the amendment of 1895 (P. L. 106) adds nothing to the power of municipal authorities. The act of 1851 gave corporate officers of boroughs authority to lay out such streets as they might deem necessary, which has not been changed by the act of 1895. By this act the power to open streets of their own motion is neither enlarged nor curtailed, but the proviso gives an exclusive method for its exercise. Why has not the legislature the right to say, if, in effect, it replaces the provisions of the act of 1851, how ordinances shall be adopted and enacted, how long they shall lie over before enactment, and how the parties interested shall be notified of the proposed local law? These are mere safeguards for the benefit of the people to be affected by the improvement. Again, why should there be two modes of procedure without petition,—the one under the act of 1851, the other under the provisions of the act of 1895? Under both acts the council has authority to open when it is deemed necessary. Should the act receive such construction as to leave municipalities, persons, and all concerned in doubt as to the act under which the proceedings take place, or should it be said that it is simply necessary to tag an ordinance in order to place it under some particular act? The effort of the supreme court and the legislature, when considering acts of this character, since the constitution of 1873, has been to simplify procedure, and make the laws uniform. In so far as the amended act of 1895 regulates procedure, it must be held to supersede and replace those parts of the act of 1851 in conflict therewith. It is therefore decided that the ordinance in question, not having been adopted and enacted according to the provisions of the act of 1895, is invalid and void, and the injunction is continued until further order."

Geo. H. Butler, E. V. Jackson, and D. L. Rhone, for appellants. William S. McLean, for appellee.

PER CURIAM. The Appeal of Hanover Borough, 150 Pa. St. 202, 24 Atl. 669, which was decided in 1892, is not conclusive of a question arising under the act of 1895. Upon the questions raised by this appeal, we are satisfied with the opinion of the learned judge of the court below, and the judgment is therefore affirmed.

BELL et al. v. WOOD et al.

(Supreme Court of Pennsylvania. May 3, 1897.)

PUBLIC CORPORATIONS—SALE OF PROPERTY ON EXECUTION—RECEIVERS.

1. It is proper, under Act April 7, 1870, to sell, on the special *fi. fa.* provided for by it, land which is a component part of a corporate plant,

and necessary to the enjoyment of corporate franchises, and which, therefore, cannot be sold on execution, under Act June 16, 1836.

2. A receiver cannot be appointed for a corporation where its only effect would be to hinder and delay collection of a valid claim.

Appeal from court of common pleas, Blair county.

Suit by John E. Bell and others against R. D. Wood & Co., for use of the Camden Iron Works, of Camden, N. J. Decree for defendants. Plaintiffs appeal. Affirmed.

The opinion and decree of the court below is as follows:

"The plaintiffs in this suit own a majority of the shares of stock of the Bellwood Water Company, amounting to some \$21,000, and on the 23d of May, 1896, they filed a bill of complaint in their own behalf, and on behalf of any such other stockholders as might see fit to join in the same. In said bill they allege that the consideration for the stock held by them in said company was the conveyance to said company of a tract of land partly in Blair and partly in Cambria county, known as the 'M. Dull Tract,' containing 433 acres, with certain water rights and privileges, and that on said tract are located the dams and reservoirs of the Bellwood Water Company, from which water is supplied, by means of water main, pipes, and connections, to the Northwestern Railroad Company and a large number of individual consumers. The bill further recites that judgments have been obtained in the courts of Blair county for upward of \$12,000, in favor of the defendants named in the bill, against said corporation, and the property, real, personal, and mixed, of the same, including the said tract of land alleged to be held in perpetuity, advertised to be sold at sheriff's sale on writs of special *fi. fa.* issued from said judgments in the manner prescribed by the act of 7th April, 1870; and the court was asked to restrain said sales by injunction, on the ground that real estate held in fee by a corporation could not be sold in the manner provided by the act of 1870. The bill also alleged that 50 bonds, of \$500 each, had been issued by said company, secured by a mortgage on all its property, and that these bonds had been given to A. A. Stevens, the treasurer of the company, for the purposes of negotiation and payment of its corporate indebtedness; that they believe there exists a fund arising from the bonds already negotiated, together with the probable proceeds of bonds not yet negotiated, sufficient to pay and extinguish the entire corporate indebtedness; that no account has been furnished by the treasurer of the proceeds of said bonds; and that, the corporation being unable to pay and discharge its indebtedness, irreparable injury will be done to complainants by the sale of the property of the corporation without affording it an opportunity to have an account stated of the proceeds of the sale of bonds, and a proper marshaling of its assets. For

these reasons, the court was asked to appoint a receiver for the said corporation. On the presentation of the bill to us, due notice of the time having been given to counsel for the defendants, who was present when the application was made, a preliminary injunction was awarded, the execution of the writs stayed, and a rule granted to show cause why a receiver should not be appointed. Subsequently defendants' counsel moved to dissolve the injunction, assigning therefor several reasons, which we need not now consider, because of the disposition made of the injunction on other grounds. We might say, however, that we do not consider any of the reasons assigned in the motion of themselves sufficient grounds for dissolving the preliminary injunction, but it is unnecessary to devote any time to the discussion of the reasons for arriving at such a conclusion. On the hearing of the motion to dissolve the preliminary injunction no testimony was taken, but it was then agreed, although no formal agreement appears on record, that the injunction should be disposed of at the next meeting as upon a final hearing, as well as the application for appointment of a receiver. The defendants then filed an answer responsive to the bill, and, at the final hearing, considerable testimony was taken, at least on part of the plaintiffs.

"Under the statement of facts contained in the plaintiffs' bill and the accompanying affidavits, it was clearly our duty to stay the writs; but, at the subsequent hearing, it was developed that the plaintiffs' counsel, in his hasty preparation of the bill, in order that it might be presented in time to prevent a sale, did not observe that the deed for the M. Dull tract did not convey the land in fee, but only conveyed certain rights to the streams of water on said tract,—a fact that was not disputed on the hearing, and was apparent to us from an inspection of the deed; and it was also shown by the testimony that no dam or reservoir had been erected on the said tract by the Bellwood Water Company. It was developed, however, that the Bellwood Water Company had a title in fee to about one acre of land conveyed to it by John Coady, and that on this was its 'intake' or small dam from which the water entered into its pipes; and this land being included in the general levy made by the sheriff, and the description of the property advertised to be sold, it was contended by plaintiffs' counsel that there was still authority for restraining a sale under the special *f. fa.* authorized by the act of 1870, and requiring the sale, at least as to this land, to be made under the act of 1836.

"Without entering into a lengthy discussion as to the effect upon the act of 1836 of the act of 1870, and the proper proceedings to be resorted to in order to sell the property of a corporation, it is sufficient to say that the precise question before us was decided by the supreme court in the case of Greensburg Fuel Co.

v. Irwin Nat. Gas Co., 162 Pa. St. 78, 29 Atl. 274, adversely to the contention of the plaintiffs. The decision in that case is so entirely in harmony with the case of *Guest v. Water Co.*, 142 Pa. St. 610, 21 Atl. 1001, and the numerous other cases in which the act of 1870 has been before the supreme court and the lower courts, that it may be regarded as settled law that it is proper practice under the act of 1870 to sell, on the special *f. fa.* provided for by that act, land which is a component part of the corporate plant, and necessary to the enjoyment of corporate franchises, and which, therefore, could not be sold on execution under the act of 1836. The land purchased from Coady is certainly dedicated to corporate purposes, and essentially incident and appurtenant to the exercise of the corporate rights, business, and franchises of the Bellwood Water Company, and therefore is subject to sale in the manner resorted to by the plaintiffs in the executions stayed by us.

"The plaintiffs were also unfortunate in being unable to substantiate the allegations in their bill upon which they based their prayer to have a receiver appointed. A. A. Stevens, the treasurer of the company, and the only witness called in regard to this matter by either side, testified that the plant of the Bellwood Water Company had cost upward of \$26,000, and there had been advanced by himself and others, including the claim of R. D. Wood & Co., upward of \$26,000, for which bonds were held as collateral; that \$12,000 of the bonds were in the hands of the defendants in this suit, as collateral for the payment of their judgments, placed there by the written order of John E. Bell, president of the company and one of the present plaintiffs, \$1,000 of the bonds were delivered in part payment for pipe laying to the parties who laid the pipe, and the balance held by himself, by Stevens & Owens, and the First National Bank of Tyrone, as collateral for money advanced to pay for the expenses of the construction of the plant; and that there are still outstanding some debts unsecured, amounting to from \$1,000 to \$1,500, some of which are in dispute. Mr. Stevens also testified that he had been unable, after repeated and diligent efforts to do so, both at home and abroad, to dispose of the mortgage bonds of the company, but that the erection of a plant by Bellwood borough and the business depression had interfered; and there was no attempt or offer to show that even a possibility exists of negotiating them now or in the future, and thus receiving sufficient money to pay off the indebtedness of the company; and, even if this could be done, we scarcely see how the situation would be bettered much with no probability of the receipt of sufficient revenue to even pay the interest on the bonds as it accrues. The testimony taken by the plaintiffs also discloses the fact that, although the water company has been in operation for over two years at

least, its revenues have not yet exceeded over \$1,150 a year, \$1,000 of which is received from one customer, the P. & N. W. Railroad Company; and the testimony in support of the witnesses that the revenue from other sources was about \$150 a year is so vague and uncertain that it seems to us that about the only reliable source of revenue is the railroad company. It will thus be seen that the revenue has as yet been insufficient to pay the interest on the bonded indebtedness, and no attempt was made to show that there was any reasonable expectation that the revenue would likely be increased in the future. We assume that this state of facts exists, mainly for the reason that, about the same time that this company was organized, a system of waterworks was introduced by the borough of Bellwood, which fact seems to have precluded this company from supplying water to persons living within the borough limits. Whether this is the result of the legal rights of the borough water company or from the force of circumstances is an immaterial matter in this case. The claim of the defendants upon which judgment was obtained and execution issued is not disputed. It was for water pipe furnished the company, is overdue, and there is no claim of any agreement to forbear collection of the same.

"Although it was intimated at the time of the hearing and on argument that the plaintiffs did not think it was necessary to dispose of or hypothecate the full amount of the mortgage bonds to secure the debts incurred in the installation of the plant of the water company,—in other words, that, if properly administered, there would remain from the proceeds of the bonds a considerable amount to apply to the legitimate indebtedness of the company,—there was no effort to introduce any testimony to this effect, although the plaintiffs received a plain intimation, from the court, in reply to the suggestion above referred to, that, notwithstanding Mr. Stevens had been called by them, testimony would be received showing what the indebtedness of the company was, and what disposition had been made of the bonds, even though that testimony tended to contradict him. In this connection we might suggest that questions of account between the stockholders and officers, and questions of a similar character, cannot be adjudicated in this case, it being between the stockholders and creditors, although, of course, such matters might be of sufficient moment in certain cases to warrant the appointment of a receiver to protect the property until they were adjudicated. This suggestion also applies to the suggestions made in the argument as to the fund in the hands of the N. & P. W. R. R. Co. not taken by the defendants on the order they hold, as well as the holding by defendants of bonds as collateral while pursuing the debtor by execution. All these matters will have to be settled in other proceedings.

"Under such a situation of affairs as that

shown by the testimony in this case and recited above, we scarcely see where the equities of the case require or even permit us to appoint a receiver to take charge of the affairs of the company. There are no scattered assets to be marshaled, no allegation of mismanagement in the conduct of the present business of the company. The purposes of the application and the only effect of granting it would be to hinder and delay the collection of a valid claim, and nowhere do we find any authority warranting the appointing of a receiver where the effect would be such as that mentioned. See opinion of Judge Weand in *Griffin v. Burden*, 10 Montg. Rep. 184, in which it is also held that on a stockholder's bill a receiver will not be appointed where the same purposes can be accomplished by a sheriff's sale. No sufficient foundation has been laid for any belief that the property could be disposed of to any better advantage at the hands of a receiver than by a sheriff's sale, and, even if that were established, it would not furnish a sufficient reason for appointing a receiver, as was expressly ruled in the case of *Pairpoint Manuf'g Co. v. Philadelphia Optical & Watch Co.*, 161 Pa. St. 22, 28 Atl. 1003. We can see that, by the conveyance to this corporation of valuable franchises by the plaintiffs, they are liable to lose them, without receiving sufficient compensation therefor; but that furnishes us with no sufficient reason to grant relief not otherwise warranted in the premises, and more especially when we cannot perceive how the granting of a receiver, which could only delay a sale of the property a short time under the circumstances of the case, can in any way reinstate them in the position they were when they made this conveyance, or furnish them with adequate compensation for the franchises conveyed by them at a time when they were *sui juris*, and capable of judging of the probable results of their act.

"We have examined with care the authorities cited and all text-books within our reach on the subject of the appointment of receivers, and fail to find a single case that would warrant us in the appointment of a receiver under the facts of this case, and this makes it unnecessary for us to refer to *Gravenstine's Appeal*, 49 Pa. St. 310, which seems to be authority that it is error to appoint a receiver when the corporation is not made a party to the bill. We suggested this weak spot in the case to the counsel when the bill was presented, and again intimated it at the time of the hearing; but the case lacks merit in the direction already referred to, and it is unnecessary for us to consider whether this authority is applicable or not. The authorities all unite in agreeing that the appointment of a receiver is a delicate duty, and one that should not be performed without hesitation and a careful examination of all the facts of the particular case, and we need only refer to a few of the Pennsylvania authorities on this subject to show that the supreme court

has always been very willing to reverse when the power has been exercised where the circumstances did not absolutely require it, and where it did not clearly appear that irreparable injury would result from the refusal to do so. We refer to *Gravenstine's Appeal*, supra; *Pairpoint Manuf'g Co. v. Philadelphia Optical & Watch Co.*, supra; *Lowry v. Philadelphia Optical & Watch Co.*, 161 Pa. St. 128, 28 Atl. 1004, and the cases there cited. The injunction previously issued, having been awarded on a state of facts not sustained by the proofs, must be dissolved at the costs of the plaintiffs; and, the facts and the law applicable thereto not warranting us in appointing a receiver, the bill must be dismissed.

"Now, July 21, 1896, this came to be heard on bill and answer, testimony having been taken, and the case argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows: That the preliminary injunction is hereby dissolved, and the bill dismissed, at the costs of complainants; and the sheriff of Blair county is permitted to proceed, on proper writ or writs of *fi. fa.*, to sell the personal, mixed, and real estate pertaining to the necessary enjoyment and exercise of the franchises of the Bellwood Water Company, together with the franchises and rights of the Bellwood Water Company."

W. I. Woodcock, for appellants. D. J. Neff and Biddle & Ward, for appellees.

PER CURIAM. A careful consideration of this record discloses no error in the decree of July 21, 1896, or in the proceedings leading up thereto. The action of the court below in dissolving the preliminary injunction, and dismissing the bill at the plaintiffs' costs, is so fully vindicated in the clear and convincing opinion of the learned president of the Forty-Seventh judicial district, who specially presided at the hearing, that nothing need be added thereto. Decree affirmed, and appeal dismissed, at plaintiffs' costs.

In re CONWAY'S ESTATE.

Appeal of CAMPBELL et al.

(Supreme Court of Pennsylvania. May 3, 1897.)

WILLS—DESIGNATION OF DEVISEES.

A devise to "my spinster or unmarried nieces" includes those nieces who, at testator's decease, were widows, as well as those who had never married.

Appeal from orphans' court, Philadelphia county.

Claim by Mary Ann McCourt and another for a distributive share of the residuary estate of Bernard Conway, deceased. The adjudication of the auditing judge in favor of claimants was affirmed by a divided court, and Mary Campbell and others appeal. Affirmed.

Edmund Randall, James A. Flaherty, and Keator, Freeman & Jenkins, for appellants. Samuel J. Taylor, for appellee Sally O'Donnell. Frank M. Cody, for appellee Mary Ann McCourt.

WILLIAMS, J. This appeal presents a new question which is by no means free from difficulty. The testator, Bernard Conway, after other devises and bequests, gave his residuary estate to his "spinster or unmarried nieces," six of whom had never been married, and were, therefore, properly described as "spinsters," and two of whom had been married and were widows. All of them were actually unmarried at the time of his death. The question now raised is whether one or both of these classes is entitled to take the residuary estate. The answer to this question must depend upon the proper construction of this clause in the will. In what sense did the testator use the word "or" in the expression "spinster or unmarried nieces?" As a general rule, the context may be successfully resorted to in a search after the meaning of a given word, but we can get no aid from the context in this case. The word "or" is ordinarily disjunctive in its office, but not always so. In the expression, "You may ride or walk," an alternative is presented to the person addressed, and he is assured that he may choose whether he will ride or walk. If a shopkeeper should inform a customer that the price of an article he was examining was "half an eagle, or five dollars," he would connect expressions he understood to be equivalent by "or," and the latter of these expressions would be used as explanatory of the sense in which he had used the former. If the same shopkeeper should offer a number of articles as constituting a lot or group of articles to be sold together, whether good or bad, the word "or" would in this case have a conjunctive force, and be equivalent to "and," the meaning being that all the articles in the class, the good and the bad, were offered in a lump. In the clause of the will before us it seems quite clear that "or" is not used disjunctively. The testator did not mean to present an alternative to his executor, and authorize him to pay to either class of nieces, at his own election. The word "or" must have been used either as connecting the word "spinster" with a word he supposed to be its equivalent, by way of explanation, or conjunctively, in the sense of "and." If we assume that he used it in the former of these senses, then he was mistaken in the use of the word he selected to furnish an explanation of the word "spinster," and has failed in his effort to make his own purpose clear. If, on the other hand, we assume that he used the word conjunctively, then all his nieces become participants on his bounty in equal shares. The spinsters and the widows stood in the same relation to the testator; their actual condition was that of single or

unmarried women; and no reason for discriminating between them appears in the will or in the circumstances presented by the case. This construction relieves the testator from the charge of mistake in his efforts to express his intention, from an arbitrary discrimination between those standing in the same degree of relationship to him, and works equality in the distribution of his estate. The court below adopted the construction of the clause under consideration, giving to "or" the power of "and," and including the spinsters and the widows among the residuary legatees. The considerations suggested as supporting the decree do not seem to us quite as satisfactory as we might wish, but they are persuasive, and attended with less difficulty than the position of the appellants. The assignments of error are therefore overruled, and the decree is affirmed.

THOMPSON et ux. v. CITIZENS' TRACTION CO.

(Supreme Court of Pennsylvania. May 3, 1897.)

CONSTRUCTION OF TRACTION RAILWAY—CHANGE OF GRADE—DAMAGES.

In a suit against a railway company for permanent injury to plaintiff's premises caused by raising the grade of a township road and maintaining a track thereon, without the consent of abutting owners, the measure of damages is the consequent depreciation in the value of plaintiff's property.

Appeal from court of common pleas, Allegheny county.

Trespass by Samuel B. Thompson and Martha J. Thompson, his wife, in right of said Martha, against the Citizens' Traction Company and O'Hara township, to recover for injury to plaintiffs' property by a change in the grade of the township road and the construction of a railway thereon. From a judgment in favor of plaintiffs against the Citizens' Traction Company, said company appeals. Affirmed.

Geo. C. Wilson and Wm. D. Evans, for appellant. S. Schoyer, Jr., S. B. Schoyer, and J. M. Cook, for appellees.

McCOLLUM, J. The right of the plaintiffs to compensation for the injury done to their property by the change of grade of the highway in front of it and the construction thereon of the railway is not disputed. The defendant, however, contends that the court adopted a wrong method of ascertaining the compensation they were entitled to receive for the injury thus inflicted. All the specifications of error relate to this contention, and the cases cited as sustaining it are *Lentz v. Carnegie Bros. & Co.*, 145 Pa. St. 612, 23 Atl. 219; *McGettigan v. Potts*, 149 Pa. St. 155, 24 Atl. 198; and *Eshleman v. Martie Tp.*, 152 Pa. St. 68, 25 Atl. 178. The rulings and instructions complained of were to the effect that the deprecia-

tion in the value of the property as the result of the change of grade, and the construction and maintenance of the railway, furnished the measure of compensation. Why the defendant, in the light afforded by the testimony in the case, complains of this measure is not apparent. The uncontradicted evidence on the part of the plaintiffs was to the effect that the cost of raising the lot and buildings to the level of the railway would exceed the depreciation in the value of the property. Besides, the manner in which the case was tried makes the judgment in it a bar to any future action by them for damages arising from the location of the railway. The plaintiffs were justified in regarding the railway as a permanent structure, an additional and continuing servitude, on their land within the highway. They could not compel a change of grade or location, nor remove the embankment which interfered with access to their lot, and was necessary to the support and operation of the railway. Their only remedy was an action to obtain compensation for the injury inflicted. *Pennsylvania R. R. v. Montgomery Co. Pass. Ry.*, 187 Pa. St. 62, 31 Atl. 468. No good reason appears for holding that the rulings and instructions in regard to the measure of compensation were erroneous. The mere fact that the defendant was not invested with the power or right of eminent domain is not a sufficient warrant for condemning them. It is true that they were in accord with the settled rule for the ascertainment of compensation in a case where a corporation invested with the privilege of taking private property for public use has in the construction or enlargement of its works taken, injured, or destroyed the property of another. But this rule is not necessarily limited to such cases. It may be applied in a case of permanent injury to real estate when the issue is between private persons. An illustration of this may be found in *Williams v. Fulmer*, 151 Pa. St. 405, 25 Atl. 103. In that case the plaintiff sought to recover from the defendant compensation for an injury to his property by reason of the diversion of the water of a navigable river from its natural channel in front of his land, and it was held that "compensatory damages in such cases would be the depreciation in value of the property, if the injury were permanent, or the cost of removing the obstruction, whichever was the lower amount." In our case the defendant made no answer to the plaintiffs' evidence in relation to the cost of raising the lot and buildings. Its evidence was principally directed to the establishment of its claim that the matters complained of by the plaintiffs were a benefit to and improvement of their property. The cases cited by the defendant are not analogous to the case at bar. This will sufficiently appear from an examination of them. The defendant, having located and constructed its railway on the public road without the consent of the abutting property owners, is liable to them for an in-

jury done to their property by such location and construction. Its liability is the same as if it had obtained their consent to the construction of the railway on giving bonds to compensate them for such injuries to their property as its location and construction might inflict. In view of this liability, and the nature of the injury for which the plaintiffs ask compensation, we are not satisfied of error in the rulings and instructions complained of. Judgment affirmed.

NUGENT v. PHILADELPHIA TRACTION CO.

(Supreme Court of Pennsylvania. May 3, 1897.)

STREET RAILROADS—INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.

Plaintiff, in crossing a street traversed by street cars on double tracks, did not look for cars after starting to cross, and went on the second track six or seven feet in front of a slowly moving car, which it was impossible for the motorman to stop in time to avoid an accident, and which plaintiff would have seen had he looked. *Held*, that he could not recover for injuries caused by being struck by such car.

Appeal from court of common pleas, Philadelphia county.

Action by Patrick Nugent against the Philadelphia Traction Company for personal injuries caused by defendant's negligence. From a judgment for plaintiff, defendant appeals. Reversed.

The specifications of error are as follows: "(1) The learned court erred in refusing to unqualifiedly affirm the sixth point submitted by the appellant (defendant below), as set forth in the bill of exceptions, to wit: 'Under all the evidence in this case, the verdict must be for the defendant.' (2) The learned court erred in refusing to unqualifiedly affirm the fifth point submitted by the appellant (defendant below), as set forth in the bill of exceptions, to wit: 'As the plaintiff testified in this case that the last time that he looked eastward for the approaching car was when he was on the south side of the east-bound track, a distance of some twelve feet from the west-bound track, upon which he was struck, he was guilty of contributory negligence as a matter of law, and therefore cannot recover in this case.' (3) The learned court erred in overruling the motion of counsel for appellant (defendant below) to withdraw a juror, and continue the case, when counsel, in his argument to the jury for plaintiff, referred as follows to a physician: 'Is he the kind of a doctor that the traction company agents can go to and put their slimy fingers on, and come into court,'—thereby purposing to appeal to the prejudices of the jury, as is particularly set forth in pages 245, 246 of the bill of exceptions."

Defendant's fifth point and the answer of the court are as follows: "As the plaintiff tes-

tified in this case that the last time that he looked eastward for the approaching car was when he was on the south side of the east-bound track, a distance of some twelve feet from the west-bound track, upon which he was struck, he was guilty of contributory negligence as a matter of law, and therefore cannot recover in this case. Answer of the court: I decline that point."

Thomas Learning, for appellant. Harvey K. Newitt and Ellery P. Ingham, for appellee.

WILLIAMS, J. The plaintiff was seriously injured by one of the cars belonging to the defendant company. He alleges that this injury was due to the defendant's negligence. On the other hand, it is asserted that the plaintiff was guilty of such contributory negligence as clearly makes him the author of his own misfortune. It becomes necessary, therefore, to ascertain and state the facts as shown by the testimony, in order that we may determine upon which side of the line drawn in *Davidson v. Railway Co.*, 171 Pa. St. 522, 33 Atl. 86, this case may fall. The plaintiff had spent the afternoon socially with some friends in this city. He was starting, at about 8 o'clock in the evening, for his home in Germantown. In order to reach the railway station, he had to cross Market street at its intersection with Fifteenth street. According to the testimony of those who saw him shortly before and at the time of his crossing the street, he was somewhat affected by what he had been drinking during the afternoon; his gait appeared to these witnesses to be unsteady, and his manner is described by them as that of one dazed or bewildered. He says that as he stood upon the south side of the street-railway tracks on the west crossing at this intersection, he looked up and down Market street to see if he could safely cross. He saw some wagons directly in front of him on the southern, or east-bound, track. He also saw a car approaching from the west at what he considered a safe distance from the crossing. As soon as the wagons moved out of his way, he started to cross, and, without looking for a car approaching from the east, he crossed the southern track and the space between the tracks, and while upon the northern track was struck by a west-bound car, and received the injury complained of. The testimony shows that he stepped upon the northern track some six or seven feet in front of a slowly moving car. The motorman instantly hallooed to him, but he seems to have gone forward a step or two without looking up, when he was struck by the car. The witnesses who saw him when he came upon the track seem to think that he might have escaped injury if he had acted promptly upon the motorman's call to him. The distance, however, was shown to be so slight as to make it impossible for the motorman to have stopped

the car in time to prevent the accident. The car was well lighted, and provided with an automatic bell. It was impossible for the plaintiff, had he looked while crossing, not to see the car. But he does not allege that he looked. He testifies that he did not look after he started to cross. The testimony leaves no room to doubt that, if he had used his senses, and acted upon the information which they would certainly have given him, he would not have gone directly in front of a moving car, to be struck by it. It is very clear also that the motorman became aware of the danger to the plaintiff only when he stepped in front of his car, and that he had no sufficient opportunity to stop its motion after this occurred. To whose negligence is the accident due? As the facts are practically uncontroverted, they raise a question of law, the decision of which was for the court. *Davidson v. Railway Co.*, supra. It was called to the attention of the court below by the defendant's fourth point for charge, as well as by the fifth point. The fourth point was declined without explanation or qualification. It should have been affirmed with the explanation that it was applicable where no obstruction interfered with the view. *Busby v. Traction Co.*, 126 Pa. St. 559, 17 Atl. 895. The fifth point should also have been affirmed with the explanation that if, by looking, at any point before reaching the west-bound track, he could have seen the car, and escaped from danger by stopping before reaching the track, it was his duty so to look and stop. Negligence is the want of such care as the circumstances may require. In the crowded streets of the city, it is not enough for a pedestrian to "stop, look, and listen" at one side of a street like Market street, which is 100 feet in width, and, seeing an opening directly before him, cross the entire street, with the street-railway tracks upon it, without further attention to the traffic of the street, or the dangers to be encountered. It is his duty to himself and to the public to look about him, and to avoid the obvious dangers with which his path may be beset. Upon the whole case, we think the defendant's sixth point should also have been affirmed. The first and second specifications of error are sustained, and the judgment appealed from is reversed.

COMMONWEALTH v. JONGRASS.

(Supreme Court of Pennsylvania. May 3, 1897.)

CRIMINAL LAW—WITNESSES—OATH ADMINISTERED BY INTERPRETER—MISCONDUCT OF JUROR.

1. An oath administered by an interpreter in the presence and under the immediate direction of the court is valid, though it is not repeated by the clerk to the interpreter every time he is called on to administer it, but only at the beginning of the examination.

2. It is proper to refuse to set aside a verdict of guilty, though one of the jurors fell

asleep; the judge having stated that he had given particular attention to the juror during the trial, because of his age, and knew that he was awake and attentive except for a single instant, and that he lost nothing of the trial.

Appeal from court of oyer and terminer, Lawrence county.

Frank Jongrass, alias G. Frank, was convicted of murder, and appeals. Affirmed.

J. M. Martin, J. L. McClelland, and Frank A. Blackstone, for appellant. Robert K. Aiken, Dist. Atty., for appellee.

PER CURIAM. There is no code of professional ethics that is peculiar to the criminal courts. There are no methods of practice to be tolerated there that are not equally entitled to recognition in the civil courts. Subtle distinctions that mark no substantial differences, and that do not affect the merits of a controversy, unless it may be to obscure or to defeat them, should not be allowed to thwart justice, in the interests of disorder and crime. The assignments of error in this case raise two questions of this class. They touch no important right of a defendant. The first one relates to the validity of the oath administered by the interpreter to some of the witnesses. The form of the oath is not questioned, nor is it denied that the interpreter correctly translated it into the language of the witness. It was done in the presence and under the immediate direction of the court. Under such circumstances, if it had been administered by a bystander it would have bound the conscience of the witness, both in law and in morals, as a valid oath. It was not necessary that the clerk should repeat the oath to the interpreter every time he was called upon to administer it to a witness. It was enough if this was done at the beginning of the examination. The interpreter acts under the sanction of his oath as such, when he administers the oath to the witness, no less than when he interprets the testimony of the witness to the court and jury.

The other question relates to the refusal of the court below to set aside the verdict because it was alleged that one of the jurors had, for an instant, appeared to be asleep. This motion was addressed to the discretion of the court. It depended upon a fact that must have transpired in the presence of the learned judge. If this assignment was regular, we could not consider it upon this record. The learned judge stated, when this motion was before him, that he had given particular attention to this juror during the trial, because of his age, and was able to say upon his own knowledge that he was awake and attentive except for a single instant, and that he lost nothing of the trial. It was idle to call witnesses to prove what the learned judge knew to be untrue. He would not have been bound by such testimony, if given, for neither a judge nor a juror is bound to accept the statement of a witness that contradicts the testimony of his

own senses. The evidence abundantly justified the conviction. The assignments of error are overruled, the judgment affirmed, and the record remitted for purposes of execution.

WILKINSON v. ROBERTSON.

(Court of Appeals of Maryland. April 1, 1897.)

ADMINISTRATION—WIFE DYING WITHOUT ISSUE OR DEBTS.

Administration should not be granted on estate of wife who dies leaving no issue and owing no debts; Act 1892, c. 571, providing, if intestate be a married woman, her personal property shall devolve on her husband absolutely, and it shall not be necessary to administer on her estate to pass title to him unless she owe debts, but title shall not pass to him when administration is not necessary, except by order of the court on his application.

Appeal from orphans' court of Baltimore city.

Petition by Lydia V. Wilkinson, by her husband and next friend, Edwin Wilkinson, Jr., for rescission of order appointing Alexander H. Robertson administrator of Amanda C. Ford, deceased, and rescission of order directing sale of property. Petition dismissed, and petitioner appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BRYAN, RUSSUM, PAGE, BOYD, and FOWLER, JJ.

William Reynolds and Richard Laws Lee, for appellant. Alex. H. Robertson, for appellee.

McSHERRY, C. J. It appears by the record now before us that Amanda C. Ford, the wife of J. Donaldson Ford, died in April, 1892, without issue, owing no debts and leaving her husband surviving her. She was possessed at the time of her decease of personal chattels valued at something over \$600, \$200 or \$300 on deposit in bank, and a one-half undivided interest in a leasehold house and lot in Baltimore, worth about \$700. In the latter part of June of the same year J. Donaldson Ford, the surviving husband, conveyed by deed to Jennie L. Billups, the sister of his deceased wife, all the interest which he, as surviving husband, had acquired under the laws of Maryland in this leasehold property owned by his wife. On November 17, 1896, the surviving husband filed in the orphans' court of Baltimore city a renunciation of his right to administer on his wife's estate, and at the same time requested that letters be granted to Mr. Alexander H. Robertson, the appellee. Accordingly on the same day letters of administration were granted to Mr. Robertson, and forthwith an order was passed directing the administrator to give the usual notice to creditors. Thirteen days afterwards the administrator filed a petition stating that the only estate of the decedent which had come to his hands was this undivided one-half interest in the leasehold house and lot that had been conveyed by the surviving husband to

his sister-in-law more than four years previously, and praying that an order might be passed authorizing the sale of the leasehold estate for the purpose of raising funds with which "to pay the expenses and debts of the administration." The same day the order prayed for was passed. Jennie L. Billups, having married Edwin Wilkinson, went into the orphans' court by petition on December 18, 1896, and asked that the order appointing Mr. Robertson administrator, and the order directing a sale of the property that had been previously conveyed to her, might each be rescinded, and on the same day that petition was dismissed. From the order of dismissal the pending appeal was taken.

The single question is, was administration on the deceased wife's estate necessary under the circumstances? If it was not, then the order granting it was erroneous; and, if that order was erroneous, the subsequent one founded on it, and authorizing a sale to be made by Mr. Robertson, is necessarily erroneous also. As the law stood prior to the adoption of Act 1892, c. 571, when a married woman died intestate and without children her personal property devolved upon her surviving husband, and no administration was necessary to perfect his title, though if he desired to protect himself from liability for her debts, in the event that she owed any, he could apply for and obtain letters of administration. This right to administer depended altogether on the fact that she owed debts. If she owed no debts, there was no necessity for administration, and none could be granted. In *re Lee's Estate*, 76 Md. 108, 24 Atl. 422. This decision gave a construction to section 32, art. 93, Code. That section, as it stood before the act of 1892 was passed, provided that "if the intestate be a married woman, and shall leave no child or children or descendants, all her personal property, including therein all choses in action, shall devolve upon her husband absolutely; and it shall not in such case be necessary for him to administer upon her estate in order to pass title to him unless she shall be liable in law for debts owing by her; but if the intestate be a married woman and leave a child," etc. By the act of 1892, c. 571, this section was repealed, then literally re-enacted, with an amendment which consists of the addition of the following provision immediately after the words "debts owing by her," viz.: "But no title whatever to such personal property or choses in action shall pass to the said husband when administration is not necessary except by an order of the orphans' court declaring the same. Upon application of the said husband the court shall pass an order nisi which shall be published in such manner, and for such time as the court in its discretion may prescribe, and which after the expiration of said notice shall be finally ratified by said court unless cause to the contrary has been shown." Now, it is perfectly obvious that,

as respects the necessity for an administration on the estate of a deceased married woman, the act of 1892 makes no change; for its whole purpose, as manifested by the exact re-enactment of the original section, was not to take away from the husband the title to the property which the law devolved upon him, but to suspend the actual passing of that title, where no administration was necessary, except upon an order of the orphans' court declaring that the title shall pass. The right of the husband to the property is unaffected by the act of 1892. The instances where an administration on the wife's estate is necessary are precisely the same as they were before the act of 1892 was adopted, and there is consequently no occasion to administer now, if under similar conditions an administration would not have been required under section 32 of article 93 as it stood prior to its being amended. But we have seen that, before the adoption of the act of 1892, there was no necessity for administration if the wife owed no debts, and, if there was no necessity to administer then, administration, even at the instance of the husband, was improvident, and, if improvident, erroneous. This is precisely what was ruled in *Re Lee's Estate*, supra. The act of 1892 leaves this conclusion untouched, and therefore the law of Maryland still is just as it was announced in the case last cited. The record shows that the wife owed no debts at all, and that the sole object for which a sale of the leasehold property is sought is to raise funds to pay the expenses and debts of the administration. Apparently the administration was procured, not because the decedent owed any debts in her lifetime, but with a view that expenses and debts might be created, and then that a sale of the leasehold might be ordered, so that these administration expenses and debts could be paid. Such an object furnishes the orphans' court no jurisdiction either to grant letters of administration on the wife's estate or to order a sale of any part thereof; and it necessarily follows that there was error in passing the orders of November 17 and 30, 1896, and hence the petition asking a rescission of those orders should not have been dismissed. In disposing of this case we have confined ourselves to the single question involved. For the error in dismissing the petition of the appellant filed on the 16th of December, 1896, the order appealed from must be reversed, and the cause will be remanded, to the end that an order conforming to this opinion may be signed. Order reversed, with costs above and below, and cause remanded.

RANDALL et al. v. RANDALL.

(Court of Appeals of Maryland. April 1, 1897.)

WILLS—CONSTRUCTION—EFFECT OF RENUNCIATION.

Renunciation by widow, and election to take against the will, is equivalent to her death

for purpose of distribution to testator's children, under will giving estate in trust for support of wife and children, during her life, and after her death to their support, in the discretion of the trustees, till they are of age or marry, and, when all the children arrive at age or marry, to divide the estate among the children, and, in the event of no child or issue thereof, then to divide the estate among testator's brothers and sisters.

Appeal from circuit court, Anne Arundel county, in equity.

Petition by Alexander B. Randall and others for construction of will of Burton Randall, deceased, and distribution of trust estate. Answer was filed by J. Wirt Randall and another, trustees, and petition was dismissed. Petitioners appeal. Reversed.

Argued before McSHERRY, C. J., and FOWLER, PAGE, BOYD, ROBERTS, RUS-SUM, and BRISCOE, JJ.

Frederick J. Brown and J. S. Lemmon, for appellants. J. Wirt Randall, in pro. per.

BRISCOE, J. Dr. Burton Randall, surgeon of the United States army, but residing in Annapolis, died in 1886, leaving a last will and testament dated in 1877. At the time of his death he left a widow, Mrs. Virginia Randall, a son, Alexander B. Randall, and a daughter, Margaret T., who has since married Dr. Joseph M. Worthington. As the questions for our consideration arise upon a construction of Dr. Randall's will, it will be necessary to set forth the entire will. It is as follows: "I give, devise, and bequeath all my estates, real, personal, and mixed, to my brother, Alexander Randall, and my nephew, Alexander B. Hagner, of Annapolis, to be held by them, and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, in trust, nevertheless, for the following purposes, to wit: First. To receive, collect, and apply the rents, issues, and profits of my said estates, in their discretion, to the maintenance and support of my wife and children, and to the education of my children during my wife's life. Second. And after my wife's death to apply the said rents, issues, and profits, in their discretion, to the maintenance, support, and education of my children, until they respectively arrive at age or marry. Third. And when all my said children arrive at age or marry, whichever event shall first happen, then to divide the whole of my estates then remaining among my children equally, and the issue of such among them as may then have died; the issue of such children to take the portion of their deceased parent equally among them. And, fourthly, in the event of no child or issue of a child of mine living at the death of my wife, then that the said trustee divide my estates then remaining equally among my brothers and sisters then living, and the issue of such as may then have died, the issue to take the portion of their deceased parent equally among them. And, lastly, in further trust, that my said trustees, or the survivor of them, or the heirs, executors, administrators, or as-

signs of such survivor, may at any time they deem it beneficial and proper to sell and dispose of, and by deed convey, any part of my said estates, receive the purchase money thereof, and invest the same in any other property for the benefit of this trust estate hereby created, and to constitute a part thereof, subject to all the provisions of this will, or apply such proceeds, or any part thereof, for the advancement in life of any of my children after they have obtained age or married, provided such advancement do not exceed the portion such child may be entitled to after deducting the one-third thereof for my wife." Mrs. Randall, the widow, who is now living, renounced all claim under the will, and elected to take dower and distribution under the law. The question, then, is whether, upon the widow's renunciation and receipt of her third, the trust estate ought not to be declared to have come to an end, and to be distributed between the testator's two children, both of whom have arrived at age, and are married; in other words, whether the devise and bequests in the will to the testator's children are to be paid at once, or are to be delayed to the death of his widow. On the 21st of July, 1886, a petition was filed in the circuit court for Anne Arundel county by Mrs. Randall and her children asking for a construction of the will, and for a distribution of the trust estate. This petition was answered by J. Wirt Randall and Judge A. B. Hagner, trustees, named in the will. There was no adjudication of the rights of the parties under the will because of the want of proper parties to the proceedings; the lower court holding that the brothers and sisters of the testator and their issue should be made parties to the case. On the 19th of November, 1895, an additional petition was filed asking for a distribution of the trust estate, and it is from the order dismissing this petition and the petition filed on the 21st of July, 1886, that this appeal is taken.

It is a well-settled rule that in every case in which a will is to be construed the great object is to ascertain from the face of the paper the intention and design of the testator, which is to be carried into effect, unless opposed by some principle of positive law. *Jones v. Earle*, 1 Gill, 395. By a careful examination of the language used in the will, and looking to the surrounding circumstances at the time of its execution, we gather the controlling intentions in the mind of the testator. They are clearly stated by the appellants, and are these: First. That during the life of the wife the estate should be held in trust for the protection of the wife and the minor children. Second. That after the cessation of the wife's estate, it should still be held for the protection of the minor children until all were of age or married. Third. That upon the expiration of the estate of the wife and of the minority of the children the trust should cease, and the children of the testator should take. Fourth. That the trustees, however, should have a right, if they thought proper, to make at any

time during the existence of the trust, even during the life of the wife, an absolute advancement of its portion of the property to any child who should attain age or become married. Fifth. That upon the determination of the wife's estate, in the event of there remaining no direct issue of the testator living, then the property should pass to the testator's brothers and sisters and their issue; in other words, to the testator's heirs at law and next of kin. What, then, was the effect of Mrs. Randall's renunciation and election to take upon the interest of the testator's children under the will. The rule followed by both the English and American courts is that a widow's renunciation and election to take as against the will is equivalent to her death, unless it contravenes some manifest intention of the testator as expressed by the will. In *Clark v. Tennison*, 33 Md. 92, where by the will a gift was to the wife during her widowhood, with a limitation over to the children upon her death, it was held, in order to carry out the plain intention of the testator, to construe the will as giving the property to the children upon the termination of the estate given to the wife, whether that be by her marriage or her death. In *Re Ferguson's Estate*, 138 Pa. St. 208, 20 Atl. 945, the court, in a well-considered case, after stating the reasons for the rule, says that the law must have a settled and uniform rule, and it is that the widow's election to take against the will is equivalent to her death. Some of the authorities that support this view are the cases of *Small v. Marburg*, 77 Md. 11, 25 Atl. 920; *Lainson v. Lainson*, 18 Beav. 1; *Craven v. Brady*, L. R. 4 Eq. 209; *Jull v. Jacobs*, 3 Ch. Div. 703; *Stephenson v. Stephenson*, 52 Law T. (N. S.) 576. In the recent case of *Boyd v. Sachs*, 78 Md. 497, 28 Atl. 391, where the question upon the construction of a will was somewhat similar to the one here, this court said: "The widow's marriage was to have the same effect upon all the interests devised and bequeathed by the will as would have been wrought by her death. By the third clause of the will the real estate was given to Daniel, the son, after the widow's death; and by the fourth clause it was stated that in case of his death before the widow it should go to his sisters and their heirs as tenants in common. The plain meaning of these clauses is that Daniel was to take the real estate on the termination of the widow's life estate (by death or marriage), and that, if he should die before such termination, it should go to his sisters. Applying this rule, then, to the will now under consideration, there can be no doubt as to the correct conclusion that should be reached in this case, and that is, the widow's renunciation and election accelerated the devise and bequest to the testator's children, and terminated the trust. The application of this equitable doctrine gives effect to the manifest intention of the testator that upon the expiration of the wife's estate, and when his minor children arrived at age or married, whichever event

should first happen, then the trust should cease, and the whole of his estate be divided among his children equally. It therefore follows from what we have said that the orders appealed from must be reversed, and the cause remanded, in order that a decree may be passed in accordance with this opinion; the costs to be paid out of the trust estate. Orders reversed, and cause remanded; costs to be paid out of trust estate.

SCHUTZ v. FERGUSON.

(Court of Appeals of Maryland. March 31, 1897.)

CONTRACT—EVIDENCE.

Plaintiff having a contract for construction of a building to be done at a certain time, and the work being at a standstill, the company which was his surety on the contract sent F. to him, and he assigned the contract to the company, knowing that F. was acting as its agent. Thereafter F. contracted with the company to complete the work for \$5,000 more than plaintiff's contract called for, he, however, to rebate to the company any profit above a commission of $2\frac{1}{2}$ per cent. on the cost of the work. In the meantime, however, the company had interviews with plaintiff relative to arrangements whereby he might carry out the contract, and it was not till negotiations with him and others to carry out the contract had failed that the arrangement was made with F. Held, that plaintiff's bill to have F. account on the theory that the assignment was in consideration of his agreement to pay plaintiff any profit above $2\frac{1}{2}$ per cent. of the cost was properly dismissed for failure of proof of such agreement, denied by F., though plaintiff, his wife, and son testified thereto.

Appeal from circuit court of Baltimore city.

Suit by William H. Schutz against William J. Ferguson. Bill dismissed, and plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, PAGE, BRISCOE, RUSSUM, and BOYD, JJ.

Fielder C. Slingluff and Thomas S. Baer, for appellant. Roger W. Cull, C. Morris Howard, and Wm. A. Fisher, for appellee.

BOYD, J. The appellant, who was plaintiff below, entered into a contract with Dr. William H. Moale on July 13, 1892, to construct a building in Baltimore city known as "Hotel Stafford." The Fidelity & Deposit Company of Maryland became his surety for the proper fulfillment of the contract, and he commenced work on the day after it was signed. On Friday, the 2d day of September, 1892, he left Baltimore without leaving any directions or money for the work, and, according to his testimony, went as far as Chicago. When he reached that city, he determined to return, and arrived at Baltimore the following Tuesday morning, being the 6th day of September. He accounts for his absence by saying that the heat had affected his head, and his physician had advised him to go away. The theory of the appellee is that he left by reason of financial embarrassment and inability to perform this and another contract he had

on hand. Whatever the cause was, his sudden disappearance and speedy reappearance was, to say the least, very peculiar. When it was ascertained he had gone, the Fidelity Company was informed of the fact, and that the work was at a standstill. The contract provided that the work should be finished on or before the 1st day of October, 1893, and that the contractor should pay the owner \$50 for every day thereafter that the work should remain unfinished, as liquidated damages. Mr. Warfield, the vice president and general manager of the company, became anxious, and sent for the appellee, who was then superintending the construction of a building being erected by the Fidelity Company. Upon inquiry he ascertained that Schutz was still away, but a day or two afterwards he returned, and Ferguson saw him at the instance of Mr. Warfield, who also had several interviews with him. On the 7th day of September, Schutz assigned his interest in the contract to the Fidelity Company, and he alleges in his bill that he did so because Ferguson proposed to him that, if he would, he (Ferguson) would finish the building in accordance with the terms of the contract, and pay him all he made under it over and above $2\frac{1}{2}$ per cent. The bill then charges that the defendant did finish the Hotel Stafford, and made a large amount of money in the construction of it, but refused to render an account to the plaintiff. It then prayed that an account may be taken, and the profits over and above $2\frac{1}{2}$ per cent. be required to be paid to the plaintiff. The answer admits that the assignment to the Fidelity Company was made, but alleges that the defendant was at that time only acting for that company; that he "had no desire, intention, purpose, or agreement to take employment from said company to finish the building in accordance with the terms of the said contract"; and then emphatically denies any agreement to pay the plaintiff all profits over $2\frac{1}{2}$ per cent. It admits that the defendant did build the Hotel Stafford as it now stands, but alleges that it was done under other contracts than the one between the plaintiff and Dr. Moale.

The important issue raised by the bill and answer is whether the defendant did promise to pay the plaintiff the profits made over and above the $2\frac{1}{2}$ per cent. Whether or not there were any profits need not now be determined, and is not material to the inquiry now before us, excepting incidentally in considering the probabilities as to whether the contract was made by the defendant with the plaintiff, as claimed by the latter. The plaintiff testified that the Tuesday morning he got back he saw Mr. Warfield, who said to him: "'Go home. We see you are sick. Go home, and go to bed, and get your doctor to attend to you, and we will attend to this until you get well,'" and that "Mr. Ferguson would attend to it for them. I went home, and in about an hour or so after that Mr. Ferguson came to my house. I was in my room, and Mr.

Ferguson came up, and said: 'I will take the job off your hands now, and do it for you for two and one-half per cent., which is the same as I am doing the Fidelity Company building for them,—2½ per cent.' And he said: 'If there is anything left when the job is done, you shall get it. The Fidelity Company don't want to make anything out of it. If they get out clear, they are satisfied.' The next day the bookkeeper of the defendant took the assignment to the plaintiff, which he signed. The wife of the appellant testified she was present, and in answer to the question whether Ferguson made any proposition to her husband said: "Yes, sir. He said that he would do the work for my husband for—He said he would do the work for my husband the same as he was doing at the Fidelity building. He was doing that work, and all over 2½ per cent. my husband was to get out of the contract after it was done,—on Dr. Moale's house." Harry W. Schutz, a son of the appellant, said he was present at the interview, and in answer to the question as to what occurred said: "When I came home one morning, Mr. Ferguson and my father and mother were in the room, and the conversation that they were talking about at the time was the Stafford Hotel, and Mr. Ferguson and my father were speaking about my father turning the building * * * of the Stafford over to Mr. Ferguson, in consideration of which he was to get all over 2½ cents on the job." The purport of the agreement as given by the wife and son was that the appellee was to take the contract; not that the Fidelity Company was. The son said, in answer to the question, "Was anything said then about the assignment of the contract to the Fidelity Company?" "Not that I heard, sir; I didn't hear that,"—although he did say that he was not present during all of the interview. The only other witness offered by the plaintiff on this point was Benjamin Watts, who was foreman for Schutz. He said he went into Schutz's shop on the 6th of September, where Schutz and Ferguson were. The former said to the latter: "I would like Mr. Watts to remain on this job, and Mr. Schutz [should be Mr. Ferguson, we suppose] said he would be glad,—he would like me to remain there also, being as I had been on the job. Mr. Schutz then says that Mr. Ferguson was to take the job at 2½ per cent." Mr. Watts did continue on the job under Ferguson. The evidence of Schutz shows that he knew on the 6th and 7th of September, 1892, that Ferguson was acting as agent for the Fidelity Company in the negotiations between them on those dates. He assigned the contract with Dr. Moale to that company, and not to Ferguson. It is difficult to believe that Ferguson would have undertaken to bind himself to turn over to Schutz any part of the profits over and above his own compensation, 2½ per cent., when they would belong to the Fidelity Company, and not to himself. Nor can we understand how Schutz would

suppose that he would have done so. It was the Fidelity Company that was interested in getting control of the contract, as it was liable for the defaults of Schutz to the extent of \$50,000. It is conclusively shown that it was impossible to complete the contract within the time Schutz had agreed to complete it, and the appellee swore most emphatically that he would not have taken the contract at the sum agreed upon by Schutz. In point of fact, he had not even agreed to superintend the work for the Fidelity Company when the plaintiff claims he made the agreement with him. The agreement with that company is in writing, and speaks for itself. It was executed on the 23d day of September,—more than two weeks after the alleged arrangement with the plaintiff. It shows that Ferguson had agreed with the Fidelity Company to assume and complete the Schutz contract for the sum of \$168,466, which was nearly \$5,000 more than Schutz's contract called for, and he also agreed to be satisfied with 2½ per cent. commissions on the net cost of the work, and to rebate the balance, provided the building did not cost more than the above-mentioned sum. After that was executed, Ferguson was, as between him and the company, the contractor for the building, and not merely the agent of the company, but it was not until then that such was the case, and on the 6th day of September he had no agreement with the Fidelity Company to take charge of the work. The allegation in the bill that the defendant proposed to the plaintiff that if he would assign the contract, he (the defendant) would be employed by the company to finish the building, is not sustained by the proof. The evidence of Mr. Warfield, as well as that of the defendant, shows that no arrangement had been made at that time with the defendant. Mr. Warfield testified that, after waiting some days after the contract was assigned, to see whether Schutz would again take up the work, he requested Ferguson to carry out the contract for the company, but he declined to do so. He then asked him to see some of the other persons who had bid on the building, and he tried to get them to take it, but they declined. After they found that they could not get any one else, he insisted upon Ferguson, who was under some obligations to the company, to take hold of the contract, and he finally consented, and the agreement above mentioned was then made. Mr. Warfield and the defendant are uncontradicted as to these efforts to have some one else take charge of the work.

But there is another circumstance that seems utterly at war with the theory and claim of the plaintiff. Mr. Warfield said that Schutz had a number of interviews with him and others connected with the company, after the assignment of the contract, looking to making some arrangement to carry it out, and this was not denied by him. Now, if it be true that he and Ferguson had entered

into an arrangement on September 6th, by which he was to assign the contract, and Ferguson was to give him all the profits over $2\frac{1}{2}$ per cent., upon what theory could he rightfully ask of the company the privilege of completing the contract? If the defendant was bound to account to him, why was not he bound by the assignment of the contract? What was to become of Ferguson and his profits, if the company reassigned the contract to Schutz, or let him proceed with it to the exclusion of Ferguson? Such conduct is wholly inconsistent with the claim that Ferguson had on the day previous to the assignment entered into such an agreement with him as is relied on as the foundation for the bill of complaint. After the agreement of September 23, 1892, was entered into between the company and Ferguson, he continued to superintend the work, and the company was still liable to Dr. Moale, as surety of Schutz. Some time afterwards (the exact time is not clearly shown) a contract was entered into between Dr. Moale and Ferguson, which was a copy of the Schutz contract. There was indorsed on it, however, a provision that the building was to be finished on the 1st of July, 1894, instead of the 1st of October, 1893, as was in the original agreement; and that, in the event of it not being finished, then \$5 per day should be paid as liquidated damages, while in the original it was \$50 per day. A number of other changes were made from time to time, which were to cost over \$50,000, including the addition of two stories to the building. After these material changes were made, the parties then seemed to treat Ferguson as the responsible party, and he was not deemed by them to be merely the agent of the Fidelity Company, but this was months after the appellant had assigned his contract. While we think the changes could not relieve the appellee from his agreement with the appellant, if there was any, yet it is apparent that the latter could only have had an interest in the contract as it existed when he transferred it. Although it is true that the contract did have a provision under which the architect could "require any alterations in the work shown or described in the drawings or specifications," he certainly could not, under that clause, require the contractor to add additional stories to the building, unless he chose to agree to do so. Such a construction of a contract might ruin a contractor of limited means, who might be prepared for the work as originally contracted for, and all reasonable alterations in it, but not for the addition of two or more stories to the building. But the difficulty in the plaintiff's case at the very threshold is that the evidence shows clearly that the appellee did not have any contract with Dr. Moale until long after the appellant had disposed of his, and he had no contract with the Fidelity Company, and, so far as the record shows, none was contemplated, when the appellant

assigned the contract. But that is not all, for it is conclusively shown that when the appellee did make a contract with the company he was only to receive therefrom $2\frac{1}{2}$ per cent. commissions on the net cost of the work. The appellee denied having made the agreement with the appellant, and he is not only sustained by Mr. Warfield, as far as he was cognizant of the transaction, but the uncontradicted evidence as to the time and extent of the appellee's connection with the work, and the subsequent conduct of the appellant, make it impossible to accept the testimony of the appellant, his wife and son, as establishing such an improbable agreement as they claim was made. Mr. Watts said Schutz said Ferguson was to take the job at $2\frac{1}{2}$ per cent., but added he did not hear Ferguson say so, although we suppose, from the connection, it was said in his presence. The fact is that Ferguson did eventually superintend the work at $2\frac{1}{2}$ per cent., and Mr. Watts did not say that Schutz said anything about Ferguson agreeing to give him any part of the profits. Just what Schutz, his wife, and son had in mind it is difficult to tell, but the appellee says that he explained to Schutz that he was then superintending the work of the Fidelity Company building for $2\frac{1}{2}$ per cent., and he did not suppose any one would do such work for less. He said: "I told him then that, in case the job cost more than the contract, the Fidelity Company had to sue him for the difference, obtain judgment, and would hold the judgment over him as long as he lived, and that would bar him from taking future contracts; and, in case the job cost less, he would be paid the difference between the contract price and the cost of the job. By doing this I tried to persuade him to take the job up again, and go to work on it." It may be that this expression, or something else that was said in that conversation, left the appellant, his wife, and son under the impression that if he gave up the job he would get all over $2\frac{1}{2}$ per cent. of the profits; but, if that be conceded, it would be the Fidelity Company, and not the appellee, who would owe it, if any one. For, as we have already seen, Ferguson was simply representing that company, and had no interest in it himself at the time, and did not want to take the work at all. We have not dwelt on the fact that most of the witnesses examined on the subject seemed to think it was impossible to finish the building within the time agreed on in the Schutz contract, nor have we thought it necessary to discuss his financial condition when he gave up the work, although it is evident he did not have the means necessary to complete the contract in accordance with its terms; but when we read the evidence on those subjects, and remember that the appellant had on hand another contract for the fulfillment of which the Fidelity Company was his surety, and see how his health was impaired, it is easy to understand why he was

apparently so willing to give up both contracts. But, without prolonging this opinion by going more into detail than we have, we think the appellant has failed to establish the fact that the appellee did agree to turn over to him the profits, if any, beyond the 2½ per cent. in consideration of his assigning the contract to the Fidelity Company. There is certainly a total failure of proof to show that the alleged promise to pay over the profits was in consideration of the assignment of the contract, and, that being so, there was no consideration to sustain such a promise, as no other was attempted to be shown. The decree dismissing the bill must be affirmed. Decree affirmed, with costs.

McCUBBIN v. STANFORD.

(Court of Appeals of Maryland. March 31, 1897.)

HUSBAND AND WIFE—WIFE'S ESTATE BY ENTIRETY—SUBJECTION TO HUSBAND'S DEBTS.

Under Const. art. 3, § 43, declaring that "the property of the wife shall be protected from the debts of the husband," land held by husband and wife as tenants by entireties cannot be subjected to the payment of a mortgage executed by the husband.

Appeal from circuit court of Baltimore city.

Petition by Thomas D. McCubbin for a writ of habere facias possessionem against Mary A. Stanford. From a decree, pro forma, dismissing the petition, petitioner appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, BOYD, PAGE, and RUSSUM, JJ.

Hugh L. Bond, Jr., and H. R. Preston, for appellant. H. E. Mann and Joseph B. Seth, for appellee.

BRYAN, J. McCubbin, having purchased certain real estate in the city of Baltimore at a sale under a decree in equity, filed a petition for a writ of habere facias possessionem against Mrs. Stanford, who was in possession of the property. Her husband was the defendant in equity, but she was not a party to the proceeding. The suit was for the purpose of subjecting the property to the payment of a mortgage executed by the husband. She answered the petition, and the court, pro forma, dismissed it. Appeal by McCubbin.

It was stated in the petition and admitted in the answer that the real estate was conveyed to Stanford and his wife to hold by entireties. By the common law, husband and wife were considered one person. When, therefore, land was conveyed to them and their heirs, each was, in contemplation of law, seised and possessed of the entire estate in fee simple, and neither could dispose of any part of it without the assent of the other. Each was entitled to the whole by reason of the legal unity of their existence, and consequently an alienation of any part of

either one of them would infringe the vested right of the other. The common law on this point has never been changed in this state. *Marburg v. Cole*, 49 Md. 411. The forty-third section of the third article of the constitution declares that "the property of the wife shall be protected from the debts of the husband." We decided in *Clark v. Wootton*, 63 Md. 113, that this provision of the constitution conferred the protection to the wife's property without the necessity of an act of the assembly, and that it embraced every portion of the property. The matter which was the subject of consideration in that case was a judgment in favor of husband and wife, which they held by the unity of interest which is a consequence of the matrimonial relation. By the law the husband had the right to alien it, but nevertheless, unless he saw fit to do so, the wife's interest existed, and it would have survived to her in case of his death in her lifetime. The constitutional protection is in the words of Acts 1863, c. 245. This act did not impair or alter the marital rights of the husband in his wife's property, but it placed it beyond the reach of his creditors. *Schindel v. Schindel*, 12 Md. 313; *Plummer v. Jarman*, 44 Md. 637; *Keller v. Keller*, 45 Md. 276. By the construction given to it, the husband might have an interest in his wife's property, but it was not subject to his liabilities. In *Clark v. Wootton* we decided that the judgment could not be subjected to the husband's debts, because thereby the wife's undivided entirety of interest in it would be destroyed, and she would be deprived of the protection which the constitution intended to give her. The reasons for the conclusion to which the court came will be found stated in the report of the case, and they need not be repeated now. It appears to us that the present case ought to be decided in the same way. Mrs. Stanford's rights are indefeasible by any deed of her husband, and cannot be subjected to any of his debts. Order affirmed, with costs.

HOFFMAN et al. v. CUMBERLAND VAL. R. CO.

(Court of Appeals of Maryland. March 31, 1897.)

CONNECTING CARRIERS—EXTRATERMINAL LIABILITY—LOCAL STATION AGENT.

1. A carrier accepting goods directed to a point off its line is only liable to the extent of its own route, and for safe delivery to the next carrier, in the absence of an express and special contract extending liability to losses on lines of connecting carriers.

2. A local station agent cannot extend liability of his company beyond its own line, unless authority therefor has been expressly conferred on him, or may be implied from the course of business.

Appeal from circuit court, Washington county. Action by Edward Hoffman and another, partners as Hoffman & Thomas, against the Cumberland Valley Railroad Company. Judg-

ment for defendant. Plaintiffs appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, and BOYD, JJ.

Alex. Armstrong, J. A. Mason, Ernest Hoffman, M. L. Keedy, W. H. A. Hamilton, and Buchanan Schley, for appellants. Geo. W. Smith, Jr., and J. Clarence Lane, for appellee.

BRISCOE, J. This is an action brought in the circuit court for Washington county by the appellants, Hoffman & Thomas, against the appellee, the Cumberland Valley Railroad Company, to recover damages caused by delay in the transportation of seven car loads of peaches shipped at Hagerstown, Md., in September, 1895, and directed to the consignees in New York. The line of the defendant's road ends at Harrisburg, in the state of Pennsylvania, and at that place, in the usual course of business, freight for New York is delivered to the Pennsylvania Railroad Company, a connecting carrier. The delay complained of in this case occurred on the road of the connecting carrier, and the question is whether, under the facts as disclosed by the record before us, the defendant is liable for such delay. The law in regard to the liability of an initial carrier of goods for losses or delays occurring on the line of a connecting carrier, to which it has safely delivered the goods in the course of transportation, has been settled in this state by the cases of Railroad Co. v. Green, 25 Md. 72, and Railroad Co. v. Schumacher, 29 Md. 168. It is that the first carrier is only liable to the extent of its own route, and for safe delivery to the next carrier, in the absence of an express and special contract increasing the liability, and causing it to cover losses that may happen upon the lines of connecting carriers. And in Elliott on Railroads (page 2227) it is said: "The majority of our courts have held, in accordance with what is called the 'American rule,' that the mere acceptance of goods directed to a point off the carrier's line is not a sufficient basis for the implication of a contract for extraterminal liability, and that in the absence of an express contract, or some significant facts or specifications other than the fact of acceptance, as the basis of an implied contract, the initial carrier is discharged by carrying safely to the end of its line, and there delivering to the next carrier."

In the case now under consideration the plaintiffs rely upon a special agreement by the defendant to deliver the goods shipped in New York or Jersey City at a specified time, over the route of a connecting carrier. The proof on the subject is as follows: One of the plaintiffs testified that he had been shipping peaches from Hagerstown, by refrigerator cars, when Long, the local station agent of the defendant, said to him that "it was not worth while to ship by refrigerator cars. Why not try ventilated cars? They would get there [New York] the same as by

express hooked onto passenger trains; rate to be 63 cents shipped by fast freight, and they would get to New York about seven o'clock in the morning." The other plaintiff testified that Long said, "If I shipped by fast freight, I was always sure of the peaches getting there on time." The only other evidence offered by the plaintiffs as to the alleged agreement was the testimony of the witness Boss, who said that, shortly before the shipments were made, Long, the agent, had said, "We made a contract with Mr. Hoffman for fast freight, and by passenger service from Harrisburg to New York, hitched to a passenger train behind the express car;" that they would get there about 7 a. m., leaving here at something after 9 at night. It was further shown on the part of the plaintiffs that all of their cars except one arrived in Jersey City several hours behind time, and that the peaches were then to some extent damaged. The freight for the entire route was paid by the consignees in New York. The testimony of Long, the station agent, was that he informed the plaintiff Hoffman that his shipments would have to leave Hagerstown on the 12:10 noon train, which was due to arrive in Jersey City at 3 o'clock the following morning; that when, before the shipments began, he was informed that Hoffman had stated to Boss that he could ship by the night train, or that the cars would arrive in Jersey City the next morning, the witness immediately sought out Hoffman, and told him that could not be done, and that no cars could be forwarded by the fast freight except on the noon train, and that the plaintiff afterwards said he could not get them ready for that train. The superintendent of the defendant company testified that the noon train from Hagerstown was the only one by which Long was authorized to send freight east by fast time; that all the freight sued for in this case was carried by defendant over its road from Hagerstown to Harrisburg, and delivered on time to the Pennsylvania Railroad Company, in good condition, at Harrisburg. There was other evidence on the part of both plaintiffs and defendant, all of which has been carefully considered by us. We do not, however, deem it necessary, in the view we take of this case, to decide whether the evidence was legally sufficient to establish the contract relied on or not. In Myrick v. Railroad Co., 107 U. S. 107, 1 Sup. Ct. 429, it was held: "Each road confining itself to its common-law liability is only bound, in the absence of a special contract, to safely carry over its own route, and safely to deliver to the next connecting carrier; but any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence." But assuming that

Long, the agent, did make the contract relied on by the appellants, he clearly had no authority or power, from the evidence as disclosed by the record, to bind the appellee company. A local railroad station agent has no power to make a special agreement extending the liability of his company beyond its own line, unless it has been expressly conferred upon him, or may be implied from the course of business. *Grover & Baker S. M. Co. v. Missouri Pac. R. Co.*, 70 Mo. 672; *Burroughs v. Railroad Co.*, 100 Mass. 26; 1 Wood, R. R. 508. In *Elliott on Railroads* (section 1437), it is said: "The courts, following the English rule announced in *Muschamp's Case*, 8 Mees. & W. 421, hold that an agent's authority to receive goods for carriage implies authority to contract for extra-terminal liability, while others deny the implication. Although a general freight agent may have this power, we think the better rule is that a local station agent has no such implied authority, unless he has in some manner been held out as having it." There is no evidence in this case that any such authority was given the agent, nor that he was held out to the world as having such authority. On the contrary, the positive testimony of Long, the agent, and of Boyd, the superintendent, is that he had no such authority. It therefore follows that the court below properly instructed the jury that the plaintiffs had offered no evidence legally sufficient to entitle them to recover. It is not therefore necessary for us to pass upon the questions raised by the other prayers in the case. Judgment affirmed, with costs.

POWELL et al. v. WILSON et al.

(Court of Appeals of Maryland. March 31, 1897.)

OYSTER-BED LAWS—CONSTRUCTION—EQUITY JURISDICTION.

1. Title by possession for 12 months of an oyster-bed location, under Acts 1894, c. 380, § 46, providing that the owner of lands bordering on navigable waters, the lines of which extend into and are covered by said waters, shall have the exclusive privilege to use the same, within the lines of his own land, for oyster beds, and any riparian owner may locate in any of the adjoining waters a lot of five acres for oyster beds, and any citizen may locate a lot of five acres in any waters not located provided notice be given the owner or occupant of the land bordering thereon, that such owner or occupant may have priority of claim; and 12 months' peaceable possession of all locations of oyster ground shall constitute a good and sufficient title thereto,—is revoked by the creek on which the location is made becoming, after such location, less than 100 yards wide at its mouth; section 47 providing that if any creek not more than 100 yards wide at its mouth make into the land, or if any creek more than 100 yards wide make into the lands, the owner or other lawful occupant shall have the exclusive right to use such creek when the mouth is 100 yards or less in width; and, when said creek is more than 100 yards wide at its mouth, said owner or occupant shall have exclusive right to use it, when it, in making into said lands, shall become 100 yards wide, for oyster beds, though

such creek be not included in the lines of any patent, and in all such cases such right of the riparian owner shall extend to the middle of such creek.

2. Equity has jurisdiction of suit by a riparian owner on a creek which has become less than 100 yards wide at its mouth, whereby exclusive rights therein are vested in such owner (Acts 1894, c. 380, § 47), to enjoin use of an oyster bed located therein while such width was more than 100 yards.

3. One who has located an oyster bed in a creek, and has planted oysters thereon, has a reasonable time to remove the same, with their increase, after exclusive rights in the creek vest in the riparian owner, under Acts 1894, c. 380, § 47, by the mouth of the creek becoming less than 100 yards wide.

Appeal from circuit court, St. Mary's county, in equity.

Suit by William P. Powell and others against William J. Wilson and another. Bill dismissed. Complainants appeal. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, BOYD, and RUSSUM, JJ.

John P. Poe, Robert C. Combs, and B. Harris Camaller, for appellants. Jos. H. Ching, Danl. C. Hammett, and Daniel R. Magruder, for appellees.

BRISCOE, J. The appellants filed a bill in the circuit court for St. Mary's county to vacate and set aside a certain oyster lot located in the waters of St. Jerome's creek, in that county, and to enjoin the appellees from depositing and bedding oysters or other shellfish therein. The bill alleges that the appellants are the owners of a tract of land lying on St. Jerome's creek, called "Bar Neck," containing 100 acres, more or less; that this creek has lately become, and is now, less than 100 yards wide at its mouth; and that they are entitled to the exclusive use of the creek adjoining their lands, and to the middle of its stream, for the purpose of bedding and planting oysters. It further avers that the appellees on or about the 6th of October, 1887, when the creek was more than 100 yards wide at its mouth, located 4.16 acres of oyster land opposite the land of the appellants, and between it and the middle of the stream, for the purpose of planting oysters; that notice as to the contraction of the creek at its mouth had been duly given, but the appellees subsequently entered thereon, and now assert a title to this located ground, under section 46 of the Acts of 1894, c. 380. An injunction was granted upon the allegations of the bill, but, after a hearing upon bill, answer, and proof, it was dissolved and the bill dismissed. It is from this order that the appeal has been taken.

There is but little dispute upon the facts, as disclosed by the record, but the main questions involved turn upon the interpretation of sections 46 and 47 of the act of 1894, c. 380, known as the "General Oyster Law" of the state. It is admitted that the mouth of St. Jerome's creek was more than 100 yards wide at its mouth when the oyster lot

in question was located, in 1887, and it appears from the proof to have contracted to the width of 84 yards since that date. The question then is, are the rights which the appellees acquired to this lot in 1887 superior and paramount to the rights of the riparian owners, the appellants? And this depends, as we have said, upon the meaning and effect to be given to sections 46 and 47 of the acts of 1894, c. 380. By section 46 of the act of 1894, which is, for the purposes of this case, substantially the same as the law in force at the time of the location of the lot in dispute, it is provided that the owner of any land bordering on any of the navigable waters of this state, the lines of which extend into and are covered by said waters, shall have the exclusive privilege of using the same for protecting, sowing, bedding, or depositing oysters or other shellfish within the lines of his own land; and any owner of land lying and bordering upon any of the waters of this state shall have power to locate and appropriate, in any of the waters adjoining his lands, one lot of five acres for the purpose of protecting, preserving, depositing, bedding, or sowing oysters or other shellfish; and any male or female citizen of full age, of the county wherein he or she resides, shall have power to locate and appropriate and hold one lot of five acres, and no more, in any waters in this state not located, provided 30 days' notice in writing shall be given the owner or occupant of land bordering on said waters proposed to be located, that the owner or occupant may have priority of claim, and that 12 months' peaceable possession of all locations of oyster ground, under the laws of this state, shall constitute a good and sufficient title thereto. And by section 47 it is further provided that: "If any creek, cove or inlet not exceeding one hundred yards at low water in breadth at its mouth make into the land, or if any creek, cove or inlet of greater width than one hundred yards at low water mark make into the lands, the owner or other lawful occupant shall have the exclusive right to use such creek, cove or inlet when the mouth of said creek, cove or inlet is one hundred yards or less in width; and when the said creek, cove or inlet is more than one hundred yards wide at its mouth at low water, the said owner or other lawful occupant shall have exclusive right to use such creek, cove or inlet as soon as said creek, cove or inlet in making into said land or lands shall become one hundred yards in width at low water, for preserving, depositing, bedding, or sowing oysters or other shell fish, although such cove, creek, or inlet may not be included in the lines of any patent; and in all such cases such right of the riparian proprietor shall extend to the middle of such creek, cove or inlet." We find no difficulty in reconciling these two sections, and giving to each its proper effect. In the case of *Hess v. Muir*, 65 Md. 600, 5 Atl. 540, and 6 Atl. 673, this court, in speaking of the statute

regulating the oyster fisheries of the state, says the right to locate oyster ground is not a grant of an indefeasible right or estate in the lot thus authorized to be located and planted with oysters. It is simply a conditional or qualified license or franchise, revocable at the will and pleasure of the state. It is neither inheritable nor transferable, but is purely a personal privilege in the party locating the lot. Now, while it is conceded that by section 46 the appellees' title was good at the date of its location, it is earnestly insisted, and the court below so held, that the possession by the appellees of this lot for more than the statutory period of 12 months gave them a good and sufficient title thereto, notwithstanding the provisions of section 47, that, when the creek, etc., is more than 100 yards wide at its mouth at low water, the owner or other lawful occupant shall have exclusive right to use such creek, so soon as the creek shall become 100 yards in width. To this interpretation of these sections we cannot agree. In order to do that, we should have to ignore section 47, and give effect alone to section 46. The fundamental rule in the construction of statutes is that, if two acts are plainly repugnant to each other in any of their provisions, the later act, without any repealing clause, will operate, to the extent of the repugnancy, as a repeal of the first. And this rule also applies to different sections of the same law, unless it appears from the whole act that the legislature intended the prior section to remain in force. *Smith v. Commissioners*, 81 Md. 513, 32 Atl. 193. We, however, fail to find any conflict between those two sections, but think that they can stand together expressing a perfectly harmonious legislative intent. And, being of this opinion, we fully agree with the contention of the appellants, as stated in their brief, that, when the appellees located this lot under section 46, they did so subject to the contingency that the mouth of the creek might thereafter become less than 100 yards wide, and that, when it did become less than 100 yards wide, their rights should cease, and be superseded by the exclusive right given in that event to the riparian owner by the language of section 47. The appellees therefore took a good title under section 46, but it was defeated upon the happening of the contingency provided for in section 47.

Upon the question of equity jurisdiction, we need only say it is clear that this case falls within that class of cases in which the jurisdiction is exercised. Mr. Pomeroy, in his work on *Equity Jurisprudence* (section 271), says the jurisdiction is constantly exercised under a proper condition of facts, and enumerates, as one of them, suits to restrain and remove private nuisances, especially when they are infringements upon some easement, as a water right. And to the same effect are the cases of *McRoberts v. Washburne*, 10 Minn. 29 (44 L. 8); *Britton's Adm'r v. Hill*, 27 N. J. Eq. 391; *Ogden v. Gibbons*,

4 Johns. Ch. 150; *Goodsell v. Lawson*, 42 Md. 354. As to the ownership of the oysters planted upon this lot, there can be no question that the appellee would be entitled to remove them within a reasonable time. This question was ruled upon in the case of *Hess v. Muir*, supra, where this court said that, if the party lawfully locating the lot takes oysters from other localities and plants them in his lot, those oysters, with their increase, become his absolute property, and he or his personal representatives or assignees may take them from the lot within any reasonable time after the license or franchise is revoked or ended. Ang. Tide Waters, 137. Being, then, of opinion that the court below erred in dissolving the injunction and dismissing the bill, the decree will be reversed and the cause remanded, so that a decree may be passed in conformity with this opinion. Decree reversed and cause remanded.

MACGILL v. McEVOY.

(Court of Appeals of Maryland. March 31, 1897.)

APPEALABLE ORDERS — GUARDIAN AND WARD — REMOVAL OF GUARDIAN.

1. Code, art. 93, § 232, providing that the orphans' court may, on application suggesting misconduct of a guardian, "at its discretion," remove him, confers a legal, not an arbitrary, discretion; and hence an order removing or refusing to remove a guardian is appealable, Code, art. 5, § 58, giving an appeal from "all" decrees and orders of the orphans' court.

2. Though Code, art. 93, § 171, as amended by Act 1892, c. 100, forbids a guardian to sell the ward's property without leave, and provides that he may be removed for so doing, such a sale is not necessarily ground for removal where the guardian believed he had leave to sell, and his bond fully protects the estate from loss.

3. A guardian should not be removed for "mental or physical incapacity" (Code, art. 93, § 232, as amended by Act 1890, c. 425) merely because he was absent on account of ill health for several months, when he had recovered his health before the application for removal was made, and the estate sustained no loss from his absence.

Appeal from orphans' court of Baltimore City.

Application by Sarah G. Macgill, by her husband and next friend, Carroll S. Macgill, for the removal of James McEvoy, guardian of Isabella B. Graham. The application was denied, and applicant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BRYAN, RUSSUM, PAGE, BOYD, and FOWLER, JJ.

W. Pinkney Whyte and Talbot J. Albert, for appellant. Bernard Carter and Brown & Brune, for appellee.

McSHERRY, C. J. In October, 1890, George B. Graham died, intestate, possessed of a large estate, and leaving a widow and one child (a daughter of about three years of age) surviving him. Beginning with the year 1882, and up to the time of his death, he con-

ducted the storage business, and James McEvoy was his confidential clerk and agent. The storage business was then a new, but thriving, enterprise. In the outset, it was carried on in a large warehouse (the old Wood, Weeks & Co.'s sugar refinery), and proved to be quite successful; and, shortly before his death, Mr. Graham erected and partially completed another large structure, on the corner of Park and Dolphin streets, in Baltimore, with a view of extending and increasing the storage business. This building was not entirely finished when Mr. Graham died. Both of these warehouses were leasehold property, and belonged to Mr. Graham. His widow renounced her right to administer on his estate, and recommended Mr. McEvoy as administrator; and the latter was also, at her instance, appointed guardian of the estate, but not of the person, of her infant daughter, by the orphans' court of Baltimore city. In 1894, Mrs. Graham, the widow, married Carroll S. Macgill; and, in 1896, she, by her husband, as next friend, filed a petition in the orphans' court praying for the removal of Mr. McEvoy as guardian. To this petition an answer was filed, and quite a volume of evidence was taken. After a hearing, the orphans' court refused to remove the guardian, and dismissed the petition seeking his displacement, and from that order of dismissal the pending appeal was taken.

A motion has been made to dismiss the appeal, upon the ground that, as the order from which the appeal was taken was one that was passed by the orphans' court in the exercise of a discretion given to it by the statutes of Maryland, no appeal will lie, because (such is the contention) no appeal will lie from any adjudication upon a subject confided exclusively to the discretion of an inferior tribunal. As this motion meets us at the threshold of the case, it will be considered and disposed of at once. The precise question raised on this motion is this: Can a party who has filed a petition in the orphans' court, under section 232 of article 93 of the Code, for the removal of a guardian, appeal from an order refusing to remove the guardian, and dismissing the petition? As thus presented, the question is one of first impression. It has not heretofore arisen in this court. That part of the section just alluded to that bears on the motion to dismiss is in these words: "The court may, on the application of any infant or any one in his behalf, suggesting improper conduct in any guardian whatever, * * * inquire into the same, and at its discretion remove such guardian, and make choice of another," etc. It is insisted that, as the section places the power of removal at the discretion of the orphans' courts, no appeal lies from any exercise of that discretion. Of course, the contention, to be tenable at all, must go to the entire length, and maintain that no appeal lies whichever way the discretion may be exercised. If the subject-matter is in fact exclusively committed to the discretion of the orphans' courts,

then, incontestably, no appeal would lie from an order removing the guardian, if no appeal could be prosecuted from an order refusing to remove him. And, if an appeal does lie from an order removing a guardian under this section of the Code, then the appeal must lie only because the section does not give to the orphans' courts such a discretion as cannot be reviewed. If the power is strictly discretionary, then the discretion is co-extensive with the power itself, and consequently no exercise of that power could ever be reviewed on appeal. But it has been distinctly and explicitly held in *Slattery v. Smiley*, 25 Md. 394, that an order passed under this very section, removing a guardian, was open to review on appeal. The appeal was entertained, and the order removing the guardian was reversed, because there were no facts alleged or shown which justified the removal. But, if the power to remove had been lodged solely with the inferior court, the mere failure to make appropriate averments or to sustain them by evidence would have been no reason whatever for a reversal of the order directing the guardian's removal, if the section of the Code now under consideration gave to the orphans' courts such a discretion as could not be reviewed in any event. Now, the power to grant a new trial is in the discretion of the trial court; but, no matter how erroneous a refusal to award a new trial may be, the decision denying it can never be reviewed on appeal, and this, too, even though it affirmatively and conclusively appears by the record, that a party who succeeded in recovering a verdict was manifestly and obviously not entitled to prevail. There can be no pretense that the orphans' courts have, in such instances as are now before us, any such discretion as this. Under section 241 of article 93 of the Code, whereby the orphans' courts are empowered, "in their discretion," to revoke letters of administration, it has been held, notwithstanding the seeming discretion intrusted to them, that an appeal will lie by an administrator whose letters have been revoked (*Forney v. Shriner*, 60 Md. 419), though, in cases arising under section 237 of the same article (which is a transcript of Act 1831, c. 315, § 4), it has been decided that an appeal would not lie (*Porter v. Timanus*, 12 Md. 292). Section 237 provides that the orphans' courts shall be "empowered, in their discretion and whenever to them it shall seem proper, either ex officio or upon application," to remove an executor or administrator for failing to bring money into court for investment when ordered to do so. It was intimated at the argument that, if no appeal could be entertained in this latter class of cases, there was no reason why one should be permitted in the one at bar. But it is very apparent, it seems to us, there is a broad and well-defined difference between the provisions of section 237 and those of sections 241 and 232. By section 237 there is no doubt that a clear unequivocal discretion, in its widest sense, is conferred upon the orphans' courts. The lan-

guage is explicit and free from ambiguity. Those courts are by that section empowered to remove an administrator for refusing to bring money into court, not only in their discretion (the terms employed in section 232), but "whenever to them it shall seem proper." The broad power is committed without qualification "to them" (the orphans' courts), to be exerted whenever they shall think proper to use it; and, from their decision in such cases, obviously no appeal can be prosecuted. But the discretion conferred by sections 232 and 241 is a sound, legal discretion, to be used conformably to the settled rules of law, to be exercised if the facts warrant it, to be withheld if they do not, and, if erroneously exerted in either direction, the determination is subject to review on appeal. The sweeping and comprehensive terms of section 58 of article 5 of the Code give a right of appeal from the orphans' courts in these words: "From all decrees, orders, decisions, and judgments made by the orphans' courts, the party who may deem himself aggrieved by such decree, order, decision, or judgment may appeal to the court of appeals." Unless the right of appeal thus broadly conferred upon litigants is restricted, narrowed, or taken away by some particular contrary provision, either expressly denying an appeal, or impliedly prohibiting it, by giving an irreviewable discretion to the lower court, the right to appeal must be held to exist. If the discretion conferred by section 232 is of such a limited character that it will not prevent an appeal from an order removing a guardian, it is difficult to see how, logically, an appeal from an order refusing to remove a guardian could be denied. It is not the manner in which a discretion has been exercised that determines whether an appeal will lie; that is, it is immaterial whether the decision complained of has been affirmative or negative action. The question as to whether an appeal will lie at all in such cases depends altogether upon whether an exclusive discretion over the subject-matter has been committed alone to the lower court. We find nothing in the words of section 232 to warrant the conclusion that the legislature intended to clothe the orphans' courts with a broad irreviewable power to remove or to refuse to remove a guardian, just as whim or caprice might dictate; and we consequently hold that their decisions under this section of the Code are open to examination on appeal. We are not to be understood, however, as qualifying in any way any ruling of this court denying the right of appeal from the orphans' court in other and different instances. The motion to dismiss this appeal is overruled.

We now come to the merits of the controversy. The petition for the removal of Mr. McEvoy, after making reference to and setting forth some of the balances shown by several of the guardianship accounts settled by him, proceeds to allege the grounds upon and on account of which the removal is sought; and these are five in number, and

may be briefly summarized as follows: First, that, though the infant was possessed of a large and lucrative estate, the income has, under the management of Mr. McEvoy, suddenly and without any natural cause decreased, while with proper and judicious management it should have largely increased; secondly, that the income has been largely consumed by extraordinary charges and wasteful extravagance; thirdly, that the guardian has not been able for a long time, either mentally or physically, to perform his duties as guardian, by reason of nervous prostration, which necessitated his absence, so that he neglected the storage warehouses, to the detriment of that business; fourthly, that he has allowed the taxes to accumulate, and has refused to see and converse with the petitioner, unless in the presence of his counsel; and, fifthly, that it will be ruinous to the estate of his ward if he is not promptly removed. The first, second, and fifth of these averments are explicitly and emphatically denied in the guardian's answer. In reply to the third charge, he admits that the past condition of his health had been bad, but he insists that it is now fully restored, and that he is devoting his whole time to the management of the ward's estate and property. He admits that taxes have accumulated, but he assigned as a reason therefor that the funds in his hands had been applied to other purposes, as shown in his accounts, and he explains how and why the business of the storage warehouses had deteriorated.

The power to appoint and to remove guardians is by the Code of Maryland, as we have seen, vested in the orphans' courts. With the provisions relating to the appointment of guardians, and with some particular sections prescribing specific grounds for removal, we are not concerned. The 232d section of article 98 of the Code, as amended by Act 1890, c. 425, is the enactment under which the pending proceedings were inaugurated; and, unless the evidence makes out a case falling within the terms of that statute, there is no reason to disturb the order appealed from. The section as it now stands reads as follows: "The court may on the application of any infant, or any one in his behalf suggesting improper conduct in any guardian whatever, either in relation to the care and management of the property or person of the infant, or physical or mental incapacity of the guardian to properly fulfill his duties and the purposes of the office, or any other matter or thing whereby it appears that the guardian is or has become unable to bestow such direct, personal care and supervision over the person or estate of his ward as is requisite to the proper discharge of the duties of guardianship, inquire into the same, and at its discretion, remove such guardian and make choice of another, who shall give security and conduct himself in the manner herein prescribed, and shall receive the property and custody of the said

ward." This section does not confer a power that can be exercised arbitrarily, or without reference to the existence of some cause supported by sufficient proof; but it gives a court of confessedly limited jurisdiction authority, upon any ground embraced in the scope of the statute's language, to displace a fiduciary of its own appointment. To justify such a step, some cause must exist; and if the assigned cause be inadequate, or, being adequate, be unsustained by evidence, the power of removal cannot be lawfully called into action. As Mr. McEvoy is only guardian of the infant's estate, and not of her person, the averments of the petition and the evidence adduced were confined to alleged mismanagement of the property, and to alleged mental and physical incapacity; and the assigned causes are all ultimately resolvable to mere questions of controverted fact.

It is undoubtedly true that there has been a reduction in the amount of the ward's income, and it is also apparent that some part of the corpus of her estate has been expended by the guardian; but we find nothing in the record to justify the charge of wasteful extravagance, while there is abundant evidence to explain how, without fault of his, the income diminished in consequence of supervening causes, for the existence and influence of which he was in no way responsible. It ought to be noted, too, that there is not the slightest imputation against the personal integrity of Mr. McEvoy. The intent to impeach his honesty has been explicitly and unequivocally disclaimed. The income of the ward consists of ground rents and other rents from real estate, the interest and dividends on bonds and other securities, and the profits from the storage warehouse business. During Mr. Graham's lifetime this business was, as we have said, a new and profitable one; so much so, in fact, that he began, and at the time of his death had partially completed, the construction of a second warehouse, in another part of Baltimore city. After Mr. Graham's decease, Mr. McEvoy was directed (and, under all the circumstances, wisely directed) by the orphans' court to continue the storage business; and it became necessary for him, therefore, to complete the unfinished structure, that it might be profitably used, and this involved a considerable outlay of money. Competition began to spring up, and the rates of insurance on stored goods were so enormously advanced by the underwriters that the business carried on at the original or first warehouse greatly shrank in volume, and the receipts perceptibly decreased, until they were scarcely sufficient to pay the ground rent and the insurance on the building and the ordinary and necessary running expenses. The large sums expended in completing the second warehouse required the sale of some securities, and the consequent loss of income from them. These and kindred circumstances, without pausing to go into a weary detail of figures, fully explain

a decrease in the ward's income, and they show no reason to question the carefulness or the fidelity of the management of the estate by the guardian. Since the decrease in the volume of storage, Mr. McEvoy has largely cut down the expenses of conducting the warehouses, including in the retrenchment an abatement of \$1,000 of his own salary.

The guardian received from himself, as administrator of Mr. Graham's estate, the sum of \$186,221.60. He received for his ward a legacy of \$5,000 from Mr. George S. Brown's estate, and, by way of a stock dividend from the Atlantic Coast Line, the sum of \$1,800. He also received for his ward, from a mortgage which he placed on her property, \$5,161.88. These sums made a total of \$198,183.48 of capital, that went into his hands. In his fifth guardianship account filed in the orphans' court, he shows, as still in his hands, \$186,635.53, which, being deducted from the \$198,183.48, leaves an apparent shrinkage in the corpus of \$12,548.10; but from this must be subtracted two-thirds of sundry bills due by Mr. Graham's estate, and actually paid out of it, but inadvertently omitted to be charged up in the administration account, whereby the balance in the hands of the administrator, and accounted for by him to the guardian, was made to appear just that much greater than it really was in fact. The two-thirds to be deducted amount to \$3,827.26. Taking that from the \$12,548.10 leaves an actual invasion of the corpus to the extent of \$8,720.84. But it is strenuously insisted that this method of ascertaining the condition of the estate is wholly erroneous. It is claimed that there is improperly included in the apparent assets the sum of \$17,422.98, expended in the completion of the warehouse on Park and Dolphin streets, and in making permanent improvements to that and other property of the infant; and it is urged that the infant has been maintained out of the corpus of the estate, instead of from the income. The calculation by which this later charge is sought to be made good is ingenious, but inaccurate. The total amount of the income is brought together and foots up \$86,018.50. Then the disbursements, other than the ward's maintenance, are summed up, and money borrowed on a mortgage, executed pursuant to an order of the orphans' court, is added as an expenditure, though not included in the total of receipts on the other side of the account, as it should have been, for it was both received and paid out, and the total is made to aggregate \$87,261.29; thus showing an excess of expenditures over receipts of about \$1,200, without including any of the \$29,000 paid by the guardian to the mother of the infant for the infant's support. But this is an entirely arbitrary mode of stating the amount of income and expenditures. Why should the \$29,000 paid out for the ward be any more a part of the corpus of the estate than the

sums paid for repairs and expenses? Or why should the funds paid for maintenance be treated as any less paid out of the income than over the amounts expended for repairs and permanent improvements? Now, if the sum of \$87,261.29 of receipts be augmented by the addition of the proceeds of the mortgage loan, it will be swelled to \$91,180.33; and, if the expenditures be made to include the \$29,000 paid for the support of the child, the total of \$87,261.29 will be increased to \$116,261.29, or \$25,180.96 more than the income; and if from this be taken the items expended in completing the warehouse and making permanent improvements, aggregating, as stated, \$17,422.98, there will be a deficit of \$7,757.98, with a mortgage lien of \$5,161.88 upon part of the corpus. For repairs and extraordinary payments, as they are called in the summary now being discussed, there were expended \$70,578.19. Now, why should this sum all be charged against the income, rather than the reverse method of making the entries? It is obvious that the process by which it is attempted to show that the child has been supported out of her capital is purely arbitrary. We have carefully and patiently gone through all of the numerous accounts in the record, and we are entirely satisfied that the true amount of deficiency in the corpus is \$8,720.84, unless the item of \$17,422.98, claimed to represent expenditures for permanent improvements, has been improperly treated as forming part of the value of the corpus. It is clear that it was necessary to complete the warehouse which was unfinished when Mr. Graham died, and the expenditure of large sums to make the needed additions caused an invasion of the corpus. The securities sold to realize the necessary funds were, with possibly the exception of \$6,000 in bonds, sold by the guardian under orders of the orphans' court. As taking the place of the securities so sold, it was entirely proper for the guardian to charge himself with this sum of \$17,422.98, representing, as it did, part of the corpus of the estate; and he rightly so entered it in his fifth account.

During nearly the whole period of the guardianship, and up to within a brief time before these proceedings were begun, the guardian paid to the child's mother, for the child's maintenance, the sum of \$6,000 a year, aggregating \$29,000. It is highly probable that the condition of the estate did not warrant so large an allowance, especially for a child of her tender years; and doubtless this considerable outlay contributed something to produce the deficit to which we have alluded. It was a mistake on the part of Mr. McEvoy to fix and to pay so large an allowance for the infant, but he has promptly corrected that error by reducing the sum one-half. With the estimated income for the current year approximating \$10,500, it will be no difficult task to speedily restore the impaired capital. That there

were other mistakes into which Mr. McEvoy fell in the statement of the several guardian accounts which preceded the last one is true; but they were not errors resulting from incompetency, and far less from dishonesty. They have all been corrected in the fifth account.

With respect to the bonds amounting to \$6,000, and which were sold by the guardian, without, it is asserted, an order of the orphans' court directing a sale, it is only necessary to say that though section 171 of article 93 of the Code (as amended by Act 1892, c. 100) forbids a guardian to make sale of his ward's property unless authorized by an order of court, and denounces any sale as void if made without such an order, and further provides that the orphans' court may remove the guardian for making sale of the ward's property without authority, still Mr. McEvoy evidently acted under the bona fide belief that he had been given permission to make the sale of these bonds. He has not been guilty of a willful and deliberate violation of the statute; and, as his official bond is amply sufficient to protect the estate, he can be required to make good whatever amount he may properly be chargeable with by reason of this mistake, if mistake there was. No loss can possibly happen to the infant in consequence of this alleged oversight of the guardian. Clearly, this circumstance of a failure to procure an order for the sale of these bonds, when he honestly believed he already had the authority from the court, ought to constitute no ground for his removal, especially as no injury has been or can be done to the estate that the guardian's bond does not furnish a complete indemnity for.

While it is undoubtedly the duty of every fiduciary to keep down the taxes on the estate in his charge, his failure to do so, under all the surroundings, and in view of the large sums of money he paid out for the use of the ward, should not, in our opinion, be treated as a sufficient ground to displace Mr. McEvoy. It is unquestionably true that for a portion of the years 1895 and 1896 Mr. McEvoy was seriously ill. He was compelled to visit Europe and health resorts in this country in effort to regain his strength; but during his absence the warehouses (which alone of all the estate required constant attention) were carried on by the same employes who had conducted the business for Mr. Graham in his lifetime; and there is not the faintest gleam of evidence to show that their management was not strictly and faithfully in the interest of the owners of the property. There is nothing to indicate that Mr. McEvoy's absence caused the slightest decline in the business, or occasioned the loss of a single dollar to the estate. To remove him merely because, in seeking to regain his health, he was absent some months, would involve the assumption, without evidence, that that absence had been of itself

productive of injury. His health is now, and before these proceedings were begun had been, entirely restored; and he devotes his whole time and attention to the discharge of the duties pertaining to the trust. If he were displaced at this time, not because he is now physically or mentally incapable of attending to his ward's interests, but because for a short space of time heretofore he had been so incapacitated, such a proceeding would not be within the letter or the spirit of the statute. Is he now capable? Was he capable when the petition was filed against him? There is not a syllable uttered by any witness in the cause that questions his mental and physical ability to attend to the business now. If strained relations have arisen and exist between Mr. Macgill and Mr. McEvoy, the ward's property interests, as was well said by the court below, "will at least not suffer detriment from a severely critical attitude towards the management." The guardian had confessedly made some mistakes; but they are not of such a character as to indicate incapacity, indifference to the duties assumed by him, or dishonesty. The mistakes have been corrected.

Upon a review of the whole record, and taking into consideration the fact that Mr. McEvoy had been the trusted and confidential clerk of the infant's father for eight years, and that he had been selected for the position which he held under Mr. Graham by Mr. Graham's father, who knew him as a bookkeeper in the large banking house of Alexander Brown & Sons for many years, we fail to see that the orphans' court committed any error in refusing to remove the guardian. If actual loss had been sustained by the estate, it would, of course, make but little difference, in so far as the practical result might be concerned, whether that loss proceeded from ignorance or dishonesty; but when errors have been made, and are not referable to a want of integrity, and have been corrected, or may be corrected without injury to the estate, then there is no good reason why, for such mistakes, the guardian should be removed. As we agree with the conclusion reached by the orphans' court, its order will be affirmed. Order affirmed, with costs above and below.

HANDY v. MADDOX et al.

(Court of Appeals of Maryland. April 1, 1897.)

HOLIDAYS — TRANSACTIONS ON FEBRUARY 22D —
OYSTER LOTS—NOTICE OF LOCATION —
SUFFICIENCY.

1. Code, art. 13, § 9, establishing February 22d as a legal holiday, and providing that it shall be treated as Sunday only as regards the presenting of bills of exchange, checks, etc., does not make such day a "dies non," and an act done on it is as effective as if done on any other day.

2. Acts 1894, c. 380, § 48, gives the owner of land bordering on navigable waters, the lines of which extend into the waters, the ex-

clusive privilege of using same for protecting oysters within the lines of his own land, and provides that any owner of land "lying and bordering" on any waters may locate "in any of the waters adjoining his lands" one lot of five acres for such purpose; that any citizen may locate one lot of five acres in any waters not located or appropriated, provided 30-days notice in writing be given the owner or occupant of land "bordering" on said waters "proposed to be located": and if said owner or occupant fail to locate the waters mentioned in said notice within the 30 days, it shall be open to any one. *Held*, that the right to such priority belongs to him whose lands, lying on the waters, are nearest to the proposed location, and owners of other lands are not entitled to the 30-days notice of such proposed location.

3. Where locators of oyster lots placed on the shore, on unoccupied land lying on the waters nearest to the proposed location, a notice stating their intention to locate the lots within 30 days (Acts 1894, c. 380, § 46), the notice was sufficient; since, if the land was vacant, it was not necessary to give any notice, and, if there was an owner unknown to such locators, all that was within their power was to post the notice on the land.

Appeal from circuit court, Somerset county, in equity.

Bill by Thomas J. Handy against Benjamin T. Maddox and Robert J. Maddox for an injunction. From a judgment dismissing the bill, plaintiff appeals. *Affirmed*.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, ROBERTS, BOYD, RUSSUM, and BRISCOE, JJ.

Hodson & Hodson and Miles & Stanford, for appellant. H. F. Lankford and Gordon Tull, for appellees.

BRISCOE, J. The motion to dismiss this appeal cannot prevail. It is apparent from the record and the proof filed in the case that the appellant is not responsible for the delay in transmitting the transcript of this record. The motion to dismiss will therefore be overruled.

We have carefully examined this case, and will affirm the order appealed from for the reasons given by the judge below in the following opinion:

"The bill alleges that in February, 1893, the plaintiff located a certain oyster lot in the waters of East creek, in Somerset county, and ever since has used the same for the purpose of planting oysters thereon, and that on the 17th of April, 1895, 'by way of abundant caution,' he relocated the said lots, as appears by exhibit filed with the bill; that on the 22d February, 1895, the defendants 'attempted to locate upon the aforesaid lot' two oyster lots, and since then have prevented the plaintiff from working his oysters and shells upon his lot, and otherwise interfered with the plaintiff's alleged ownership. The complainant prays for an injunction to prevent the intermeddling of the defendants with said oyster lots, and that the locations of the defendants may be declared null and void, and for general relief. The preliminary injunction having issued, the defendants answered, and, after testimony was taken, the case was heard

on argument. The answer of the defendants alleges: First. That the defendants located their lots on the 4th of May, 1891, under the law then in force, with the knowledge, acquiescence, and agreement of the plaintiff, and immediately went into the possession thereof, and have ever since used them for all the purposes to which they are adapted. That after the passage of the act of 1894 (chapter 380) each located his respective lot according to the provisions of that act. That the shore on the east side of East creek, opposite the lots in question, was then vacant land; but, in order to comply with the provisions of the forty-sixth section of the act of 1894, notices were posted on the shore of their intention to appropriate the water for the purposes of an oyster lot after the expiration of thirty days. That the lots in question are opposite and nearest to the land on which the notices were posted, and on the east side of the channel (if there be any); are not opposite nor nearest to any land owned by the plaintiff, who is therefore not entitled to notice of the defendants' intention to locate. The defendants therefore allege: (1) That the right of the parties must be determined by the provisions of the act of 1894, c. 380; (2) that the defendants' locations were made according to the provisions of that law; (3) that their locations, being first in time, are first in right, and the plaintiff's locations, so far as they conflict with those of the defendants, are null and void; and (4) that, therefore, the complainant is not entitled to the relief prayed for, and the injunction should be dissolved, and the bill dismissed. That the rights of the parties must be determined by the provisions of the act of 1894 was not denied at the argument, and we are of opinion must be conceded. This was conclusively settled by the decision of *Hess v. Muir*, 85 Md. 599, 5 Atl. 540. See, also, opinion of Alvey, J., 6 Atl. 673. Nor can it be successfully contended that, if the rights of the parties depend upon the provisions of this act, the locations of the defendants, being first in point of time, must take precedence over that of the plaintiff, provided such locations were made in conformity with that act; and this must be the case whether the plaintiff's location under the act of 1894 was regular or not.

"Let us first inquire whether the defendants' locations are valid. They were made on the 22d February, 1895. The complainant's counsel insist that this was a 'dies non,' and for that reason the locations must fail. We have been furnished with no authority directly sustaining the position. There is no law forbidding work of any kind to be done on the 22d February. The day is established by section 9, art. 13, of the Code, as a legal holiday; but by the terms of the act it is only 'as regards the presenting for payment or acceptance, etc., of bills of exchange, bank checks, etc.,' that it is to be treated and considered as Sunday. It is unnecessary to examine whether an act of this kind would be invalid if done

on Sunday. The 22d of February is a voluntary holiday, and we perceive no reason (none has been furnished us) why an act done on that day is not quite as effective as if done on any other day. *Richardson v. Goddard*, 23 How. 28.

"It is further insisted that the locations of the defendants are void because the notice of an intention to locate was not given as required by law, and the complainant contends: First, that he was entitled to be notified; or, second, if he was not, that the owner of Brant's Point was; or, third, that however that may be, that the notice to the owner of Beach Point was insufficient. We do not deem it necessary to determine here how far the absence of notice would vitiate a location, except as against a party legally entitled to the notice, or (to apply the statement to the facts of this case) whether Handy would have any standing in court to complain that the notice had not been served on some one else. If the provision for notice was inserted only for the purpose stated in the law, viz. 'that the owner or occupant [of the adjoining shore] may have priority of claim,' it seems difficult to understand how one who, under no circumstances, could have 'priority of claim,' has any concern about the matter. But of this we express no opinion whatever. Have the defendants failed to give the notice? To properly reply to this inquiry it is necessary to determine with some accuracy the position of the lots with reference to the stream in which they lie, and the adjacent shore. The general trend of East creek is from south to north. The lots in question lie well over to the east side, close to Beach Point, the nearest land. To that point, from the extreme northeastern corner of the lot, the distance is only a few yards, and to the extreme northwestern corner it is 310 yards. The complainant's land lies to the northwest, and is distant from the nearest point of the lots 408 yards; and the residue of each of the lots lies still further along. To Brant's Point, lying to the southwest, the distance is 491 yards. Immediately across East creek to the west is Indian Hammock Cove; and to the east, only a few yards distance, is Beach Point. It will thus be seen that Handy owns no land opposite or nearest to the lots in question, and the same remark may be made as to the owner of Brant's Point. If 'oppositeness' or proximity be the test by which it is to be determined who ought to receive the notice from the defendants, then clearly Handy must be regarded as having no interest in the matter different from that of any other person in the community. And this was not seriously denied by the counsel for complainant at the argument. To meet the difficulty, two theories have been advanced: (1) That the notice must be given to the owners on both shores, and (2) that the right of an owner or occupant having the priority of location extends to the channel. It is upon the deter-

mination of these rather inconsistent theories that this case must rest. Without considering them seriatim, it will be as well, probably, to endeavor to fix what is the meaning of the statute. Section 46 of chapter 330, Acts 1894, provides as follows: "The owner of any land bordering on any of the navigable waters of this state, the lines of which extend into and are covered by said waters, shall have the exclusive privilege of using same for protecting,' etc., 'oysters within the lines of his own land; and any owner of land lying and bordering upon any of the waters of this state shall have power to locate and appropriate in any of the waters adjoining his lands one lot of five acres for the purpose of,' etc.; 'and any male or female citizen of full age, of the county wherein he or she resides, shall have power to locate and appropriate and hold one lot of five acres and no more, in any waters in this state not located or appropriated; provided thirty days' notice in writing shall be given the owner or occupant of land bordering on said waters proposed to be located, that the owner or occupant may have priority of claim; and if such owner or occupant shall fail to locate or appropriate the water mentioned in said notice within thirty days after receiving the same, it shall be open and free to any one under the provisions of this section; provided,' etc. By the forty-seventh section the exclusive right is given to the owner in cases where a creek or cove not exceeding 100 yards in breadth at its mouth makes into the land, or when the creek or cove becomes 100 yards in width, 'and in all such cases the right of the riparian proprietor shall extend to the middle of the creek, cove, or inlet.' It will be seen, therefore, that the right of priority is reserved to three classes of proprietors or occupants: (1) The owner of land whose lines extend into the water has exclusive right within the lines of his land. This is a proprietary right, and probably exists without regard to the provisions of the statute. (2) Owners or occupants of land 'lying and bordering' on the waters have priority in 'any of the waters adjoining their lands.' (3) When a cove or creek greater in width than 100 yards at its mouth makes into the land, or when it becomes 100 yards in width, the riparian proprietors have prior rights to the middle. The right of priority thus conferred is not an incident of the estate of the riparian proprietor; it is a mere privilege, probably founded on the policy of giving a person desirous of engaging in the business of oyster planting an opportunity of having his place of business close to his residence, and thus secure to him the advantages naturally belonging to his property on the water side. It is in no sense like or analogous to the riparian rights of the common law or of our statute of 1862. By virtue of these, improvements made into the water are attached to the land, and are an incident to the estate. The act in question, however, is a regulation

of the oyster fisheries of the state, and it is by virtue of the state's general power to regulate, improve, and protect the public fisheries that it was passed. The principles, therefore, laid down in *Goodsell v. Lawson*, 42 Md. 348, have no bearing whatever upon the facts of this case. The priority of claim is given to any owner of land 'lying and bordering upon,' etc., to appropriate one lot 'in any of the waters adjoining his lands.' His land must lie upon and border upon the water. The word 'border' means 'approach,' 'to come near to,' 'to verge.' It conveys the idea of immediate proximity. The employment of the two words 'lying' and 'bordering' seems to emphasize this meaning. The land is not only to lie on the waters, but it is to border the waters 'proposed to be located.' There is nothing in the act to limit or extend the meaning of these words so as to make the channel a test of the right to priority of claim. But it does seem clear that the priority was meant for those whose lands lie on and are near to the water proposed to be located. If the stream is narrow, the right of persons on each side being the same, each right would extend to the middle. And in every case where the right exists it would belong to him whose lands, lying on the waters, are nearest to the proposed location. This construction would give to each proprietor the prior right in such waters as are nearer to his property than to that of any other person. It is also in harmony with the provisions of section 47, by which, in the smaller waters, each proprietor has the exclusive right of planting in those parts of the cove or inlet that are nearest to his property. If this be a correct interpretation of the statute, there was no obligation upon the defendants to notify either the complainant or the owner of Brant's Point of their intention to make the locations they did. The defendants allege in their answer, and the proof sustains the statement, that Beach's Point, the nearest land, was vacant at the time the lots were surveyed; but that, notwithstanding, notices were placed on the shore, stating their intention to locate the lots within 30 days, and copies of the notices are filed among the proceedings before the examiner. If Beach's Point were vacant, without an owner or occupant, it was not necessary to give any notice at all, from the fact that there was no one who had a prior claim. On the other hand, if there was an owner unknown to the defendants, all that was within their power was to post the notice on the land. In either view of the case, we think there was no such failure on the part of the defendants as affects their title, or will furnish ground of complaint to the complainant. There were numerous exceptions to the evidence filed by respective counsel, and many other questions discussed at the argument. We deem it unnecessary to pass specifically upon them, inasmuch as what has been said requires us to dismiss the bill."

Decree affirmed, with costs.

DUNKLEE v. HOOPER.

(Supreme Court of Vermont. Windsor. May Term, 1896.)

DEED—BREACH OF CONDITIONS—WAIVER—EVIDENCE.

1. Where plaintiff conveyed certain property to defendant in consideration of his future support, and left the premises for 11 weeks because of alleged breach of conditions, but returned thereafter, and remained for a year and a half, the acceptance of further support was a waiver of a right to claim forfeiture for any breach which existed prior to his departure.

2. Where a deed is given in consideration of future support, and provides for forfeiture on a breach thereof, the grantor is entitled to a reasonable time after such breach to claim forfeiture; and the fact that the breach did not continue to the day of a declaration of such forfeiture did not constitute a waiver of the breach.

3. Evidence that the grantor had no place to which to go for his support from the time of his return after a first breach of the conditions, in 1893, until he left the premises, in 1895, was inadmissible with reference to a time when the grantor was making no efforts to find a place to go to.

Exceptions from Windsor county court; Rowell, Judge.

Action by Reuben V. Dunklee against Nettie L. Hooper. Verdict and judgment for plaintiff, and defendant excepted. Reversed.

April 1, 1891, the plaintiff conveyed the premises to the defendant by a deed of warranty in common form, but subject to the condition that the defendant should support the plaintiff during his life in the manner provided. Alvah Dunklee, a son of and witness for the plaintiff, having testified on cross-examination that his father remained at the defendant's, receiving support, from October, 1893, to August, 1894, was allowed to state on re-examination that "there was no other place where his father could have got his daily food from October, 1893, until April 17, 1895," to which the defendant excepted.

Gilbert A. Davis, W. E. Johnson, and George L. Fletcher, for plaintiff. L. M. Read and W. W. Stickney, for defendant.

MUNSON, J. The title to the demanded premises vested in the defendant upon the receipt of her deed from the plaintiff, subject to be defeated by a breach of the condition contained in the deed and a claim of forfeiture by the grantor. The plaintiff took up his residence on the premises, as provided for in the deed, on the 6th day of April, 1891, and received his support there from that date until the 17th day of April, 1895, except during 11 weeks in the summer of 1893. He left the premises on the day last named, and immediately brought this suit. We do not deem it necessary to consider the circumstances connected with the plaintiff's absence from the place in 1893. He returned to the premises, and received his support there for a year and a half after this. There was no evidence tending to establish any fact that could relieve him from the consequences

which the law attaches to this course of action. His voluntary return to the premises, and acceptance of further support, was a waiver of his right to claim a forfeiture for any breach which existed prior to his departure. But there was evidence tending to show a failure to provide properly for the plaintiff during the winter of 1894-95. The plaintiff's brief refers to the breaches relied upon as having occurred shortly before he left. The defendant claims that there was no evidence tending to show a breach immediately preceding the departure, and that the plaintiff's acceptance of support until then, without giving notice of his purpose to claim a forfeiture, was necessarily a waiver of the prior breaches. But our view of the law applicable to the case is such that it is unnecessary to inquire whether the evidence brings the defendant's default down to the very day of the plaintiff's removal. It is true as a general proposition that an acceptance of further performance of a condition will defeat the grantor's right to claim a forfeiture for a known prior breach. It may be that when the condition provides only for the payment of money at stated intervals, or the doing of certain specific acts, the question of waiver can be disposed of as one of law. But the situation is different when the condition covers the continuous care and infinite variety of service which constitute the support of one as a member of the family. We think that in cases of the latter class it cannot be said, as matter of law, that every acceptance of further service without notice is a waiver. A grantor who is receiving his support under a conditional deed is entitled to a reasonable time to take action with reference to a breach, and what might be an unreasonable time in the case of one person might be entirely reasonable in the case of another.

This view might have disposed of the question raised as to the admissibility of evidence that the plaintiff had no place to which he could go if he left the defendant's if it had been confined to the time during which his removal was in contemplation; but we think evidence of this character, covering the entire period from his return, in 1893, to his final departure, in 1895, was inadmissible. It is clear that the plaintiff could not take his support for a year and a half, and then say that his remaining did not amount to a waiver because he had no place to which he could go. It is only when this fact is brought into connection with other conditions that it becomes material. It was not admissible with reference to a time when the plaintiff had no thought of leaving, and was making no effort to find a place to go to. There was no evidence tending to show that the plaintiff contemplated leaving, or that anything looking to a removal was being done by him or any one in his behalf, until a few weeks before he left.

It may be suggested that, if this evidence was admissible as to the last few weeks, its

admission as to the whole period must have been harmless. But this is a case in which it is more than ordinarily difficult to feel sure that testimony of this character had no prejudicial effect. This evidence covered a long period regarding which accounts of the defendant's ill treatment of the plaintiff were before the jury, and it was in substance that the plaintiff had no other place where he could have got his daily food unless he was taken by the town. The question is not whether this ought to have prejudiced the jury, but whether it may have done so. But we think it is quite probable from the manner in which the evidence was offered and received that it was prejudicial. The evidence was first introduced with reference to a period extending from the plaintiff's return, in 1893, to August, 1894, and was offered, as shown by the frame of the question, to meet a statement of the witness, previously made in cross-examination, that the plaintiff remained at the defendant's during that time receiving his support, and was admitted by the court as bearing upon the question of waiver. It does not appear how the case was finally submitted, for no exceptions were taken to the charge.

It is not necessary to pass upon the exception allowed to the answer which the court had said should not be taken. Judgment reversed, and cause remanded.

OHRISTENSON v. CARLETON.

(Supreme Court of Vermont. Washington. Oct. Term, 1896.)

ARBITRATION AND AWARD—CALLING IN UMPIRE— WAIVER OF IRREGULARITIES.

1. Arbitrators empowered to call in another if they fail to agree, are not authorized to do so without first trying to agree, and, if they do, such action and all subsequent proceedings are void.

2. A party does not, by proceeding with a rehearing before an additional arbitrator, waive the failure of the original arbitrators to try to agree before calling in the additional one, unless he knew of such failure.

Exceptions from Washington county court; Ross, Chief Judge.

Debt by Ohrs. Christenson against Edwin Carleton on a written award. Plea, the general issue. There was a verdict directed for plaintiff for the amount of the award, with interest and costs, and defendant excepted. Reversed.

H. W. Scott and Richard A. Hoar, for plaintiff. W. E. Barney and Frank J. Martin, for defendant.

Taft, J. This action is in debt upon a written award. The parties submitted a controversy as to a certain horse, and other disputes and claims, to the arbitrament and award of Allen Bates and John McLaughlin, and stipulated that, in case said Bates and McLaughlin failed to agree, they (Bates

and McLaughlin) should have power to select another arbitrator, and the decision of the majority should be final. The award was signed by Bates, McLaughlin, and a third person by the name of Jackman. Upon trial the testimony tended to show the following facts, viz.: That before the cause was heard the two arbitrators proposed that Mr. Jackman, or some third man, should be called in to act with them, but the defendant objected, and said to them to try it themselves. They accordingly heard the case, and considered it. They then agreed between themselves that there was a great deal more to the case than they had any idea there was when they consented to hear it, and Mr. Bates proposed to call in the third man, and they did so, when the three heard the case, and made the award. Both of the arbitrators testified,—McLaughlin that, after they had heard the testimony, they did not try to agree upon the case; and Bates that the arbitrators neither disagreed nor agreed, and did not really try to do so, giving as a reason that he thought there was no use in it, that the defendant was not present when the arbitrators agreed to call in the third man, and that they did not notify him that they had failed to agree. The defendant testified that he supposed the arbitrators, when they called in Jackman, had failed to agree; that he did not suppose they would be bold enough to call in another man after he had so strenuously refused to have them do so, unless they had disagreed. Under the terms of the submission the defendant was entitled to have Bates and McLaughlin exercise their judgment in respect to the controversies submitted to them, and they had no right to call in Jackman to act as arbitrator, unless, after they had heard the parties and their witnesses, they failed to agree in respect to the matters submitted to them. Until they did exercise such judgment, and failed to agree, they had no right to call in the services of a third arbitrator, and such proceeding and all subsequent ones were null. It is insisted that the defendant waived that irregularity by proceeding with the arbitration. Had he known, when Jackman was called in, that the arbitrators had not failed to agree, and he had then proceeded with the arbitration, this claim might be tenable; but his testimony tended to show that he believed they had disagreed, and was not aware that they had not disagreed until some days after the hearing. This was no waiver of the irregularity, as he did not know what his rights were in that respect, supposing that they had disagreed. A waiver is an intentional abandonment of a known right. These questions whether the two arbitrators failed to agree, and whether the defendant voluntarily proceeded with the arbitration knowing that they had not failed to agree, are questions that should have been submitted to the jury. The court erred in not doing so, and for that reason the judgment is reversed, and cause remanded.

ROWELL v. DUNWOODIE.

(Supreme Court of Vermont. Washington. Oct. Term, 1896.)

STATUTE OF FRAUDS—AGREEMENT TO PAY DEBT OF ANOTHER—RULINGS ON EVIDENCE.

1. Defendant, residuary legatee in a will, agreed in writing to pay two notes which plaintiff held against decedent's estate, if plaintiff would cease to oppose the probate of the will. The agreement also stated that plaintiff held a claim for a fixed amount against such estate, which was also to be paid, and that plaintiff had no other claim against the estate. *Held*, that the writing sufficiently described the debt of the third person assumed by defendant as to be valid under the statute.

2. Where the court rejects certain notes offered in evidence for plaintiff, and directs a verdict for the amount of a certain account sued on, and plaintiff excepts to the exclusion of the notes, but not to the order directing a verdict, by so excepting he saved the right to insist on a recovery of the amount due on the notes.

Exceptions from Washington county court.

Action by I. H. P. Rowell against M. J. Dunwoodie. Verdict for defendant, and both parties except. Reversed.

The plaintiff claimed to recover upon the written contract recited in the opinion, and introduced the same in evidence. The defendant excepted to its admission on the ground that the plaintiff could not recover thereon under the common counts. The plaintiff offered in evidence two notes purporting to be signed by the testator, payable to the plaintiff or bearer, and offered oral evidence to identify them as the notes mentioned in the contract, and to prove that they had been kept alive as against the statute of limitations. The court excluded the notes on the ground that the statute of frauds required the memorandum to be complete, and that oral evidence was not admissible to identify the notes. To the exclusion the plaintiff excepted. The plaintiff's evidence tended to prove that all the conditions of the written contract had been fulfilled. No question was made but that one-half of the account referred to in the writing amounted to \$29.40, and the court directed a verdict for the plaintiff for that amount. The defendant excepted thereto on the ground that recovery could not be had under the common counts. The plaintiff did not ask to go to the jury on any question, and took no exception to the action of the court in directing a verdict.

T. R. Gordon, for plaintiff. Geo. W. Wing and Dillingham, Huse & Howland, for defendant.

TYLER, J. The plaintiff claims to recover, in the common counts in assumpsit, upon a written agreement signed by the defendant, which is as follows: "I, M. Jennie Dunwoodie, of Montpelier, Vermont, named as residuary legatee in the will of Joseph B. Rowell, late of Montpelier, aforesaid, now pending for probating in the probate court for the district of Washington, Vermont, hereby agree to pay

I. H. P. Rowell of Montpelier, Vermont, two notes he holds against the said Joseph B. Rowell, with the interest thereon, upon the following conditions: (1) The said Rowell shall withdraw from opposing the probating of said will, and allow the same to be probated. (2) That the estate shall be solvent, and that sufficient shall be realized therefrom to pay all legacies and debts. (3) In case no appeal is taken by any one interested in said estate as a creditor or otherwise. In case an appeal shall be taken, no liability shall attach to the said M. Jennie Dunwoodie until such appeal is determined; and, if such determination shall be adverse to her, then said M. Jennie Dunwoodie shall be discharged from all liability under this agreement. The said Rowell has an account for legal services and costs against Joseph B. Rowell for one-half said amount, estimated to be from twenty to thirty dollars, which is to be paid, subject to the above conditions, by the said M. Jennie Dunwoodie; and the said Rowell has no other claim against said estate." The plaintiff's evidence tended to show that all the conditions of the agreement had been fulfilled, and the defendant made no claim that the first, second, and third conditions had not been performed. The question is whether the agreement satisfies the statute which requires that a promise to answer for the debt of another shall be in writing. If the promise had been to pay a specific sum of money, as \$142.99,—the face of the two notes,—no question could be raised but that the debt was definitely described. But now it is contended that the contract is partly in writing and partly dependent upon parol evidence, and therefore within the statute. The rule of law is that enough should appear in the writing to show that a contract has been concluded which is legally binding upon the party sought to be charged; that the written note or memorandum must, either by its own language or by reference to something else, contain such a description of the contract actually made as shall obviate the necessity of resorting to parol evidence in order to supply any term of the contract essential to give it validity. *Ide v. Stanton*, 15 Vt. 635. The plaintiff offered in evidence two notes, signed by the testator, which were excluded. If the writing had been indefinite, so that it might have applied to different notes, the ruling of the court excluding them would have been correct. But it appears by the writing that these two notes and the account were all the claims that the plaintiff had against the estate, so that their identity was established by their production, and parol evidence was necessary only for the purpose of fixing the amount due upon them. So we are not required to go beyond the rule in *Ide v. Stanton* to inquire how far parol evidence might be resorted to in order to identify the subject-matter of the contract. Upon proof that the plaintiff had complied with the terms of the agreement, and the admission of the notes in evidence, he would have been entitled

to recover in general assumpsit. A case would have been made where nothing remained for the defendant to do but to pay over the amount due upon the notes. The defendant's promise was not collateral to that of the testator. It was absolute upon the plaintiff's performance of the conditions, and was obviously for the defendant's benefit, she being the residuary legatee under the will.

The defendant makes the further point that the verdict and judgment for the plaintiff to recover the amount of his account preclude him from a recovery upon the notes. This cannot be maintained. The plaintiff's exception to the ruling of the court excluding the notes as evidence saved his right in respect to a recovery of the amount due upon them. Judgment reversed, and cause remanded.

CUTLER et al. v. SKEELS.

(Supreme Court of Vermont. Washington. Oct. Term, 1896.)

APPEAL—REVIEW—RULINGS ON EVIDENCE—IMPROPER ARGUMENT OF COUNSEL.

1. Error cannot be predicated upon an improper answer by a witness to a proper question.

2. The exclusion of a question to a witness is not reversible error unless an offer is made showing that the answer would disclose admissible testimony.

3. Where the contents of a document offered in evidence are not shown by the record, an appellate court cannot say that its exclusion was error.

4. It is error to permit counsel in argument to state facts to a jury as of his own knowledge of which there was no evidence.

5. A general exception to a portion of a charge as a whole cannot be sustained when any part of it was correct.

Exceptions from Washington county court; Start, Judge.

Assumpsit by Cutler & Martin against Hynman Skeels. Judgment for plaintiffs, and defendant brings exceptions. Reversed.

The action was for the price of a pair of oxen. The oxen, while alive, were sold, by description, through Howard P. Martin, as the plaintiffs' agent, to be dressed and delivered at the defendant's market in Barre at seven cents per pound. The defendant's evidence tended to show an express warranty that the oxen were not over five or six years old, a strictly fancy pair, and fit to hang in the defendant's windows as an advertisement, and that the price was for that reason larger by one cent per pound than the price of ordinary first-class beef; that the contract was made January 18, 1893, and that the cattle were delivered February 23, 1893, by one Lombard, as the plaintiffs' agent; that the defendant received the meat with objections, not as filling the contract, but in reliance upon Lombard's representation that the plaintiffs would do what was right about it; that until a month after the delivery the defendant supposed he was dealing with Howard P. Martin as principal; that the day after the delivery the defend-

ant notified Howard P. Martin, by letter, that the meat was unsatisfactory, and that he must come and settle, which letter was received and delivered to the plaintiffs on the day following; that, after waiting a reasonable time, and receiving no reply, the defendant cut up the meat, and began the sale of it, being still ignorant of the age of the cattle, and not intending to accept it under the contract; that about March 1, 1893, the plaintiff Willard S. Martin called upon the defendant for the pay for the cattle, and that the defendant insisted upon settling with the supposed principal, Howard P. Martin; that, soon after, Howard P. Martin called, and was informed by the defendant that the meat was not accepted, and that the defendant claimed damages for breach of the contract; that the cattle were, in fact, from twelve to fifteen years old, and the meat not worth over four or five cents per pound, and that considerable of it was unmarketable; that the defendant offered to return the unsold portion when he found that the plaintiffs were unwilling to allow a recoupment of damages. The plaintiffs conceded that they were bound by any representation made to the defendant by Howard P. Martin. The plaintiffs' evidence tended to show that there was no warranty as to the age of the cattle, that they were not sold as a fancy article, and that the meat was all that it was represented to be.

(1) The basis for this exception appears in the opinion.

(2) On cross-examination, the plaintiff Willard S. Martin was asked if he did not instruct Lombard to keep quiet about where the oxen had gone, and answered: "No, I never did; and I never heard of it until you just spoke." He was then asked: "You did not know that Mr. Lombard had told somebody that you had instructed him to that effect, did you?" The question was excluded, and the defendant excepted.

(3) On further cross-examination, the same witness admitted that while the case was pending before the justice he did, perhaps, ask him to look at other of the plaintiffs' cattle, and see what kind of cattle they were. The defendant then offered to ask him: "Did you not know better than to approach a justice in that way?" The question was excluded, and the defendant excepted.

(4) The basis for this exception appears in the opinion.

(5) The defendant, while putting in his case, called the plaintiff Martin for cross-examination, and asked him to produce a letter written to the plaintiffs by the defendant, concerning the cattle, which the witness acknowledged was in court in the hands of his counsel. The court refused to order the letter produced at that time. The defendant excepted.

(6, 15½, 16) The witnesses Hall and Brock were allowed to give their opinion as to the age of the cattle, having testified that they

had examined them for the purpose of determining their age.

(7, 8, 15) The basis for these exceptions appears in the opinion.

(17) Counsel for the plaintiffs, in the opening argument, stated to the jury that one of the witnesses for the defendant was an assistant counsel, and argued that his relations as such counsel affected his credibility as a witness. There was no evidence in support of the assertion. The defendant was allowed an exception. In the closing argument the plaintiffs' counsel stated that the plaintiffs brought their reputation into court with them; that he (counsel) had known them for many years, and known of their previous good character and reputation, and that these were the best kind of evidence in their behalf. There was no evidence in support of either of these assertions. The statement was not withdrawn, but left to have its natural effect. The defendant was allowed an exception.

(18) The holding of the court renders a statement of the charge unnecessary.

W. A. Lord and R. A. Hoar, for plaintiffs.
John W. Gordon, for defendant.

TAFT, J. 1. The plaintiff Martin, in response to a question, testified that he gave Howard P. Martin instructions in regard to the sale of the cattle. No objection was made to the question, but in answering it he stated that he authorized him to sell them for seven cents a pound, and added "that they were worth that, as he understood cattle were bringing that in Barre." It is insisted that the admission of this latter remark was error. It was not in response to the question. That error cannot be predicated upon an improper answer to a proper question, see numerous Vermont cases. But the answer had some bearing upon the question of what instructions he gave Howard P. to sell them. It was more probable that he authorized him to sell them at that rate, if cattle were bringing the sum named in the Barre market, than if the rate in that market had been less. But there was no controversy about the price agreed upon for the cattle; therefore the defendant was not harmed by the plaintiff's testimony that he understood cattle were bringing seven cents a pound in the Barre market, for that was the price at which the cattle were sold. For each of these reasons there was no error.

2. Whether the plaintiff Martin had heard that Lombard had told somebody that he (Martin) had instructed him (Lombard) to keep quiet where the oxen had gone to, was immaterial. It was not pertinent to any issue in the case, and had no tendency to prove nor disprove any fact in controversy.

3. The plaintiff Martin answered fully all questions asked in regard to what he had said to the justice about the latter looking at his (Martin's) cattle, at the time this suit

was pending before the justice. There was no error in excluding the question of whether he knew better than to approach the justice, and try to influence him, for it does not appear what his answer would have been. He may have answered "No," which would have been no benefit to the defendant. The defendant must show he has been harmed by a ruling before a judgment should be reversed. The exclusion of an unanswered question is not error; an offer must be made showing that the answer would disclose admissible evidence.

4. The plaintiff testified in respect to Mr. Lombard, "I engaged him to carry the meat over." This testimony was not objected to. The court ruled that it was proper to show what the plaintiff engaged Lombard to do, but no further testimony was given under the ruling, and therefore no injury was caused by it. The correctness of the ruling is not considered.

5. The defendant had written the plaintiffs a letter, and during the trial called upon the plaintiffs to produce it. The letter was concerning the cattle. It is not shown what the contents of the letter were. The court ruled that at the time the defendant was not entitled to its production. The contents of the letter not being shown, we cannot say that it was error to exclude it. Were the contents material, we do not say it was an erroneous ruling. We are not called upon to consider the question.

6, 15½, 16. When the witness Rice was testifying, the court ruled he could not give his opinion as to the age of the ox; but, notwithstanding the ruling, he stated that, as near as he could judge, the ox was 10 years old. The defendant was not harmed by the ruling, for the question he asked was answered. A witness qualified to speak upon the subject may give his opinion as to the age of cattle. There was no error in admitting the testimony of Hall and Brock.

7. There was no error in excluding the testimony that the witness Rice, after the justice trial, told the plaintiff Cutler the oxen were old. The defendant was permitted to show the age of the oxen, and that the plaintiffs had changed the ground upon which they claimed to recover. The plaintiffs had conceded that they had inquired of the witness how old the oxen were, and the witness had stated at the trial how old they were. It will be inferred that the witness told the plaintiffs the age as he understood it to have been. It does not appear that the offer of the testimony was to show he told them it was different from what he stated on the trial that it was. We infer it was the same. The testimony, in substance, was already in the case, and further examination of the witness was unnecessary.

8. As tending to show what the plaintiffs knew about the age of the oxen at the time of the justice trial, statements made to the plaintiffs prior to the trial were admitted;

but statements made to the plaintiffs after the justice suit had no tendency to show that the plaintiffs knew the age of the oxen at the time of the trial, which was the purpose for which the testimony was offered.

9, 10, 14. These points are waived.

11, 15. A Mr. Rowell was called as a witness. He was a dealer in meats, and had seen the meats in question. He was asked to compare the meats with that which could be obtained from such cattle as were described by another witness. His comparisons were properly excluded. He could describe the meat in question, and the jury could make the comparison, if it was material. For the same reason the question noted in the fifteenth exception was properly excluded.

12. All that the defendant proposed to show by Mr. Bacheider under the twelfth exception had already been conceded by the plaintiff Martin.

18. There was no error in asking the defendant if, in his letter, he stated his claim of breach of contract, as he then, on trial, claimed it. No inquiry was made as to what the contents of the letter were.

17. The counsel for plaintiffs, in the opening and closing arguments, stated to the jury facts not supported by any evidence in the case. The statement of counsel that he had known the plaintiffs for many years, and knew of their previous good character and reputation, and that their character and reputation was the best kind of evidence in their behalf, was not legitimate argument. It was a statement of facts that he had no right to make; and, as it was permitted by the court, we regard it as an implied ruling that such argument was legitimate. In this respect there was error, for which the judgment must be reversed.

18. The exception to that portion of the charge detailed in the bill was taken in these words: "To all which" the defendant excepted. To sustain such an exception, the whole charge as detailed must have been faulty. No question is made but that the charge as to a warranty was correct. The exception must be overruled even if a part of the charge was incorrect. Whether it was faulty in some of its aspects, we have no occasion to consider. This point has been decided so often that it is needless to cite authorities in support of it. Judgment reversed, and cause remanded.

TOWN OF BARRE v. JERRY.

(Supreme Court of Vermont. Washington.
Jan. Term, 1896.)

COSTS—ACTION FOR PENALTY.

R. L. §§ 1444, 1445 (V. S. § 1686, 1687), restricting costs in justice court or on appeal: therefrom to five dollars on a recovery not exceeding that sum, do not apply to proceedings under R. L. § 3132 (V. S. § 3513), subsequently

enacted, and providing for recovery by a town of a penalty "with costs" for wanton injury to a highway.

Exceptions from Washington county court. Action by the town of Barre against George Jerry for a penalty. Heard in county court on appeal by plaintiff from a justice of the peace. There was a verdict for one dollar, and judgment thereon for full costs, and defendant excepted. Affirmed.

John W. Gordon and George W. Wing, for plaintiff. John G. Wing, for defendant.

MUNSON, J. This is an action founded on R. L. § 3132 (V. S. § 3513), which provides that one who wantonly or illegally injures a highway in any of the ways therein specified shall forfeit to the town, to be expended in repairing highways, not more than \$30, to be recovered by the selectmen in an action in the name of the town, with costs. The plaintiff obtained a verdict for one dollar, and the court allowed full costs. To this allowance the defendant excepted.

R. L. § 1444 (V. S. § 1686), restricts costs in actions tried before a justice to five dollars, when the amount recovered does not exceed that sum; and R. L. § 1445 (V. S. § 1687), provides that when the plaintiff appeals the county court shall be governed by the same rule. The plaintiff would have recovered the restricted costs allowed by this general provision if nothing had been said about costs in R. L. § 3132 (V. S. § 3513); so no effect will be given to the words "with costs," contained in that section, unless they are held to carry full costs. The general provision was enacted as early as 1822; and the section last cited, the substance of which had been before enacted and repealed, dates from the Revision of 1839. There is nothing to indicate that the allowance of costs by this section was intended as a mere repetition, and the rule which requires that some force be given to a further legislative expression must be applied. Judgment affirmed.

executed on a sufficient consideration, and delivered as security.

Exceptions from Rutland county court; Munson, Judge.

Application by the First National Bank of Brandon against George Briggs' assignees for the allowance of a claim arising from the insolvent's suretyship on the official bond of claimant's cashier. It was adjudged that the action might be maintained, and defendants except. Reversed.

J. C. Baker, for plaintiff. Stewart & Wilds, for defendants.

MUNSON, J. The plaintiff is a corporation organized under the national bank act. Its board of directors was empowered by that act to appoint a cashier, and dismiss him at pleasure, and to prescribe by-laws, not inconsistent with law, regulating the manner in which the cashier should be appointed. A by-law was adopted which provided that the cashier should be appointed to hold his office during the pleasure of the board. The insolvent's first election as cashier was for the year ensuing, and he was thereafter for 10 years annually re-elected. Soon after his first election, he gave the bond in controversy, which is conditioned for the faithful discharge of his duties as cashier forever, so long as he should occupy the position. The defaults complained of occurred after the expiration of his first official year.

We are not aware that the precise question raised by this statement has been passed upon, but a review of the course of decision by which courts have arrived at what must now be regarded the settled law upon the subject of official bonds will aid us in the disposition of the case. In *Lord Arlington v. Merricke*, 2 Saund. 411a, the delinquent was a deputy postmaster, who was originally appointed for six months, but whose bond was for and during all the time that he should continue in the office. The time for which he was appointed was recited in the condition, and it was considered that the terms of the obligation must be held to refer to the recital, and that the liability was thereby limited to six months. In *Waterworks Co. v. Atkinson*, 6 East, 507, there was a recital in the condition of the bond that the defendant had agreed with the plaintiff to collect its revenues for 12 months, and the condition was that the defendant should justly account during the continuance of such his employment, and for so long as he should continue to be employed; and it was held that the obligation was confined to the 12 months mentioned in the recital. These cases are authority for saying that, when a definite period of appointment is recited in the condition, the obligation will not be extended beyond that period by any subsequent general words. In *Wardens of St. Saviour's v. Bostock*, 2 Bos. & P. (N. R.) 175, it was shown by the recital in the condition that the principal was

FIRST NAT. BANK OF BRANDON v. BRIGGS' ASSIGNEES.

(Supreme Court of Vermont. Rutland. May Term, 1894.)

OFFICIAL BONDS—SURETIES—EXTENT OF LIABILITY—BONDS—SEAL.

1. Under the provision of the national banking act empowering directors to appoint a cashier, and dismiss him at pleasure, and to prescribe by-laws, a by-law was adopted which provided that the cashier should hold office during the pleasure of the board, and a cashier was appointed, who gave a bond conditioned for the faithful performance of his duties as cashier forever, so long as he should occupy the position. The first election as cashier was for the year ensuing, and he was thereafter for 10 years annually re-elected. *Held*, that the sureties on the bond were not liable for defaults occurring after the expiration of the first year.

2. Though an instrument in form a bond is without seals, it is a valid obligation, where

appointed collector of the church rate of the parish, but the period of appointment was not stated. It appeared from the replication that the first appointment was for one year, and that the incumbent was continued in office by annual reappointments. The office was apparently an annual one, by virtue of the local act under which the rates of the parish were managed. The bond was upon condition that the collector should from time to time account for all moneys received by him on account of the rate assessed, or of any other rates which might thereafter be made and collected by him. The court considered that the case could not be distinguished from that of *Waterworks Co. v. Atkinson*. In *Peppin v. Cooper*, 2 Barn. & Ald. 431, the condition recited an appointment as collector of land taxes under an act of parliament, but the term of appointment was not stated. The condition of the bond was to account for moneys received at all times thereafter. The court held that these words must be construed with reference to the recital and the nature of the appointment therein mentioned; and that, inasmuch as the fact that the appointment was an annual one could be learned from the act of parliament under which it was made, it was unnecessary to state that fact, either in the bond or in pleading. These cases are authority for saying that, when the appointment is for a definite period fixed by law, a recital of the term in the bond is not necessary to limit the effect of general words which in themselves would indicate a continuing liability.

The above cases, and others of the same holding, were reviewed by this court in *Treasurer v. Mann*, 34 Vt. 371; and it was then considered upon their authority to be perfectly settled that when the appointment is for a limited period, which is recited in the condition of the bond, or, if not recited, is fixed by law, the liability will be confined to the period named in the condition or fixed by law, although the language of the condition is general and unlimited. In that case the delinquent was the director of a bank by whose charter the office was made annual. Acts 1842, p. 107. At his first election he gave a bond conditioned to secure the due performance of his duty as director while he should continue in the office, and gave no bonds when subsequently re-elected. The bond was held to cover the defaults of the first year only. It is sufficient to say that the authorities in this country are entirely in accord with this decision. *Kitson v. Julian*, 4 Bl. & Bl. 854, covers ground in advance of these cases. In that case the delinquent was appointed an officer of a private corporation, and gave a bond conditioned to account for all moneys collected by him "from time to time, and at all times so long as he should continue to hold the said office or employment." The bond contained no recital of the period for which he was appointed. The plea averred

that the appointment was for one year from a day named. The replication averred that the appointee continued in his employment, with the assent of the defendants and the company, after the expiration of the year. It was held that, inasmuch as the condition of the bond recited the appointment, it was to be assumed that the extent of that appointment was known to the signers of the bond, and that they contracted with reference to it. This case is authority for saying that general words will not extend the liability beyond the term of the appointment named in the recital, although the extent of the appointment is neither given in the recital nor fixed by law.

It is not to be understood, however, that words may not be used in the condition sufficiently specific to extend the liability beyond the time of the original appointment. But, to have this effect, the words must be such as clearly to indicate that the parties contracted with reference to a further liability. In *Hassell v. Long*, 2 Maule & S. 363, the officer was a collector of taxes imposed by act of parliament, and the condition was to account for moneys received on any tax then imposed, or which might thereafter be imposed. The court held that inasmuch as the imposition of further taxes within the year, however improbable, was not impossible, the words employed were not sufficiently clear and certain to extend the liability beyond the current year. But whenever the words clearly indicate that it was the intention of the parties to furnish security for the time the appointee should continue in office, without regard to the term of his appointment, they are to be given their full effect. In *Augero v. Keen*, 1 Mees. & W. 380, the condition, after reciting the appointment, held the appointee to an accounting for such moneys as he should receive "from time to time at all times thereafter during such time as he should continue in his said office of collector, whether by virtue of his aforesaid appointment, or of any reappointment thereto." The court considered the liability of the obligors for the entire period to be beyond question. The same effect was given to words of like import in *Oswald v. Berwick-upon-Tweed*, 5 H. L. Cas. 856. It is also held that, when the office is by term annual, a further provision that the incumbent shall remain in office until his successor is appointed does not take the case out of the rule above presented. In *Treasurer v. Mann*, already cited, it was said that the office was to be regarded as annual, notwithstanding such a provision. In *Welch v. Seymour*, 23 Conn. 387, the articles of association of a corporation provided that its treasurer should continue in office until the next annual meeting, and until another should be elected in his stead. It was held that the office was an annual one, and that the obligation of the bond did not extend beyond the year. In *Dover v. Twombly*, 42 N. H. 59, the incumbent of an annual office held through another year, by

force of a statutory provision, in default of the appointment of a successor. It was held that the bond, although general in terms, was good only for the time for which the principal was appointed. In *Chelmsford Co. v. Demarest*, 7 Gray 1, it was provided that the treasurer of a corporation should be chosen annually, and hold office until the election and qualification of his successor. Here it was said that the obligation of the bond extended to the next annual meeting or the meeting at which the next annual election should be made, and for such reasonable time after that as would enable the successor to complete his qualification, and no further.

The plaintiff does not question the doctrine of these decisions; but it contends that, in view of the statutory provision regulating the tenure of these appointments, it must be considered that the cashier, although appointed for a year, and re-elected at the end of the year, was holding his office during the pleasure of the board, and that his various re-elections did not create new terms, but were simply expressions of the will of the directors that he should continue in office. Much of the reasoning relied upon in support of this contention is derived from *Bank v. Root*, 2 Metc. (Mass.) 522. In that case it appeared from the records of the corporation that the cashier's first appointment was for the year ensuing, and that at the expiration of the year he was again appointed for the year ensuing, after which he continued to serve for several years without reappointment. There was, however, a statutory provision that a cashier should retain his place until removed, or until another was appointed in his stead; and it was considered that, although the election was for a year, the law made it a continuing office. Dewey, J., dissented, on the ground that, the appointment having been in fact made for a year, the sureties could not be held for defaults occurring after the year. It is said in 1 Morse, Banks, § 27, upon the authority of *Bank v. Root*, that a mere usage of the directors to re-elect every year does not impart to the office the legal character of annual duration; that sureties will not be presumed to have contracted with reference to such a usage; and that a re-election in pursuance of the usage will not limit the obligation of the bond. But this must be read with a remembrance that in the case under review the court considered that the office was a continuing one, by force of the statute. The controlling effect of the statute upon the disposition of *Bank v. Root* is emphasized by a later case. In *Trustees v. Dean*, 130 Mass. 242, where the statute left with the corporation the right to fix the term of office as it saw fit, it did not appear what the by-laws of the corporation were, but the corporation had for a long series of terms elected its treasurer triennially. It was held that, as there was no statute which made the office a continuing one, the reasoning in *Bank v. Root* was not applicable; and that the corporation had, by

its long and uniform practice, made the office a triennial one, so that, when the defendants made their contract, it was with reference to a fixed and limited term.

It is evident that the case of *Bank v. Root*, if followed, will not be decisive of the case at bar, unless the United States statute is held to have the same effect that was given to the Massachusetts statute. The two provisions are not similar in terms. The federal regulation is simply that the directors may appoint the necessary officials, and remove them at pleasure. The only case that has come to our notice in which this provision has been considered is the case of *Harrington v. Bank*, 1 Thomp. & C. 361. There a teller, who had been employed for a year, was discharged before the expiration of the year, and sought to recover compensation for the full term. The court held that the appointment was subject to a right of dismissal given the defendant by law. The decision goes no further than the express provision of the statute. As is said in 2 Morse, Banks, pt. 2, § 108d, the cashier of a national bank cannot be irrevocably appointed for a definite time. It is evident that the further statement in section 109, that a national bank cannot hire its officers for any specified time, was not intended to convey a broader meaning. The Massachusetts statute contemplated a termination of the incumbency by an act removing or superseding the incumbent, which implied a continuing office. We see nothing in the language of the bank act which requires that a limited appointment under it be treated as of this character. The provision that an officer may be dismissed at pleasure can apply as well to an appointment limited to a given time as to an appointment for an indefinite period. It does not impliedly prohibit the fixing of a time beyond which the appointment shall not extend. Its effect is simply that the appointment, however made, shall be terminable at the pleasure of the appointing power. An appointment may be made which, if not previously terminated by the action of the directors, will continue for the period designated, and expire by its own limitation. There is nothing in the statute which requires us to hold that this surety contracted with reference to an unlimited period, when the appointment was in terms for a specified time. The cashier's re-election was something more than a meaningless expression of the pleasure of the directors. It was the filling of a vacancy occasioned by the limitation of their previous appointment.

It remains to determine whether the defendants' liability is affected by the provision of the plaintiff's by-law, that the cashier should be appointed to hold his office during the pleasure of the board. It is claimed by defendants' counsel that this provision does not contemplate an appointment for an indefinite period; but, in disposing of the point stated, we shall assume that it does. It thus becomes necessary to consider whether the sure-

ty shall be held to have contracted with reference to the term contemplated by the by-law, or the term fixed by the vote of the directors in making the appointment. The case cannot be put on the ground that the corporation had, by long and uniform practice, made the office an annual one, notwithstanding the provision of its by-law. This bond was given at the cashier's first election, and the case does not show what the previous course of the corporation had been. But, irrespective of any previous action of a similar character, we think the liability of the surety is to be determined with reference to the appointment as made. The case discloses nothing to place the surety in any other position as regards the by-law than that of a stranger; and the doctrine is that by-laws of this nature are merely provisions for the government of the corporation, that strangers are not bound to know them, and that notice of them will not be presumed. *Mor. Priv. Corp.* §§ 500, 502, 593. The early decisions to the contrary in New York have been ignored in recent cases. *Rathbun v. Snow*, 123 N. Y. 343, 25 N. E. 379. But, if the surety were to be held charged with notice of the by-law, we think his liability would not be extended by it. The by-law and the vote making the appointment were expressions of the same authority. It is not necessary to consider what the situation may be when the by-law is adopted by one quorum, and the appointment made by another, or when the votes are taken at meetings held upon different notices; for the case does not present these questions. The identical power which made the by-law could formally abrogate it, or ignore it in a particular instance. It was dispensed with for the time being when a vote inconsistent with it was passed, and, having been disregarded in limiting the cashier's appointment, it cannot now be invoked to extend the liability of his surety. The instrument in question in this suit is in form a bond, but without seals. Such an instrument is a valid contract obligation, if executed upon a sufficient consideration, and delivered to take effect as security. *U. S. v. Linn*, 15 Pet. 290. Judgment reversed and cause remanded.

STATE v. McCAFFREY.

(Supreme Court of Vermont. Orleans. May Term, 1896.)

CRIMINAL LAW—TRUANCY ACT—SUFFICIENCY OF COMPLAINT—EVIDENCE.

1. Under Const. c. 1, art. 5, providing that the people may regulate the internal police of the state, it is competent for the legislature to prescribe the form of complaint in proceedings for violation of a police regulation.

2. Under V. S. § 711, making it the duty of a person having control of a child between the ages of 8 and 15 to send him to school for a certain portion of the year, a complaint charging that respondent neglected to send his minor son, between such ages, to school, as required by law, is sufficient.

3. V. S. § 705, prescribes that the school year shall commence on the 1st day of April. Section 711 makes it the duty of a parent or guardian to send a child of a certain age to a public school at least 26 continuous weeks in a year, the attendance to begin with the school year, unless he is otherwise furnished with the same education. *Held*, that the offense was committed whenever it was shown that the child was not in attendance in such a manner as would make 26 continuous weeks from the beginning of the first term, though defendant intended to send his son to an academy for a period, which time, with the time he had attended the district school, would make 26 continuous weeks.

4. On a trial for violation of the truancy law in failing to send a child to school for the statutory period, the burden is on the defendant to show that he came within the exceptions of the statute.

Exceptions from Orleans county court; Thompson, Judge.

William McCaffrey was convicted of a violation of the statute against truancy, and excepted. Exceptions overruled.

At the close of the evidence the respondent moved the court to order a verdict of not guilty, for that under the statute no prosecution can be had till the end of the school year, and upon the ground that there was no evidence tending to show that the said Mark McCaffrey had not been elsewhere provided with the same education during the time that the state's evidence tended to show that he was absent from school. The motion was overruled, and the respondent excepted. All the evidence was referred to. The evidence of the state tended to show: That during the school year beginning April 1, 1895, there was kept in the district where the respondent resided a lawful public school of three terms,—one term of 8 weeks, beginning May 6, 1895; one term of 10 weeks, beginning September 2, 1895; and one term of 10 weeks, beginning December 2, 1895. That the respondent had, at the beginning of said school year, and from thence continuously to the commencement of this prosecution, in his charge and under his control, his minor son, Mark, who, at the commencement of this prosecution and at the time of trial, was over 8 and under 15 years of age. That during said first term the respondent did not cause said Mark to attend said school continuously, but on several days permitted him to remain away therefrom; and that during said second term said Mark attended the same only 39½ days, and that the first day he was absent from said term complaint was made in respect to such absence, and this prosecution was commenced. That said Mark, during all the time said three terms were in session, was mentally and physically able to attend school continuously, beginning with the first day of the school year and the first day of said first term, and that during all that time he had not acquired the branches required by law to be taught in the public schools; and that during the time he was absent he was not otherwise being fur-

nished with the same education as was being furnished by said public school, or any education, and had not attended a public school 26 weeks continuously, in that school year, prior to the commencement of this prosecution. The respondent offered to show that "when he kept his son out of school he intended to send him, subsequently, to the Craftsbury Academy for a time and in a manner which would make twenty-six continuous school weeks, together with what he had attended continuously at the district school, and that he did subsequently send his child to the Craftsbury Academy, and that the child is now attending school there." This offer was excluded, and the respondent excepted. It was conceded that Craftsbury Academy was a school fully equal to that which the state claimed the respondent should have caused his son to attend. The respondent excepted to the failure of the court to charge that there was no proof but that the child was otherwise furnished with the education required.

O. S. Annis, State's Atty. H. F. Graham and Cook & Redmond, for respondent.

TYLER, J. Section 711, V. S., makes it the duty of a person having the control of a child between the ages of 8 and 15 years to cause such child to attend a public school at least 26 weeks in a year, such attendance to begin with the school year, and be continuous, unless the child is mentally or physically unable to attend, has already acquired the branches required to be taught in the public schools, or is otherwise being furnished with the same education.

1. The respondent does not contend that the law is unconstitutional in respect to its compulsory requirement, but that the complaint does not apprise him of the "cause and nature of his accusation" in the manner provided by the constitution. The complaint charges that the respondent had the control of his minor son, Mark McCaffrey, who was between the ages of 8 and 15 years, and neglected to send him to school as required by law. It is drawn in accordance with V. S. § 720, which prescribes the form applicable to cases arising under sections 711 and 719. See No. 13, Acts 1870, and No. 22, Acts 1892. Section 711, which provides for compulsory attendance, is in the nature of a police regulation, and was enacted with a view to the safety and welfare of the state; the intelligence of the people being its safeguard. Article 5, c. 1, of our constitution, provides: "That the people of this state, by their legal representatives, have the sole, inherent, and exclusive right of governing and regulating the internal police of the same." It was said in *State v. Hodgson*, 66 Vt. 134, 28 Atl. 1089: "The constitution of the state, its provision for a legislature to enact laws, the committal to it of the exclusive right and power to govern and regulate the internal

police of the state, as well as the statutes of the state, proceed upon the theory that the state has the right and power to change and vary at its pleasure, both in criminal and civil matters, the methods of procedure, so long as it does not invade the fundamental rights of the citizen reserved by the constitution. It does not, as some seem to think, tie up the legislature to follow common-law methods of procedure, even in criminal cases." It was, therefore, competent for the legislature to prescribe the form of complaint, and it sufficiently exhibited to the respondent the nature and cause of the accusation.

2. Section 705 prescribes that the school year shall commence on the 1st day of April. The clause in section 711, "beginning with the school year," was evidently employed to require that the 26-weeks attendance should commence at the beginning of the first term, and be continuous thereafter when school was in session. The reasons for the requirement are obvious,—that children should begin their attendance when classes are being formed for the year, and that they should not interrupt the work of classes by unnecessary absences. The constitution declares that a competent number of schools ought to be maintained in each town for the convenient instruction of youth, and the statute requires that each district shall maintain a school at least 26 weeks in the school year, and that all pupils shall be thoroughly instructed in certain branches of education. These requirements may be partially defeated, and much of the expense of maintaining schools rendered useless, unless regular attendance can be enforced. The offer of the respondent to show that he intended subsequently to send his son to an academy for a period of time which, with the time that he had attended the district school, would make 26 continuous weeks, was properly excluded. The offense was committed, and the respondent became amenable to the statute, whenever it was established that the child was not in attendance upon school in such a manner as would make 26 continuous weeks from the beginning of the first term in the school year. The state's evidence tended to show that prior to the filing of the complaint the child had been absent several days during the first term, and had been in attendance only 39 days of the second term of that school year. It was held in *Com. v. Roberts*, 159 Mass. 372, 34 N. E. 402, under a statute similar to ours, that it was incumbent upon the respondent, in order to escape the penalty imposed, to show that the child had been instructed for the specified time in the required branches of learning, unless the child had already acquired them.

3. The respondent contends that to establish the offense it was incumbent upon the state to negative the exceptions in the statute. The rule is that the exceptions must be negated only where they are descriptive of

the offense, or define it; but where they afford matter of excuse merely, and do not define nor qualify the offense created by the enacting clause, they are not required to be negatived. In this case the exceptions are not descriptive of the offense. If the respondent came within either of the exceptions, the fact was peculiarly within his knowledge, and should have been proved by him as matter of defense. The cases cited by the state and by the respondent support this rule. Judgment that there was no error, and that the respondent take nothing by his exceptions.

SHUM v. CLAGHORN.

(Supreme Court of Vermont. Rutland. Jan. Term, 1896.)

DEED—CONDITION SUBSEQUENT—RIGHTS OF GRANTEE—CHATTEL MORTGAGE.

1. A condition in a deed that the grantee shall provide for the grantor for life, and that, if he fails, the instrument shall be void, is a condition subsequent vesting title in the grantee until defeated by nonperformance of the condition and a claim of forfeiture by the grantor.

2. Where a grantee in a deed owns under a condition subsequent, a transfer of the property by him is valid if made before a claim of forfeiture by the grantor for a breach.

3. A description of property in a chattel mortgage as "one four year old mare, cream color," is sufficient, though there is no statement of ownership or location, it not appearing that the mortgagor owned more than one mare of that description.

Taft, J., dissenting.

Exceptions from Rutland county court; Ross, Chief Judge.

Action by Edward Shum against C. A. Claghorn. Judgment for return of property replevied, and plaintiff excepts. Affirmed.

The court found the following facts: The plaintiff, being on May 3, 1893, the owner of a farm in Wallingford, and personal property thereon, including the mare replevied in this action, conveyed the farm and personal property to his son, Joseph E. Shum, by warranty deed, with a condition for the support of the plaintiff and his wife. The son took possession, and began to perform the condition, but in September of the same year, trouble having arisen in the family, the son removed from the farm, having previously arranged with the defendant, a merchant, to furnish the plaintiff such things as he needed. After the son's removal, the plaintiff, with occasional help from the son, carried on the farm. Some of the personal property embraced in the deed was sold with the consent of the plaintiff and his son, and the avails applied on the son's debts contracted for the plaintiff's support, and on debts of the plaintiff assumed by the son, and some of it was used for the son's benefit while carrying on the farm. The plaintiff continued to treat the son as performing the conditions of the deed until a few days later than February 12, 1894, although the court found that he might rightfully have

treated the deed as void upon the son's removal from the farm, had he so elected. February 12, 1894, the son mortgaged the mare in question to the defendant to secure an account due from the son to the defendant for articles furnished, some of them for the plaintiff's support, and some of them for the son's use; and the mortgage was duly recorded the same day. On the same occasion the son executed a quitclaim deed of the farm to the plaintiff, except delivery, which was not made until three or four days later. When he did deliver it he did not tell the plaintiff that he had mortgaged the mare. The plaintiff received the quitclaim deed, expressing his willingness to give up the contract of May 3, 1893, and his satisfaction with what he was receiving back. Learning, a few days later, of the chattel mortgage, he saw his son, but made no offer and expressed no desire to give up the quitclaim deed. Subsequently the defendant took the mare on foreclosure proceedings, when the present action was brought. The chattel mortgage, which was received in evidence against the plaintiff's exception, describes the mortgaged property in these words only: "One four year old mare, cream color."

Butler & Maloney, for plaintiff. C. L. Howe, for defendant.

MUNSON, J. This action is replevin for a mare, which was covered by a conditional deed executed by the plaintiff to his son, and was afterwards mortgaged by the son to the defendant. The condition in the deed is as follows: "Provided, nevertheless, the said Joseph E. Shum, or his heirs, is to care for us according to our age and infirmities; and, if he does thus care for us, then this deed to be and remain in full force and virtue in law; but, if he fails or neglects to do so, then this instrument to be null and void." The grantee entered upon the performance of this condition, but failed to carry it out; and the plaintiff now claims that the condition is such that the title would not pass until full performance. The treatment of the case depends upon whether the condition is precedent or subsequent. It is well settled that the creation of a condition of either class does not depend upon the use of any particular words, and that the intention of the parties is to be gathered from the whole instrument. But it is often difficult to determine the nature of these provisions, and many rules have been given to aid in their classification. It is said by one writer that: "If from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, then the condition is subsequent." 2 Washb. Real Prop. (5th Ed.) 7. This rule may, perhaps, properly be treated as decisive of the construction when the words themselves are not conclusive. It certainly requires that the ordinary terms of affinance

and avoidance be held to create a condition subsequent, when employed in a deed given to provide for the support of the grantor. The nature of the contract contemplates the possession and use of the property in the performance of the condition. We hold, therefore, that the condition above recited is subsequent; and it would appear from what is said in *Rollins v. Riley*, 44 N. H. 9, that this holding accords with the weight of authority.

When property is conveyed upon condition subsequent, the title vests in the grantee, subject to be defeated by a nonperformance of the condition, and a claim of forfeiture by the grantor. The existence of the condition does not deprive the grantee of the right to transfer the property, and the title of a transferee will be valid until defeated as above stated. But a failure to perform the condition will not defeat the title, unless the grantor takes advantage of the breach. *Cross v. Carson*, 44 Am. Dec. 713, note. The case finds that there was a breach of the condition of this deed prior to the delivery of the mortgage to defendant, but that the plaintiff did not elect to avoid the deed, and continued to treat it as in force until after the mortgage was delivered. So the title was in the grantee of the conditional deed at the time the mortgage was given, and passed thereby to the defendant; and the question is whether it was afterwards defeated by the manner in which the conditional estate was terminated. It appears that about three days after the mortgage was delivered the grantee of the conditional deed, in an interview which was understood to relate to the personal property as well as the real, delivered to his grantor, the plaintiff, a quitclaim deed of the farm, and that the plaintiff then expressed his willingness to give up the contract, and said that he was satisfied with what he was getting back. This cannot be considered an assertion of the rights accruing to the plaintiff from the breach. The conditional estate was terminated by mutual agreement, and not by an enforcement of the forfeiture. This left the defendant's title to the mare unimpaired. The situation is not affected by the fact that the plaintiff was not aware of the mortgage at the time he took back the property. It appears that he learned of it within a few days, and then saw his son in regard to it, but that nothing was said about giving up the quitclaim deed. The arrangement made with his son concerning the property was suffered to stand after he knew what had been done in regard to the mare.

But the plaintiff claims that the chattel mortgage is void for the want of a sufficient description. The property is described as "one four year old mare, cream color." There is no statement of ownership or location. We are aware that it has been held that no presumption of the mortgagor's ownership arises from the execution of the mortgage, and that a description which does not designate the property as belonging to the mortgagor will apply as well to any chattel which satisfies

the description given, whoever its owner may be. But we think that, as long as it is held that the sale of a chattel in possession is an implied warranty of the vendor's title, it should be presumed in aid of the description in a chattel mortgage that the mortgagor is the owner of the property he assumes to mortgage. Can it be said that the fact that the mortgagor claims to mortgage such a chattel is not enough to suggest inquiry with reference to his property? If it were found on inquiry that this mortgagor owned one cream-colored four year old mare, and no other horse answering that description, could the inquirer have any doubt as to what property was mortgaged? Could the mortgagor raise any doubt in regard to it by saying that his neighbor owned a cream-colored mare to which the description equally applied? We think this description should be given the same effect as if it read "one four year old mare, cream color, belonging to the mortgagor." In *Huse v. Estabrooks*, 67 Vt. 223, 31 Atl. 293, we held that a description of a heifer as a "two year old," without more, was insufficient. It was then said that a description must not be so uncertain as to apply equally to any property of the kind described, but must contain some statement concerning the property that would serve to distinguish it from other property of the same kind. The description here is more definite, in that it designates a four year old mare that is cream colored. We think this is all that can reasonably be required to give a prima facie validity to the mortgage. Any attempt to gain greater certainty by a description of the animal itself must be by the designation of special marks not easily described with accuracy. A statement of size cannot properly be held essential to a general description, for it is useless as a means of future identification in the case of growing animals, and the period of growth is of uncertain duration. It is true that age, which is included in the description under consideration, is not universally available as a means of identification, for it cannot always be given when the animal is mortgaged, and, if given, cannot always be determined of the animal which is claimed to be the one mortgaged; but it is an item of description which is ordinarily relied upon, and, if stated in the mortgage, affords a means of identification whenever the age of the animal in question is ascertainable. When the color is given in connection with the sex and age, it completes an enumeration of the characteristics which constitute a general description. Nothing naturally pertaining to the animal remains beyond sex, age, and color, to distinguish one from another to ordinary observation. If we go beyond these primary characteristics, we enter upon a series which is without natural limit, and which can never bring us to a description that is absolutely certain. However far we may go in the use of distinguishing marks, it may still be said

that there is nothing to show that the mortgagor did not have another animal with the same marks. Whatever the minuteness of detail, it would always be necessary to negative the ownership of other animals of the same description. It is so nearly the universal rule that the location of property of this kind is easily ascertainable from the fact of ownership that we think a statement of the town or farm where the animal is kept ought not to be required in addition to sex, age, and color, to give the description *prima facie* validity. It certainly is not required by the rule which provides that the description shall be such as to enable a stranger to find the property by the inquiry which it suggests; for, if one mortgages his two year old red heifer, and has but one such animal, the description contains everything necessary to the discovery and identification of the property. A statement of the location of the animal, or the designation of special marks, will often be necessary to perfect a description when the mortgagor has others of the same sex, age, and color; but we think a mortgage ought not to be held invalid for the want of such further description, unless it appears that the mortgagor owned other animals answering the description given. To hold otherwise would be to make what might be a necessary matter of description in one case, essential to the validity of a mortgage in all cases. It was said in *Parker v. Chase*, 62 Vt. 203, 20 Atl. 193, that, while a description need not be enough to enable one to find the property without inquiry, it must be such as to indicate the line of inquiry, and furnish the basis of identification. This does not seem to indicate, and we do not understand, that a description must come as near as is practicable, in the circumstances of each case, to making extrinsic evidence unnecessary. We think that, if any description other than a statement covering sex, age, and color is needed to distinguish the mortgaged animals from others owned by the mortgagor, it should be made to appear by the production of extrinsic evidence in impeachment of the mortgage. It not appearing that this mortgagor owned more than one cream-colored four year old mare, we hold the mortgage sufficient. Of course, it is not intended to intimate that other methods of description may not be adopted, which might render unnecessary any or all of the items embraced in the description now passed upon. Judgment affirmed.

TAFT, J., dissents.

CAMPBELL v. CAMP.

(Supreme Court of Vermont. Washington. Oct. Term, 1896.)

REPLEVIN—PLEADING—DEMURRER.

1. Under the statute (V. S. § 1471), "not guilty" is the proper general issue in replevin.

2. A notice of a special defense, filed with the general issue, is not subject to demurrer, and objection to its sufficiency can only be taken on the offer of evidence under it.

Exceptions from Washington county court; Start, Judge.

Action in replevin by Arthur E. Campbell against H. O. Camp. Judgment for defendant, and plaintiff brings exceptions. Affirmed.

John W. Gordon, for plaintiff. Richard A. Hoar, for defendant.

ROWELL, J. This is replevin for 70 bottles of beer, alleged to have been taken by the defendant, as deputy sheriff, from the plaintiff's store, on a warrant of search and seizure. Plea, not guilty, and notice of justification under said warrant. Both the plea and the notice are demurred to.

As to the demurrer to the plea, the statute provides that the general issue shall be joined on the plea of not guilty, and this court has held, in cases just like this, that such a plea is good. *Town of Plainfield v. Batchelder*, 44 Vt. 9; *Loop v. Williams*, 47 Vt. 407. As to the demurrer to the notice, it is sufficient to say that a notice is not the subject of demurrer. If insufficient, advantage must be taken of it by objecting to the testimony offered under it. Judgment affirmed, and cause remanded.

STATE v. BRUCE.

(Supreme Court of Vermont. Washington. Oct. Term, 1896.)

CRIMINAL COMPLAINT—SUFFICIENCY OF—NAME OF PERSON INJURED.

A complaint charging that a defendant disturbed the peace by "threatening to strike, beat, injure, and assault divers and sundry persons," without alleging the names of any of them, or that their names are unknown, is bad on demurrer.

Exceptions from city court of Barre.

Fred Bruce was convicted of disturbing the peace, and brings exceptions. Reversed.

Zed S. Stanton, State's Atty. Richard A. Hoar, for defendant.

ROWELL, J. The complaint, which is demurred to, alleges that the prisoner, on such a day, disturbed the peace by "threatening to strike, beat, injure, and assault divers and sundry persons," etc., but does not name any of them, nor allege that their names were unknown. It is fundamental in the law of criminal pleading that the name of the person injured, or against or upon whom the offense is committed, must be stated, if known. The reason is that thereby the offense is more certainly identified, and made more specific, instead of being left general; the prisoner is better enabled to make his defense, and to plead his conviction or acquittal in bar of another prosecution for the same offense, and to avoid being put on trial

for an offense not intended by the indictors. 1 Bish. New Cr. Proc. § 571; 2 Hawk. P. C. c. 25, § 71; 1 Chit. Cr. Law, *213. Lord Ellenborough says that the convenience of mankind demands, and that in furtherance of that convenience it is the duty of those who administer justice to require, that the charge should be specific, in order to give to the accused notice of what he is to come prepared to defend against. *Rex v. Perrott*, 2 Maule & S. 379, 386. Suppose the prisoner at the bar to have been engaged in several like affrays on the day and at the place alleged, how is he to know which one this complaint charges him with? In an information drawn by an eminent pleader a century ago for riotously disturbing the peace by breaking into a warehouse where "divers and very many persons were assembled and met together," and there assaulting them, the names of some of the persons assembled are stated, and the names of the others are alleged to be unknown. So, for riotously disturbing the peace by breaking into a house and assaulting a lodger, the name of the lodger is stated. 2 Chit. Cr. Law, 502, 503. *State v. Coffin*, 64 Vt. 25, 23 Atl. 632, relied upon by the state, is not in point. The acts there alleged as constituting a breach of the peace were not directed against any one in particular, but only against the public generally. When the name of the person injured is not known, it must be so alleged, to show a reason for not stating it. And the allegation must be true in fact; for, if false, it is improper, and will not avail. *Rex v. Walker*, 3 Camp. 264, and note; *Com. v. Blood*, 4 Gray, 31, 33. Whether the names of third persons otherwise connected with the offense must be stated, the cases do not agree. 1 Bish. New Cr. Proc. § 572. In *State v. Hover*, 58 Vt. 496, 4 Atl. 226, it was held necessary to state the name of the person of whom the prisoner solicited a risk for insurance as agent of a company not authorized to do business in the state. Judgment reversed, demurrer sustained, complaint adjudged insufficient, and cause remanded.

TAFT, J., did not sit; the respondent being absent.

VILLAGE OF WEST DERBY v. NEWPORT CEMETERY ASS'N.

(Supreme Court of Vermont. Orleans. Oct. Term, 1896.)

MOTION FOR APPEAL—TIME OF FILING.

The chancery court is always open for the purpose of filing a motion for appeal, at least until the enrollment of the decree, under V. S. § 915, providing that "for all purposes except the final hearing of a cause such court shall be always open for business," and section 981, providing that a party may, by written motion filed at the term in which a final decree is made, appeal therefrom.

Appeal in chancery, Orleans county; Ross, Chancellor.

Bill by the village of West Derby against

the Newport Cemetery Association, heard on a master's report. There was a decree for the orator, and defendant moved for an appeal, which was allowed. The orator moves to dismiss the appeal for want of jurisdiction. Motion overruled.

E. A. Cook and J. W. Redmond, for orator. John Young, for defendant.

TAFT, J. This cause was heard upon a motion to dismiss an appeal in chancery of a case heard at the September term, 1896, in Orleans county. The Orleans county court adjourned on the 17th day of September. The cause was heard, and a final decree entered by the chancellor prior to the adjournment. Five days afterwards the defendant filed his motion for an appeal. Section 981, V. S., provides that "a party may, by a written motion filed at the term in which a final decree is made, appeal therefrom." The orator insists that the appeal was not taken at the term. Section 915, V. S., provides that "for all purposes except the final hearing of a cause such court shall be always open for business." We hold that one of the purposes for which the court is always open, at least until the enrollment of the decree, is the filing of a motion for an appeal, and that in this case the appeal was regularly taken. Whether one can be taken after a decree is recorded we need not consider, for in this case it was taken within 20 days from the time the final decree was made, and the decree could not be recorded until after the expiration of that time. This holding is in accord with the uniform practice which has long been followed in this state. Motion to dismiss the appeal overruled, and cause continued.

SPRAGUE v. FLETCHER.

(Supreme Court of Vermont. Rutland. May Term, 1896.)

TAXATION—CONSTITUTIONAL LAW—INVENTORY—DEDUCTION FOR DEBTS.

1. The invasion of plaintiff's rights by a sale of his bank stock for an illegal tax is complete, so as to render the tax collector liable, when due return of the sale is made, and a certified copy thereof served upon the bank, though the stock was not transferred on the bank books, because plaintiff himself bid it in at the sale.

2. Acts 1892, No. 17, restricting to residents of Vermont the right to deduct from personal taxes on account of debts owing by the taxpayer, as authorized by Acts 1882, No. 2, § 12, is in conflict with Const. U. S. art. 4, § 2, providing that citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.

3. The fact that the inventory returned by a taxpayer of the debts for which he claims deduction does not give the addresses of some of the creditors does not authorize the listers to reject debts as to which all proper information is given.

4. A taxpayer's right to have deducted from his taxable personalty the amount of his indebtedness over that of his stock and bonds exempt from taxation (Acts 1882, No. 2, § 12) is not impaired by the fact that in the inven-

tory he lists certain stock as taxable, instead of "claimed to be exempt," where it does not appear from the face of the inventory but that such stock was taxable, and the value of his taxable personalty is less than his debts, though such stock be first deducted from the debts, and the listers denied the deduction solely on another ground.

Exceptions from Rutland county court; Thompson, Judge.

Trover and case by Nathan T. Sprague against William C. Fletcher for the sale by defendant, as tax collector, of plaintiff's bank stock. There was judgment on a verdict directed for plaintiff, and defendant excepted. Affirmed.

O. A. Prouty, for plaintiff. Stewart & Wilds and J. C. Baker, for defendant.

START, J. The evidence tended to show that the defendant had authority to collect several taxes that were assessed against the plaintiff on the grand list of the town of Brandon for the year 1893; that he duly distrained, posted, and sold the bank stock declared for, in accordance with the requirements of No. 11 of the Acts of 1882; that the plaintiff purchased the same at the official sale thereof, and paid therefor; that the defendant made due return of his proceedings, and delivered duly-attested copies thereof to the clerk and cashier of the bank issuing the stock; and that no transfer of the stock was made upon the books of the bank, and no certificate of transfer issued. At the close of the evidence, the defendant insisted that an invasion by the defendant of the plaintiff's right in the stock had not been shown, and, upon this ground, moved for a verdict. This motion was denied, and the defendant excepted. The defendant now insists that the motion should have been granted, because the stock was not transferred upon the books of the bank, and a certificate of transfer issued to the plaintiff. We think this motion was properly denied.

When the defendant delivered copies of his tax warrants, with his return thereon duly attested, in accordance with the requirements of No. 11 of the Acts of 1882, it became the duty of the proper officers of the bank to transfer the stock upon the books of the bank, and issue a certificate of transfer thereof to the purchaser named in the defendant's return. This was not done, because the stock then stood in the name of the purchaser upon the books of the bank. There was no occasion for such transfer and issue of a certificate. The defendant's return showed that the plaintiff became the purchaser at the official sale of the stock, and his title was perfect without such transfer and certificate. The defendant could not transfer the stock upon the books of the bank, or issue a certificate of transfer thereof. When he had distrained it, posted it for sale at public auction, offered it for sale to the highest bidder, sold it to the plaintiff (because he was such bid-

der and paid therefor), and made return of his doings as the law requires, he had invaded the plaintiff's right in the stock, and done all he could to divest the plaintiff of all title to it, except the title acquired by its purchase from him. He had compelled the plaintiff to become the purchaser thereof, or submit to having his stock sold to a stranger, transferred upon the books of the bank, and a certificate of transfer thereof issued, which would place it beyond his reach or control for a time, if not permanently, or to institute legal proceedings to prevent such sale and transfer thereof. The plaintiff has paid the defendant for the stock. He has done this, not as a volunteer, but because the defendant, in his official capacity, by invoking the aid of the law, has compelled him to do so, or stay the hand of the defendant by resort to equity for an injunction, or suffer his stock to pass out of his control to an extent that would for a time, at least, deprive him of dividends thereon, and preclude him from voting and participating in the business and management of the affairs of the bank to the extent that he otherwise would; and we think this was such an invasion of the plaintiff's right in the stock as was held actionable when this case was before us on demurrer to the declaration. *Sprague v. Fletcher*, 67 Vt. 46, 30 Atl. 693.

The plaintiff, whose domicile was in Brooklyn, N. Y., as the jury have found, claimed to be domiciled in Brandon, Vt., and duly returned to the listers of Brandon an inventory of his personal estate, and therein claimed a deduction for specified debts that he was owing, to the full amount of the appraised value of his personal estate. The listers treated him as a nonresident, and, in accordance with the provisions of No. 17 of the Acts of 1892, refused to make the deduction to the extent claimed, and placed his personal estate in the list at \$65,640; and this sum entered into the list on which the taxes in question were assessed. The court below held that this statute was unconstitutional, and ordered a verdict for the plaintiff, to which the defendant excepted.

Section 12 of No. 2 of the Acts of 1882 provides that listers, in making up the lists of the several taxpayers, shall deduct from the appraised value of personal estate a sum equal to the excess, if any, of debts owing by such taxpayer over the aggregate amount of his United States bonds and other stocks and bonds exempt from taxation by the laws of this state, and the amount of his deposits in all the savings banks, savings institutions, and trust companies in this state or elsewhere, and shall take 1 per cent. of the balance as the list of the personal estate of such taxpayer. This statute is general, and was applicable to lists of nonresident as well as resident taxpayers, until the act under which the listers proceeded was passed; and it would have been the duty of the listers to have proceeded under it, in making up the

plaintiff's list, but for the later statute, which was enacted after the statute above cited had been in force some 10 years, and provides that no deduction shall be made for debts owing by a corporation or person residing without this state, and doing business within this state, except such as were contracted by reason of business done within this state, and which are in excess of cash on hand within and without this state, and sums due without this state by reason of business done within this state. Had the listers, in making up the plaintiff's list, proceeded under the statute first enacted, and made the deductions thereby authorized, no sum for personal estate would have remained for taxation; and the plaintiff would have been exempt from taxation to that extent. This statute remains in force, and under it a resident of this state is entitled to a deduction from the appraised value of his personal estate equal to all debts owing by him in excess of the value of his nontaxable bonds, stocks, and deposits; and, if these debts equal or exceed the appraised value of his personal estate, his personal estate is exempt from taxation. Under the later statute, this right, which had been for 10 years extended to nonresidents doing business in this state, is taken away; and the right remains only to a resident of this state. A nonresident doing business in this state is allowed a deduction from the appraised value of his personal estate for only such debts as were contracted by reason of business done in this state, and these are diminished by sums due to him without this state by reason of business done in this state, and cash on hand within and without this state that may be the proceeds and accumulations of business done entirely without this state. This statute provides only for lists of nonresidents, and, because the plaintiff was a nonresident, the listers proceeded under it, and denied the claimed deductions in making his list, and, in so doing, denied to him an immunity from taxation that is given to our own citizens. If the listers had made the deduction from the valuation of the plaintiff's personal estate that is allowed to residents, they would have exempted the plaintiff's entire personal estate from taxation. By proceeding under the statute relating to nonresidents, the listers have assessed the plaintiff for property valued at \$65,640 that they would have exempted from taxation if the plaintiff had been a resident of this state. The effect of the statute is to exempt from taxation all the personal estate of a resident of this state, except the excess in value of such estate over debts owing in excess of nontaxable bonds, stocks, and deposits, and to tax a nonresident's property, circumstanced the same, except that the owner resides out of the state; and, in so far as it does this, it provides an immunity from taxation to a resident that it denies to a nonresident, discriminates in favor of a resident and against a nonresident, and denies to citizens

of other states an immunity given to our own citizens. Such discrimination and denial is clearly forbidden by the constitution of the United States, which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states. Const. U. S. art. 4, § 2.

When a nonresident observes laws that are enacted with a view to regulate the conduct and action of our citizens, it is his right and privilege to have his property, situate in this state, protected under our laws as effectually as the property of a resident; and if his property is subject to taxation, burdens, and diminutions that a resident's property, circumstanced the same, is exempt from, his property is not thus protected, and he is denied an immunity under our law that is given to our own citizens. A nonresident cannot be taxed higher for personal property, situate in this state, than a resident owning like property under like circumstances, nor can he be compelled to pay taxes on such property if like property, circumstanced the same, is exempt from taxation in the hands of a resident. A nonresident conforming to our statute relating to taxation is entitled to deductions from the appraised value of his personal estate, situate in this state, for debts owing, as favorable as those given to a resident; and he is entitled to a mode of classification and of determination as to what sum his property shall be placed in the list at for the purpose of taxation that does not subject him to taxation, when he would be exempt therefrom if he were a resident of this state, owning like property.

Under our system of taxation, when a nonresident's property is placed in the grand list, it is there for all purposes of taxation that the resident's property is subject to, when placed in the list, and to the same extent. The list is increased by denying deductions and exemptions and diminished by allowing them. The only opportunity to discriminate is in making up the list, as the rate of taxation, or percentage of the grand list, for residents and nonresidents, is the same. Therefore discrimination should be avoided in the method of making up the list for taxation. A mode of making up the grand list of a nonresident, or a system of classifying, that results in placing his property in the grand list when a resident's property, under like circumstances, is not, or is placed at a lower valuation by reason of a deduction from its appraised value that is not allowed to a nonresident, subjects the nonresident to a greater rate of taxation, and to the payment of taxes that are not exacted of a resident. In *People v. Weaver*, 100 U. S. 539, it is held that a statute of New York which permits a debtor to deduct the amount of his debts from the valuation of all his property, including moneyed capital, except his bank shares, taxes those shares at a greater rate than other moneyed capital, and is therefore in conflict with so much

of the national banking act as provides that taxation on shares of national banks shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals, and void as to the shares of national banks. Mr. Justice Miller, in delivering the opinion of the court, said: "It cannot be disputed—it is not disputed here, nor is it denied in the opinion of the state court—that the effect of the state law is to permit a citizen of New York, who has money capital invested otherwise than in banks, to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation, while he whose money is invested in shares of bank stock can have no such deductions. Nor can it be denied that, inasmuch as nearly all the banks in that state and in all others are national banks, the owner of such shares who owes debts is subjected to a heavier tax on account of those shares than the owner of moneyed capital otherwise invested, who also is in debt, because the latter can diminish the amount of his tax by the amount of his indebtedness, while the former cannot. That this works a discrimination against the national bank shares as subjects of taxation, unfavorable to the owners of such shares, is also free from doubt. The section to be construed begins by declaring that these shares may be 'included in the valuation of the personal property of the owner, in assessing taxes imposed by authority of the state within which the association is located.' This valuation, then, is part of the assessment of taxes. It is a necessary part of every assessment of taxes which is governed by a ratio or percentage. There can be no rate or percentage without a valuation. This taxation, says the act, shall not be at a greater rate than is assessed on other moneyed capital. What is it that shall not be greater? The answer is, taxation. In what respect shall it be not greater than the rate assessed upon other capital? We see that congress had in its mind an assessment, a rate of assessment, and a valuation; and, taking all of these together, the taxation on these shares was not to be greater than on all other moneyed capital. We are therefore of the opinion that the statute of New York, as construed by the court of appeals, in refusing to the plaintiff the same deduction for debts due by him, from the valuation of his shares of national bank stock, that it allows to those who have moneyed capital otherwise invested, is in conflict with the act of congress."

By our statute, the method of ascertaining at what sum, if any, the personal estate of a nonresident shall be placed in the list for general taxation, is so radically different from the method of ascertaining like facts for the purposes of a resident's list that it subjects the nonresident doing business in this state, and having personal estate situate in this state, and owing debts not contracted by reason of business done

in this state, to taxation that he would be exempt from as a resident of this state, or to a higher rate of taxation. By making the plaintiff's list under the statute in question, instead of the statute relating to lists of residents, he was denied an immunity from taxation given to our own citizens,—an immunity that he claimed, and, by his inventory, placed himself in a position to be heard in respect to and insist upon. The legislature may have power to provide a method for making up the grand list of a nonresident that differs from the method of making up the list of a resident, and to classify property for the purposes of taxation, if the purpose of the different method and classification is to secure uniformity of taxation, and they have a tendency to secure it; but it has not the power to deny to a nonresident a deduction which is allowed a resident, that has the effect to place his property in the list for taxation, and exempt like property of a resident, circumstanced the same, except that it is owned by a resident. Such legislation denies to citizens of other states privileges and immunities of citizens of this state. We do not give to the words "privileges and immunities" the effect and meaning intended by the framers of the constitution, nor the meaning they fairly import, unless we give to the citizens of all the states the same benefits and advantages of acquiring and holding property, and having the same protected, as we give our own citizens. If we subject their property to taxation and burdens from which the property of our citizens is exempt, we discriminate against them in a manner forbidden by the federal constitution.

In *Ward v. Maryland*, 12 Wall. 418, the state imposed a higher license tax upon a nonresident than upon a resident for the privilege of selling goods by sample, and it was held that the act was void under the second section of the fourth article of the federal constitution. Mr. Justice Clifford, in speaking of "privileges and immunities," says: "Beyond doubt, those words are words of very comprehensive meaning; but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union, for the purpose of engaging in lawful commerce, trade, or business, without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens. Comprehensive as the power of the states is to lay and collect taxes and excises, it is nevertheless clear, in the judgment of the court, that the power cannot be exercised to any extent in a manner forbidden by the constitution; and, inasmuch as the constitution provides that the citizens of each state shall be entitled to all the privileges and immunities of

citizens of the several states, it follows that the defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the state might sell, or offer or expose for sale, in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents. Important as these provisions have been supposed to be, still it is clear that they would become comparatively valueless if it should be held that each state possesses the power in laying taxes for the support of its own government to discriminate against the citizens of every other state of the Union."

In *Wiley v. Parmer*, 14 Ala. 627, it is held that the statute of the state, taxing the slaves of a nonresident at double the amount at which those of a resident were taxed, was unconstitutional.

In *BHess' Petition*, 63 N. H. 135, it is held that a state cannot refuse a peddler's license to a citizen of another state, asked for upon the same terms that it grants licenses to its own citizens. The court said: "The state power of taxation cannot discriminate against the citizens of other states. The equality of privileges and immunities guaranteed by the federal constitution to the citizens of each state exempts them from any higher taxes than the state imposes upon her own citizens."

In *State v. Lancaster*, 63 N. H. 267, it is held that an act requiring nonresidents to procure a license for the sale of trees and shrubs which residents of the state are permitted to sell without license is in contravention of the federal constitution.

In *McGuire v. Parker*, 32 La. Ann. 832, it is held that a state law requiring the payment of \$25 per month by every nonresident selling goods by sample, as a traveling salesman, is unconstitutional.

In *Oliver v. Washington Mills*, 11 Allen, 280, it is held that a tax upon the shares of nonresident, and not upon those of resident, stockholders in domestic corporations, is void, as a discrimination against the citizens of another state. In the course of the opinion, the court said: "We are unable to see how it can be supported consistently with that provision of the constitution of the United States which secures to the citizens of each state all the privileges and immunities of citizens of the several states. * * * It is obvious that the power of a state to impose different and greater burdens or impositions on the property of citizens of other states than on the same property belonging to its own subjects would directly conflict with this constitutional provision. By exempting its own citizens from a tax or excise to which citizens of other states were subject, the former would enjoy immunity of which the latter would be deprived. Such has been the judicial interpretation of this clause of the constitution by courts of justice in which the question has arisen."

In *Town of Farmington v. Downing*, decided by the supreme court of New Hampshire in 1893, reported in 30 Atl. 345, the plaintiff assessed a tax on 50 shares of the capital stock of the Farmington National Bank, located in the plaintiff town. The defendant was a resident of Massachusetts, and claimed that the shares were not liable to taxation because of his indebtedness. The court, in delivering the opinion, said: "For taxable purposes, Downing's national bank stock is to be treated as money on hand or at interest; and, if he had been a resident of this state, the excess only of the value of the stock over his interest-bearing indebtedness would have been taxable; and, as the value of the stock did not exceed the amount of his indebtedness, it would not have been taxable. The taxable value of the shares is not determined by the residence of the owner. If the stock was not taxable to Downing as a citizen of New Hampshire, it was not taxable to him as a citizen of Massachusetts. The imposition of a higher tax upon him as a citizen of Massachusetts than he would be obliged to pay as a citizen of this state would be in conflict with the provision of the federal constitution that the citizens of each state shall be entitled to the privileges and immunities of citizens of the several states."

In *People v. Barker*, 141 N. Y. 118, 35 N. E. 1073, relied upon by the defendant, it is held that the New York statute does not authorize a deduction of debts from sums invested in business in that state by nonresidents. In this holding, the court only gave a construction to the New York statute, and did not consider or decide whether the statute denied to a nonresident an immunity guaranteed by the federal constitution. Therefore the case is not an authority upon the question we have under consideration. The New York statute only provides that sums invested by nonresidents in business shall be taxed, while our statute subjects all property of a nonresident, situate in this state, to taxation to the same extent that a resident's property is taxed, and denies a deduction to a nonresident that is given to a resident.

The plaintiff claimed to be a resident of this state, and sought to place himself, for the purposes of taxation, upon the same ground that a resident is placed. By his inventory, he returned his property for taxation to the same extent he would have been required to do had he been a resident of this state. He returned his chattels, cash on hand, notes, mortgages, leases, sums due to him from parties residing within and without this state, taxable and nontaxable bonds, stocks, etc. He answered all interrogatories in the inventory, and complied with all laws respecting taxation that are applicable to residents, and insisted upon the same immunity from taxation that our statute gives to them. It was his right to have the indebtedness set forth in his inventory considered by the listers; and if found bona fide, and that he had complied

with the law that a resident must comply with to be entitled to a deduction for debts owing, he was entitled to have the excess of such indebtedness over his nontaxable bonds, stocks, and deposits deducted from the appraised value of his personal estate. Had this been done, no sum for personal estate would have remained for taxation, and his personal estate, situate in this state, would have been exempt from taxation. This right was denied him. The listers refused to consider his indebtedness, and denied this exemption from taxation, because he was a nonresident, and, in so doing, denied to him an immunity from taxation that is given by our statute to residents of this state. This was the denial of a right guaranteed by the federal constitution, and, because of this denial, the assessments against him must be held for naught.

The defendant insists that the listers properly refused the deduction claimed for debts owing, because the plaintiff did not give sufficient information as to the residence of the parties to whom he was indebted, and because he gave his stock in the Sprague National Bank in answer to interrogatory 14, when he should have given it in answer to interrogatory 19. It was clearly the duty of the plaintiff, if he claimed deductions for debts owing, to furnish, by his inventory, such information as would enable listers to determine whether he was entitled to such deductions; and we think he has done so. He gave the residence of persons to whom he was indebted with sufficient definiteness, and the amount owing to each to an amount exceeding the value of his taxable and nontaxable personal estate. This information, if the indebtedness was bona fide, was sufficient to enable the listers to determine that his indebtedness exceeded his entire personal estate by many thousand dollars; and the fact that he named other persons to whom he was indebted, without giving the places of their residence, did not justify the listers in refusing to consider his indebtedness to parties whose residence was given. Interrogatory 19 of the inventory was as follows: "What amount of stocks and bonds, claimed to be exempt from taxation under the laws of this state, was owned or held by you on the first day of April, 1893?" To this interrogatory the plaintiff answered, "None." Interrogatory 14 was as follows: "What stock in banks, trust companies, and other corporations in this state (except what is exempt in manufacturing and railroad corporations in this state) was owned or held by you on the first day of April, 1893?" In answer to this interrogatory the plaintiff gave in his stock in the Sprague National Bank as taxable property, instead of claiming it as exempt, in answer to interrogatory 19, as he might have done if the bank issuing the stock was located without this state; but no one was wronged by this. The listers had no reason to complain, and they did not. They did not deny a deduction because the inventory was not

full and complete, but because they adjudged that the plaintiff was a nonresident. They knew from the inventory that the plaintiff had this stock. It will be noticed that interrogatory 19 called upon the plaintiff to state what amount of stocks he claimed to be exempt from taxation under the laws of this state. He was under no duty to claim that his bank stock was exempt, when he had returned it as taxable property in answer to interrogatory 14. It does not appear from the inventory where the bank in which he owned stock was located. If it was located in this state, it was his duty to return it as taxable property in answer to interrogatory 14. As the plaintiff was circumstanced in respect to assets and liabilities, it could make no difference whether his bank stock was deducted from his indebtedness, or his indebtedness deducted from his bank stock, as by either method no sum for personal estate would remain for taxation.

The defendant requested the court to instruct the jury that the plaintiff was not entitled to any deduction as claimed by him if he willfully misrepresented and underestimated the value of the Sprague National Bank stock in his inventory. This request was properly denied, unless the plaintiff placed a value upon this stock in his inventory, and the evidence tended to show that he willfully misrepresented and undervalued his stock. It does not appear from the defendant's exceptions, nor from the plaintiff's inventory, that the plaintiff placed any value upon his stock. It appears that some figures were placed opposite the shares of stock, and erased; but by whom they were placed there, or when erased, whether before or after the delivery of the inventory, does not appear. It does not appear from the defendant's exceptions, or from any evidence to which our attention has been called, that the evidence tended to show that the plaintiff willfully made any misrepresentations respecting the value of his stock, by his inventory or otherwise.

The defendant claims that, if the tax on the personal estate is invalid, the judgment should be reversed, and that the plaintiff should have relief only in respect to taxes assessed upon his personal estate, as deductions for debts owing do not extend to real estate. In respect to this claim it is sufficient to say that it does not appear from the defendant's exceptions that any of the taxes in question were assessed upon the plaintiff's real estate. Judgment affirmed.

STEVENS v. GIBSON.

(Supreme Court of Vermont. Bennington.
Oct. Term, 1896.)

BILLS AND NOTES—PLEADING—GUARANTY.

1. An allegation in a plea by one of the joint makers of a note, in an action thereon, that he signed without any consideration, will be construed as an averment only that he received none of the money loaned on the note,

where the plea further alleges that the loan was to the other signers, that defendant signed as a guarantor, and that the loan was made with that understanding.

2. A guaranty to pay a note when due if the principal debtors do not, is absolute, and does not require notice to charge the guarantor.

Exceptions from Bennington county court; Start, Judge.

Assumpsit by Rena M. Stevens against J. E. Gibson in the common counts and a special count on a promissory note. A demurrer to a special plea in bar was sustained, and defendant excepted. Affirmed.

The note reads as follows: "\$500. Camden, N. Y., Oct. 27, 1893. One year after date, I promise to pay to the order of Mrs. W. T. Stevens five hundred dollars, at Camden, N. Y. Value received, with interest. E. W. Gibson. A. L. Gibson. J. E. Gibson. R. F. Fargo." Mrs. W. T. Stevens is the plaintiff. The plea reads as follows: "That said note was given to the said plaintiff by E. W. Gibson and A. L. Gibson, makers thereof, for a certain sum of money, to wit, the sum of five hundred dollars then loaned to them by the plaintiff, and for their sole use and benefit, to wit, at Camden, in the state of New York, to wit, on the — day —, 1893, as was well known to the plaintiff at the time she so loaned the same and received said note; that this defendant signed his name to said note with, and at the request of, the said plaintiff and said E. W. Gibson and A. L. Gibson, who also signed it without any consideration whatever therefore, as was well known to the plaintiff at the time she loaned said money and received said note; and this defendant signed the same at the request of the plaintiff and the said Gibsons as aforesaid, to guaranty and as a guarantor to the plaintiff that he would pay said note when it became due if they did not, as was well known to said plaintiff when she received the same and loaned said money, and she did receive said note and loan said money with that understanding; that at the time said note became due, to wit, on the 27th day of October, 1893, and for a long time, to wit, for one year and more, thereafter, said E. W. and A. L. Gibson were possessed of a large amount of property, and more than sufficient to satisfy said note besides what was exempt from execution, and which property was located and situate in Camden, New York, where they and the plaintiff then resided and still reside, and this defendant then resided and still resides in Bennington, Vermont; and said note then and during that time could have been collected from said property of the said E. W. and A. L. Gibson in due course of law, as the plaintiff well knew; and no demand was made on said E. W. and A. L. Gibson or on the defendant or R. L. Fargo, the other person who signed said note, for the payment of said note when it became due, and no notice was given by the plaintiff, or any one in her behalf, to this

defendant when it became due that it had not been paid; nor did this defendant know or have notice from the plaintiff, or from any one, for the space of one year and more after said note became due, that said note had not been paid; and at the time this defendant first knew said note had not been paid the said E. W. and A. L. Gibson were entirely insolvent, and ever since have been, and still are, and said note, or any part thereof, could not at any time since then, and cannot now, be collected of them or from their property."

Barber & Darling, for plaintiff. Batchelder & Bates, for defendant.

ROWELL, J. The note in suit reads, "I promise to pay," and is signed by four,—two Gibsons other than the defendant, and Fargo. On the face of it, the note is, in legal effect, joint and several, and the signers are makers. But the defendant seeks by his plea to stand as a conditional guarantor, damaged for want of notice of the principals' default. If the plea is construed to allege that the defendant signed the note without any consideration whatever, as he contends it should be, it is repugnant, as it also alleges that he signed it at the request of the plaintiff and the other Gibsons, "to guaranty and as a guarantor to the plaintiff that he would pay said note when it became due if they did not," and that the plaintiff received the note and loaned the money with that understanding. This is certainly a sufficient consideration to support the defendant's undertaking. But when a pleading is capable of different meanings, it clashes with no rule of construction to construe it in the sense in which the pleader must be understood to have construed it, supposing him to have intended it to be consistent with itself. *Royce v. Maloney*, 58 Vt. 437, 445, 5 Atl. 395. Applying this rule, it is clear that the pleader meant that the defendant signed without consideration, in that he received none of the money for which the note was given; for the plea alleges that the money was loaned to the other Gibsons, and was for their sole use and benefit, to the knowledge of the plaintiff, when she made the loan and took the note.

The next question is whether the guaranty set up is conditional or absolute. The defendant claims that it is conditional, and relies largely on *Sandford v. Norton*, 14 Vt. 228, to show it. That case seems not to have been very fully reported. It shows that the defendant offered to prove by parol that after the note passed from the payee's hands, and before it became due, he put his name on the back of it as guarantor for the maker to Raymond, pursuant to an agreement then made between them without the concurrence of the maker; but the terms of that agreement are not stated, except that the court says in the opinion that, if the testimony offered was credited, the defendant was in no

sense a joint maker, but merely a collateral guarantor, and undertook to pay the note if the maker did not. But in *Sylvester v. Downer*, 20 Vt. 355, Judge Redfield, who delivered the opinion in *Sandford v. Norton*, says that judgment was reversed in that case because the court excluded the testimony offered to show that at the time the defendant put his name on the back of the note he was understood to assume only the obligation of a common indorser, and therefore was entitled to demand and notice. He says he presided at the next trial, and admitted the testimony, and that the plaintiff obtained a verdict by showing demand and notice. The case went to the supreme court from that trial, and is reported in 17 Vt. 285. Williams, C. J., who delivered the opinion then, said it was to be taken that the testimony established that the defendant was not a maker nor a guarantor, but an indorser. So that case is not much in point for the defendant in this case; but *Noyes v. Nichols*, 28 Vt. 159, is much in point against him. The language of the guaranty there was, "I will be accountable to you for all his contracts or agreements, as you and he may agree; and, in case he does not fulfill them as agreed, I will guaranty the payment thereof." This was held to be an absolute guaranty. The court said that the addition of the words, "in case he does not fulfill them as agreed," did not alter the nature of the undertaking, nor impose any duties on the plaintiffs that would not exist without them, and that demand and notice were not necessary. That guaranty and this are alike in legal effect. Judgment affirmed, and cause remanded.

TERRYBERRY v. WOODS.

(Supreme Court of Vermont. Bennington. Oct. Term. 1896.)

PAYMENT—BURDEN OF PROOF—INSTRUCTIONS.

A defendant pleading payment does not cast the burden of disproving such payment on plaintiff by introducing in evidence a receipt, and hence is not entitled to an instruction that the receipt, if genuine, was prima facie evidence, and cast the burden on plaintiff to disprove payment.

Exceptions from Bennington county court; Start, Judge.

Assumpsit in the common counts by Emma Terryberry against Edward D. Woods. Pleas, general issue, payment, and offset. There was judgment on a verdict for plaintiff, and defendant excepted. Affirmed.

The plaintiff sought to recover \$1,000 and interest, which she claimed the defendant had collected for her, and failed to pay her on request. The verdict was for the full amount. The defendant claimed that he had paid \$500 on one occasion to the plaintiff herself, and \$250 on another occasion to the plaintiff's mother for the plaintiff, and introduced receipts for such payments, purporting to be signed by the plaintiff and her mother re-

spectively. The plaintiff denied the payments and the giving of the receipts, but did not deny the genuineness of the signatures. The defendant requested the court to charge—First, "if the plaintiff signed the receipt for five hundred dollars, it is prima facie proof that she received the money from the defendant, and the burden of proof is on the plaintiff to show that the defendant did not pay the five hundred dollars as he claims," and, second, "if the plaintiff's mother signed the receipt for two hundred and fifty dollars, the burden of proof is on the plaintiff to show that the defendant did not pay the money expressed therein to her." The court declined to charge in accordance with either request, but told the jury that the burden was upon the defendant to prove the allegation of payment. No exception was taken to the charge as given.

F. S. Platt, for plaintiff. Batchelder & Bates, for defendant.

TAFT, J. The burden of proving a fact alleged in a judicial proceeding is upon the person making the allegation, and this burden of proof, as it is called, never changes, but remains upon the alleging party throughout the trial. As the testimony upon the trial is introduced, the weight of the evidence may vary from side to side, but the burden of proof remains upon the one making the allegation. The defendant pleaded payment, and by so doing assumed the burden of proving it. The defendant was not entitled to binding instructions upon a portion of the evidence applicable to a single question. The request was properly denied. The instructions, as given, are not in question. Judgment affirmed.

STATE v. WARNER.

(Supreme Court of Vermont. Franklin. Oct. Term. 1895.)

CRIMINAL LAW—EVIDENCE—TRIAL—INSTRUCTIONS—APPEAL—MOTION IN ERROR—MATTERS NOT APPARENT OF RECORD.

1. Failure to charge the jury to disregard improper evidence cannot be assigned as error, in the absence of an exception.

2. Where the state's attorney testified that defendant had made certain statements to him, which he denied on the stand, the attorney's statement, in his argument, that a man who would make such denial would stop at nothing, was not error.

3. Where the state's attorney testified that defendant had made certain material admissions to him, which defendant denied, an instruction that, if there was any doubt as to what passed between the parties, defendant's version must be adopted, was properly refused.

4. On appeal a motion in arrest of sentence and to set aside the verdict cannot be heard on affidavits, without any findings of facts of the trial court.

Exceptions from Franklin county court; Tyler, Judge.

Joseph Warner was convicted of an assault with intent to ravish, and excepts. Affirmed.

The claim of the prosecution was that the respondent committed the assault upon a girl

of eight years in a shed. The state's attorney testified that the respondent, while in jail, admitted to him that he was with the girl in the shed. The respondent, upon the stand, denied that he was in the shed, and denied that he made the admission. In argument, the state's attorney, referring to the contradiction, said, "I do not think a man who will go on the stand and make the contradictions this man made will stop at anything,—even so heinous as the crime charged against him here to-day." To this remark the respondent was allowed an exception. After verdict the respondent moved that sentence be arrested and the verdict set aside on the ground that, before the impaneling of the jury, the state's attorney had misled the respondent's counsel into the belief that he would not be used as a witness upon the subject of the respondent's admission to him, in consequence of which they omitted to challenge certain talesmen who would have been objectionable as former neighbors of the state's attorney; and on the ground that they had been deceived as to what his testimony would be, by reason whereof they failed to object seasonably to the state's attorney's evidence; and on the ground that the counsel for the prosecution, in his closing argument, made unwarranted statements of fact, and unjustly contrasted the characters of the state's attorney and the respondent. Affidavits were filed in support of the motion. The motion was denied, and the respondent allowed an exception to the denial, "if entitled thereto as a matter of law."

Isaac N. Chase, State's Atty. C. G. Austin, for respondent.

MUNSON, J. The mother of the child alleged to have been assaulted was called to establish the fact that an immediate complaint was made. In spite of the efforts of counsel and court, and evidently from a failure to comprehend the limit of admissibility, she interjected some improper statements regarding the complaint. But the only part of her testimony covered by an exception was a direct affirmative answer to the question whether the child complained of having been illtreated by anybody. The respondent also excepted to what the court charged in regard to this testimony, but his present contention is that the jury should have been told to disregard the improper portions of it. There was no error in the charge, as given, for the court referred to the testimony merely as evidence that a complaint was made. The respondent cannot complain of the omission referred to, for there was no exception to a failure in that respect. He would undoubtedly have had the benefit of such an instruction if it had been suggested.

The child claimed that the assault was made in one of several sheds in a certain locality, and the state produced a witness who testified that he examined these sheds just after the assault was alleged to have been committed, and found in one of them the tracks of a man and child. The court was clearly justified in

referring to this as an item of testimony bearing upon the issue.

The state's attorney testified to certain material statements of the respondent, which the latter denied having made. In commenting upon this denial in his argument to the jury, the state's attorney said, in substance, that a man who would do that would stop at nothing. This argument was based upon the testimony, and cannot be held a legal error. The attorney had a right to argue upon the supposition that his own testimony might be found true, and that of the respondent a deliberate perjury. Nor was the respondent entitled to a charge that, if there was any doubt as to what passed between him and the state's attorney, his own version must be adopted.

The respondent filed a motion in arrest of sentence, and that the verdict be set aside. The motion was based upon matters outside the record, and was supported by affidavits. The case comes up with the affidavits attached to the motion, and without any finding of facts by the court. A motion in arrest can be sustained only for matters apparent of record. *Walker v. Sargeant*, 11 Vt. 327. A motion to set aside a verdict will not be heard in this court on affidavits. *Mullin v. Rowell*, 56 Vt. 301. Judgment that respondent takes nothing by his exceptions.

TAFT, J., did not sit.

PICTORIAL LEAGUE v. NELSON.

(Supreme Court of Vermont. Chittenden. Oct. Term, 1896.)

ACTION ON WRITTEN CONTRACT—EVIDENCE OF CONTEMPORANEOUS PAROL AGREEMENT—APPEAL—HARMLESS ERROR.

1. In an action on a written order for advertising cuts to be sent by plaintiff, which did not specify the quality of the cuts, it was error to admit evidence that plaintiff's agent should send specimen samples.

2. It was also error to admit evidence that the agent, on the same day, procured orders from others in the same place, and made similar representations in regard to samples, where the order had on the margin the statement, signed by plaintiff and the agent, that "the proprietors are not responsible for any agreements not appearing on the face of this contract."

3. The error in receiving such evidence was not harmless where the court made findings to the effect that plaintiff did not furnish sample sheets as represented by the agent, and therefore defendant had no opportunity to select the cuts.

Exceptions from city court of Burlington; Russell, Judge.

Action by the Pictorial League against Henry J. Nelson, tried by the court without a jury. There was a judgment for defendant, and plaintiff appeals. Reversed and remanded.

Powell & Powell, for plaintiff. R. E. Brown, for defendant.

ROSS, C. J. The action is to recover for cuts furnished in accordance with a written contract dated April 24, 1894, and for a breach of the contract by the defendant. The contract is in the form of an order, and is as fol-

lows: "The Pictorial League," etc. "Gentlemen: Please furnish the undersigned with one cut and reading matter semimonthly to illustrate the furniture and draperies business in the city of Burlington, state of Vermont, only, for the term of one year from commencement, for which I agree to pay to your order, at New York, the sum of one dollar and postage for each cut, at the end of the month," etc. This order was signed by the defendant. The order was procured by an agent of the plaintiff. On the margin of the order was the following: "The holder of this blank is authorized to receive orders for the Pictorial League. The proprietors are not responsible for any agreements not appearing on the face of this contract." This was signed by the proprietors and agent. The plaintiff mailed the defendant four cuts, which he refused to use, and directed them to cancel his order. This order is a written contract on the part of the defendant, which could not be enlarged, varied, nor contradicted by parol testimony of what transpired at the time of its execution. *Daggett v. Johnson*, 49 Vt. 345.

Against the plaintiff's exception, the defendant was allowed to give evidence tending to show that upon the occasion of giving the order, and before it was given, the agent represented that there would be sent by the plaintiff to the defendant, each time, before the cut was sent him, a sample sheet containing not less than ten samples, from which he could select one, and the cut for that sample would then be sent to him; that the plaintiff did not perform this representation of the agent, but sent cuts which the defendant did not want, and which were inferior to the sample exhibited by the agent. This was error. It was allowing a further stipulation resting in parol, made contemporaneously, to be added to the written contract. The order does not specify the quality of the cuts to be furnished. If the plaintiff was, at the date of the contract, executing cuts of a specific quality only, whether it could furnish cuts of lower quality is not a question raised nor considered. If the plaintiff was then making cuts of different qualities, whether a latent ambiguity might not arise is not a question raised by the exceptions, nor considered.

Against the like exception of the plaintiff, the defendant was permitted to show that the agent, on the same day, procured orders from persons in Burlington, engaged in other kinds of business, and made similar representations in regard to forwarding sample sheets. This was clearly error. The plaintiff had given notice by what was upon the margin of the order, that the agent was not authorized to bind it by any representations not embodied in the terms of the order. Hence neither the defendant nor the other persons from whom he procured similar orders could treat the agent as authorized to make any representations or stipulations which would bind the plaintiff, unless the same were embraced in

the written order. Moreover, the stipulations which a party may agree to in making a sale to other persons has no necessary or legal tendency or relevancy to show that he made the like stipulations in selling the like article to the defendant, although the sales were made nearly concurrently. This subject is fully considered in *Aiken v. Kennison*, 58 Vt. 665, 5 Atl. 757.

The defendant contends that these errors are rendered immaterial by the findings of the city court. This contention is not maintainable. From the statement in the exceptions, it appears that the city court used this testimony, erroneously received, in making its findings "that the representations were made by the plaintiff's agent, and that the defendant gave the order relying upon them, and that the plaintiff has never complied with the terms of the contract, and furnished such cuts as the defendant had a right to demand." This evidently means that the plaintiff did not furnish sample sheets as represented by the agent, and therefore the defendant had no opportunity to select the cuts. Hence the cuts furnished were not such as he had a right to demand. Judgment reversed, and cause remanded.

GREGG et al. v. BEANE.

(Supreme Court of Vermont. Addison. Oct. Term, 1895.)

BANK CHECK—PRESENTATION—DILIGENCE—QUESTION OF LAW.

1. Where there is no excuse for delay, the payee of a check drawn on a bank in another place must forward it by mail to the bank's domicile on the day after he receives it, and his local agent must present it the day after it reaches him by due course of mail.

2. After the facts are found, what constitutes due diligence in presenting a check for payment is a question of law.

Exceptions from Addison county court; Ross, Chief Judge.

General assumpsit by the firm of Gregg & Co. against J. H. Beane. Defendant pleaded the general issue, payment, and notice of special matter. There was a trial by the court. Plaintiffs had judgment, and defendant excepts. Reversed.

Button & Button and Stewart & Wilds, for plaintiffs. W. W. Ryder and W. H. Bliss, for defendant.

MUNSON, J. The plaintiffs claim to recover the amount of a check drawn in their favor by the defendant on S. M. Dorr's Sons, private bankers at Bristol, Vt., and mailed them in payment of an indebtedness. The check was received by the plaintiffs at their place of business in Trumansburg, N. Y., on the 9th of August, and was forwarded on the same day to the First National Bank of Ithaca, N. Y., for collection. On the 10th of August the bank at Ithaca mailed the check for collection to its reserve agent, the Fourth Na-

donal Bank of New York City. This bank received it on the 11th of August, and on the 12th mailed it for collection to the Merchants' National Bank of Burlington, one of the banks through which it made its collections in Vermont. The 13th was Sunday. The Burlington bank received the check on the morning of the 14th, at an hour which did not permit of its being sent to Bristol by the morning mail of that day. The banking house of S. M. Dorr's Sons closed its doors on the 14th, at 10 o'clock in the forenoon. It is found that 24 hours is required for the transmission of mail between Trumansburg and Bristol; and, in the absence of any statement as to the hours of departure and arrival, it must be assumed from this general finding that a letter mailed in Trumansburg to a correspondent in Bristol would be received on the following day. There is no special finding in regard to mails from Ithaca, but it is evident from its location and connections that it is within the facts found in regard to Trumansburg. It appears then that, if the Ithaca bank had mailed the check directly to some one in Bristol, it would have been received on the 11th, and would have been presented by the 12th, and paid. No claim inconsistent with this view is made in argument. It is found that, in collecting a check in the usual way, the payee deposits it in a local bank, and that the local bank sends it to its reserve bank in Boston, New York, Albany, or Troy, and that the reserve bank sends it to its correspondent bank nearest the bank on which the check is drawn, and that the correspondent bank sends it to the drawee. It is found, however, that in some cases a reserve bank receiving a check for collection sends it directly to the bank on which it is drawn; but it is also found that, if this course had been pursued in the present instance, the check would not have reached Bristol in due course of mail until after the suspension. It is further found that, in collecting this check, the plaintiffs pursued the usual and ordinary course, and that there was not in that course any unusual or unnecessary delay.

The plaintiffs claim that the finding of the court below that this check was forwarded for collection in the usual way is conclusive upon the question of diligence. But this cannot be so, unless it be considered that any change of method which grows into a settled practice of itself works a modification of the law. It can hardly be claimed that custom is so exclusively the test of diligence that the adoption of a particular practice by any class of business men leaves nothing for the determination of the court. When the custom of one period has resulted in the adoption of a definite legal rule, the development of a new custom will not effect a modification of the rule in advance of judicial sanction. The case shows the manner in which this check was forwarded for presentment, and, when the facts are found, due diligence is a question of law. The rule, in its most general

statement, requires the payee of a check to present it for payment with reasonable diligence. But the law goes further than this general statement, and determines what reasonable diligence is under ordinary circumstances. When the case presents only the simple facts of time, location, and stated means of communication, the question of liability is to be determined by an application of the more definite rule. It is only when the case presents special circumstances which are claimed to warrant further delay that the court is left without other guidance than the general requirement. This case discloses nothing in the nature of an excuse for delay.

It is well settled that a check must be presented to the bank on which it is drawn if the bank be in the same place with the holder, or forwarded by mail if the bank be in another place, by the next secular day after it is received, and that the depositing of the check in a local bank for collection does not give the holder the benefit of an additional day. So this check was forwarded neither earlier nor later than the law required; and the controversy is confined to the question whether it was forwarded in the proper manner. As presented by the findings, the question is whether the local bank was justified in forwarding the check through its New York correspondent. The defendant sustained no harm from the course taken by the New York bank in sending it to Burlington. It is said in *Daniel on Negotiable Instruments* that, when the payee receives a check from the drawer in a place distant from the place where the bank on which it is drawn is located, it will be sufficient if he forward it by post to some person in the latter place on the next secular day after it is received, and if the person to whom it is thus forwarded present it for payment on the day after it has reached him by due course of mail. If this be accepted as a correct statement of the rule, it would seem not to permit the collection through a correspondent so remote as to delay the presentment a day beyond the time so allowed. It is true that the rule is sometimes stated to be that the check should be forwarded for presentation on the day after it is received, and that the agent to whom it is forwarded must in like manner present it, or forward it, on the day after he receives it. This phraseology might seem to contemplate the collection of a check by means of several agents. But statements regarding the forwarding of a check by successive holders will ordinarily be found to refer to checks drawn for the purpose of being put in circulation, or to questions arising between indorser and indorsee where a check given in payment has been diverted from its proper use. Statements applicable to such cases must not be taken to indicate that the requirement of diligence, as between payee and drawer, will be satisfied by a regular transmission upon successive days, if an improper number of agents be employed.

The rule is ordinarily stated to be that the payee or the local bank receiving it for collection must forward it directly to the place of payment. It is said in *Byles on Bills* that the bank receiving it for collection cannot postpone the time of presentment by circulating it through agents or branches of the bank. In *Moule v. Brown*, 4 Bing. N. C. 206, the right of a branch office of the plaintiff bank to send through the home office, in accordance with the custom of the bank, was considered and denied. We do not find that any modification of the rule as before stated has been recognized in recent cases. In *Bank v. Miller*, 37 Neb. 500, 55 N. W. 1064, the question was as to the liability of the payee on his indorsement to the bank. The check was deposited on Saturday, the 31st day of May, and was drawn on a bank located at Courtland, 27 miles distant from the bank of deposit, and accessible by two daily mails. On receiving the check, the Bank of Wymore mailed it to a bank in St. Joseph, Mo., for collection, and this bank mailed it to a bank in Omaha for collection, and the latter bank mailed it to the bank on which it was drawn. The court said the evidence did not show that this method of presentment was in accordance with any custom of bankers, but said, further, that, if such a custom had been shown, it would not have relieved the bank from liability. Without undertaking to lay down any general rule, the court said that, in this case, Tuesday, June 3d, would have been a reasonable time within which to make presentment. This was in accordance with the rule as stated by Daniel. In *Gifford v. Hardell*, 88 Wis. 538, 60 N. W. 1064, a check indorsed by the defendant was delivered to the plaintiff's agent at Dousman on July 17th, and was at once mailed to the plaintiff at New Richmond, who received it on the 18th, and at once delivered it to a local bank for collection. This bank had no correspondent in Milwaukee, and immediately mailed the check to its correspondent in Chicago. From Chicago it was forwarded to Milwaukee, and presented on the 21st. If the check had been sent directly to Milwaukee from New Richmond, it would have arrived in time for presentation on the 20th, and would have been paid. The trial court held that sending the check for collection by way of Chicago was not reasonably diligent, and directed a verdict for defendant. On appeal the judgment was sustained, the court saying that, when the defendant delivered the check at Dousman, he had a right to expect that the plaintiff or his agent would present it for payment within a reasonable time, instead of which it was sent to New Richmond, several hundred miles northwest of Milwaukee, and then sent back through Milwaukee to Chicago, and from there returned to Milwaukee. The court then stated how a check should be forwarded and presented in such cases, its rule corresponding to that given by Daniel. The rule is similarly stated in *Holmes v. Roe*, 62 Mich. 199, 25 N. W. 884. In *First Nat. Bank of Grafton*

v. Buckhannon Bank, 80 Md. 475, 31 Atl. 302, the plaintiff bank, located at Grafton, W. Va., received on the 12th of January, in payment of a balance due it, a check on J. J. Nicholson & Sons, of Baltimore, and on the same day forwarded it for collection to its correspondent bank in Philadelphia. The Philadelphia bank received it on the 13th, and at once mailed it to its correspondent bank in Baltimore. This bank received it on the 14th, and presented it to the drawee on the same day. The court sustained this presentment, on the ground that the Grafton bank, having sent out the check one day sooner than was necessary, had it in Baltimore for presentment on the day required, notwithstanding its transmission through Philadelphia. We think that if this rule of commercial law, stated in the various text-books, and affirmed by these recent cases, is to be modified in derogation of the rights of drawers of checks, it should be done by legislative enactment. Judgment reversed, and judgment for defendant.

TAFT, J., did not sit.

NOTE. The disposition of this case was made known during the session of the legislature, and No. 38, Acts 1896, was then passed.

In re WELCH'S WILL.

FIELD v. HUBBARD.

(Supreme Court of Vermont. Addison. Oct. Term, 1896.)

APPEAL FROM PROBATE COURT—SECURITY FOR COSTS—PLEADING—JURY TRIAL.

1. A county court has no authority, on an appeal from an order of the probate court directing payment of a legacy, based on a petition filed in such court, to require the petitioner to give security for costs.

2. In such case a plea filed by the appellant in the county court, merely denying that the petitioner is the person designated as legatee in the will, is insufficient; the whole question before the probate court, as to what disposition should be made of the legacy, being brought to the county court for determination by the appeal.

3. Such a case is in the nature of an equitable proceeding in rem, and, where it might be impossible to frame issues between the parties before the court, which would determine the disposition to be made of the legacy, neither party is entitled to a jury trial, under the constitution, or under V. S. § 2595, which provides that on such appeals, if a question of fact is to be decided, issue may be joined thereon, and a trial had by jury; but the court has discretionary power to order a reference, under section 1437, giving such authority where the issue is not such as to entitle the parties to a trial by jury as matter of right.

Exceptions from Addison county court: Rowell, Judge.

Appeal by Harriet Anna Hubbard from an order of the probate court directing the payment of a legacy left by the will of Harriet A. Welch, deceased, to Harriet Ella Hubbard Field, on her petition therefor. The cause was passed to the supreme court for determination of exceptions taken to rulings of the county court. Reversed.

Bliss & Deberville, for appellant. Stewart & Wilds, for appellee.

ROSS, C. J. By the will of Harriet A. Welch, which was duly probated, a legacy of \$500 is given to Harriet Ellen Hubbard, a niece of the testatrix. The probate court decreed this legacy to Harriet E. Hubbard, a niece of the testatrix, May 20, 1895. No niece of the testatrix bearing the name of Harriet Ellen Hubbard appearing to claim the legacy, October 4, 1895, Harriet Ella Hubbard Field, a niece of the testatrix, filed her petition in the probate court, setting forth that she is the person designated in the will, and that Harriet Anna Hubbard, also a niece of the testatrix, asserts that she is the person designated; that, by reason of the uncertainty in the identification of the legatee named in the will and decree, the executors refuse to pay the legacy to the petitioner,—and praying that the decree of May 20, 1895, be so corrected as to designate the petitioner as the distributee entitled to the legacy. On December 2, 1895, on hearing, the probate court decreed that the executors pay the legacy to the petitioner. Nothing being shown to the contrary, it is to be presumed that due notice of this application and hearing was given. Harriet Anna Hubbard, claiming to be aggrieved by the decree, brought the matter to the county court by appeal. In the county court, on motion of the appellant, the petitioner, against her exception, was ordered to furnish security to the appellant for costs.

1. Had the county court the legal power to make this order? It is only by force of statute that costs are allowed (Tyler v. Frost, 48 Vt. 486), or that a court has the right to require a party, in a proceeding before it, to give security for their payment. None of the sections of the statute (2345, 1408, 2596, 2599) called to our attention by the appellant give the court any power to require the petitioner to furnish security for the payment of costs. We are not aware that any such statute exists. The petition was not required to have, and did not have, any citation attached, requiring the appellant to appear and answer before the probate court, and for this reason does not come within the provisions of section 2345. Section 1408, when in a pending case it is found that the recognizance taken for the payment of costs is insufficient, authorizes the court to order additional security for their payment to be given. V. S. § 2589, requires the appellant to give to the court a bond to prosecute her appeal to effect, and pay intervening damages and costs occasioned by the appeal. Section 2596 gives the supreme and county courts, in appeals from the probate court, power to tax or deny costs to the prevailing party. If, under this section, the county court might, in its discretion, allow costs against the petitioner if the appellant prevails, the section gives it

no power to require the petitioner to furnish security for their payment. This exception is sustained.

2. The appellant filed a plea alleging that the petitioner is not the person designated by the testatrix in the legacy. The plea is demurred to. Was it sufficient? In appeals from the probate court, the county court acts as a higher probate court. Adams v. Adams, 21 Vt. 162; Holmes v. Holmes, 26 Vt. 536; Hilliard v. McDaniels, 48 Vt. 122. It took by the appeal, for determination and decision, the identical matter which was before the probate court. The probate court had in hand the estate of the testatrix for distribution in accordance with her will. By the will a legacy of \$500 is given a niece of the testatrix called Harriet Ellen Hubbard. No niece answering that name in full appears to claim the legacy, nor is known to exist. The petitioner and appellant each bear some portion of the name. Whether the testatrix had other nieces which bear some portion of the name does not appear. It was for the probate court to determine, on proper investigation, whether the testatrix intended the legacy for the petitioner, the appellant, or some other niece bearing some portion of the name, or whether the legatee was so imperfectly and inaptly designated that the legacy is void and becomes a part of the residue of the estate. No other determination would fully ascertain, and enable it to decree, the disposition which the executors should make of this \$500. The investigation by the county court, as a higher court of probate, must be as broad, and cover the same ground, as did the investigation in the probate court, to enable it correctly to determine and decree what is to be done with this legacy. It must fully determine and decree in regard to its disposition, and certify its determination and decree to the probate court. The plea of the appellant covered only a portion of the inquiry and investigation brought by the appeal to the county court for determination and decree. The plea might be found to be true, and the county court would have advanced only one step in the required investigation and determination. Hence it should have been adjudged insufficient on demurrer. The proceeding in both courts is in the nature of a proceeding in rem, namely, what shall the executors be ordered to do with that portion of the estate included in the legacy? Upon it the decree would operate, as well as upon the persons in contention in regard to it. The investigation was of such a character that the common-law rules of pleading, which demand that a single issue shall be framed and joined, did not apply.

3. The appellant moved for a trial by the jury; the petitioner, for a trial by the court, or, if the court held that under V. S. § 2595, there was a question of fact to be decided, and an issue could be joined thereon suitable for the jury, then that, under V. S. § 1437,

the court, in its discretion, should appoint a referee to try the same. The court, pro forma, as in its other rulings, held that the appellant had the right to a trial by the jury, and that it could not legally exercise its discretion to appoint a referee. This holding was against the exception of the petitioner. In appeals from the probate court, V. S. § 2595, provides: "When such certified copy is filed in the county court, it shall try the question; and if a question of fact is to be decided, issue may be joined thereon under direction of the court and a trial had by jury." As shown in considering the previous point, the final adjudication and determination in regard to the order which the court should issue to the executors for the payment of that part of the estate included in this legacy might involve inquiry into a number of facts. It would be difficult, if not impossible, under rules of pleading at common law, to frame a single issue which would determine the question. Several issues might be framed by which a special verdict by the jury might determine all the facts necessary to enable the court to decide the question. While whether the petitioner, the appellant, or some other niece of the testatrix is the legatee intended by the testatrix, or whether the legatee could not be identified, are questions of fact, yet the determination of how many of them might be required to enable the court to make the proper order and judgment could not be ascertained in advance of the trial. It is evident, from the language used, that V. S. § 2595, contemplates a case which can be fully determined by issues joined. Those issues might be joined on several counts embracing different matters involving the determination of several facts, but from their determination the jury must be able to say that one of the parties to the issues, conclusively, is entitled to recover. The only parties appearing upon the record are the petitioner and appellant. Yet the facts established by the inquiry presented might conclusively show that neither of the parties is entitled to this legacy. Such is likely to be the result where the proceeding is, as this is, in the nature of a proceeding in rem, or to determine the identity of one out of a class to whom a portion of an estate is given, or whether the description of the legatee, aided by extraneous, relevant facts, is so indefinite that the intended legatee cannot be ascertained with certainty, and for that reason the legacy falls and the sum appropriated falls into the residue. Such inquiries in England were not made on issues joined in the common-law courts, but were conducted either in the ecclesiastical court or in the courts of equity, in neither of which was a jury available to a party as a matter of right. *Sparhawk v. Buell*, 9 Vt. 41; *Howard v. Brown*, 11 Vt. 361; *Plimpton v. Town of Somerset*, 33 Vt. 283; *In re Weatherhead's Estate*, 53 Vt. 653; *Bellows v. Sowles*, 57 Vt.

411; *Lynde v. Davenport*, Id. 597; *Weeks v. Sowles*, 58 Vt. 696, 6 Atl. 603; 1 Story, Eq. Jur. 552-595; 1 Pom. Eq. Jur. § 156; 3 Pom. Eq. Jur. § 1155; Chit. Pl. 101; *Deeks v. Strutt*, 5 Term R. 690; *Norris v. Hemlingway*, 1 Hagg. Ecc. 4; *Capel v. Robarts*, 3 Hagg. Ecc. 161. It is abundantly settled by the decisions of this court above cited that the constitutional right to a trial by jury secured by the twelfth article of the bill of rights and the thirty-first section of chapter 2 of the constitution does not apply to questions raised in bills in equity, proceedings in admiralty and in probate. Very little in elucidation of when this right does and when it does not attach would be added by a review of these decisions. They uniformly hold that, if the right of trial by jury attaches to such proceedings, it is because conferred by statute, and not because secured by the bill of rights and constitution. Hence, were the contention sustainable, that V. S. § 2595, confers the right of trial in this case by jury,—it being a right conferred by statute, and not one secured by the constitution,—it follows from V. S. § 1437, which reads, "The supreme or county court may, in an action pending therein, when the issue is not such as to entitle the parties as matter of right under the constitution to trial by jury, appoint one or more referees to try and determine such issue, and may, by agreement of parties, appoint such referees in any cause pending in such courts," the county court had the discretionary power to appoint a referee to try and determine the issue. V. S. § 1437, was passed subsequently to V. S. § 2595, and qualifies the right of trial by jury conferred by the latter section when the same is not secured by the constitution. Judgment reversed and cause remanded.

=====

HARTFORD SCHOOL DIST. v. SCHOOL DIST. NO. 13 IN HARTFORD.

(Supreme Court of Vermont. Windsor. Oct. Term, 1896.)

APPEAL—REVIEW—TRIAL—CONCLUSIONS OF LAW—LIMITATION OF ACTIONS—WAIVER.

1. Objections to particular items of an account cannot be first made on appeal.
2. Where the court found that a certain order was given by a school district for the payee's services as treasurer, and that it had not been paid, a further determination that, "upon all the testimony, * * * the district was not legally indebted" on said order, was a conclusion of law.
3. In adjusting its accounts, a school district abolished by Act 1892 could lawfully pay a just debt barred by limitations.

Exceptions from Windsor county court; Tyler, Judge.

Assumpsit by Hartford school district against school district No. 13 in Hartford to recover funds in defendant's hands when the act of 1892, abolishing the former school districts, went into effect. There was a judgment for plaintiff, and defendant brings exceptions. Reversed.

The defendant, against the plaintiff's exception, introduced in evidence an order given one H. E. Tinker, in 1895, by the defendant's prudential committee, and claimed that the amount of the same should be deducted from the funds in its hands.

S. E. Pingree and W. E. Johnson, for plaintiff. J. J. Wilson and J. G. Harvey, for defendant.

MUNSON, J. The question litigated before the county court was whether the balance otherwise payable to the plaintiff, as shown by the accounts of the defendant, should be reduced by an allowance of the Tinker order as an indebtedness of the district; and the court rendered judgment for the plaintiff for the balance shown by the accounts, with that order disallowed. The defendant excepted to the introduction of the auditor's report showing the accounts, and to the rendition of such judgment. In the accounts presented were two items of cash received for tuitions and hay, to which the attention of the court was not specifically directed; and the defendant now claims that the judgment was erroneous, because these items entered into the balance, and insists that it can avail itself of this error under the exceptions taken. But we think a consideration of this matter is forbidden by the rule which restricts this court to the review of questions raised below. It is clear that the county court assumed, and had a right to assume, the correctness of every item to which its attention was not particularly called. The right of the district to have these items excluded from the accounting was not asserted on the trial, and the question will not be considered here. The county court found and certified the facts in regard to the Tinker claim, and, "upon all the testimony in the case, * * * decided that the defendant district was not legally indebted" upon the order. The plaintiff insists that this was a finding of facts, and that consequently no question was saved by the defendant's exception. But the court found the facts to be as testified to by Mr. Tinker, and it appears from his testimony that the order was given him for his services as treasurer, and that it had not been paid. These facts having been found, it is clear that the court's further determination was a conclusion of law from all the facts in the case.

Upon the finding made, as above stated, it is to be considered that the order was legally issued. So the case presented is that of a just debt barred by the statute of limitations. The running of the statute does not extinguish a debt, but prevents its collection if insisted upon. The right to plead the statute is a personal privilege, of which the debtor may avail himself or not, as he chooses. *Smith v. Lincoln*, 54 Vt. 382; *Sanger v. Nightingale*, 122 U. S. 176, 7 Sup. Ct. 1109. Doubtless, the legislature might have transferred the rights of the old district to the town dis-

trict in such a manner as to give the latter the same right to insist upon the statute. But it has not done this. The provision is that the indebtedness shall be paid by the district in the settlement of its pecuniary affairs. The adjustment by which the balance for transfer is to be determined is left in the hands of the old district. In making that adjustment, the district could lawfully pay a just debt, although barred by the statute. Judgment reversed, and judgment for plaintiff for \$1,561.98, with interest from January 1, 1894.

HUSTED v. STONE et al.

(Supreme Court of Vermont. Addison. Oct. Term, 1896.)

TRUSTEE PROCESS—DEDUCTIONS BY TRUSTEE—EXECUTORS—LIABILITY—AGREED STATEMENT.

1. The claim of a trustee on account of a note of the beneficiary which he has indorsed, but has not assumed or paid, is not a demand against the beneficiary "on a contract express or implied" (V. S. 1365), which he may deduct when charged by trustee process in an action against her.

2. V. S. 1307, making executors liable to trustee process, does not render liable an executor carrying out a testamentary trust to pay the income of certain property to a legatee for life, where there has been no order for payment or termination of the trust, and he has not stated an account with the beneficiary, or promised to pay her, so as to be liable to an action by the beneficiary for the trust funds.

3. Such an executor does not concede his present liability to the beneficiary by entering into an agreed statement, in lieu of disclosure on trustee process, that he has sufficient funds from the income to pay the claim if a certain offset be not allowed, "providing said income is answerable to the trustee process."

Exceptions from Addison county court; Rowell, Judge.

General assumpsit by J. B. Husted against Ellen G. Stone and J. M. Dean, trustee. A judgment against the principal debtor in justice court was affirmed, and defendant Dean adjudged chargeable for the amount thereof on trustee process, to which he excepted. Reversed.

The agreed statement contained the following clause: "If said four hundred dollar note is not allowed in offset, * * * it is agreed that he has in his hands sufficient funds from the income of said estate to pay the plaintiff's judgment, in excess of all sums due the trustee from said Ellen G. Stone, * * * provided said income is answerable to the trustee process."

F. W. Tuttle, for plaintiff. F. L. Fish and H. S. Peck, for trustee.

TYLER, J. The plaintiff seeks to have said Dean adjudged chargeable in his individual capacity on account of money received for the defendant by Dean in the performance of his duties as executor of the will of Electa Hazard, deceased. The will was executed September 10, 1874. The first and sec-

ond bequests are not involved in this case. The third is as follows: "I give and bequeath to my daughter, Ellen G. Stone, of Ferrisburg, Addison county, Vt., the sum of three thousand dollars, to be paid by my said executors within six months after my decease. I also give, devise, and bequeath to my said daughter, Ellen G. Stone, all the real estate I now own in the town of Ferrisburg, Addison county, Vt., and also the use and income of the residue and remainder of my estate, both real and personal, during the lifetime of the said Ellen G. Stone. At and after the decease of my said daughter, Ellen G. Stone, I do hereby give, devise, and bequeath the said residue and remainder of all my estate, both real and personal, to be equally divided between such children of my daughter, Ellen G. Stone, as may live to be of legal age." Joshua M. Dean and Rufus Hazard were named as executors; were appointed as such by the probate court upon the allowance of the will, January 19, 1875; and they distributed the estate according to the terms of the will, the defendant taking certain personal and real property. The defendant also took possession of the real estate of which she was given the use, and thereafter managed it and took the profits. The executors retained the personal property, amounting to about \$10,000, of which the defendant was given the income, and managed it until April, 1891, when Rufus Hazard died, after which Dean managed it, from time to time paid the income to the defendant as he received it, and rendered frequent accounts of his trust to the probate court. That court has made no order giving the defendant the management of the personal property, and it has made no decree or order directing the executor to pay over any part of the income of the trust fund to the defendant. The executor had in his hands at the time of his disclosure an amount of income derived from the trust fund sufficient to have paid the plaintiff's judgment against the defendant, unless the executor was entitled to have deducted therefrom the amount of a \$400 bank note which he had indorsed for her. The foregoing facts were agreed upon for the purpose of the trial. The trustee contends that he is not personally chargeable, for the reasons that there had been no accounting in the probate court, and that no order of distribution had been made of such income prior to the disclosure.

1. It is clear that the trustee was not entitled to deduct the amount of the note indorsed by him. He could only deduct demands against the defendant founded on contract expressed or implied. *V. S. 1365*. He had not paid nor assumed payment of the note, and his liability was only the usual liability of an indorser. *Strong v. Mitchell*, 19 Vt. 644.

2. It is provided by *V. S. 1307*, that a debt or legacy due from an executor or administrator, and other goods, effects, and credits

in his hands, may be attached by trustee process; but it is held that an executor or administrator shall not be liable to be sued for the distributive share of an heir to the estate previous to any proceedings being had in the probate court in reference to fixing the amount of each heir's distributive portion of the estate. *Adams v. Adams*, 16 Vt. 228. A decree of distribution is indispensable to any right of action, as against the executor. *Short v. Moore*, 10 Vt. 446. When a decree has been made, and the time fixed for payment has expired, the amount decreed becomes a debt due from the trustee to the beneficiary. Until that time the fund belongs to the estate, and the legal title is held by the trustee. *Bank v. Kidder*, 20 Vt. 519; *Probate Court v. Chapin*, 31 Vt. 373; *Foss v. Sowles*, 62 Vt. 221, 19 Atl. 984; *In re Hodges' Estate*, 63 Vt. 661, 22 Atl. 725. The plaintiff contends that, in the circumstances of this case, the income was the defendant's, so that she could have enforced its collection without an order of the probate court. The general rule is that, for a creditor of one to make another chargeable as trustee of the debtor, the latter must have a cause of action against the trustee; that the creditor takes the place of the principal debtor. *Kettle v. Harvey*, 21 Vt. 301; *Boyden v. Ward*, 38 Vt. 628; *Smith v. Stratton*, 56 Vt. 362. It was held in *Lynde v. Davenport*, 57 Vt. 597, that an action at law would lie to recover the amount of a trust fund, when the trust had terminated, and nothing remained to be done but to pay over the money. Upon the same ground it was decided in *Underhill v. Morgan*, 33 Conn. 106, that a widow might maintain assumpsit against her husband's administrator for a fund which her husband had held in trust for her. In *2 Perry, Trusts*, 843, it is laid down as a rule that, where an account between the trustee and the cestui que trust has been stated, assumpsit will lie while the trust remains open, upon the ground that a legal debt had been created between the parties. So it has been held that, where there is an express promise by the trustee to pay the beneficiary a certain part of the income, assumpsit will lie upon the promise. *Weston v. Barker*, 12 Johns. 276; *Dias v. Brunell*, 24 Wend. 9; *Roper v. Holland*, 3 Adol. & E. 99. In *Case v. Roberts*, Holt, N. P. 500, it is carefully stated that a balance of money received and to be accounted for by a trustee cannot be sued for at law by the party entitled, unless such balance had been specifically adjusted, in which case it may be sued for. The case at bar does not come within these rules. The trust had not terminated. The trustee had not promised to pay the beneficiary the amount of income in his hands, nor accounted to her for it so that a promise could be implied. No decree or order having been made, the defendant was not entitled to sue for it. The case of *Hoyt v. Christie*, 51 Vt. 48, does not aid the plaintiff; for in that case the estate had been fully settled,

and the share of the defendant therein fully determined, and the money which constituted the defendant's share had ceased to be the money of the estate, and had become the money of the defendant. But the plaintiff contends that the trustee conceded his liability in the agreed statement. The concession was as to the amount of funds in his hands, with a submission to the court of the question whether he was chargeable as trustee. The same question is now presented in respect to the trustee's legal liability that would have arisen upon the report of a commissioner. Judgment reversed, and judgment that the trustee is not chargeable.

MASCOTT et ux. v. FIRST NAT. FIRE INS. CO.

(Supreme Court of Vermont. Rutland. Oct. Term, 1896.)

INSURANCE—OWNERSHIP IN FEE—USE OF PROHIBITED ARTICLES IN BUILDING—MATERIAL CONCEALMENT—QUESTION OF FACT.

1. Where a policy provided that it should be void if the building insured was on "ground not owned by the insured in fee simple," it was not invalidated by the fact that one of the insured owned the land in fee simple, while both owned the building.

2. When a policy, by the written portions, covers property to be used in conducting a particular business, the necessary using of an article in such business will not avoid the policy, although the keeping and use of such article is prohibited by the printed portions of the policy.

3. Where a fire policy provided that it should be void if the insured misrepresented or concealed "a material fact," and in an action on it it appeared that there was a mortgage on the property for \$200, which was not disclosed by the insured, and defendant did not go to the jury on the question of the materiality of the concealment, it will not be assumed on appeal that it was material.

4. Where neither party desires to go to the jury on any issue of fact, it is for the court to direct a verdict on such a state of facts as it regards proved by the evidence.

5. It is a question for the jury whether a misrepresentation or concealment by the insured is "material," within a policy providing that it shall be void for the concealment of a material fact.

Exceptions from Rutland county court; Taft, Judge.

Assumpsit by Fred E. Mascott and wife against the First National Fire Insurance Company on a fire insurance policy. There was a trial by jury at the March term, 1896. At the close of the testimony defendant moved for a verdict, and, the motion being denied, did not desire to go to the jury on any issue of fact. The court then directed a verdict, and rendered judgment thereon, for plaintiff, and defendant excepts. Affirmed.

Wm. H. Preston, F. S. Platt, and Butler & Moloney, for plaintiff. Henry L. Clark, J. C. Baker, and F. W. McGettrick, for defendant.

START, J. The action is assumpsit upon a fire insurance contract, by which the plaintiffs were insured in the sum of \$900 on their two-

story frame building, occupied for a storehouse and paint shop. The policy contained the following provision: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof; or if the interest of the insured in the property be not truly stated herein." The policy further provided that, unless otherwise provided by an agreement indorsed thereon or added thereto, the policy should be void if the interest of the insured was other than unconditional and sole ownership, or if the subject of the insurance was a building on ground not owned by the insured in fee simple, or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there was kept, used, or allowed on the premises, benzine. As the defendant did not desire to go to the jury upon any issue of fact, the following circumstances must be considered in passing upon the questions presented by the defendant's motion for a verdict: That the building was insured as a storehouse and paint shop; that it was consumed by fire; that the fire was caused by the use of benzine, mixed with asphaltum, in the paint shop; that benzine was an article necessarily used in a paint shop, and indispensable in the business; that the damage equaled or exceeded the insurance; that due notice and proofs of loss were furnished; that plaintiff Emma owned in fee simple the land on which the building was erected; that the building was erected with money belonging in part to both plaintiffs; that the building and lot were worth \$2,500; that there was a mortgage for \$200 on same at the time the contract of insurance was made, and ever since has been; and that the incumbrance was not represented to the defendant at the time the contract of insurance was made. It did not appear that any written application for insurance was made by the plaintiffs, nor that the agent of the defendant made any inquiries respecting incumbrances.

1. The defendant insists that the contract of insurance is void because the plaintiffs were not owners in fee simple of the land on which the building was erected, and this fact was not indorsed on the policy, or added thereto. Emma Mascott held the legal title to the land, and the combined interest of the plaintiffs in the land was that of owners in fee simple; and it was not necessary that their respective interests should be set forth in the contract of insurance. The combined ownership in them is not inconsistent with the condition of the policy. The policy was not to be void by reason of the condition in regard to ownership, unless the building was on "ground not owned by the insured in fee simple." It cannot be said that the building was on land not owned by the insured. If the conveyance of the land, the relation of the insured to each other, their marital rights, the manner of occupancy, the sum each contributed to the erection of the building, had been set forth in

the policy, it would have appeared that their combined interest was that of owners in fee simple, and that they were the only owners of the land. Being such owners, the contract of insurance is not void because their respective interests are not set forth in, or indorsed upon, the policy. To hold such a contract void because of the condition in respect to the ownership of the land, there must be an ownership in some person other than the insured. In *Rankin v. Insurance Co.*, 47 Vt. 144, the action was upon a policy of insurance on a woolen factory, which was issued to the Essex Mills Company and George H. Wilbur. The factory was owned by the Essex Mills Company, but was operated by Wilbur under a contract with the company. The court found that at the time of the proof of loss Wilbur had no interest in the property insured. The policy provided that, if the interest or property insured be leasehold, or that of mortgage, or any other interest not in fee simple in case of real estate, or absolute as to personal property, such must be made known to the company, and expressed in the policy. The court held that this condition was obligatory upon the insured only in cases where the united interest of the insured was less than absolute. In *Webster v. Insurance Co.*, 53 Ohio St. 558, 42 N. E. 546, the representation made by the insured was that the property was owned jointly by them, when, in fact, the house was owned wholly by the wife. The policy was issued to the husband and wife, and it was held that they could jointly recover on the policy. In *Walner v. Insurance Co.*, 153 Mass. 335, 26 N. E. 877, it is held that if a person has such an interest in property that he will suffer pecuniary loss by its destruction, he has an insurable interest; and, if he has an insurable interest, it is sufficient to describe the property as belonging to him, unless some inquiry is made of him, the answer to which amounts to a false warranty, or a misrepresentation. In *Dohn v. Insurance Co.*, 5 Lans. 275, a condition in the policy required that, if the applicant had a less estate than a fee in the property to be insured, he should state the nature of such estate; and it was held that, inasmuch as no question as to the nature of the title of the applicant was included in the written form of application furnished by the company, it was liable upon such policy, although the title held by the insured was, in fact, an equitable one only, under a contract of sale. In *Insurance Co. v. Dunham*, 117 Pa. St. 460, 12 Atl. 668, the insurance was upon certain buildings on land which the insured had purchased, but on which he had made no payment. The policy contained a condition that insurance on buildings on land not owned by the insured in fee simple should be void, and it was held that the insured had an insurable interest. In *Niblo v. Insurance Co.*, 1 Sandf. 551, it is held that the description of the buildings in a fire insurance policy as "his buildings" is not equivalent to a war-

ranty on the part of the assured that he is the owner of the same; that it does not constitute a misrepresentation of the fact when the only interest in the buildings is as tenant for a year; and that, where no inquiry is made, or statement given, on the happening of a fire, he will recover according to his real interest.

2. The defendant also insists that the contract of insurance is void because benzine was used in the building, contrary to a printed condition in the policy. The contract of insurance provided for the occupancy of the building for a paint shop. Benzine, mixed with asphaltum, was used in the paint shop; and it must be held, from the statements in the exceptions, that it was necessarily used, and indispensable in the business authorized by the contract of insurance to be carried on in the building. It is fair to presume that when the defendant made the contract for insurance upon the building, and authorized its use for a paint shop by a clause written in the policy, it was acquainted with the business usually carried on, the work usually done, the materials necessarily used in prosecuting the business, in a paint shop; that it knew that the business authorized to be carried on could not be conducted in the usual and ordinary way without the use of benzine; that it included in the risk such materials as were necessarily used in the business, and intended to permit their use; and that the written portion of the policy in this regard was intended to control the printed portion, prohibiting the use of benzine. It is a well-established rule that when the written and printed portions of a policy are inconsistent the written portion prevails, as it expresses the special agreement and declared intention of the parties at the time of the contract. *Carrigan v. Insurance Co.*, 53 Vt. 418. It is clear that the parties intended that the paint shop, as it was, and as it must necessarily continue if used for the purposes authorized by the written portion of the policy, should be carried on with all the usual and necessary incidents thereto; and that as such it was protected by the contract of insurance. We think the rule is well settled that when a policy of insurance, by the written portions, covers property to be used in conducting a particular business, the necessary using of an article in such business will not avoid the policy, although the keeping and use of such article is prohibited by the printed portions of the policy. In *Faust v. Insurance Co.*, 91 Wis. 158, 64 N. W. 883, the written portion of the policy insured the building as a "furniture store and repair shop," and the printed portion declared that it should be void if benzine was kept on the premises. It was held that the policy was not forfeited by keeping benzine for necessary use in the repair shop. In *Carlin v. Assurance Co.*, 57 Md. 515, the policy covered a factory and machinery, and prohibited the keeping or use of petroleum. The court held, in effect, that if the engine room and machinery were included in the description of the insured premises,

the keeping of petroleum, although among the prohibited articles, would not avoid the policy if the evidence showed that it was an appropriate and customary article used in the insured's business for lubricating machinery, and he kept it solely for that purpose; that the insurance company knew, when it issued the policy, that the factory could not run without machinery, and it must be supposed to have contracted with reference to such use as an ordinary incident of the business; that, if petroleum oil was usual and necessary, such use must have been contemplated, though prohibited in the printed portion of the policy. In *Hall v. Insurance Co.*, 58 N. Y. 292, it is held that, where a policy is issued upon the material used in a business, it includes and authorizes the use of all such materials as are in ordinary use in the business, although, by the printed clause of the policy, the keeping or use thereof upon the premises is prohibited, and although other materials might be substituted. In *Fraim v. Insurance Co.*, decided by the supreme court of Pennsylvania in 1895, and reported in 32 Atl. 613, the policy was issued to a silver-plating company on its tools and machinery, and prohibited the keeping or use of gasoline on the premises. The court, in holding that the use of gasoline in the company's business was not prohibited, said: "The general rule deducible from the text-books and adjudged cases as to such prohibitions is that it is the intent of the parties to insure the subject of insurance, as it necessarily is, and must continue to be, during the life of the policy." In *Viele v. Insurance Co.*, 26 Iowa, 9, the policy expressly prohibited the keeping of benzine upon the premises. It was necessary, in the preparation of paints and varnish used in the manufacture of rustic window shades; and it was held that consent to the manufacture of window shades in the building implied a consent to use benzine, if it was necessary or commonly used in making those articles, and that the permission operated to dispense with the prohibition. In *Insurance Co. v. McLaughlin*, 53 Pa. St. 485, the keeping of benzine upon the premises was prohibited. It was a necessary article in the manufacture of patent leather. The fire consuming the building was caused by benzine, and the court held that the permission to use the building for a patent-leather manufactory carried with it the permission to use all articles necessary to the business, and dispensed with the prohibition in the policy. The same rule is announced in *Harper v. Albany Ins. Co.*, 17 N. Y. 194; *Harper v. New York Ins. Co.*, 22 N. Y. 441; *Pindar v. Insurance Co.*, 36 N. Y. 648; *Collins v. Banking Co.*, 79 N. C. 279; *Whitmarsh v. Insurance Co.*, 16 Gray, 339; *Maril v. Insurance Co.*, 95 Ga. 604, 23 S. E. 463; *Wheeler v. Insurance Co.*, 62 N. C. 459.

3. The clause in the policy against concealment and misrepresentation provides that the entire policy shall be void if the insured has concealed or misrepresented, in writing or

otherwise, any material fact or circumstance concerning the insurance, or the subject thereof; or if the interest of the insured in the property be not truly stated therein. There was a mortgage of \$200 on the property, and this fact was not represented to the defendant at the time the policy was issued; and it is insisted by the defendant that this was a concealment of a material fact. The evidence tended to show that the property was worth \$2,500. It did not appear on trial in the court below that any written application for the policy was made by the insured, nor that the agent of the company made any inquiry as to incumbrance. The terms of the condition relied upon by the defendant are not those which would naturally direct the attention of the insured to the necessity of disclosing incumbrances upon the property, or suggest that they were material to the risk. A concealment of a fact not material would not avoid the policy. The question of whether the policy shall be void by reason of concealment or misrepresentation is, by the terms of the policy, made to depend upon their materiality. The fact that there is a mortgage for \$200 would not seem to be material in effecting an insurance for \$900. The defendant did not desire to go to the jury upon the question of whether such concealment was material, and we cannot, in view of the holding of the court below, assume that it was. As neither party desired to go to the jury on any issue of fact, it was for the court to direct a verdict on such a state of facts as it regarded proved by the evidence, and the verdict will be upheld if there is any evidence to sustain it. *Robinson v. Larabee*, 58 Vt. 652, 5 Atl. 512. The evidence tended to show that, if there was concealment or misrepresentation, it was not material. The insured were the owners of the property, notwithstanding there was a small mortgage thereon; and under the findings of the court below it must be held that there was no material misrepresentation or concealment respecting such ownership by reason of the undisclosed mortgage. If the company had intended that the policy should be void if the insured omitted to mention incumbrances, it could have made that intention clear by inserting the word "incumbered," instead of leaving it for the insured to conjecture respecting the materiality of facts and circumstances. The insured might well regard the existence of a small mortgage upon their property an immaterial fact, inasmuch as their attention was not directed to the subject of incumbrance by the defendant's agent or by the policy. A misrepresentation in insurance is a statement of something as a fact which is untrue, and which the insured states knowing it to be untrue, or which he states positively as true without knowing it to be true, with intent to deceive, and which has a tendency to mislead, such fact in either case being material; and the materiality of a representation or concealment is a question for the

jury. *Daniels v. Insurance Co.*, 12 Cush. 416; *Clark v. Insurance Co.*, 40 N. H. 333. Concealment, according to the law of insurance, is a designed and intentional withholding of any fact material to the risk which the assured ought in honesty and good faith to communicate; and any fact is material, the knowledge or ignorance of which would materially influence the insurer in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of insurance. *Clark v. Insurance Co.*, supra. In *Dolliver v. Insurance Co.*, 128 Mass. 315, the policy contained the following provision: "If the interest of the assured be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, it must be represented to the company, and so expressed in the written part of the policy, otherwise the policy shall be void." The assured, at the time the policy was issued, was the owner of the property in fee, but had mortgaged it, and leased it for a term of years; and it was held that the policy was not thereby avoided. In *Fletcher v. Insurance Co.*, 18 Pick. 419, the plaintiff obtained insurance on his store without disclosing the fact that it stood on the land of another person, under a verbal agreement terminable at the pleasure of such person upon six months' notice. No inquiry was made by the insurer in regard to his title. It was held that there was not a concealment of a material fact, that the policy was not thereby avoided, and that the materiality of the fact concealed was for the jury. In *Com. v. Hide & Leather Ins. Co.*, 112 Mass. 136, it is held that a provision in a policy of fire insurance that "the assured covenants and engages that the representation given in the application for this insurance contains a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured," is waived by an insurer who issues the policy upon a bare request to insure the property, unaccompanied by any statement as to its condition, situation, value, or risk. In *Insurance Co. v. Kelly*, 32 Md. 421, the policy was issued upon the condition that, if the interest of the insured in the property was a leasehold interest, or other interest not absolute, the company should be so informed at the time of contracting the insurance, or the policy would be void. The insured, at the time the insurance was negotiated, was the owner of an equity of redemption only, and no mention of that fact was made. It was held that the interest of the insured as mortgagor was absolute, within the meaning of the policy, and no explanation of that interest was required before the issuing of the policy. In *Quarrier v. Insurance Co.*, 10 W. Va. 507, the policy provides that, if the interest of the insured be not truly stated, or is other than the entire, unconditional, and sole ownership, it must be so expressed in the policy, under penalty of forfeiture. It was held that the policy was not rendered void by

the failure of the insured to disclose that at the time the policy was issued there was a deed of trust of the property insured, no inquiry having been made about the state of the title. The holding is, in effect, the same in *Insurance Co. v. Weill*, 28 Grat. 389. Judgment affirmed.

GALLAGHER et al. v. BOROUGH OF OLYPHANT et al.

(Supreme Court of Pennsylvania. May 10, 1897.)

MUNICIPAL CORPORATIONS—ORDINANCES—PUBLICATION—EQUITY PLEADING—AMENDMENT OF BILL.

1. Ordinances authorizing the erection of electric light works, recorded in the ordinance book, and advertised, fixed in detail the kind and character of the work to be done, the time of completion, the penalty for nonfulfillment of contracts for the work, and all details except the price, and provided for advertisements for sealed proposals. After bids were accepted, contracts were awarded by resolutions duly passed and entered on the minutes. *Held*, that the contracts were not invalid, because neither the plans and specifications referred to in the ordinances as "attached hereto," nor the resolutions awarding the contracts, were recorded in the ordinance book or advertised, under the general borough act of April 3, 1851 (P. L. 322), or act of May 23, 1893 (P. L. 113), neither of which requires anything but an "enactment, regulation, ordinance, or other general law" to be recorded and advertised.

2. A bill against a borough to have certain contracts for the erection of electric light works declared void simply called in question the good faith of the council in awarding them, and the regularity and legality of the ordinances on which they were based, and did not question the right of defendant to issue bonds. More than a year after it was filed, and while the cause was awaiting decision, application was made for leave to file an amendment to the bill, the purpose of which was to have the increase of the borough debt declared illegal. No affidavit was filed that the application was not made for the purpose of vexation or delay, or that the matter of amendment could not, with reasonable diligence, have been sooner introduced into the bill, as required by equity rule 10. *Held*, that it was error to allow the amendment.

Appeal from court of common pleas, Lackawanna county.

Action by R. J. Gallagher and others against the borough of Olyphant and others to restrain defendants from performing contracts for the erection of electric light works. From a decree in favor of plaintiffs, defendants appeal. Reversed.

Everett Warren, Henry A. Knapp, and Chas. P. O'Malley, for appellants burgess, town council, and borough of Olyphant. George Tucker Bispham and John Hampton Barnes, for appellant Fanny M. Massey. I. H. Burns, for appellees.

FELL, J. No attempt was made to sustain the allegations of fraud in awarding the contracts, and, at the final hearing of the case, the only questions which arose under the original bill related to the validity of the contracts entered into by the borough for the

erection of electric light works. The ordinances which provided for the construction of the different parts of the works were all duly passed by the borough council, approved by the burgess, recorded in the ordinance book, and advertised; but the plans and specifications referred to in the ordinances as "attached hereto" were not recorded or advertised. The ordinances provided for advertisements for sealed proposals, but they made no provision for the awarding of contracts. The bids were accepted and the contracts awarded by resolution duly passed, approved by the burgess, and entered upon the minutes, but not recorded in the ordinance book, and not advertised. The objections to the validity of the contracts were based upon the ground that neither the plans and specifications attached to the ordinances, nor the resolutions awarding the contracts, were recorded in the ordinance book, or advertised. The learned judge found that the ordinances had not gone into effect, for the reasons that the specifications had not been recorded and advertised, and that the resolutions awarding the contracts, being legislative in their character, and not recorded and advertised, conferred no authority for making the contracts.

Neither the general borough act of April 3, 1851 (P. L. 322), under which the borough of Olyphant was incorporated, nor the act of May 23, 1893 (P. L. 113), require anything but an "enactment, regulation, ordinance, or other general law" to be recorded and advertised. The plans and specifications, although referred to in the ordinances, were not in terms made a part of them. The specifications at the time of the hearing were fully recorded, and an offer to show that the plans were of such a character that it was impossible to record or advertise them was overruled. Unless, for the purpose of notice to the public of the action of council, the plans and specifications must be considered as essential parts of the ordinances, they do not come within the requirements of either act. In some cases they may be so considered, but in this we think not. If they had been referred to as on file in the office of the clerk, burgess, or engineer of the borough, it could scarcely be contended that the acts applied to them. The publication of the minute details of construction contained in specifications would impose an unreasonable burden on boroughs, and would serve no useful purpose. The publication of plans and models would often be utterly impracticable. Such plans and specifications should be carefully preserved in the proper office, and open to the inspection of all persons concerned. This was done, and every one interested had the means of information. In *Glading v. Frick*, 88 Pa. St. 460, it was held that the act of April 3, 1872, which provided that, when a contract for the construction of a building was recorded within 15 days of its execution, the building should be liable to the contractor alone for work done and materials furnished, was

fully complied with by recording the contract without the specifications. It was said in the opinion in that case, in speaking of the specifications: "A peculiar state of facts ought to exist to make the recording of auxiliary documents like these indispensable. It is possible to conceive of specifications that would contain plans, drafts, or models of a kind to render their transfer to the record impossible, or at least intolerably inconvenient. * * * The rule that annuls the effect of an unrecorded agreement, which forms part of a single transaction, has no room to operate in such a case as this." The word "ordinance," as used in either act, includes a resolution providing for the construction of public works. "An ordinance is defined to be the enactment of a permanent rule of conduct or government, while a resolution is an order of council of a special or temporary character. This distinction, however, is not adhered to. A permanent regulation in a municipal government may be adopted by what is designated as a resolution, and, if so intended, will have the same force and effect as an ordinance, if passed with the same formalities. What the borough cannot do by the latter, it cannot do by the former." *Trickett's Pennsylvania Borough Law*, § 106. A resolution of council is but another name for an ordinance, and, if it be a legislative act, it is immaterial whether it be called a resolution or an ordinance. *Sower v. Philadelphia*, 35 Pa. St. 231; *Kepner v. Com.*, 40 Pa. St. 130; *Wain v. Philadelphia*, 99 Pa. St. 330. A resolution renewing a loan was held in *Kepner v. Com.*, *supra*, to require the approval of the mayor; and in *Marshall v. Mayor of Allegheny*, 59 Pa. St. 455, a resolution not published and recorded was held ineffectual to revoke a contract for grading, and to authorize a new contract therefor. While legislation by borough councils may be by ordinance or resolution, the requirements which are essential to the validity of an ordinance must be observed in the passage, approval, recording, and publication of resolutions where the action of councils is legislative.

But a direction that enactments, regulations, ordinances, and other general laws shall be recorded and advertised does not apply to all acts of council. It does not include resolutions which are not in their nature legislative, and which do not take the place of ordinances. The learned judge says in his opinion: "I find nothing in the law requiring resolutions accepting bids, and awarding contracts to be recorded in the ordinance book, and advertised, providing the authority to accept bids and award contracts has been properly conferred." But he finds the resolutions invalid for failure to record and advertise, because they were the only action of council conferring the authority, and were therefore legislative enactments. The prior ordinances providing for the erection of the works were three in number. By them it was "enacted and ordain-

ed" that buildings should be constructed; that an electric light plant should be purchased; that a steam plant to supply power for the manufacture of electricity should be purchased; and the secretary of the borough was directed to advertise for sealed proposals, and the burgess was directed to appoint suitable persons to superintend the construction of the building, and to inspect the machinery, etc. These were legislative acts providing for the construction of public works, and were the creation of the authority for that purpose. If the ordinances had authorized the burgess or some other officer or a committee of council to open the bids, and award the contracts, nothing would have remained to have been done by council. The ordinances fixed in detail the terms of the contracts to be entered into, the kind and character of the work to be done, the time of completion, the penalty of non-fulfillment, and in fact everything except the price to be paid. What was left to be done was an executive or ministerial act, not a legislative one; and it was done by the whole body. It was to receive the bids, and award the contracts,—acts which could have been done by any one to whom authority had been given by ordinance. What necessity can there be that council, by ordinance, should authorize itself to take the successive steps to carry into effect that which it had already enacted and ordained should be done? The awarding of a contract thus previously authorized could be done by resolution duly passed, and approved by the burgess, and entered upon the minutes. The prior ordinances were a full and complete authorization.

The only remaining objection to the contracts is based upon the ground that the increase of the debt was illegal. This objection was not raised by the original bill, and we are of the opinion that the amendment was improperly allowed. The purpose of the bill was to have certain contracts for the erection of electric light works declared void. The bill called into question the good faith of the council in awarding the contracts, and the regularity and legality of the ordinances upon which the contracts were based, but it did not question the right of the borough to issue bonds. The purpose of the amendment was to have the increase of the borough debt declared illegal, and thus to strike down the security of the bondholders. The application for leave to amend was made more than a year after the bill was filed. In the meantime an answer and a replication had been filed, the testimony had all been offered, the argument made, and the case had been fully heard, and was awaiting decision. No opportunity was ever given to the borough or the bondholders to be heard on the allegations in

the amendment. The application for leave to amend was not made in accordance with the equity rules. It was too late, and it introduced a new and independent cause of action. No affidavit was filed that the application was not made for the purpose of vexation or delay, or that the matter of the amendment could not with reasonable diligence have been sooner introduced into the bill, as required by rule 10. The introduction of the amendment shifted the ground of action by introducing an entirely new question,—the means by which the money was raised. The bill was to declare the contracts void, because of alleged defects in the ordinances intended to authorize them. If the plaintiffs were entitled to the relief sought, they could have obtained it under the original bill. The subject-matter of the amendment was not an integral part of the subject-matter of the bill. The validity of the contracts did not necessarily depend upon the validity of the bonds. Their invalidity was alleged upon entirely different grounds. The answer introduced no new matter unknown to the plaintiffs when the bill was filed, and it cannot be said accurately that it introduced any new matter. The complaint of the bill was that the contracts had been fraudulently made, and that the ordinances were defective. Every allegation of fraud and irregularity was denied by the answer. There was no attempt to prove fraud, and, at the hearing, the question was narrowed to the technical objections to the ordinances. The fact that a vote to increase the debt had been taken, and an ordinance providing for the issue of bonds passed, was set up in the answer, not as a separate ground of defense, but in reciting the proceedings by the borough council which had led up to the question at issue. The application for leave to amend was evidently an afterthought, based upon a new ground of objection to the contracts, suggested by the decision in *Sener v. Ephrata Borough*, 174 Pa. St. 80, 34 Atl. 954; and the amendment was allowed at a time and in a manner which denied the appellants an opportunity to be heard.

The right of the plaintiffs, who, as members of council, participated in all the proceedings, and by their votes approved all that was done, or of any one under the circumstances disclosed by the testimony, to object now to the validity of the bonds, may well be doubted. The decree is reversed and set aside. As there was ground for the objections to the contracts when the bill was filed, which were removed by the subsequent action of council in passing the ordinances and entering into new contracts, the costs should be divided equally between the plaintiffs and the borough of Olyphant; and it is so ordered.

HENRY CHRISTIAN BUILDING & LOAN ASS'N v. WALTON.

(Supreme Court of Pennsylvania. May 10, 1897.)

RATIFICATION OF FORGED INSTRUMENT.

A forged instrument cannot be ratified.

Appeal from court of common pleas, Philadelphia county.

Action by the Henry Christian Building & Loan Association against James Walton on a mortgage. Judgment for defendant. Plaintiff appeals. Affirmed.

John T. Murphy and Joseph P. McCullen, for appellant J. Morris Yeakle and Maxwell Stevenson, for appellee.

FELL, J. (The distinction between the power to ratify acts void because of a fraud affecting individual interests only and the power to ratify acts which involve a public wrong has been carefully defined and preserved in our decisions. The right to avoid a contract on the ground of fraud is a privilege given to the injured party for his own protection, and it may be waived; but he cannot give validity to an illegal contract. The earlier cases which held that all contracts vitiated by fraud are insusceptible of confirmation, are, in effect, overruled by *Pearson v. Chapin*, 44 Pa. St. 9, and *Negley v. Lindsay*, 67 Pa. St. 217. The distinction between the cases pointed out in the opinions in *Shisler v. Vandike*, 92 Pa. St. 447, and *Lyons v. Phillips*, 106 Pa. St. 57, is this: Where the transaction is contrary to good faith, and the fraud affects individual interests only, ratification is allowed; but where the fraud is of such a character as to involve a crime the adjustment of which is forbidden by public policy, the ratification of the act from which it springs is not permitted. Forgery does not admit of ratification. A forger does not act on behalf of, nor profess to represent, the person whose handwriting he counterfeits; and the subsequent adoption of the instrument cannot supply the authority which the forger did not profess to have. "A forged bond or note obviously wants the essentials of a contract, because the intention is not to bring the minds of the obligor and obligee together, but to practice a fraud on both." *Hare*, Cont. p. 108.)

All of the assignments of error which were insisted upon at the argument relate to the instruction given to the jury that, if the mortgage upon which the action was founded was a forgery, there could be no ratification of it, and that no act of the defendant thereafter could make it binding upon him. There can be no doubt of the correctness of the first part of this instruction, and, in view of the evidence, the whole of the instruction was free from error. Magee, who committed the fraud, was the accredited agent of the building association, and represented it in the preparation of the mortgage. He may

have represented the defendant in other matters, but there was not the slightest evidence of his agency for the purpose of executing the mortgage. Nor was there evidence of any act of the defendant upon which to base an equitable estoppel. The attempt to bring the case within the principle of the decision in *Garrett v. Gonter*, 42 Pa. St. 143, that a deed or contract executed by a professed agent, acting under a pretended authority, may be confirmed, failed for want of proof. The judgment is affirmed.

In re HARVEY'S ESTATE.

Appeal of DALEY.

(Supreme Court of Pennsylvania. May 10, 1897.)

WILLS—TESTAMENTARY CAPACITY AND UNDUE INFLUENCE—DIRECTION OF ISSUE.

Direction of issue as to testamentary capacity or undue influence is necessary only where the evidence is such that the trial court would not feel constrained to set aside a verdict against proponents of the will.

Appeal from orphans' court, Crawford county.

In the matter of the estate of Mary Harvey, deceased. From a decree refusing to direct issue *devisavit vel non*, Hannah Harvey Daley, contestant of the will of deceased, appeals. Affirmed.

Wm. J. Breene, for appellant. Julius Byles and Eugene Mackey (Jules A. C. Dubar, of counsel), for appellees.

STERRETT, C. J. This appeal is from the decree refusing to direct an issue *devisavit vel non* for the purpose of determining—"First, whether the testatrix, Mary Harvey, was of sound and disposing mind, memory, and understanding at the time of the execution of the will in question; and, second, whether said will was not procured by undue influence." In the court below the really pertinent inquiry was whether, upon the testimony of the respective parties, a serious dispute had arisen as to either of said questions,—such a dispute as should have been submitted to and passed upon by a jury. In rightly determining such questions there is perhaps no safer or more reliable test than this: If the testimony is such that, after a fair and impartial trial, resulting in a verdict against the proponents of a will, the trial judge, upon a careful review of all the testimony, would feel constrained to set aside the verdict as contrary to the manifest weight of the evidence, it cannot be said that a dispute, in the meaning of the act, has arisen. On the other hand, if the state of the evidence is such that he would not feel constrained to set aside the verdict, the dispute should be considered substantial, and an issue should be directed. *Knauss' Appeal*, 114 Pa. St. 10, 20, 6 Atl. 394; *Herster v. Herster*, 122 Pa. St. 239, 16 Atl. 342. After a pains-

taking review of the nearly 300 printed pages of testimony taken on the hearing, the learned president of the orphans' court, in a clear and convincing opinion, came to the conclusion that, according to the test aforesaid, the evidence was insufficient to justify him in directing an issue as to either of said questions; and a careful consideration of the testimony, in connection with the specifications of error, has convinced us that there is no substantial error in his conclusion. As to the question of testamentary capacity, the testimony in favor of the proponents of the will is not only distinct and positive, but practically unimpeached. On the question of undue influence, there is some testimony tending to show facts and circumstances which, in themselves, might be calculated to excite suspicion, but, when viewed in the light of the undisputed evidence, these circumstances, etc., furnish no reasonable ground even for suspicion that undue influence of any kind was operative in the making or execution of the will. A detailed consideration of the testimony is wholly unnecessary. Nor is there anything in either of the specifications of error that requires extended comment. We are all of opinion that the issue was rightly refused, and that the decree should not be disturbed. Decree affirmed, and appeal dismissed, at appellant's costs.

IN re DE WOLFF'S ESTATE.

Appeal of INNES, et al.

(Supreme Court of Pennsylvania. May 10, 1897.)

FINDINGS OF FACT—REVIEW.

Findings of fact by the auditor, approved by the court below, are conclusive, unless clear mistake, misconduct, or manifest error be shown.

Appeal from court of common pleas, Philadelphia county.

In the matter of the trust estate of Elizabeth De Wolff, deceased. From a decree dismissing exceptions to report of the auditor on a reference to settle the account of the Girard Life Insurance, Annuity & Trust Company, trustee, under deed of trust made by deceased, Frances F. Innes and James H. De Wolff, executors and devisees of deceased, appeal. Affirmed.

R. L. Ashhurst, for appellants. A. H. Wintersteen and Geo. Tucker Bispham, for appellee.

PER CURIAM. In May, 1838, Miss Elizabeth Byerly, afterwards Mrs. De Wolff, conveyed all her real and personal estate to Samuel and Tobias Wagner, in trust for the purposes specified in her deed. In 1866 the trustees filed their account, which was duly confirmed by the court; and thereupon they resigned the trust, and the Girard Life Insurance Annuity & Trust Company, the appellee, was substituted in their stead. Af-

terwards the cestui que trust, Miss Byerly, married George B. Innes, who predeceased her. By him she had one child, Frances B. Innes, one of the appellants. Subsequently she married Erastus De Wolff, who also predeceased her. By him she had one child, James H. De Wolff, the other appellant. On February 22, 1894, Mrs. De Wolff died, testate, and, by her last will, gave one-half of her estate to her daughter, and the remaining half to her in trust for her son, James H. De Wolff, and appointed said son and daughter executors of her will. During Mrs. De Wolff's lifetime no regular account was filed by the substituted trustee, but, at regular intervals from 1866 until her decease, she was furnished with statements of the management of the trust, and received from the substituted trustee the net income accruing therefrom. Shortly after her decease, at the request of the appellants, her executors, etc. the substituted trustee's account was filed and due notice was given, as directed by the court, that the same would be allowed on Saturday, July 14, 1894, unless cause be shown to the contrary. Appellants and their then counsel, Mr. Turner, were furnished with a copy of the account, and afforded every facility for inspection of the trustee's books and vouchers. At Mr. Turner's request, after conference with his clients, the account for filing was prepared by omitting therefrom the income accounts prior to Mrs. De Wolff's death, and it was accordingly filed in its present shape. This was done with the view of effecting a speedy settlement and avoiding the delay and expense of reference to an auditor. On September 14, 1894, no exceptions having been filed, the account was duly confirmed, and distribution ordered. Nearly two months thereafter, on the petition of these appellants, a rule was granted on the substituted trustee to show cause why the decree of September 14, 1894, confirming its account, etc., should not be opened, and the account referred to an auditor. This was resisted by the trustee's answer, questioning the right of the petitioners to thus interfere, and denying the allegations of fact on which the rule to show cause was grounded; but the matter was so proceeded in that on March 7, 1895, the rule was made absolute, and five days thereafter the account was referred to the learned auditor, who in March of the following year reported in favor of the substituted trustee, on every material question properly before him. To that report 34 exceptions were filed by appellants, 1 to the exclusion of evidence, 16 to the learned auditor's findings of fact, and the remaining 17 to his conclusions of law. Referring to these in his supplemental report, the auditor says: "He has carefully examined the said exceptions and the matters therein mentioned, but has failed to find anything which alters his opinion as heretofore expressed, or which should cause him to change his findings of law or fact." Af-

erwards, upon due consideration of the report and the exceptions thereto, the latter were dismissed by the court, and the former was confirmed. On this appeal from that decree, the same exceptions are made the basis of the 34 specifications of error now before us. It is, of course, unnecessary to consider these in detail, because nearly all of them relate more or less directly to one or other of the following subjects of complaint: (1) Refusal of the court below to surcharge the trustee with the alleged difference between the value of the trust estate's share in No. 711 Sansom street and the amount realized therefrom in the partition, viz. \$1,000, with interest from February, 1879. (2) Refusal to surcharge the trustee with \$832.73, difference between the appraised value of 11 shares of the Planters' Bank of Tennessee and the amount realized therefrom, with interest from January, 1867. (3) In not surcharging the trustee with interest on the whole fund, because no income account was submitted upon the call of appellants. (4) Alleged excessive and improper charges upon the fund, in connection with the confirmation of the trustee's account and the contest before the auditor.

These several subjects of complaint, so ably and forcibly presented and pressed upon our attention by the learned counsel for appellants, depend almost entirely on questions of fact which were determined adversely to his clients by the auditor, whose findings of fact as well as conclusions of law were reviewed on exceptions, and approved by the court below. Nothing is better settled by a long line of cases (among which are *Bedell's Appeal*, 87 Pa. St. 510; *Logue's Appeal*, 104 Pa. St. 136; *Lewis' Appeal*, 127 Pa. St. 127, 17 Atl. 805; *In re Penn Bank's Estate*, 152 Pa. St. 65, 25 Atl. 310; *Prouty v. Prouty*, 155 Pa. St. 112, 25 Atl. 1001; *In re Donaldson's Estate*, 153 Pa. St. 292, 27 Atl. 959; *Stevenson Co. v. Sample*, 174 Pa. St. 165, 34 Atl. 519; *In re Hughes' Estate*, 176 Pa. St. 387, 35 Atl. 244) than that such approved findings of fact as this record presents are conclusive, unless clear mistake, misconduct, or manifest error be shown. A careful examination of the record has failed to disclose the existence of either of these in this case, or any other ground that would warrant a reversal or modification of the decree for error in any of the findings of fact or conclusions of law. In view of the conclusive effect that should be given to such approved findings of fact, special reference to the testimony bearing on either of the questions involved would consume time to no useful purpose. We find nothing in the record to indicate anything like want of good faith on the part of the substituted trustee in its administration of the trust. Nor is there anything in the facts or circumstances of the case, as we gather them from the record, that would justify us in sustaining any of the

specifications of error. We are all of opinion that the decree should not be disturbed. Decree affirmed, and appeal dismissed, at appellants' costs.

STATE, to Use of BRADY, v. CONSOLIDATED GAS CO. OF BALTIMORE CITY.

(Court of Appeals of Maryland. April 30, 1897.)

GAS COMPANIES—NEGLIGENCE—DUTY TO INSPECT—EVIDENCE.

1. An upright pipe, screwed to a gas-supply pipe entering the cellar of premises tenanted by plaintiff, stood unsupported by the wall. Plaintiff, who did not use gas, had caused coal to be dumped around and against said pipe. There had never been any escape of gas till the day plaintiff's daughter was found dead in the cellar, with the gas escaping at a leak in the joint, but the physician who examined the body could not say what caused her death. *Held*, that an instruction for defendant gas company was proper.

2. The fact that a gas company makes no examination of its pipes on premises into which they run raises no presumption of negligence in the absence of any notice of cause for examination.

3. Evidence as to whether a stopcock on the top of an upright pipe was a dangerous method of shutting off gas was properly rejected where the leak alleged to have caused the injury complained of was at another point in the pipe.

Appeal from court of common pleas.

Action by the state of Maryland, for the use of James Brady, against the Consolidated Gas Company of Baltimore City. From a judgment for defendant entered on a verdict directed by the court, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, BRYAN, BRISCOE, and RUSSUM, JJ.

Thomas E. Brady and C. Morris Howard, for appellant. Wm. A. Fisher, J. Alex. Preston, and Robert L. Preston, for appellee.

RUSSUM, J. This suit was brought by James Brady, in the name of the state, for his use, against the Consolidated Gas Company of Baltimore City, to recover for the death of his daughter, Marian Brady, alleged to have been caused by the negligence of the defendant. The defendant, at the time of the accident complained of, was engaged in the manufacture and supply of illuminating gas in Baltimore city. The declaration contains two counts, the first of which charges that Marian Brady, while employed in her household duties, and using due care and diligence, "died from inhaling the gas which the defendant wrongfully and negligently permitted to escape in and upon the premises of the equitable plaintiff," and the second count, after setting out that the defendant was engaged in the manufacture and supply of illuminating gas, "an article dangerous to property and deadly in its effects on human life," negligently permitted the same to flow through "rotten, decayed, and otherwise dangerous pipes into, and filled the premises of,

the equitable plaintiff"; and the said Marian Brady, while occupied in rendering services to plaintiff as his housekeeper, and using his premises with due care and diligence, was overcome and "died from inhaling the said gas." With the declaration there was filed a statement of the particulars of the claim, and the ground upon which it was made, as follows: "Marian Brady was found dead in the cellar of house No. 619 East Chase street, on October 11, 1893, having died from the effects of inhaling gas with which the premises were filled from pipes belonging to the defendant. The equitable plaintiff is the father of said Marian Brady." The case was tried upon the general issue that the defendant did not commit the wrong alleged, and under the instruction of the court the verdict was for the defendant.

The evidence shows that on the morning of October 11, 1893, about 7 o'clock, the equitable plaintiff left his house, No. 619 East Chase street, where he resided with his daughter, Marian Brady, to go to his work. When he returned, at 5 o'clock in the afternoon, he found Mrs. Braden, Miss Braden, and Miss Basson at the house, and the smell of gas very strong. Not finding his daughter, he went to the cellar, where he heard the gas escaping through the pipe with a hissing noise, apparently under the coal, and strong enough to make any one sick if he remained there any time, and his daughter lying on her back, her body stiff and cold, and her feet 10 feet from the gas pipe. The gas pipe had been in the cellar during the whole time he resided there, about five years; but there was no meter there, as he had not been using gas. The supply pipe entered the cellar from the street, about one foot above the cellar floor, and the depth or pitch of the cellar was about seven feet. The upright pipe, or "riser," was screwed into the pipe entering from the street, and stood without being supported by the wall. The cellar was about 14 feet wide by 15 in length. The coal bin was located at the point at which the gas pipe was situated, and the equitable plaintiff had been in the habit, during his occupancy of the house, of having coal dumped into it through a chute, and a short time before the death of Miss Brady four tons of coal had been put in there. It had fallen around the pipe, and the equitable plaintiff had himself shoveled part of it against the pipe. The coal was piled up as high as the cellar window, and around the upright pipe, which projected about six or seven inches above the coal. The odor of gas became very perceptible and oppressive between 10 and 11 o'clock, but before that time had not been noticed by the neighbors. Dr. Brinton was sent for, and found Miss Brady lying in the cellar, dead. She had been dead some time, as rigor mortis was very marked, which usually does not happen until three or four hours after death. He could not say from what cause she died, unless he had been in charge of the case

before death. At the conclusion of the plaintiff's case the court below was asked by the defendant to instruct the jury that, "even if all the evidence offered by the plaintiff can be regarded as correct, nevertheless none had been offered sufficient to show that the death of Miss Marian Brady resulted from the negligence of the defendant, its officers or agents, and the verdict must be for the defendant." This ruling constituted the first exception, and in determining whether it be correct or not it becomes necessary to refer to the settled principles of law applicable to the case. All the cases agree that, to constitute a good cause of action, there should be stated and proved a right on the part of the plaintiff, and a duty on the part of the defendant in respect to that right, and a breach of that duty by the defendant, whereby the alleged injury was produced. Between the negligence and the injury there must be the relation of cause and effect. *Maenner v. Carroll*, 46 Md. 212; *W. U. Tel. Co. v. State*, 82 Md. 310, 38 Atl. 763; *Holly v. Gas Light Co.*, 8 Gray, 123; *Trainor's Case*, 33 Md. 554. If the evidence falls short of proving that the injury complained of was the direct result of the defendant's negligence, whenever it is so inconclusive that no well-constituted mind can infer from it the fact which it is offered to establish, it becomes the duty of the court, when requested, to instruct the jury that the evidence is insufficient to justify their finding the fact attempted to be proved. *Brinkley v. Platt*, 40 Md. 529; *Tyson v. Tyson*, 37 Md. 567; *Clarke v. Dederick*, 81 Md. 148; *Plank-Road Co. v. Bruce*, 6 Md. 457.

Having these well-established legal principles in view, we now proceed to a consideration of the facts in proof, bearing in mind that the onus is on the plaintiff to show affirmatively all the elements of the right to recover. It was necessary for the plaintiff in this case to prove (1) the death of Miss Brady, (2) the negligence of the defendant, and (3) that such negligence was the cause of Miss Brady's death. We have been unable to discern any evidence in the record tending to prove that the escape of gas from the defendant's pipe on the premises of the equitable plaintiff was, in any respect, due to the negligence of the defendant. The equitable plaintiff had not used gas during the five years of his occupancy of the house, and there had, in that time, been no escape of it, even up to the time he left home on the morning of October 11, 1893. The pipes were left on the premises, presumably by the consent of the owner of the building, and for the convenience of his tenants. The gas was shut off in the usual way, by a stopcock in the riser, which, according to the proof, answered the purpose effectually. Whether the leak, which was at the L, was caused by the fact that the pipe was defective when put in, or whether the break in it was caused by the rough and negligent manner in

which it was treated by the equitable plaintiff in dumping large quantities of coal against and around it for four or five years in succession, are questions upon which the proof is entirely silent. It was not negligence on the part of the company to leave its pipes on the premises, nor does the fact that it made no examination of the pipes raise any presumption of negligence, in the absence of any notice of the existence of any cause for an examination. Had there been such notice, its duty would have been to have discovered the cause of the leak, and to have used proper means to remedy it. It was not required to keep up a constant inspection all along its lines, without reference to the existence or nonexistence of a probable cause for the occurrence of leaks or escape of gas. *Gas Co. v. Crocker*, 82 Md. 124, 33 Atl. 423. This is not a case in which negligence may be inferred from the occurrence of the injury, as has been so earnestly argued by counsel for the appellant. It differs from the cases cited by them in the fact that in each of them there was evidence of an act of negligence; as, for instance, in *Worthington's Case*, 21 Md. 275, the accident was caused by a misplaced switch, due to negligence in the construction of the defendant's railroad track; and in *Mahone's Case*, where a person who had bought a ticket was invited to cross the track in front of an approaching train by the defendant's agent; and in *Kaskell's Case*, 78 Md. 517, 28 Atl. 410, where an overcrowded street car, off the track, was driven two squares over cobble stones, without an effort to replace it, until it collided with a freight car on an adjoining track, injuring the plaintiff. In this case there is no proof of any act or omission on the part of the defendant to which the escape of gas may fairly be attributed. Nor have we been able to find any proof in the record that the death of Miss Marian Brady was caused by inhaling gas. So far as the record discloses, the evidence is so vague and uncertain that the death might, with equal reason, be attributed to some sudden and natural cause. Dr. Brinton, who was familiar with the circumstances surrounding her death, and who examined her body, was unable to say from what cause she died; and yet we are asked to say that it was proper to have allowed the jury to speculate—to guess—that she met her death by inhaling gas. The proof of the fact that Miss Brady's death was caused by inhaling gas which had permeated the dwelling of the equitable plaintiff through the negligence of the defendant was essential to recovery.

But it is insisted that ocular or other direct testimony of the details and precise manner of the accident are not essential parts of the proof in this case, because the doctrine of *res ipsa loquitur* applies, and many cases are cited in support of this theory. It is a sufficient answer to this propo-

sition to say that, while it is true that whether this doctrine applies becomes a question of common sense, there can be no common sense in its application to any case unless the accident is connected with the defendant. In the cases cited in support of this contention there was no doubt as to the proximate cause of the injury. In this case, as we have seen, there is not a particle of proof to connect the defendant with the escape of the gas, nor is there any that the death of Miss Brady was caused by inhaling gas. If the cause of her death was known, there might be some reason for the inference of negligence, but we cannot infer that she died from inhaling gas, and then build on that the second inference that the escape of the gas was due to the defendant's negligence. There being no proof to show what was the immediate cause of the death of Miss Brady, and that it could not have happened in any other way than by reason of the defendant's negligence, the doctrine of *res ipsa loquitur* is not applicable to this case. It follows from what we have said that the court below was right in instructing the jury that their verdict must be for the defendant.

In the course of the trial, William Furguson, a witness for the plaintiff, was asked whether a stopcock on the top of the riser, or on some other portion of the supply pipe, would be a dangerous method of shutting off the gas, which was objected to by counsel for defendant, and sustained by the court, and this constitutes the second exception. We see no error in this ruling. There was no pretense that the stopcock had anything to do with the escape of gas. It was calculated to mislead the jury, and was properly rejected.

The court below also properly refused to permit the witness to answer the questions in the third and fourth bills of exception. Whether some other plan than the one adopted by the defendant would be safer or not was not the question before the jury. There was no question before the jury as to the efficiency of the plan adopted by the company to shut off the gas, and all such questions were irrelevant and misleading. The only obligation on the company was to use a safe plan, which appears to have been done. *Wood v. Helges*, 83 Md. 257, 34 Atl. 872; *Crowther's Case*, 63 Md. 569.

The question propounded to the witness McConnell, which constitutes the fifth exception, was also properly rejected. The question of negligence *vel non* is either a question of law or one for the jury. This question proposes to substitute the opinion of a witness upon a matter of law for that of the judge, whose province it is to pass on all such questions. It assumes, as a matter of law, that, regardless of all other facts in the case, there was an obligation on the part of the defendant to have made an examination, and makes the opinion of the

witness take the place of the jury upon the very question it has been impaneled to decide. The question propounded to the same witness which constitutes the sixth exception was also properly rejected. Whether or not the appellee had the means of determining defects was not a question in the case, since there was no evidence of such a state of facts as to impose on it the duty of an inspection. Besides, it proposes that the witness shall express an opinion on a state of facts that, according to his previously expressed opinion, could not exist. Judgments affirmed, with costs above and below.

DEMUTH et al. v. OLD TOWN BANK OF BALTIMORE et al.

(Court of Appeals of Maryland. March 31, 1897.)

MORTGAGE — INDORSEMENT — MORTGAGE NOTE — RIGHTS OF INDORSEE — LIMITATIONS.

1. In 1888 one P. made a pretended assignment of leasehold property to his clerk, taking back a mortgage to secure a note for \$1,000 and two interest notes, and a reassignment of the property; the first deed and the mortgage being alone recorded. P. then indorsed the principal note to defendant bank, but notice of the transfer was not recorded, nor was the mortgage itself assigned; and in 1891 plaintiffs, desiring to purchase the property, were informed by P. that the mortgage was paid, and the latter, after producing the reassignment from the pretended grantee, and exhibiting the interest notes and a \$1,000 note (which he claimed was the principal mortgage note, but which a comparison with the interest notes and with the mortgage would have shown was not the genuine mortgage note) released the mortgage on the records, recorded the deed of reassignment, and gave a deed to plaintiffs. In 1895 defendant foreclosed its mortgage. *Held*, that since the indorsement and delivery of a mortgage note, prior to Acts 1892, c. 392, carried with it the lien of the mortgage, P.'s attempted release, and his fraud on plaintiffs, did not affect defendant's right to the benefit of said lien.

2. Lapse of time less than 20 years will not bar foreclosure of a mortgage, though the mortgage note itself be barred.

Appeal from circuit court of Baltimore city.

Petition by Charles H. Demuth and another against the Old Town Bank of Baltimore and others to rescind a decree of foreclosure. From a decree dismissing the petition, plaintiffs appeal. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BRYAN, PAGE, BOYD, and RUSSELL, JJ.

Millard F. Taylor and Rob. F. Leach, Jr., for appellants. Thomas Hughes, for appellees.

McSHERRY, C. J. This is a case of exceedingly great hardship, and we have diligently, but in vain, sought for some tenable ground upon which the appellants could be relieved from the loss that an affirmation of the decree appealed from will necessarily subject them to. But hard cases, it has often been said, almost always make bad law; and

hence it is, in the end, far better that the established rules of law should be strictly applied, even though in particular instances serious loss may be thereby inflicted on some individuals, than that by subtle distinctions, invented and resorted to solely to escape such consequences, long-settled and firmly-fixed doctrines should be shaken, questioned, confused, or doubted. *Lovejoy v. Ireland*, 17 Md. 527. It is often difficult to resist the influence which a palpable hardship is calculated to exert; but a rigid adherence to fundamental principles at all times, and a stern insensibility to the results which an unvarying enforcement of those principles may occasionally entail, are the surest, if not the only, means by which stability and certainty in the administration of the law may be secured. It is for the legislature, by appropriate enactments, and not for the courts, by metaphysical refinements, to provide a remedy against the happening of hardships which may result from the consistent application of established legal principles.

Now, the facts before us are these: Samuel D. Price was in 1888 the owner of some leasehold property in Baltimore city. This on January 28, 1888, he assigned to Henry C. Fowler, an employé of his, for an alleged, but in fact for a simulated, consideration of \$1,500. On the same day, and as a part of the same transaction, Fowler executed and delivered to Price a mortgage on the same property to secure the payment of \$1,000, stated to be the balance of purchase money due by Fowler to Price; and Fowler also signed and delivered a promissory note of even date, payable to Price in 1 year, for the principal sum of \$1,000, and two other promissory notes, each for the sum of \$30, payable in 6 and 12 months, for the interest. These three notes are described in the mortgage. The deed and the mortgage were promptly placed on record. Simultaneously with the execution of the deed, the mortgage, and the notes, Fowler also executed and delivered to Price a deed reconveying and reassigning to him the identical leasehold property. This deed was not placed on record until November 12, 1891. The sale by Price to Fowler was not an actual sale at all. It was a mere device to which Price, who was a builder, resorted to raise money without himself executing a mortgage on his property. To all appearances, however, so far as the public records disclosed, it was a perfectly regular and bona fide transaction. On January 31, 1888, Price borrowed from the Old Town Bank of Baltimore the sum of \$1,200, and indorsed to the bank, as collateral, the \$1,000 mortgage note of Fowler, and another note, with which we have no concern. Price's note to the bank was repeatedly renewed, and, when each renewal was made, Fowler's note to Price was repledged. There can be no doubt about the entire good faith of the bank in this transaction. The bank continued to hold the note, which on its face showed that it was

secured by a mortgage of even date, and on October 31, 1895, after Price had become insolvent, and shortly before he died, the bank filed in the circuit court of Baltimore city a petition praying for a decree directing a sale of the mortgaged premises, and under the terms of the mortgage the usual decree was forthwith signed. Within a month thereafter the appellants came into the case, and by petition asked that the decree be set aside. They base the relief which they seek upon these facts: In November, 1891, the appellants, desiring to purchase the property in question, had the title examined, and, it being then discovered that Price held the mortgage thereon from Fowler, negotiations were opened, not with Fowler, the apparent owner, but with Price, who informed the appellants and their counsel that the mortgage had been paid, and that he held a deed from Fowler assigning the property back to him. He thereupon produced the deed of assignment, contemporaneous in date with the mortgage and with the deed from Price to Fowler; and he exhibited three promissory notes, purporting to be the three mortgage notes described in the mortgage from Fowler to him,—the one note for \$1,000, and the other two each for \$30. Without making any inquiry of Fowler, the appellants concluded the purchase with Price; and Price on November 12, 1891, released on the public records the mortgage of January 21, 1888, and then placed on record the deed of assignment from Fowler to himself, dated, as stated, on January 28, 1888, and delivered to the appellants a deed dated November 12, 1891, assigning to them the same property. Thereupon the appellants paid him \$1,300, the amount of the purchase money. The appellants had no knowledge of the outstanding note in the hands of the bank, and they believed that the \$1,000 note exhibited by Price, and stated by him to be the identical note secured by the mortgage, was in fact the mortgage note. The evidence, however, clearly shows that Fowler signed two \$1,000 notes on the same day, and the one retained by Price, and subsequently exhibited to the appellants as the genuine mortgage note, was not in fact the note secured by and described in the mortgage at all, and that the note indorsed to the bank, and forming the basis of the decree, was in reality the mortgage note. About this the evidence leaves no room for doubt. The appellants claim that they are bona fide purchasers of the property from Price, for value, and are, as such, entitled to hold it against the claim of the Old Town Bank. They undoubtedly paid their money for the property to Price, who shamefully deceived and misled them; but whether these facts, under the circumstances, are sufficient to defeat the rights acquired by the bank, is the question brought before us. The court below dismissed the petition asking for a rescission of the decree, and from the order of dismissal,

which permits the decree of October 31, 1895, directing a sale of the property to stand, this appeal was taken.

Now, it cannot be doubted that prior to the adoption of the act of 1892, c. 392 (which, however, has no application to this case), the law of Maryland was, and still is, except in so far as modified by the statute just named, that the indorsement or assignment of a promissory note secured by a mortgage gives to a bona fide holder of such note the benefit of the lien of the mortgage, as fully as though he had been named as the actual mortgagee; and this, too, though the public records furnish no evidence of the indorsement or transfer and delivery of the note. The transfer or indorsement of the note, which is the principal, carries the mortgage, which is the incident, and effectually clothes the bona fide holder of the note with the lien of the mortgage itself. *Clark v. Levering*, 1 Md. Ch. Dec. 178; *Insurance Co. v. Ross*, 2 Md. Ch. Dec. 26; *Byles v. Tome*, 39 Md. 463; *Boyd v. Parker*, 43 Md. 199; *McCracken v. Insurance Co.*, Id. 477; *Hewell v. Coulbourn*, 54 Md. 63. Clearly, then, the indorsement and delivery by Price of the \$1,000 mortgage note to the Old Town Bank on January 31, 1888, for value, operated to carry the mortgage with it, and stripped Price of all authority to deal with that mortgage without the consent or sanction of the bank. From the moment of that indorsement and delivery, it ceased to be in the power of Price to release the mortgage so as to deprive the bank, by which the note was held, of the benefit of its security under the mortgage. This is precisely what was decided in *Boyd v. Parker*, *supra*,—a case that cannot be distinguished from this. If, then, the bank became the equitable owner of the mortgage, and Price no longer had power to release it so as to affect the rights of the bank, how can the fraud and deception which Price undoubtedly practiced upon the appellants, and for which the bank was in no way responsible or answerable, interfere with the title of the bank, or give to the appellants rights superior to those which Price himself could have asserted? In answer to this it is said that the appellants are bona fide purchasers without notice, and consequently are entitled to the protection of a court of equity. Bona fide purchasers without notice, and for value, are a highly-favored class in equity, and, in a certain sense, the appellants bought in good faith; but it is not every bona fide purchaser who can invoke the interposition of a court of equity to defeat the equally meritorious claims of others. In the recent case of *Seldner v. McCreery*, 75 Md. 296, 23 Atl. 643, we said: "Where a title is perfect on its face, and no known circumstances exist to impeach it or to put a purchaser on inquiry, one who buys bona fide and for value occupies one of the most highly-favored positions of the law. If circumstances after-

wards come to light which invalidate the title of the seller, there is nothing to prevent redress against him in behalf of the party who may be injured, but the innocent purchaser must be protected at all events." This language was used in replying to an objection that a will, upon which the title then being examined depended, had been proved only in common form, and might, consequently, thereafter be caveated, whereby the purchaser would be involved in litigation. No facts were shown which rendered it probable that the will was invalid, and, the probate in common form being sufficient proof of the will to pass the title to the devisee, the mere possibility that the will might afterwards be contested was not a ground upon which the title that it did pass could be impeached. Under the will the seller had a title, and, of course, circumstances coming to light afterwards, and invalidating that title, could not affect a bona fide purchaser for value and without notice. But we have here and now no such question before us. Price had no title, on the face of the records, except as mortgagee, when the negotiations were opened with him by the appellants; but even that title he had parted with nearly four years previously, by assigning or indorsing the mortgage note to the bank. Consequently, at the very time he executed the deed to the appellants the bank owned the lien of the mortgage; and, because the bank held the note secured by the mortgage, Price's attempted release of the mortgage was utterly ineffectual. No circumstance has come to light since the date of the deed to the appellants which invalidates Price's title, for Price had no title at the time he made the deed that was not actually subject to the lien of the mortgage in the hands of the bank.

But, in addition to this, the whole difficulty has arisen out of the deception practiced by Price upon the appellants. The bank had no agency in misleading them, and is clearly not responsible for Price's fraud. The appellants do not seem to have considered it singular that if the mortgage notes had been paid by Fowler, as Price represented, the notes themselves still remained in the possession of Price. Had they been altogether free from fault, or less willing to rely on the statements of Price, they would have applied to Fowler, the mortgagor, and would have learned from him the true nature of the transaction, and the important fact that he had in reality executed two notes, each for \$1,000, on the same day; and a casual comparison of the interest notes with the \$1,000 note exhibited by Price would have indicated such a marked difference as to suggest at least a doubt as to whether the \$1,000 note shown to them was the genuine mortgage note. The interest notes shown by Price to the appellants contained on their face the words "collateral with mortgage of even date herewith," and along the margin

the words "mortgage note." The \$1,000 note produced by Price contained none of these words, and, in terms, drew interest from its date, payable half-yearly,—a provision wholly unnecessary, and altogether out of place, where separate interest notes have been given. But, more than this, a comparison of the note produced by Price with the description in the mortgage of the one secured by the mortgage would have indicated that Price was not then in possession of the genuine mortgage note, because, as just stated, the note produced was drawn to bear interest from its date, whereas the note described in the mortgage was a note for the principal sum of \$1,000, payable one year after date, and, for the interest to accrue thereon, two interest notes were provided. The note produced by Price bore no mark to designate that it was a note secured by a mortgage at all, as each of the interest notes did. These were circumstances calculated to suggest inquiry, if not to excite suspicion, when they are all considered together, and were clearly sufficient to put the purchasers to a further investigation than they actually made. The note produced by the bank corresponds precisely with the interest notes, has the same words upon its face as to being collateral with mortgage, and the same words on its margin, and does not bear interest from its date. Obviously, the note held by the bank was the genuine mortgage note, and unless the bank's failure to secure an assignment of the mortgage, or its omission to have placed on record a notice that it owned the note, forfeits its right to the lien created by the mortgage, no act done by Price without the bank's concurrence or sanction can prejudice or affect its lien. If this were not so, there would have been no occasion for the adoption of the act of 1892, c. 392.

But laches and limitations are relied on by the appellants as final defenses. It has been repeatedly said that the application of the doctrine of laches depends on the circumstances of each particular case, and while, in the abstract, this is true, it is apt to be misleading, if the constituent and essential elements which go to make up laches, in the technical sense of the term, are overlooked or disregarded. Strictly speaking, and using the term as it is understood in the law, laches is such neglect or omission to assert a right as, taken in conjunction with lapse of time more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. Lord Ellenborough said, in discussing the question whether a failure to present a bill of exchange at the specified place of payment was sufficient to discharge the acceptor: "Laches is a neglect to do something which by law a man is obliged to do. Whether any neglect to call at a house where a man informs me that I may get the money amounts to laches depends on whether I am

obliged to call there." *Selbag v. Abithol*, 4 Maule & S. 462. Obviously, then, there must be a legal duty to do some act, a failure to do that duty, and attendant circumstances which cause prejudice to an adverse party, before the doctrine can be successfully invoked. Mere lapse of time, without more, unless of sufficient duration to amount to and constitute the bar of the statute of limitations, will not be sufficient. Now, there was clearly no duty which the bank owed any one to foreclose the mortgage prior to the sale of the deed to the appellants. Its omission to do so anterior to the date of the purchase by the appellants was not, therefore, the omission to do something which by law it was required to do; and the subsequent delay (that is, the delay between the date of the purchase by the appellants and the filing of the decree appealed from) placed the appellants in no worse position than they occupied the very moment they paid the purchase money to, and took the deed from, Price. No act of the Old Town Bank, and no omission on its part to do something that it was legally bound to do, operated to prejudice the appellants, unless the mere naked failure to secure an assignment of the mortgage, and to have that assignment recorded, was an omission to perform an act which the bank was obliged to perform. But the decided cases we have referred to conclusively establish that no such duty or obligation rested on the bank. The essential elements of laches are therefore wanting, and the question comes down to one of mere lapse of time, or the statute of limitations. About this question—the statute of limitations—there is no room to doubt. While it may be conceded that the mortgage note of January, 1888, given by Fowler to Price, and by Price indorsed to the bank, was barred by limitations when the decree was signed, still the right of the bank to have the mortgage foreclosed could not be barred by the lapse of less than 20 years. This principle has been expressly settled by this court, and we need do no more than refer to two of the cases in which it was distinctly applied: *Railroad Co. v. Trimble*, 51 Md. 111; *Magruder v. Peter*, 11 Gill & J. 217. As we find no error in the decree appealed from, it will be affirmed, with costs. Decree affirmed, with costs above and below.

HAYES v. COLCHESTER MILLS.

(Supreme Court of Vermont. Chittenden. Jan. Term, 1894.)

MASTER AND SERVANT—PERSONAL INJURY—ASSUMPTION OF RISKS—CAUTION—FELLOW SERVANTS—CHILDREN—CAPACITY—QUESTIONS OF FACT—INSTRUCTIONS—APPEAL—REVIEW.

1. Performance of the duty of one who employs an immature and inexperienced person for a dangerous service, to explain to him the incidental dangers, and how to avoid them, does not relieve the employer from liability to the servant if the work required of him was not within the scope of his employment, and such as ought not

to have been required of a person of his capacity.

2. Where an employer assigns a servant to the care of machinery, and places another servant under his orders, and the first, acting within the scope of his own duty, requires of the second a service outside his employment, which a prudent master would not impose on a person of his years, strength, and judgment, the employer is liable for the consequences of the improper order, regardless of the question of fellow servants.

3. A boy fourteen years of age was employed as a helper in a spinning room, and had been in the service two years. His ordinary duties were to sweep the floor, pick up waste, change bobbins, and occasionally to oil and clean some parts of the machinery when it was not running. An employé having the oversight of the machinery and the immediate charge of the helpers, was mending a belt, and directed the boy to go to the top of a stepladder 12 feet high, and hold the belt away from a shaft which was revolving rapidly. The boy was caught by the belt, and injured. *Held*, that it was a question for the jury whether the service was beyond the boy's capacity, and consequently outside his employment.

4. It was also for the jury to determine whether the boy was entitled to caution as to the danger, and instruction how to avoid it.

5. In an action for personal injuries resulting from the use of dangerous appliances by a servant, the service need not be characterized as dangerous by witnesses, in order to render the master liable, where the mere description of it shows it to have been so.

6. In an action by a servant for personal injuries resulting from dangerous appliances, his failure to prove that he did not receive proper instructions as to their use is waived by defendant's failure to object in the trial court.

7. In an action for personal injuries to a minor employé, a request to charge that plaintiff, within the scope of his employment, assumed all risks that were "apparent, obvious, and comprehensible to him" was substantially complied with by instructions that the rule as to assumption of risks applies to children, if they are able to understand clearly the risks and dangers; that, if a child has discretion enough to fully appreciate the danger, no warning is required; and that he must use such capacity as he has to avoid the danger to which he is exposed.

Exceptions from Chittenden county court; Tyler, Judge.

Action on the case by William B. Hayes, by next friend, against the Colchester Mills, for personal injuries. Defendant pleaded the general issue, and there was a trial by jury at the April term, 1893. There were verdict and judgment for plaintiff, and defendant excepts. Affirmed.

C. M. Wilds, Seneca Hazelton, and E. R. Hard, for plaintiff. W. L. Burnap, Henry Ballard, and H. F. Wolcott, for defendant.

MUNSON, J. The plaintiff, a boy of 14, was one of several helpers employed in the defendant's spinning room. He lost an arm while at work under the immediate direction of one Sturgis, who was mending a belt which hung from a revolving shaft. The plaintiff was standing near the top of a stepladder, holding the belt from the shaft, to prevent it from crawling, when he was caught by the belt in some manner, and drawn over the shaft. He had been employed in this room about two years. His evidence tended

to show that his ordinary duties were to sweep the floor, pick up waste, change bobbins, mend broken threads, and occasionally oil and clean some parts of the machinery when it was not running; that up to this time he had not been called upon to render such service as he was engaged in when injured, nor assisted in mending a belt, nor made use of a stepladder; that Sturgis was the second hand in the spinning room, and had the oversight of the machinery, and the immediate charge of the helpers, and entire charge of the room when the first hand was absent from it, as was the case at the time of the accident; that Sturgis generally hired the helpers, and set them at work, and discharged them if dissatisfied, but that the first hand could retain them notwithstanding Sturgis' action if he thought best. The shaft from which this belt was hanging was the main shaft, elevated 13 feet above the floor, and having 300 revolutions a minute. Attached to this shaft was a drum 4 feet in diameter, which was connected by a 12-inch belt with the gearing of the water power beneath. There was a space of 5 or 6 feet between the drum and the wall of the building. The stepladder was set up in this space, by the side of the drum and main belt, and about a foot from them. It was a stepladder of the ordinary construction, 12 feet high, somewhat worn, and not entirely firm. There was nothing by which the plaintiff could steady himself but the ladder. The rapid motion of the drum and connecting belt produced a considerable movement of the air where the ladder stood. It was not claimed that the plaintiff came in contact with either the drum or the main belt. The evidence of the plaintiff tended to show that, on going up the ladder, he became frightened, and returned to the foot of the ladder, and told Sturgis he did not want to stay up there, for fear he would be hurt; and that Sturgis thereupon clapped his hands together, and told him with an oath to go up, or take his hat and go home; and that upon this he went up the ladder again, and received his injury. The case was submitted to the jury on the theory that there was evidence tending to show that Sturgis was negligent in requiring of the plaintiff a dangerous service, not suited to his capacity, and in failing to give him such advice and instructions as the case required; and that the negligence of Sturgis in these respects was the negligence of the defendant. The defendant insists that there was no evidence tending to show negligence in the respects claimed, and that, if there was any negligence on the part of Sturgis, it was the negligence of a fellow servant.

It is well settled that one who engages in a dangerous employment as the servant of another takes upon himself all the risks which are ordinarily incident to that employment, and that among the risks thus assumed are those which arise from the negligence of a fellow servant. It is also true that one who is engaged with another in the same employment is not divested of the character of a fel-

low servant by the mere fact that he has authority to direct the other in his work. A minor, even if a child of tender years, is held to be within the application of these general rules. But in the case of young persons their effect is modified by other rules, which impose special duties upon the employer, in view of the inexperience and want of judgment of servants of this class. It is the duty of one who employs an immature and inexperienced person for a dangerous service to explain to him the perils incident to his work, and instruct him how to avoid them. But the giving of proper instructions will not relieve an employer from liability to a child, if the work required of him was not within the scope of his employment, and not such as ought to have been required of a person of his capacity.

The plaintiff was not engaged for the performance of any specific work. He was to do such general work in the spinning room as was suited to his capacity. His engagement contemplated the undertaking of more difficult work as he became fitted to do it. It is evident that this is not a case in which it can be said, as matter of law, that the service the plaintiff was called upon to render was or was not such as it was his contract duty to perform. This new service had come within the line of his employment if his advancing years and experience had prepared him to undertake it. It had not come within the line of his employment if it was still beyond his capacity. It was therefore proper for the court to treat the question of the defendant's negligence in requiring the service as depending simply upon the plaintiff's capacity. If this service was beyond the plaintiff's capacity, and so outside the scope of his employment, he did not assume the risks attendant upon it. A person of mature years might have been held to have assumed them by consenting to do the work; but the rights of a child are not permitted to depend upon his ability to discriminate promptly as to the work required of him, or to refuse obedience to the command of his superior. This limitation of the plaintiff's risk renders the doctrine of fellow servant inapplicable. In entering the defendant's service, the plaintiff assumed only such risks arising from the negligence of his co-employees as might be incurred within the scope of his employment. So, it is not necessary to determine whether the nature and extent of Sturgis' authority over the plaintiff were such as to exclude him from the relation of fellow servant. The effect of his authority over the plaintiff is to be considered without reference to that relation. The defendant assigned Sturgis to the care of the machinery, and placed the plaintiff under his orders. If Sturgis, acting within the sphere of his own duty, required of the plaintiff a service which was outside his employment, and which a prudent master would not have imposed upon a person of his years, strength, and judgment, the defendant is liable for the consequences of the improper order. In Rail-

road Co. v. Fort, 17 Wall. 553, a boy of 16 had been engaged as a helper in a machine shop. After he had been employed for a few months in receiving moldings as they came from a machine, he was sent by the person under whose direction he was working into the midst of rapidly revolving machinery, to adjust a belt, and, in attempting to do this, received an injury. It was found that this service was beyond the scope of the boy's employment, and was one which a prudent man would not have required him to undertake. It appeared also that the person giving the order had the care and management of the machinery. The plaintiff in error was held liable. The court considered that the rule exempting the master from liability for the negligent conduct of a co-employee in the same service did not apply; that the rule stood upon the presumption that an employee, in entering the service of his principal, took upon himself the risks incident to the undertaking; and that this presumption could not arise where the risk was not within the contract of service, and the servant had no reason to believe he would have to encounter it.

It is apparent that the plaintiff's evidence entitled him to go to the jury upon the question of negligence as depending upon his capacity for the service, irrespective of the giving of instructions, and that this alone would have prevented the direction of a verdict for the defendant. But, assuming that the service required of the plaintiff was such as he might properly have been called upon to undertake with suitable instructions, it remains to consider whether there was evidence tending to show that the defendant was negligent in failing to instruct him. It is said there was no evidence that the service was hazardous. It was not necessary to have the service so characterized by witnesses. The mere description of the work was evidence tending to show that it was hazardous. It is said that the previous service of the plaintiff had been such that his employer was justified in assuming that he was fitted to undertake the work required of him. The length of time the plaintiff had been employed there, the nature of the work he had been engaged in, and the knowledge he had acquired of the machinery, were important to be considered by the jury, but afforded no basis for a conclusion of law. Inasmuch as the evidence tended to show that this was a service essentially different from any before required of him, it could not be assumed that his experience was such that instructions were unnecessary. It is also said that it does not appear but that instructions were given. It is true that the burden is upon the plaintiff to show a failure in this respect, and that the statement of the case contains nothing as to any evidence on this point. But the defendant is not in a position to avail itself of this objection. The point was not brought to the attention of the court by the request which

is treated as a motion to direct a verdict. It was in no way suggested by the request relating to the subject of instructions. The only reference made in the charge to the situation of the case in this respect was the statement that it did not appear that any instructions were given. The jury were thus told, in effect, that they were to start in their consideration of the subject of instructions with the fact that none were given, and no exception was taken to this method of submitting the case.

It is further insisted that, however different this service may have been from the work plaintiff had previously done, it must be supposed from his long employment in the room that he knew the shaft was in motion, and that contact of the belt with it would be dangerous, so that any instructions that could have been given would have simply covered what he already knew. In *Buckley v. Manufacturing Co.*, 113 N. Y. 540, 21 N. E. 717, a boy who was in the performance of his duty about a machine, at which he had worked for several days, slipped on the floor, and involuntarily threw out his hand, in such a manner as to thrust it into a set of cogwheels. Here it was said to be "impossible to perceive how the absence of instructions had anything to do with the injury." In *Ogley v. Miles*, 139 N. Y. 458, 34 N. E. 1059, the plaintiff lost his fingers by a buzz saw soon after he was set to work at one by the defendants, without instructions. It appeared, however, that he had operated such a saw before, long enough to learn the nature of it, and the danger attending its use; and the court considered that this placed him "in the same position as to knowledge that he would have been in had the defendants imparted to him oral information of the dangerous character of a buzz saw." But we think the case under consideration is not fairly within this line of decisions. The plaintiff was suddenly called upon to perform a service which was essentially different from any he had before undertaken. The danger of the service lay somewhat in the place where it was to be done, and the position it was necessary to take in doing it. It cannot be assumed from the fact that the plaintiff knew in a general way of the movement of the shaft, and its effect upon a belt, that he so understood the dangers connected with the performance of this particular service that the caution and instruction of an experienced workman would have been of no benefit to him. We think the plaintiff's knowledge in the respects stated will not justify us in holding, as matter of law, that he was not entitled to caution or instruction under the circumstances disclosed by his evidence.

It being for the jury to determine whether instructions should have been given the plaintiff, it is necessary to consider whether any omission of *Sturgis* in this matter was

the negligence of the defendant. It is evident that the right of an employé to receive instructions cannot be made to depend upon the presence of the employer or his general representative. The duty must often rest upon the one whose order creates the necessity for the instruction. In such a case the employer cannot excuse himself for the employé's failure to receive instruction by saying it was the neglect of a fellow servant. If it became the duty of the defendant to instruct the plaintiff, the performance of that duty devolved upon Sturgis, and any negligence of Sturgis therein would be chargeable to the defendant. This holding is not upon the ground that Sturgis was not a fellow servant of the plaintiff in the general sense, but upon the ground that his connection with the plaintiff in this transaction was such that, when occasion arose for instructing the plaintiff, he was in that matter the representative of the defendant. When an employé, although a fellow servant of the injured employé, is charged with the master's duty to such employé, his failure in that duty is the negligence of the master, and the doctrine of fellow servant does not apply. So there was evidence tending to show that the defendant was negligent in the matter of instructions.

The defendant's fourth request, to the effect that the duty of instruction would depend upon the plaintiff's need of it, and not upon the fact of his minority, was fully complied with.

The defendant requested the court to charge that, if this service was within the scope of the plaintiff's employment, he took the risk of any peril attending it "that was apparent and obvious and comprehensible to him." We think this request was substantially complied with. The jury received the following instruction: "It is true, as a general rule of law, that employes take the ordinary risks incident to their employment. And this applies to children if they are able to understand clearly the risks and dangers. If they are not able to understand the risks and dangers, then they should be informed and apprised of them." The jury had before this been told that "if a child has mind enough, discretion enough, to fully appreciate the danger, then the caution would not be required." And, again: "If a child has mind and discretion sufficient to see and fully appreciate the danger to which he is exposed, then the law requires that he shall use that capacity in order that he may recover." We are satisfied from a careful examination of the whole charge that the jury must have understood that if this service was within the scope of the plaintiff's employment, and the danger attending it was obvious and comprehensible to him, he took the risk of it, and was not entitled to recover. No exception was taken to the charge as given. Judgment affirmed.

ELLIOTT et al. v. JENKINS.

(Supreme Court of Vermont. Caledonia. May Term, 1896.)

DEDICATION—EQUITIES OF ABUTTERS—DEEDS—EVIDENCE.

1. Defendant purchased land, and, before receiving his deed, arranged with his grantor for the dedication of a strip thereof for a street. This was done. The balance of the purchase was deeded to defendant, and thereafter the dedication was accepted. For 15 years, with the acquiescence of the grantor and orators, who purchased from grantor land including the dedicated strip, defendant exercised all rights of an abutter over the fee to the center of the street, and was so doing under circumstances indicating a claim of right when orators took their deed. Orators paid nothing for the fee to the street, and made no investigation as to defendant's rights. *Held*, in a suit by orators to enjoin defendant from using the street except as one of the public, that, irrespective of who had the legal title, defendant's equity was superior, and should prevail.

2. A clause in defendant's deed which was made before the dedication was accepted, giving him a right of way over the land proposed to be dedicated, should be construed as designed to apply only in case the dedication was not accepted, not as a limitation of defendant's rights in the street.

3. One sued in equity by the legal owner of the fee of a street to enjoin him from use of such street except as one of the public, may prove an equitable title to such fee.

Appeal from chancery court, Caledonia county; Ross, Chancellor.

Bill by Mary T. Elliott and another against E. R. Jenkins. Exceptions to master's report were overruled, and defendant was perpetually enjoined from use of the disputed land except for highway purposes as one of the public, and he appeals. Reversed.

Bates & May, for defendant. Dunnett & Slack, for orators.

START, J. The defendant is the owner of a house and lot situated on the west side of Pleasant street and north side of Buzzell street in the village of St. Johnsbury. The lot on the south side of Buzzell street is owned by one Leeth, and the orators' lot is situated at the west end of Buzzell street and the defendant's lot. Prior to May, 1871, and before Buzzell street was laid out, and the land over which it passes dedicated to the public for a street, Luke Buzzell owned all of the land now owned by the orators and the defendant. In May, 1871, the defendant purchased of Buzzell his lot and that part of the land over which Buzzell street is laid which is in controversy, went into possession of the same, and has ever since been in the possession and occupancy of his lot and of the margin of the street abutting thereon, so far as it is possible to have possession of land within the limits of a street. After the defendant purchased and went into possession of his lot and the land in dispute, and while Buzzell owned all of the land now owned by the orators, and a lane about 20 feet wide on the south side of the land purchased by the

defendant, leading from Pleasant street to the orators' lot, and before the defendant had taken his deed, the defendant agreed with Buzzell to give a sufficient amount of his land, along his southern boundary adjacent to Buzzell's lane, to make, with the lane, a street three rods wide, with the understanding that Buzzell was to give the lane, and make the whole into a street. This agreement and understanding was carried out, and the land thus given is now Buzzell street, and the land in controversy is the margin of the street abutting on the defendant's lot, and a part of the land so given by the defendant. Subsequently, and before the land so given had been accepted by the village of St. Johnsbury, Buzzell deeded to the defendant the land so purchased, except that portion which had been set apart for a street. The master refers to the orators' deed, and makes the question of whether they have the record title to the land in dispute depend upon the construction the court gives to the deed.

Without construing this deed, or determining who has the record title, we shall, for the purpose of discovering whether the orators are equitably entitled to the relief prayed for, assume that they have such title. The defendant gave the land in question for a public street, and with the knowledge and acquiescence of the orators and the grantors in their chain of title has, for more than 15 years, been in the possession and occupancy of the same, subject only to the rights of the public therein. During this time he has exercised the rights and control of an abutter, owning the fee in the land to the center of the street; and at the time the orators took their deed he was in the possession and exercise of these rights, under circumstances which would indicate to an observer that he was doing so under a claim of right. The orators now seek to dispossess him, and prevent a further exercise of these rights by the extraordinary remedy of injunction. Will a court of equity, under these circumstances, by mandatory injunction, dispossess and prevent the defendant from further exercising the rights of an abutter and equitable owner of the fee in the land he purchased and dedicated to the public for a street, after he has been in the exercise of such rights for more than 15 years, with the knowledge and acquiescence of the orators and grantors in their chain of title? Before doing so, it becomes important to inquire whether the orators' equities are superior to those of the defendant. It does not appear that the orators, in purchasing this lot, paid any valuable consideration for the fee of the land over which the street is laid; that they made any inquiry respecting the defendant's rights, or examined any records; that they took their deed, relying upon any deeds, records, or representations respecting the ownership of the fee in the land within the limits of the street; or that they relied upon or anticipated any bene-

ficial use of the street that was not common to the general public. Before one pays a valuable consideration to secure a conveyance of a public street, from one not an abutter thereon, for the purpose of a beneficial use therein, distinct from the general public, common prudence and fairness require that he inquire respecting the rights of lot owners abutting thereon, who are apparently in the exercise of the rights of abutters, owning the fee in the land to the center of the street. One not an abutter on a street in a city or village has no reasonable ground to anticipate a beneficial use of the street, distinct from the general public, by reason of his owning the fee in the land over which the street is laid. In 3 Kent, Comm. 433, it is said by Chancellor Kent that "the presumption is that owners of the land on each side go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public." In the same section he says: "The established inference of law is that a conveyance of land bounded on a public highway carries with it the fee to the center of the road as a part and parcel of the grant. The idea of an intention in a grantor to withhold his interest in a road to the middle of it, after parting with all his right and title to the adjoining land, is never to be presumed. It would be contrary to the universal practice." It has been held that when a person, owning the fee in the land over which a street passes, and an adjoining lot, conveys the lot, the land to the center of the street is also granted, unless specially reserved. *City of Dubuque v. Maloney*, 9 Iowa, 450; *Low v. Tibbetts*, 72 Me. 92; *Winter v. Peterson*, 24 N. J. Law, 524; *Paul v. Carver*, 26 Pa. St. 223. In cities and villages, it is important that owners of lots abutting on streets have the free and uninterrupted use of the margin of the street for the beneficial use and enjoyment of their lots, subject only to the easement of the public. If property rights in a street can be exercised by a grantor of a lot, he may deprive his grantee of the means of entry into and exit from his house at points most convenient, and deprive him of lawns, shade trees, awnings, light, air, and many privileges that, by the general understanding of the people and extensive and immemorial practice, he is entitled to. All these can be prohibited, to a greater or less extent, by the original owner, if his right of property remains after parting with his lots. In this state it is held that, where one owns land abutting on a highway, the legal presumption, in the absence of evidence showing the fact to be otherwise, is, that such landowner owns to the middle of the highway; and when one conveys land abutting on a highway in which he owns the fee, the law presumes that he intended to convey to the middle of the highway, and will give the deed such effect, unless the language used by the grantor in his deed shows a clear intent to

limit the grantee to the side of the highway. *Buck v. Squiers*, 22 Vt. 489; *Marsh v. Burt*, 34 Vt. 289; *Morrow v. Willard*, 30 Vt. 118; *Maynard v. Weeks*, 41 Vt. 619. These principles would doubtless be controlling in this case if, before the defendant took his deed from Buzzell, the village of St. Johnsbury had accepted the land dedicated, and worked and opened it for public travel. But, notwithstanding this had not been done, these well-recognized rules of construction, the immemorial custom, the general understanding among the people, should be considered by a court of equity, in connection with the acts of the orators and the grantors in their chain of title, in ascertaining what the orators understood and relied upon, and had a right to rely upon, respecting the defendant's rights when they took their deed, and in determining whether they are equitably entitled to the relief prayed for. At the time the defendant took his deed, he and Buzzell had agreed to dedicate the land for a street, and had set it apart for that purpose. It is clear that they expected that the village would accept it, and the same would become a public street; but, inasmuch as the land had not been accepted, and the same was not then a public street, they provided in the deed that the defendant should have a right of way over the land they had set apart for, and expected would be, a public street. It would seem that this clause was inserted in the deed for the purpose of securing to the defendant a right of way in case the village did not accept of the dedicated land, and not with a view of limiting the rights of the defendant as an abutter on the land in case it was accepted and opened as a public street, as the parties then intended and expected it would be. If the land had been accepted for a street, there would have been no occasion for inserting this clause in the deed. The acts of the parties indicate that such was the object and purpose of giving the defendant a right of way over the dedicated land. The defendant, after he took his deed, continued in the possession and occupancy of the land the same as before; and, in 1874, while Buzzell owned the orators' lot, the trustees of the village worked the land for a street, and opened it for public travel. The orators and the grantors in their chain of title have acquiesced in the defendant's occupancy and use of the margin of the street adjacent to his lot for more than 15 years, without questioning his right to do so, or attempting to restrict his rights as owner of a lot abutting on the street by reason of the clause in his deed from Buzzell giving him a right of way, and have thereby given a reasonable, practical, equitable, construction to the deed and the contract made between the defendant and Buzzell, whereby the land was dedicated to the public for a street. In *Jackson v. McConnell*, 19 Wend. 175, it is held that the acquiescence in a boundary line is evidence of an agreement to abide by it,

and, if continued sufficiently long to give title by prescription, is conclusive evidence. It is unnecessary to decide whether the defendant has a clear, legal title to the land in question. He has an equitable title, and his equities are superior to those of the orators. When the orators took a deed of their lot they knew, or ought to have known, that the land in question had been set apart for a street; that it had been worked and was being used as such, and that the defendant's lot abutted thereon. They might well anticipate that he claimed the right of an abutter, owning the fee to the center of the street; and, doubtless, by inquiry, would have learned that he claimed and had exercised such rights ever since he purchased the land, and dedicated it to the public for a street. We think they are chargeable with knowledge of such facts as they might have ascertained by reasonable inquiry. The situation and surroundings were such that they were under a duty to inquire respecting the defendant's rights and the character of his possession and occupancy. The presumption was that the defendant owned the fee in the land over which the street passed to the center of it; but, notwithstanding this presumption, the orators elected to take the deed under which they claim title without making inquiries that were suggested by the situation, surroundings, and the character of the defendant's occupancy, and without making the inquiries they naturally would make, if they expected any beneficial use of the street, distinct from the general public. Aside from such use as was common to the public, they could not have reasonably expected to make any use of the title to the land over which the street was laid, unless for the purpose of annoyance to the lot owners. We think the defendant is the equitable owner of the fee in the land in question; that the orators took their title to the street, if any they have, under such circumstances that it must be held that they knew, or ought to have known, that the defendant was such owner, and was, and had been for more than 15 years, in the exercise and enjoyment of all the rights and privileges of an abutter, owning the fee in the land to the center of the street; that it would be inequitable to dispossess him, and prevent him from a further exercise of these rights and privileges; and that the orators are not equitably entitled to the relief prayed for. The orators having brought the defendant into a court of equity, his equitable title and his possession and occupancy under it are available to him in defense; and for this purpose the testimony received by the master, subject to the orators' exception, was properly admitted. *Sheldon v. Preva*, 57 Vt. 263; *Holmes v. Caden*, Id. 111; *Griffith v. Abbott*, 56 Vt. 356. The decree of the court of chancery is reversed, and cause remanded, with mandate to enter a decree dismissing the orators' bill, with costs.

McKEOUGH'S ESTATE v. McKEOUGH.

(Supreme Court of Vermont. Chittenden. May Term, 1895.)

WILLS—DEVISE OF "HOME PLACE"—TRIAL BY COURT.

Testator occupied a house on one corner of a lot on which were other buildings owned by him and occupied by tenants. The corner on which testator's house stood was inclosed on one inner side by one of the other buildings and a fence extending therefrom, and on the other by a chicken yard used by him and extending to such fence. The balance of the lot was used by the tenants indiscriminately, but testator used a wood shed thereon, and used the basement of one of the leased houses for a shop. Some of the tenants used an outbuilding on testator's inclosure, and the tenants' children played in such inclosure. The only wagon entrance to the lot available to testator was on the premises used by the tenants, and testator frequently piled lumber, etc., near such entrance. He obtained the entire lot at a single purchase. *Held*, that a devise of a life estate in "my home place where I now live" carried only the house occupied by testator and the inclosure about it, with the use of the wood shed, chicken yard, and wagon entrance as enjoyed by testator.

Thompson, J., dissenting.

On Rehearing.

1. Where a devise of "my home place" is not applicable indifferently to several tracts, but is doubtful only as to its scope, a finding of the county court as to what passed thereby is an interpretation of the devise, not a finding of intent as an extrinsic fact, though extrinsic evidence was heard as to such interpretation.

2. Such finding, on a trial by the court, is a conclusion of law reviewable on appeal, not a finding of fact.

Thompson and Start, JJ., dissenting.

Exceptions from Chittenden county court.

Appeal by John McKeough from a decree in probate construing the will of Francis McKeough. There was a decree that by the clause of the will in question he took the use of the entire property, and Francis McKeough's estate excepted. Reversed.

W. H. Bliss and R. E. Brown, for exceptant. H. S. Peck and Elihu B. Taft, for the estate.

MUNSON, J. The testator's will contains the following clause: "After the decease of my said wife, I give to my son, John McKeough, the use, during his natural life, of my home place where I now live, on the west side of Champlain street, in said Burlington." We are called upon to determine what property is covered by the expression "my home place where I now live." The testator lived in a house which stood upon the corner of a lot on which there were three other buildings, leased by the testator, and occupied as dwellings. He obtained the lot at a single purchase in 1850, and held it without interruption until his death. At the time of his purchase there was a small house on the northeast corner of the lot, which he soon removed to the rear of the lot, where it has since stood. Soon after this he moved

a building upon the northeast corner, which he fitted up as a dwelling, and lived in during the remainder of his life. Some years later he moved a building onto the southeast part of the lot, and finished it into two tenements. A few years before his death he moved into the space between this double tenement and the house on the rear of the lot another building, which he used for two or three years as a barn and shop, and then turned into a tenement. From this time until his death he had a shop in the basement of the southerly tenement in the double building. The double tenement above mentioned was so located as to leave a passage of seven feet between it and the house occupied by the testator, and a passage of sufficient breadth for teams between it and the south line of the testator's land. A fence, which was substantially in alignment with the north side of this double tenement, extended from its northwest corner to the front line of certain structures occupied by the testator. These consisted of a chicken house and chicken yard, which together extended from the north line of the testator's land to the line of the fence above described, and a coal and wood shed which adjoined the chicken yard, but was south of the line of the fence, and in the rear of the double tenement. It will be seen by this description that the house occupied by the testator stood in an inclosed yard, the south line of which was formed by the side of the double tenement and the fence, and the west line by the rear walls of the chicken house and yard. The only structure occupied by the testator outside of this was the coal and wood shed, which formed a continuous row with the chicken house and yard. The place inclosed as above stated could be entered from the street by a narrow gate between the testator's dwelling and the double tenement, and through a gate in the fence above described, located at the northwest corner of the double tenement. A necessary outbuilding, used in common by the testator and the occupants of the north part of the double tenement, stood in this inclosure. A cess-pool, connected with the testator's house and with both parts of the double tenement, was located under the fence already described. The occupants of the north part of the double tenement hung out their washings in this yard, and children from all the tenements were allowed to play there. Teams were never driven into it. The wagon entrance for all the buildings was through the passage between the double tenement and the south line of the testator's land. The testator worked up his wood and deposited his ashes in the open space between his wood shed and the double tenement. He frequently piled considerable quantities of lumber and other material along the south and west lines of his land, near the two rear tenements. There was no other division of the lot than that above indicated, and no

particular parts of the vacant space around the tenements were assigned to the different occupants.

The question presented suggests a consideration of the word "homestead." "Stead" originally meant place or spot. This meaning is now obsolete, except as preserved in compound words. Webster defines "homestead" as the home place. It is a house occupied by its owner as a dwelling, with the outbuildings and land used in connection with it. It is that part of a man's premises where he lives and has his home. Except as modified by limitations of value and questions of intent, the legal use of the term is the same as the popular use. So, in determining what a devisee will take under the expression "my home place where I now live," it will be well to consider what can be held as a homestead under the statutes. It is said to be a general rule that buildings rented to others cannot constitute a part of the lessor's homestead, even though erected on the same lot with his dwelling. *Pryor v. Stone*, 70 Am. Dec. 350, note. It is held that when one part of a double house, having distinct entrances, but a common yard, is occupied by the owner, and the other part let to a tenant, only that part occupied by the owner can be held as his homestead. *Tiernan v. Creditors*, 62 Cal. 236; *Dyson v. Sheley*, 11 Mich. 527. In the first of these cases the statute protected the dwelling house in which the claimant resided; but, although there was only one building, the court said the claimant "did not reside in the structure which was occupied by his tenants." In the second case, the statute exempted a limited quantity of land, with a dwelling house thereon and its appurtenances, owned and occupied by the debtor. Here the occupancy of the yard by the debtor and his tenants was in some respects like that had by the testator and the occupants of his double tenement of the space immediately in the rear of their houses. A penstock used by both families was located in the middle of the lot. A necessary outbuilding used by both stood entirely on the rented half. The court considered that this use of the rented part of the yard by the owner did not indicate a right therein predominant over that of the tenant, and did not render the whole of the yard exempt. A still greater similarity to the facts of the present case is found in *Ashton v. Ingle*, 20 Kan. 670. There the debtor owned an L-shaped piece of ground, the branches of which abutted on different streets. The lot was fenced in one inclosure, but for convenience the court treated it as divided into two parcels. On the south parcel were the debtor's dwelling house and outbuildings. On the north parcel were two small houses occupied by his tenants. A clothesline stretched from one of the tenements onto the south parcel, and was used jointly by the occupants of both parcels. A walk extended from the

south parcel across the north parcel, which was sometimes used by the occupants of the south parcel. No importance was attached to this incidental use of the north parcel by the owner. The court considered that when houses were rented with the intention that they should become the homes of independent families, and they in fact became such homes, they could not longer be regarded as a part of the lessor's home, and confined the debtor's homestead to the south parcel. Mr. Thompson, in his work on Homesteads, deduces from the cases the rule that houses built for the purpose of being rented to tenants, and yielding to the owner a revenue separate from any use immediately connected with his dwelling, form no part of his homestead.

The use of a part of the basement of the double tenement by the testator as a shop cannot save the building from the operation of the rule above presented, as far as it may be considered applicable to a case like this. It is held that the letting of rooms in a building primarily used as the owner's dwelling will not deprive the building of its character as a homestead. *Pryor v. Stone*, 70 Am. Dec. 350, note. It must also be held that the owner's maintenance of a shop in a house primarily used for renting will not make the building a part of his homestead. Nor do the facts that the testator's only entrance for teams was in common with that of his tenants, and that he frequently deposited loads at points easily accessible from this common way, require that the whole property be considered his home place. This use was not inconsistent with a complete enjoyment of that portion of the property by others, in everything essential to an independent residence. The decisions above referred to were made in controversies concerning the rights of debtors; and, while they must be regarded as somewhat helpful in the construction of this devise, they are by no means necessarily determinative of it. The question here is as to the testator's intention; yet that intention is to be gathered from the language used, with such aids in applying the language as the law permits and the case affords. But, having in mind that these decisions are of use only as they throw light upon the ordinary meaning and effect of the words employed, we think the expression "my home place where I now live" can hardly be held to pass with the buildings occupied by the testator a group of tenement houses, although located upon the same lot, as determined by unity of purchase and unbroken ownership. It is true that the testator lived upon the original lot on which all these dwellings were placed, and that, if the conditions absolutely forbade its being regarded as separated into different lots, it would be necessary to consider it his home place as distinguished from other lots. But, when read in the light afforded by the character of the property, the language of the

testator seems to call for a division subordinate to that effected by the intervening lands of another. It is not necessary to every division of a lot that it be separated by erections upon the land or the exact bounds of a deed or written lease. When the testator located upon different parts of this lot separate dwellings, he gave to those parts the character of different house lots, notwithstanding the unity of ownership and the lack of definite dividing lines. But he made a more marked separation of the lot into two parts by the different uses to which he devoted it. One part he fitted up to occupy as his home. The other part he fitted up for the purpose of renting. This distinction was emphasized by the fence which completed his private inclosure,—the only fence upon the tract. The house in which he lived, and the buildings prepared for use in connection with it, with his inclosed yard and his right of convenient access, fully answer the description of a home place. We think the language of the will points to that which the testator occupied as a home, to the exclusion of that from which he derived his income.

As we hold for the estate upon the facts reported, we assume, without consideration, the competency of all the testimony received against its objection. Judgment reversed, and judgment that the appellant take under the will the use of the house in which the testator lived, and of the chicken house and yard and coal and wood shed used by the testator, together with the yard, separated from the other portion of the premises by the fence, in connection with the chicken house and yard, and the passageway between the house above mentioned and the double tenement, with a right of access for teams to the space in the rear of the house as enjoyed by the testator; to be certified, etc.

THOMPSON, J., dissents.

On Rehearing.

MUNSON, J. This case has been heretofore disposed of upon the theory that the decision of the county court involved a matter revisable in this court, and it is now before us upon a rehearing of that question. The case was tried below by the court, and the appellant contends that the decision of that court was no more than a finding of fact as to the testator's intent, and was therefore final.

The county court received certain evidence from which it found the facts recited in the former opinion. Extrinsic evidence is ordinarily received to aid the court in arriving at the testator's intention by a construction of the terms of his will, but it is sometimes received to prove the testator's intention as an independent fact. This is the case when the words of the will "are applicable indifferently to more than one person or thing,"

and so present nothing to determine which person or thing was intended. But, when the extrinsic facts disclose but one person or thing that adequately answers the description given, this evidence of intention cannot be received. The disposition must then be in accordance with the intention expressed in the will, whatever the testator's actual intention may have been. If the county court had been called upon to determine which of two parcels the testator intended to devise by language which applied with equal accuracy to each, the appellant's contention might be sustained. But we think the inquiry in this case cannot properly be treated as of that nature. The question to be determined was whether the whole or a part only of the testator's premises on the west side of Champlain street was covered by a devise of his home place. The testator had but one home place, and the only office of the extrinsic evidence was to show of what that place consisted. The evidence received raised no question of intent independent of construction. The intent was to be derived from the language of the will, construed in the light of extrinsic facts. So the court's ascertainment of what passed under the devise was a determination of construction, and not the mere finding of a fact.

But the appellant contends that the nature of the inquiry was such that there can be no revision of the finding, even though it involved a construction of the will. This claim is based upon what is asserted to be the rule of procedure in jury trials; and we are referred to authorities which say that, when the meaning of a writing is to be gathered from a consideration of both its language and the collateral facts, the whole matter is necessarily left to the jury, and the entire inquiry becomes one of fact. But we do not consider it necessary to inquire what the procedure should be when a question of this nature is to be determined in a jury trial. This inquiry was had by the court, and the nature of the inquiry did not convert that tribunal into a mere trier of fact. It ascertained the facts to aid it in the exercise of its judicial function, and then gave its interpretation to the testator's language. It is evident that the court below had this understanding of its decision. It considered the question to be "what property is included in the terms 'my home place where I now live,'" and received evidence of the situation and use of the property "to determine the construction to be given to these words." It found and stated the facts, and "on these facts * * * adjudged that the appellant, by this clause of the will, took the use of the entire property." It did not dispose of the inquiry as one of fact, but as one of construction. Order of stay of certificate vacated.

THOMPSON and START, JJ., dissent.

STATE v. McMILLAN.

(Supreme Court of Vermont. Caledonia. Oct. Term, 1896.)

GAMING—BUCKET SHOPS—INDICTMENT.

1. An indictment under V. S. § 5128, which alleged that defendant kept and caused to be kept "a bucket shop, to wit, an office, in which said bucket shop, to wit, said office, was then and there conducted and permitted the pretended buying and selling of stocks, bonds," etc., was bad, though it followed the words of the statute, since it at most only by inference charged defendant with conducting or permitting the business that made said office a bucket shop.

2. V. S. § 5130, provides that it shall not be necessary, in order to violate section 5128, prohibiting the keeping of bucket shops in which is carried on the pretended buying or selling of stocks, etc., that both buyer and seller agree to do any of the acts therein prohibited, but that the offense shall be complete against one pretending or offering to sell or to buy, whether the offer be accepted or not; and that any one communicating, receiving, or displaying such offer so to buy or to sell, or any quotations of the prices of such property, with a view to such transaction, is an accessory, punishable as one who violates section 5128. *Held*, that an indictment under section 5130, which made no allegation that the things complained of were done with a view to transactions in a place the keeping of which is prohibited by section 5128, was bad.

Exceptions from Caledonia county court; Ross, Chief Judge.

William H. McMillan was indicted for keeping and causing to be kept a bucket shop. A demurrer to the indictment was overruled. The defendant excepted, and the case was passed to the supreme court before final judgment, as provided by V. S. § 1629. Reversed.

The substance of the indictment is as follows: "That William H. McMillan, of St. Johnsbury, in the county of Caledonia, on the 1st day of June, A. D. 1896, and at divers other times and days, both before and since said 1st day of June, at St. Johnsbury, in the county of Caledonia, aforesaid, did keep and cause to be kept, and did aid, abet, and assist divers other persons to keep and cause to be kept, a bucket shop, to wit, an office, in which said bucket shop, to wit, said office, was then and there conducted, and permitted the pretended buying and selling of stocks and bonds of divers corporations, and the pretended buying and selling of petroleum, cotton, grain, provisions, pork, and other produce, on margins and otherwise, there being then and there no intention of receiving and paying for such stocks and bonds and such petroleum, cotton, grain, provisions, pork, and other produce so sold by divers other persons to your grand jurors unknown; and * * * did then and there keep and cause to be kept, and did then and there aid, abet, and assist divers other persons to your grand jurors unknown to keep and cause to be kept, a bucket shop, to wit, an office, in

which bucket shop, to wit, said office, was then and there conducted and permitted the pretended buying and selling of such stocks and bonds of divers corporations and the pretended buying and selling of such petroleum, cotton, grain, provisions, pork, and other produce, on margins; and * * * did then and there keep and cause to be kept, and did then and there aid, abet, and assist divers other persons to your grand jurors unknown in keeping and causing to be kept, a bucket shop, to wit, an office, in which said bucket shop, to wit, said office, was then and there conducted and permitted the pretended buying and selling of such stocks and bonds of divers corporations and the pretended buying and selling of such petroleum, cotton, grain, provisions, pork, and other produce; that is to say, that he, the said William H. McMillan, did then and there keep and cause to be kept, and did aid, abet, and assist divers other persons to your grand jurors unknown in keeping and causing to be kept, such bucket shop, to wit, such office, in which bucket shop, to wit, such office, was then and there conducted and permitted the buying and selling of such stocks and bonds and such petroleum, cotton, grain, provisions, pork, and other produce, when the party buying such stocks and bonds, and such petroleum, cotton, grain, provisions, and other produce, then and there did not intend actually to receive the same if purchased, and where the party selling such stocks and bonds, and such petroleum, cotton, grain, provisions, pork, and other produce, then and there did not actually intend to deliver the same if sold,—contrary, etc. And the grand jurors aforesaid, etc., that the said William H. McMillan, on, etc., and at divers other times, at, etc., did communicate, receive, exhibit, and display offers by divers persons to your grand jurors unknown to buy and sell stocks and bonds of corporations, and petroleum, cotton, grain, provisions, pork, and other produce, on margins, without the intention of receiving and paying for such property so offered to be bought, or of delivering such property so offered to be sold; and did then and there communicate, receive, exhibit, and display statements and quotations of the prices of such stocks and bonds and such petroleum, cotton, grain, provisions, and other produce, with a view to such pretended purchase and sale as aforesaid,—contrary," etc.

W. H. Taylor, State's Atty. Bates & May, for respondent.

ROWELL, J. This indictment which is demurred to contains two counts. The first is based on section 5128 of the Vermont Statutes, and the second on section 5130. These sections, with the others under the head of "Stock Gambling," were first passed in 1888, in an act to suppress "bucket shops and gambling in stocks, bonds, petroleum, cotton, grain, and provisions." It was the intention of that act, as therein declared, to prevent,

punish, and prohibit within this state the business engaged in and conducted in places commonly known and designated as "bucket shops," including the practice commonly known as "bucket shopping" by persons, corporations, etc., who ostensibly carry on the business or occupation of commission merchants or brokers in grain, provisions, petroleum, stocks, and bonds. Although this declaration of intention is not contained in the Vermont Statutes, it may be considered in construing the sections in question. Section 5128 provides that no person or corporation shall keep or cause to be kept a bucket shop, office, store, or other place, in which is conducted or permitted the pretended buying or selling of stocks, bonds, etc., on margins or otherwise, without any intention of receiving and paying for the property so bought, or of delivering the property so sold, or in which is conducted or permitted the pretended buying or selling of such property on margins, or when the party buying or offering to buy such property does not intend actually to receive the same if bought, or to deliver it if sold.

The first count alleges that the prisoner kept and caused to be kept "a bucket shop, to wit, an office, in which said bucket shop, to wit, said office, was then and there conducted and permitted the pretended buying and selling of stocks, bonds," etc., following the words of the statute. This does not—directly, at all events—charge the prisoner with conducting or permitting the business that made said office a bucket shop. If it charges him with it at all, it is only by inference and argument, which is not enough. For aught that can properly be gathered from the count, the business may have been conducted and carried on there by others without the permission, or even the knowledge, of the prisoner. The offense created by this section is the keeping of a bucket shop, and that is what the prisoner is charged with; but, in order to be guilty of that offense, he must in some assignable way have conducted or permitted the business that made the place a bucket shop. The precedents for keeping gaming houses are instructive. After alleging the keeping of the house, they directly connect the prisoner with the business carried on therein that makes the place a gaming house, by alleging that he caused and permitted divers persons to frequent and come together there to game, and to be and remain there for that purpose, and that he procured, permitted, and suffered them there to game and play together. 3 Chit. Cr. Law, 673, and following. The first count, therefore, is bad for the reason stated, which makes it unnecessary to consider the other objections made to it.

Section 5130 provides that it shall not be necessary, in order to commit the offense defined in section 5128, that both the buyer and the seller agree to do any of the acts therein prohibited, but that the offense shall be com-

plete against a person or corporation thus pretending or offering to sell or to buy, whether the offer is accepted or not; and that a person or corporation communicating, receiving, exhibiting, or displaying in any manner such offer so to buy or to sell, or any statements or quotations of the prices of such property, with a view to such transaction, shall be deemed an accessory, and punished as provided in case of one who violates section 5128. It is upon the last part of section 5130 that the second count is based. But that section does not create a substantive offense, independent of the offense created by section 5128, which is the keeping of a bucket shop, but creates one that is accessory to it, as the section declares; and the things prohibited by the section, in order to constitute an offense under it, must be done with a view to transactions mentioned in section 5128, namely, to transactions in a place the keeping of which is there prohibited. This count makes no allegation that the things complained of were done with a view to transactions in such a place, and is, therefore, bad. Judgment reversed, demurrer sustained, indictment adjudged insufficient and quashed, and the prisoner discharged.

MANLEY v. DELAWARE & H. CANAL CO.

(Supreme Court of Vermont. Rutland. Oct. Term, 1896.)

RAILROAD—INJURIES AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—PLEADING AND PROOF—WITNESSES—CROSS-EXAMINATION—IMPEACHMENT.

1. While a person is bound to look and listen before crossing a railroad track, he is not obliged, as a matter of law, to stop for that purpose.

2. Evidence that the whistle was not sounded nor the bell rung was admissible under an averment that defendant "negligently drove and managed its locomotive."

3. Evidence that plaintiff had curvature of the spine and defective eyesight was admissible, without an allegation in respect thereto, if they resulted from the injuries specified in the declaration.

4. Where the speed of defendant's train was in issue, and defendant's witness testified that the train stopped "very abruptly" before it reached the station, it was proper to ask him on cross-examination if he had not told certain persons that the train was running desperately at the time of the accident, and, on his denial, to show that he had so stated.

Exceptions from Rutland county court; Taft, Judge.

Action by Mary Manley, by next friend, against the Delaware & Hudson Canal Company, to recover for personal injuries. Plaintiff had judgment, and defendant excepts. Affirmed.

Wm. H. Preston and Joel C. Baker, for plaintiff. Butler & Maloney, for defendant.

ROWELL, J. The defendant moved for a verdict, for that there was no testimony tending to show negligence on its part, and for that the testimony disclosed contributory neg-

ligence on the part of Higgins, with whom the plaintiff was riding at the time of her injury, and whose negligence, the defendant claimed, was imputable to her.

The motion was properly overruled as to the first ground, for, although all of the defendant's testimony and a large part of the plaintiff's tended to show that the whistle was blown and the bell rung seasonably and sufficiently, yet some of the plaintiff's tended to show the contrary, which made the question of the defendant's negligence for the jury.

We also think that the motion was properly overruled as to the second ground. For some little distance south of where the highway turns to cross the railroad, to a point 32 feet east of the center of the track at the crossing, a train cannot be seen approaching from the south. But at that point the track can be seen in that direction a distance of 503 feet. As you approach the crossing, going west, it is seen less and less, for it curves in the rock cut, the west side of which obstructs the view more and more as you advance. Higgins had a very gentle horse, which was walking slowly. Some of the testimony tended to show that the train was running rapidly, and that the whistle was not blown nor the bell rung until it was in dangerous proximity to the crossing. The defendant claims that, if Higgins had looked, he must have seen the train; and if he did look, and undertook to cross in front of it, he was negligent; and, if he did not look and listen, he was equally negligent. But the jury has found that he could not have prevented the accident if he had looked and listened. It cannot be told with any certainty whether the train was in sight or not when he reached the 32-foot point. The jury seems to have thought that it was not in sight, for if it had been, and he had seen it, he could have avoided the accident by stopping, for his horse was exceedingly reliable, to his knowledge. The defendant undertakes to demonstrate by figures that it was in sight. But the data for such demonstration are too uncertain to be reliable. The case, on the testimony, was fairly for the jury on the question of contributory negligence.

The defendant requested the court to charge that it was Higgins' duty, on approaching the crossing, to stop, look, and listen for approaching trains, and that if by doing so he could have avoided the accident, and he did not do it, he was guilty of contributory negligence, and the plaintiff could not recover. The court complied with the request, omitting the word "stop," to which omission the defendant excepted. The omission was right. A traveler approaching a railroad crossing is not bound, as matter of law, to stop in order to avoid the imputation of negligence. He is bound to make vigilant use of his sight and hearing to discover and avoid danger,—such use as a careful and prudent man would make in the same circumstances. If it is necessary for him to stop in order to do that, then he must stop; but it is for the jury to say whether it

was necessary or not. This is the general rule, although in Pennsylvania and a few of the other states it is held, as matter of law, that he must stop. *Kellogg v. Railroad Co.*, 79 N. Y. 72; note to *Ernst v. Railroad Co.*, 90 Am. Dec. 783; *Tyler v. Railroad Co.*, 137 Mass. 238; *Railroad Co. v. Hague*, 54 Kan. 284, 38 Pac. 257; 4 Am. & Eng. Enc. Law, p. 68, § 33, and notes.

The averment that the defendant so carelessly and negligently drove and managed its locomotive engine and train of cars that they struck and injured the plaintiff was sufficiently broad to let in the testimony that the whistle was not blown nor the bell rung, as that was a part of the management of the engine and train.

Testimony that, as a result of plaintiff's injuries, she had curvature of the spine and defective eyesight, was objected to, for that the declaration contains no allegation in respect of them. But, if they resulted from the injuries specified in the declaration, they could well be shown; and, if necessary to avoid a reversal, we should assume that they did so result, as the contrary does not appear.

On cross-examination of the defendant's witness Dibble, who was a passenger on the train at the time of the accident, he was asked if he had not told certain persons that the train was running desperately at the time, and denied it. In rebuttal, the plaintiff was permitted to show that he had so stated. Defendant claims that this was error, for that the witness was the plaintiff's on that point, as the defendant did not inquire of him concerning the speed of the train. But the defendant asked him if the train stopped before it reached the station, and he answered that it did, and "very abruptly," which attracted his attention. The speed of the train was a controverted question, and this answer had some tendency to show that it was not running unusually fast. Consequently, the plaintiff's inquiry of the witness was legitimate cross-examination, and the impeachment of him, in rebuttal, proper. Judgment affirmed.

BROWN v. TOWN OF SWANTON.

(Supreme Court of Vermont. Franklin. Jan. Term, 1896.)

HIGHWAYS—EXISTENCE—DEFECTS—NOTICE—NEGLIGENCE—EVIDENCE—OPINIONS—REBUTTAL—WITNESSES—EXAMINATION—CREDIBILITY—PROVINCE OF JURY.

1. Witnesses other than the town clerk may testify that there is no record of the laying out of a certain road.

2. Evidence that a certain road has been maintained by the town tends to show that it is a public highway.

3. In an action in 1895, against a town, for the death of one thrown from his wagon while driving over a sluice built in 1878, the top of which consisted of marble slabs covered with earth, it appeared that the side walls consisted of single courses of large cobble stones, originally eighteen inches apart. Plaintiff claimed that the sluice was too small, and that water

had been retained until it had flowed across the roadbed, and made a gully in the earth above the slabs; that the walls had never been relaid; and that the action of the frost had gradually crowded the walls together, until they were in some places but three inches apart. *Held*, that it was not error to admit evidence that in 1892 the stones were not more than six inches apart in places, and that witness had examined the sluice five years before the accident, and the year after it, and several times between, and found that the opening had contracted every time he looked, from first to last.

4. Nor was it error to admit evidence of plaintiff that while acting as selectman, about a year before the accident, he was told that the sluice was not sufficient to carry off water in spring.

5. Evidence that witness had seen water run on top of the sluice several times in spring, in different years before the accident, was admissible.

6. There was evidence by the person who built the sluice that, if it had remained its original size, it would have been sufficient to carry off the water; that he examined it in 1892, and found the space narrowed in places to six inches; that he had noticed the water that had accumulated; and that there was enough to float a boat almost any time in spring or fall. He was then asked whether the sluice, as it was when he examined it in 1892, was sufficient to carry off water that accumulated at any time. He answered that it was not more than half big enough. *Held*, that even if the question was objectionable, as calling for an opinion, the answer was really no more than a statement that the sluice did not carry off half the water, and could have conveyed no impression beyond that given by his other testimony.

7. Defendant claimed that one M. had dug the gully which caused the accident, and threw the dirt beside it. M. testified that he found the gully there with the water running through it, and got out a few shovelfuls of earth at one end, to lower the channel, and let the water off, but the difficulties were such that he abandoned the attempt. Plaintiff was particularly inquired of on cross-examination as to the amount of such dirt, for the evident purpose of claiming that it was sufficient to account for the gully. *Held*, that it was not error to permit him to state on redirect how far the dirt would go towards filling the gully.

8. A witness may, in the absence of proof of measurements of the pile and the excavation, give his opinion as to how far dirt piled beside a gully will go towards filling the gully.

9. The jury having viewed the sluice as it was in April, 1895, it was not error to permit a witness who had seen it both at that time and in the spring of 1893, just after the accident, to state that its condition in April, 1895, was about the same as at the time of the accident.

10. Defendant put in evidence that a year before the trial, and until shortly before the jury saw the sluice, its walls were regular and straight, and at least 12 inches apart at the narrowest point, and that they had been tampered with not long before the jury was taken there. *Held*, that it was not error to permit witnesses to give in detail, in rebuttal, the results of an examination of the sluice made during the trial, instead of confining their testimony to a statement that they had examined it enough to determine whether it had been tampered with, and found that it had not.

11. Where witnesses for defendant testified that they saw deceased as he was driving towards the sluice, and that he was driving fast, it was not error to permit a witness who saw deceased at a point nearer the sluice to testify that he was then driving slowly.

12. Where plaintiff's evidence tended to show that the insufficiency in the covering of the sluice was the direct result of a defect in the sluice of which defendant had long known, it was not

necessary for plaintiff, to entitle him to recover, to show that defendant knew of the gully, or that it had existed so long that it ought to have known of it, and repaired it.

13. Evidence that the horse deceased was driving stopped with the hind wheels of the wagon but a few inches past the gully was affirmative proof that deceased was exercising ordinary care.

14. In an action against a town for the death of one thrown from his wagon, while driving over a sluice, the top of which consisted of marble slabs covered with earth, plaintiff put in evidence that the sluice was too small, and that the water had been retained until it flowed across the roadbed, and made a gully in the earth above the slabs. The highway commissioner had gone over the road four days before the accident, and saw no water running over the road, and no sign of its having done so. *Held*, that it was for the jury to say whether defendant was negligent in having failed to inspect the road again before the accident.

15. The fact that, on the Monday before the accident, the highway commissioner was told that the sluice was frozen up, and the water running over the road, and that the speaker was going to be damaged by the water backing into his cellar, might be considered on the question of notice of a defect in the highway, rendering it unsafe for travel.

16. The fact that defendant had no reason to expect that the stoppage of the water would render the road unsafe, did not relieve it from liability for failure to exercise diligence after the defect had been developed.

17. Deceased's mother and his wife were riding together behind him, as he approached the place of the accident. The wife was produced as a witness to the occurrences at the time, but the mother was not, though she was accessible and able to appear. *Held*, that the court properly refused to charge that it was fair to infer from the failure to call the mother that the testimony given by plaintiff's other witnesses as to matters of which the mother had knowledge was untrue.

Exceptions from Franklin county court; Tyler, Judge.

Action by O. K. Brown, administrator of the estate of one Mead, deceased, against the town of Swanton, under R. L. §§ 2138, 2139, for damages to the wife and next of kin resulting from the death of plaintiff's intestate, caused by a defect in defendant's highway. From a judgment entered on a verdict in favor of plaintiff, defendant excepts. Affirmed.

D. G. Furman and H. A. Burt, for plaintiff.
R. O. Sturtevant, E. A. Ayers, Ballard & Burleson, and F. W. McGettrick, for defendant.

MUNSON, J. The testimony of witnesses other than the town clerk was admissible to establish the fact that there was no record of the laying of the road. In *Hill v. Bellows*, 15 Vt. 727, where it is held that the certificate of the town clerk is not evidence that there is no record of a conveyance, it is said that legitimate proof of that fact would be the oath of the town clerk or of some one who had examined the records.

The fact that a road is a public highway may be established by evidence that the town has recognized it as such by expending highway money in its repair. Page v. Town of Weathersfield, 13 Vt. 424. The testimony of O. K. Brown that this road had been

maintained by the town was evidence tending to show that it was a public highway.

Plaintiff's intestate was injured by being thrown from his wagon while driving over a sluice, the top of which consisted of marble slabs covered with earth. Plaintiff claimed that this sluice was insufficient in size, and that the water had been retained until it had flowed across the roadbed, and made a gully in the earth which covered the slabs. The theory of the defense was that the excavation had been made in such a manner and at a period so recent that the town was not liable because of it. It appeared that the sluice was built in 1878; that the side walls consisted of single courses of large-sized cobble stones; and that, as originally laid, the space between the walls was about eighteen inches. The plaintiff claimed that the walls had not been relaid, and that the action of the frost from year to year had gradually crowded them together, until they were in some places but three inches apart. It was clearly competent for the plaintiff to support his evidence as to the situation of the stones at the time of the accident, by showing a natural movement which would account for their being in the situation claimed. It was therefore proper to show by the witness Rood that he examined the sluice in 1892, and that the stones were then not more than six inches apart in some places; and by the witness Hislop that he examined the sluice five years before the accident, and the year after it, and several times between, and that he found the opening had contracted every time he looked, from first to last.

In view of the relation which was claimed to exist between the previous condition of the sluice and the excavation which caused the accident, it was proper to show that the town had knowledge of this previous condition. It is true that notice is not necessary to make a town liable for an insufficiency which exists through its fault; but in this case it was clearly permissible to prove notice, to show that the town was in fault. This made admissible the testimony of O. K. Brown that while acting as first selectman, about a year before the accident, he was told that the sluice was not sufficient to carry off the water in the spring. The possession of this knowledge would bear upon any claim that the injury to the covering of the sluice had occurred so recently that no liability attached. The town would be liable for a defect in the covering of the sluice, although too recent to have been known, if it was the natural and probable result of a previous condition as to which the town was in fault.

The plaintiff was also entitled to show that this contracted condition of the sluice had existed so long, and produced such results, that the town ought to have known of it, if it did not. To this end, it was proper to show by Truman Mead, Jr., that he had seen

the water run on top of the sluice several times at the spring season, in different years prior to the accident.

The witness Rood, who built this sluice, testified without objection that, if it had remained the size it was built, it would have been sufficient to carry off the water, and, as above held, was properly permitted to testify that he examined it in 1892, and found the space narrowed in some places to six inches, and also testified without objection that he had noticed the water that had accumulated there, and that there was enough to float a boat most any time in the spring or fall,—two or three feet deep. He was then asked, under exception, whether the sluice, as it was when he examined it in 1892, was sufficient to carry off the water that accumulated there at any time, and replied that it was not more than half big enough. It is claimed that this inquiry was objectionable, in that it called for the opinion of the witness upon a question of sufficiency. The question was fairly limited by its connection to the seasons of accumulation respecting which the witness had testified, and his testimony was in terms sufficiently general to cover all the years during which the trouble had existed. In view of this, it may perhaps fairly be claimed that the question did not call for an opinion, but for a statement in another form of a fact to which the witness had already testified. However this may be, we think the answer as given was really no more than a statement that the sluice did not carry off half the water, and could have conveyed to the jury no impression beyond that given by his previous testimony received without objection. Harm cannot be predicated of an opinion which goes no further than what the witness has just presented of his own knowledge, in the nature of actual demonstration.

Defendant claimed that Truman E. Mead dug the trench which caused the accident, and threw the dirt beside it. Mead testified that he found the gully there, and the water running through it, and got out a few shovelfuls of earth at one end, with the idea of lowering the channel, and letting off the water, but that the difficulties were such that he abandoned the attempt. The witness Brown was particularly inquired of on cross-examination as to the amount of this dirt, with the evident purpose of claiming that the pile was sufficient to account for the excavation. The witness was then permitted to state on redirect how far the dirt would go towards filling the gully. This fact was proper to meet the purpose of the cross-examination, and the manner of proving it was not in violation of the rule respecting opinion evidence. In the absence of proof of measurements of the pile and the excavation, no description of the two could enable the jury to determine whether the dirt was sufficient to fill the hole, and the judgment of the witness might properly be taken.

The jury having viewed the sluice as it was in April, 1895, and the witness Brown having seen it both at that time and in the spring of 1896, just after the accident, it was not error to permit him to state that its condition in April, 1895, was about the same as its condition at the time of the accident. It was proper to supplement the examination of the jury with direct evidence of the fact that the condition of the sluice remained unchanged. It was not necessary that the jury be left to determine the fact solely by comparing what they had seen with the description given of its previous condition. It is impracticable, and often impossible, to describe conditions so accurately and minutely as to negative the occurrence of a change with the same force that attaches to the statement of the observer.

The defendant claimed, and introduced evidence tending to show, that a year previous to the trial, and until shortly before the jury saw the sluice, its walls were regular and straight, and at least 12 inches apart at the narrowest point, and that they had been tampered with by some one not long before the jury was taken there. To meet this evidence, the witnesses Clark and Mason were permitted to give in detail the results of an examination of the sluice made during the trial. The evidence was objected to as not proper rebuttal; and it is now urged in support of the objection that their testimony should have been confined to a statement that they had examined the sluice enough to determine whether it had been tampered with, and found that it had not. But we think the testimony might properly embrace such details as would be likely to satisfy the jury that the witnesses were not mistaken in regard to the main fact. The fact that such details would have been pertinent and important in the opening did not require their exclusion in rebuttal. We have not been furnished a copy of this testimony, and must dispose of the matter upon what is shown by the exceptions. It appears that the witnesses, after stating that they removed the dirt which covered the slabs, and then took up the slabs, were permitted to describe the manner in which the stones of the side walls were imbedded in the earth, and to give a large number of measurements of the space between the side walls, showing the irregular position of the stones. This clearly tended to disprove a part or all of the testimony of the defendant above stated. We cannot say that the details were more than might properly be received to give force to the testimony.

The defendant having introduced witnesses who testified that they saw the deceased as he was driving towards the place of the accident, and that he was driving fast, it was not error to permit the plaintiff to show by Miss Butterfield, who lived at a point nearer the place of the accident, and saw deceased as he was passing her house, that he was then driving slow.

We have not been furnished with the testi-

mony of Friott, referred to in the exceptions, and nothing is disclosed by the exceptions themselves that enables us to pass upon the propriety of the testimony received in rebuttal of his statements.

The motion to direct a verdict for the defendant was properly overruled. The first ground alleged erroneously assumes that the plaintiff could not recover without showing that the town knew of the existence of the gully, or showing that it had existed so long that the town ought to have known of it, and repaired it. The case presented was not that of an unforeseen defect arising without fault of the town. The plaintiff's evidence tended to show that the insufficiency in the covering of the sluice was the direct and natural result of a defect in the sluice, of which the town had long had knowledge. This view disposes also of the second ground stated in the motion, as well as of the first request to charge relied upon in argument.

The claim that there was no affirmative proof that the deceased was in the exercise of ordinary care was incorrect. The exceptions refer to the testimony of Truman E. Mead and Hattie Mead, as bearing upon this point. The testimony of Hattie Mead has not been furnished us, but that of Truman E. Mead certainly disclosed circumstances which pointed to the exercise of proper care. The fact that the horse stopped with the hind wheels of the wagon but a few inches past the gully was evidence tending to show that the deceased was driving carefully.

The court properly refused to instruct the jury that if the highway commissioner went over the road four days before the accident, and saw no water running over the road, and no sign of its having done so, the town was not negligent in failing to go over the road again before the time of the accident. Looking at the case with reference to the washout alone, it was for the jury to say whether the town should have known of the defect under the circumstances.

Truman Mead testified that, on the Monday before the accident, he told the highway commissioner that the sluice was frozen up, and the water running over the road, and that he was going to be damaged by the water backing into his cellar. It was not error to refuse an instruction that this was not notice of any defect in the highway rendering it unsafe for travel. The town could not claim immunity on the ground that its knowledge did not extend to the actual cutting of the gully. This complaint, although made with reference to private damage, informed the authorities of a condition of things which might be expected to result in an unsafe culvert; and, having regard to the gully alone, the question of its diligence was to be considered with reference to this information.

The defendant requested an instruction that if the jury found the sluice was sufficient for carrying away such water as would naturally and ordinarily run to it, and that its suffi-

ciency was only impaired by its freezing up in the winter, the town could not be held responsible for such freezing, nor liable for the happening of the accident, unless the town officers, as reasonably careful and prudent men, had reason to expect that, as a result of such freezing, the road would be rendered insufficient and unsafe, and unless it was so rendered insufficient and unsafe. This request is defective in at least one respect. It is not true that, if the town had no reason to expect that the stoppage of the water would render the road unsafe, it could not be liable for the accident. If the stoppage of the water did produce an insufficiency of the culvert which rendered it unsafe, it was the duty of the town to learn of the defect, and repair it within a reasonable time, even though it may not have had reasonable cause to expect such a result. The fact that it had no reasonable cause to expect such a result would have its bearing upon the question of diligence when the defect was developed, but would not relieve it from the duty of prudent supervision and reasonable promptitude, nor from liability for any lack in this respect.

Mrs. Truman Mead, the mother, and Mrs. Ella Mead, the wife, of the intestate, were riding together in another vehicle behind the intestate as he approached the place of the accident. The wife was produced as a witness to the occurrences of the evening, but Mrs. Truman Mead was not, although she was accessible and able to appear. The court was asked to instruct the jury that, in view of all the testimony, it was fair to infer from the failure to call Mrs. Truman Mead that the testimony given by the plaintiff's other witnesses to matters concerning which Mrs. Truman Mead had knowledge was untrue. The instruction was properly refused. The failure to call Mrs. Mead may have been a circumstance proper for the jury to consider, but, if the defendant was entitled to any charge in regard to it, it certainly was not entitled to the charge asked. If it is ever fair to assume from the failure to produce one of two favorably disposed witnesses that the testimony given by the other is false, it must be in view of a variety of circumstances which it is the province of the jury to pass upon. A charge in the language of the request would have assumed that certain features of the testimony could be viewed only in one way. Judgment affirmed.

MCNEAL PIPE & FOUNDRY CO. v. INMAN et al.

(Supreme Court of Vermont. Rutland. Oct. Term, 1896.)

GARNISHMENT—JOINT DEBT.

Defendants, having a city contract, and lacking means to perform it, agreed with one F. to form with him a corporation into the capital of which they would put, among other things, such contract. Defendants and F. performed the contract as partners, F. contributing the necessary funds, and before the completion of the

work the corporation was organized, and the contract assigned to it. *Held*, that the city never became liable to defendants alone, but to the corporation, or to defendants and F. jointly, and hence, irrespective of notice to the city of the assignment, it could not be charged by trustee process as a debtor of defendants alone.

Exceptions from Rutland county court; Taft, Judge.

General assumpsit by the McNeal Pipe & Foundry Company against Inman Bros., in which trustee process was issued against the city of Rutland. There was judgment discharging the trustee on a hearing on the report of a commissioner, and plaintiff excepted. Affirmed.

Edward Dana, for plaintiff, Frank D. White and Henry L. Clark, for defendants.

ROWELL, J. The defendants contracted with the city of Rutland, the trustee, for laying water pipe. They had not sufficient means to enable them to perform the contract, but expected to obtain means, as they subsequently did, but the city did not know it. After the contract was made, but before work was begun under it, they induced Mr. Foote to join them in the undertaking, and to advance the necessary means, on certain terms as to sharing in the profits. To that end the defendants and Foote agreed to organize a corporation consisting of themselves, to be called the Inman Brothers Construction Company, with a capital of \$75,000, of which the defendants were to put in \$50,000 in tools, machinery, etc., and the good will of their business, including the contract with the city and other contracts, and Foote was to put in \$25,000 in cash, for which he was to be secured by the capital stock of the corporation and the control of its finances; and he paid in that amount accordingly from time to time, commencing before the work began. Although the contemplated corporation was not formed for some time, yet immediately upon the making of said last-mentioned agreement the defendants and Foote began to act as partners under the proposed corporate name, and continued so to act until the organization of the corporation a short time before the work in question was completed, when they transferred all the business to it, including the contract with the city. The funds thus contributed by Foote, and the remittances received from New York in the name of the construction company, were used to pay for labor and materials in performing the contract, and without such contribution and remittances the contract could not have been performed. Although the contract was originally between the defendants and the city, yet it was wholly performed by the defendants and Foote as partners, and by the corporation, of which they were the sole members. Consequently, the entire indebtedness of the city for the performance of the contract belongs to them or to the corporation, and cannot be attached by trustee process as the property of the defendants. The city

never became indebted to the defendants alone, but to them and Foote jointly, or to the corporation, and they or it could maintain an action against the city in their or its name. This being so, it is unnecessary to inquire as to the sufficiency of the notice of assignment, for no notice was necessary. This holding is fully sustained by *Bartlett v. Woodward*, 46 Vt. 100, one phase of which is almost precisely like this case. Judgment affirmed.

McKINDLEY v. DREW.

(Supreme Court of Vermont. Caledonia. Oct. Term, 1896.)

FRAUDULENT REPRESENTATIONS — EVIDENCE — MEASURE OF DAMAGES — WITNESSES.

1. In an action to recover for alleged fraudulent representations made by defendant to induce plaintiff to take a policy of life insurance, it was competent for plaintiff to show his own ignorance of life insurance and defendant's familiarity with it.

2. It was also competent for plaintiff to show that defendant had a pecuniary interest, as agent, in effecting the insurance, where defendant was a witness in his own behalf.

3. Evidence that defendant, within three months of the time of effecting plaintiff's insurance, had taken a large number of other applications, was admissible as tending to impeach defendant's recollection of the particular transaction in issue.

4. Where defendant used certain pages of his instruction book in figuring the surplus to which he represented plaintiff would be entitled under his policy, such pages were admissible in evidence.

5. The measure of damages recoverable by one who was induced by fraudulent representations to purchase a policy of life insurance, where, on discovering the fraud, he repudiated the contract, and refused to pay further premiums on the policy, is the amount of the premiums paid, less the value of the insurance he has had.

Exceptions from Caledonia county court; Ross, Chief Judge.

Action on the case by John McKindley against John H. Drew to recover damages for alleged fraudulent representations. Judgment for plaintiff, and defendant brings exceptions. Reversed.

W. P. Stafford, for plaintiff. Bates & May, Dunnett & Slack, and Harry Blodgett, for defendant.

TYLER, J. The plaintiff's evidence tended to show that the defendant, by false and fraudulent representations, induced him, for an annual premium of \$262.50, to take a \$5,000 endowment policy in the New York Mutual Life Insurance Company, with a right to whatever surplus the policy might be entitled to under the rules of the company; that the policy was payable in 20 years, or at an earlier time in the event of the plaintiff's death, he having a right to withdraw at any time after making three payments, when he would receive a paid-up policy for as many twentieths of the \$5,000 as he had made payments; that the fraudu-

lent representations were that the surplus which was to apply upon the policy was guaranteed by the company to be \$1,800, and that, if the plaintiff withdrew, he would receive his twentieths in cash; that he paid the first premium on the delivery of the policy and the second a year thereafter, when, on account of the fraud, he decided to make no further payment and brought this suit. The defendant denied making the fraudulent representations. On the trial the plaintiff abandoned the contract phase of his declaration and claimed to recover only upon the ground of fraud.

1. The court did not err in permitting the plaintiff to show his own ignorance of life insurance and the defendant's familiarity therewith. It tended to show that he relied upon the defendant's representations, and was deceived by them.

2. It was competent for the plaintiff to show that the defendant was entitled to receive from the company a part of the first premium, and that he was working for a prize that had been offered by the company to the agent who would return the largest amount of insurance. The defendant was a witness in his own behalf, and it was proper to show his interest in the matter in issue.

3. The fact that the defendant had, within three months, taken a large number of applications for insurance, might render it less probable that he would remember as distinctly as the plaintiff the details of the interview in question; therefore evidence of that fact was properly admitted.

4. The offered testimony of Nelson was properly excluded, as having no relevancy to the question in issue.

5. It was not error to admit the several pages of the instruction book. The defendant used the book on the occasion in question, and the plaintiff claimed that the defendant showed him some pages from which he figured a \$1,800 surplus on a \$5,000 policy. The plaintiff had a right to exhibit in evidence any page that related to the subject-matter of such surplus. The other pages were, of course, immaterial. It did not seem clear what pages the defendant figured from, which probably led to the examination of several pages mentioned in the exceptions.

6. The court instructed the jury that, if they found either of the claimed misrepresentations set forth in the declaration established, the plaintiff would be entitled to recover such damages as would make the policy of the value it would have had if it had been as represented. In this there was error. This would have been the rule had the plaintiff elected to proceed under the contract, which he might have done. But he was not bound to perform the terms of a contract to which he never gave his assent, — to pay annual premiums upon a policy which he did not purchase. The fraud invalidated the contract, and upon its discov-

ery the plaintiff had a right to rescind it, and be placed in statu quo.

No point is made in the brief of defendant's counsel, nor was it raised in the court below, that the plaintiff should have expressly refused to make further payments, and returned the policy. The contract was executory, and upon discovery of the fraud the plaintiff had a right to repudiate it, and treat it as a nullity. His acts were a repudiation and a rescission of the contract.

The only question is, what damages is the plaintiff entitled to recover? The general rule is that the party who would rescind a contract on account of the fraud practiced upon him by the other party must seasonably return the property to him, and put him in statu quo. If the plaintiff in this case had received dividends upon his policy, the law would not permit him to recover the premiums and retain the dividends, for then the other party would not be placed in statu quo. The plaintiff had received no dividends to be returned, but he had been insured for a year and a half before he rescinded the contract; and, if he had died within that time, his estate would have received \$5,000 from the insurance company. So it cannot be held as matter of law that he had received no benefit from the contract. The case should have been submitted to the jury with instructions that the plaintiff might recover the amount of premiums paid, less the value, if any, of the insurance which he received. What value the insurance was to him was for the jury to determine. The case of *Hedden v. Griffin*, 136 Mass. 229, is like the one at bar. There the defendant, as a general agent of a life insurance company, by false and fraudulent representations induced the plaintiff to take a policy in the company. Upon discovering the fraud, the plaintiff gave the defendant notice of his rescission of the contract, demanded a return of the premiums paid, and brought the suit therefor. The court refused to instruct the jury that the rule of damages was the difference in money value between what the plaintiff got and what he would have got had the representations been true, but did instruct them that upon the rescission of the contract the plaintiff should recover the amount of money paid, less the value of the insurance, if any, which he had received. The supreme court sustained the ruling, and afterwards reaffirmed its soundness, in *Nash v. Trust Co.*, 163 Mass. 574, 40 N. E. 1039, though it referred to an intimation made by the court in the former case that the plaintiff might recover the whole consideration paid without any deduction for the protection which he had before the rescission. These rulings are in accordance with the general rule of law requiring a return of the property on the rescission of a contract on account of fraud. Judgment reversed, and cause remanded.

BADGER v. STATE.

(Supreme Court of Vermont. Washington. Oct. Term, 1896.)

CRIMINAL LAW—NEW TRIAL—ABSENCE OF WITNESSES.

1. A new trial will not be granted on account of the absence of witnesses where no continuance was asked.

2. A new trial will not be granted on account of the absence of witnesses where it is doubtful that a different result would be arrived at in another trial.

Harvey Badger was convicted of a breach of the peace, and files a petition for a new trial. Dismissed.

J. P. Lamson, for petitioner. Zed S. Stanton, State's Atty.

TYLER, J. The petition is brought upon two grounds: First, the absence from the trial of two witnesses, whose testimony, it is alleged, would have been material to the petitioner; second, newly-discovered evidence.

Assuming it to be true that Annie Oderkirk and George A. Barnett were not within the reach of a subpoena, nor within the control of the petitioner, at the time of the trial, it was then his obvious duty to have moved for a continuance of the case. It must be presumed that such a motion would have been granted if supported by affidavits of the facts now alleged as to the importance of the testimony of the two witnesses, and that their attendance could not be procured at that term. The petitioner elected to go to trial with such evidence as he had, and without objection, so far as the case discloses. The petition and testimony in *Geno v. Paper Co.*, 68 Vt. 568, 35 Atl. 475 (heard at last May term), presented a much stronger case in this respect than does the case at bar. But, passing the question of the petitioner's laches in going to trial without the testimony of these witnesses, the evidence produced by the state in this proceeding, which tended to show Mrs. Oderkirk's version of the affray given directly after it occurred, as well as later on, in which she confirmed her husband's testimony, and the state's evidence tending to contradict the other new witness, Barnett, considered in connection with the petitioner's rebutting testimony, render it extremely improbable that a different result would be arrived at in another trial.

The second ground of the petition is that the state's principal witness, George Oderkirk, freely admitted, both before and after the trial, that the petitioner did not assault him with an ax; that Oderkirk had admitted that he swore falsely at the trial, for the purpose of procuring the petitioner's conviction; and that he had declared that he would considerably absent himself from another trial if one were had. It is quite improbable that the witness should have told his neighbors and acquaintances, previous to the trial, that the petitioner did not strike him with an ax.

and, having testified that he did so strike him, on his way home after the trial confessed to the affiant Little, and afterwards to the petitioner, that he had committed perjury. The affidavits tending to show Oderkirk's admissions, when considered in connection with his denial of them, are entitled to but little weight. The case seems to have been tried mainly upon the issue whether the assault was with an ax or not. No surprise seems to have been manifested by the respondent's counsel at Oderkirk's testimony, and none of the affiants with whom he is said to have conversed about the affray, during the summer before, seem to have been ready to contradict him. We do not think that this evidence, either alone or in connection with the proposed testimony of Mrs. Oderkirk and Barnett, in the light of the contradictions and improbabilities, would be likely to produce a different result at another trial of the case. The petition is dismissed.

BAGLEY v. MASON.

(Supreme Court of Vermont. Caledonia. Oct. Term, 1896.)

ASSAULT AND BATTERY—CIVIL ACTION—EVIDENCE—DRUNKENNESS—DAMAGES—COMPLAINT TO PHYSICIAN—TRIAL—CROSS-EXAMINATION—PHYSICAL EXAMINATION—REMARKS OF COUNSEL.

1. In an action for an assault and battery, which defendant denies, not only the fact of his drunkenness at the time, but the extent and effect thereof, are admissible, to increase the probability of his having committed the assault.

2. For that purpose plaintiff may show defendant's boisterous conduct, and an assault by him on another person, when approaching the place of the alleged assault.

3. It is not error to permit plaintiff to show, in an action for assault and battery, that five months afterwards his injuries were aggravated by sickness; the jury being instructed that defendant was only liable for damages flowing from his acts.

4. Complaints of pain by an assaulted person, made immediately after the assault to an attendant who was not a physician, are admissible in an action for the assault.

5. Complaints of pain by an assaulted person to the physicians by whom he was treated are admissible in an action for the assault, though at the time of making them he expected to bring the action and to use the physicians as witnesses therein.

6. A question, on cross-examination, whether the witness "believed from plaintiff's appearance" that he was in pain, is properly excluded.

7. In an action for assault and battery, plaintiff may show his wages before and after the assault, and the time lost by reason thereof.

8. Though evidence of the amount paid by plaintiff for board while he was unable to work is, where it is not connected with his earnings, immaterial in an action for assault and battery, such evidence is not prejudicial under correct instructions.

9. A party is not entitled as of right to have an offer of proof made privately to the court.

10. On a trial for an assault and battery, which defendant denies, cross-examination of defendant as to whether he did not, two months thereafter, leave the state and pass under an assumed name, to avoid arrest, is proper.

11. The impropriety, if any, of asking a witness for defendant in an action for assault and battery whether defendant stopped with him "the

night he ran away," and withdrawing the question on objection, is rendered harmless by subsequent testimony of defendant as to his leaving the state after the alleged assault, and the places where he stopped.

12. Defendant's request for an examination of plaintiff's person in the presence of the jury, in an action for assault and battery, is properly refused where he suggested such examination for the first time after the close of the evidence.

13. On trial of an action for assault and battery, plaintiff's counsel asked him if entries made by him in a book which was in evidence, charging defendant with his lost time, were made with the idea that defendant would have to pay. On objection, counsel withdrew the question, saying that the jury could draw the inference. *Held*, that the remark did not suggest to the jury an inference from the question, but only from the book, and hence was not ground for reversal.

Exceptions from Caledonia county court; Ross, Chief Judge.

Trespass by C. E. Bagley against Thomas Mason for assault and battery. Plea, the general issue. There was judgment on a verdict for plaintiff, and defendant excepts. Affirmed.

The plaintiff's evidence tended to show that on the 24th day of February, 1895, while he was lying upon a lounge at his boarding place, the defendant, in a state of intoxication, struck him in the abdomen, inflicting an injury, which resulted in hernia; that he had suffered a general loss of health, and had been unable to work. Against the defendant's exception, the plaintiff was permitted to show that in July, 1895, he was sick with a cold and a resulting fever, and that this illness aggravated the injury inflicted by the defendant; also, that immediately after receiving the blow he complained to his attendant (not a physician) of being in great pain; and was permitted to show the complaints made by him to physicians whom he consulted, and by whom he was treated, while contemplating this suit, with the understanding on his and their part that they would be used as witnesses therein. A witness for the plaintiff had testified that the plaintiff, though complaining of a cold just before the assault, did not then appear to be suffering greatly. On cross-examination, defendant's counsel was refused permission to ask the witness if, at the time, he believed from the plaintiff's appearance that he was in pain. To this refusal the defendant excepted.

W. P. Stafford, for plaintiff. Bates & May, for defendant.

MUNSON, J. The plaintiff claimed that the defendant struck him in the abdomen while he was lying upon a lounge. The defendant denied the striking. The plaintiff introduced testimony to show that the defendant was intoxicated, and included therein evidence of what the defendant did before he came into the plaintiff's presence. It is insisted that this evidence should have been confined to a direct statement of the witness as to the defendant's condition. But we think

the same reason which permits proof of intoxication as bearing upon the probability of an assault will permit proof of the extent and effect of that intoxication to increase the degree of the probability. This cannot always be effectively presented without some descriptive testimony. We think it was proper to show the boisterous and belligerent conduct of the defendant just before the alleged assault, and while he was approaching the place of it, and that in doing this it was permissible for the witness to state that the defendant collared him as he passed through the room.

The testimony of the physicians as to the plaintiff's condition in July, when suffering from a cold and resulting fever, was properly received. It was competent as tending to show that the injury complained of was of such a nature and severity that it was aggravated by other indispositions. The situation of the case, as affected by this testimony, was properly brought to the attention of the jury. They were distinctly told that they were to compensate the plaintiff only for the suffering and loss occasioned by the defendant's act.

The testimony as to the complaints of bodily suffering made by the plaintiff to his physicians was properly received. Evidence of those made to an attendant not a physician was also admissible. Greenl. Ev. § 102. Nor was it error to receive testimony as to such complaints made when the suit was in contemplation. *Kent v. Lincoln*, 32 Vt. 591. The question whether the witness believed the plaintiff was in pain was properly excluded. It might have been proper to ask him whether the plaintiff appeared to be feigning. His opinion was proper only so far as it was necessarily included in the presentation as it appeared to him of something which could not be otherwise described. It was not a matter of belief, but of description.

It was proper for the plaintiff to show what daily wages he earned before and after the injury, and the time he was unable to work because of it. As the wages he received both before and after were independent of board, the amount he paid for board while unable to work was not necessary to the ascertainment of his damages; but it cannot, under correct instructions, have been used to the defendant's injury.

The defendant excepted to the action of the court in permitting plaintiff's counsel to make in the hearing of the jury an offer to show by a cross-examination of the defendant that he left the state early in May, and afterwards remained out of it, passing under assumed names, for the purpose of avoiding arrest in this suit. A party is not entitled as of right to have an offer made privately to the court. Moreover, this offer embraced nothing inadmissible. The defendant having denied that he made the assault, the plaintiff might properly be permitted to discredit his testimony by showing a course of conduct inconsistent

with his claim of innocence. It appears that the defendant then testified, upon inquiry, to his leaving the state and going to different places. In a previous cross-examination of one of defendant's witnesses, plaintiff's counsel asked him if the defendant stopped with him the night he ran away, and, upon an exception being taken, withdrew the question. The asking of the question may have been improper, but in view of the plaintiff's right to inquire into that matter, and of what subsequently came into the case, it cannot be considered an adequate ground for reversal.

There having been no suggestion on the part of the defendant that the plaintiff's person be examined in the presence of the jury until after the evidence was closed, the court was perfectly justified in refusing to permit it at that time.

The defendant introduced a book, produced by the plaintiff on cross-examination, in which plaintiff had made daily charges of his lost time to the defendant. In re-examination, plaintiff's counsel asked him if he made the charges with an idea that the defendant would probably have to pay them, and, on objection being made, withdrew the question, with the remark that he presumed the jury could draw the inference themselves. An exception was taken to this remark. If the remark was a suggestion to the jury to infer something from the question asked and abandoned, it was highly improper. But if it meant that the jury could draw the inference from the charges alone, without explanation, it was objectionable, if at all, merely as an argument out of time. The latter seems to us to be the evident meaning.

No exemplary damages were allowed. The defendant, as bearing upon the claim for exemplary damages, showed the amount of the debts proved against his estate in insolvency; and the plaintiff then put in the list of his debts, from which it appeared that two of them were owing to his brothers. Plaintiff's counsel claimed in argument that there was a strong suspicion that these family debts were fraudulent, and the defendant excepted to the refusal of the court to give the jury any instruction upon this point. The argument was not justified, but it was addressed to evidence admitted solely upon a question which the jury found in favor of the defendant; and, from a consideration of the whole case, we are satisfied that it cannot have prejudiced him upon the issues found against him. Judgment affirmed.

BURNHAM v. COURSER.

(Supreme Court of Vermont. Windsor. Oct. Term, 1896.)

LIMITATION OF ACTIONS—EVIDENCE—PLEADINGS—BURDEN OF PROOF.

1. Where plaintiff relied on defendant's absence from the state, without known attachable property therein, to arrest limitations, defend-

ant's statement to a third person that he had been in the hotel business for 17 years, and that, with the exception of 1 year, the places where he had kept hotel and where he spent his summers were all out of the state, was evidence that during said period he resided out of the state.

2. A statement in a lease taken by defendant that he resided at a certain place was admissible as a declaration by him in regard to his then residence.

3. Where defendant in assumpsit pleads limitations, to which plaintiff replies absence from and residence out of the state without known attachable property therein, the burden of proving that he had such property within the state is on defendant.

Exceptions from Windsor county court; Bowell, Judge.

Action by M. N. Burnham against M. P. Courser to recover on a note. There was a verdict and judgment for plaintiff, and defendant excepts. Affirmed.

Hunton & Stickney, for plaintiff. William Batchelder, for defendant.

ROSS, C. J. The only contention is whether the action on the note in suit is barred by the statute of limitations. To this plea the plaintiff replied absence from and residence out of the state, with no known property within it. Rejoinder, a traverse. The note is payable on demand, and dated May 19, 1868. Immediately upon giving it the defendant removed from and resided out of the state until about 1880. About that time he came to Barton, and kept an hotel about a year. The defendant introduced no testimony.

1. He insists that the plaintiff's testimony had no tendency to show that, after he ceased to keep hotel at Barton, the defendant was absent from, and resided out of, the state. The testimony of Newcombe was, in substance, that the defendant told him that he had been keeping hotel 17 or 18 years, that he was at Barton about a year, and that all the other places where he kept hotel and where he spent his summers were out of the state. This had a tendency to show that the defendant during these years was present where he was carrying on business, where he said he spent his summers; that he resided at the places named, and therefore was absent from and resided out of the state, except while at Barton. Hence the court committed no error in submitting this testimony to the jury as tending to establish the two facts of absence from and residence out of the state. Nor did the court err in its instructions to the jury that the statement in the lease which the defendant in 1894 took of the hotel at White River Junction, in regard to his then residence, might be considered as tending to show where his residence was at that time. It was a declaration, presumably of the defendant, in regard to his then residence.

2. While the plaintiff gave some testimony tending to show that the defendant left no known attachable property in the state, the

court, against the exception of the defendant, held and charged that if, "when he got through keeping hotel at Barton, the defendant removed from the state, and was thereafter absent therefrom and nonresident therein until he came to White River Junction, the plaintiff was entitled to recover, as in that case the burden would be on the defendant to show that he had the requisite property in the state, which he had not attempted to do." This holding is directly sustained by the decisions of this court in *Hill v. Bellows*, 15 Vt. 727, and in *Rixford v. Miller*, 49 Vt. 326, in each of which the identical question was raised and decided. It is, in substance, so held in *Mazon v. Foot*, 1 Aik. 282. The defendant contends that this court held in *Stevens v. Fisher*, 30 Vt. 200, and in *Batchelder v. Barber*, 67 Vt. 254, 31 Atl. 293, that the burden to prove that the defendant, at the time the cause of action accrues, "is absent from and resides out of the state and has not known property within the state which can by common process of law be attached," rests upon the plaintiff to prevent the statute running. Some of the language used apparently supports this contention. But in neither was the precise question raised or considered. In *Stevens v. Fisher* the defendant pleaded that the plaintiff's cause of action did not accrue within eight years next before the commencement of the suit. The plaintiff replied that the defendant was out of the state before and at the time the cause of action accrued, that he first returned at a specified date, and that he brought his action within eight years thereafter. He did not reply that during that time the defendant also resided out of the state, nor that he had no known attachable property in it. The plaintiff proved that during the time covered by the replication the defendant resided in the state of New York. After stating that, to prevent the running of the statute, two facts must concur,—absence from the state, and that the defendant had no known attachable property within the state,—the court remarked, "The replication is, we think, entirely defective, and the plaintiff's proof is equally defective, in bringing the defendant within any of the exceptions of the statute." This does not touch the question upon whom the burden rested to prove the nonexistence or existence of known attachable property, if the plaintiff had both alleged and proved absence from and residence out of the state. Clearly, the plaintiff's replication and proof were both defective. He had alleged absence from the state, and proved residence out of it. If he had proved his absence from the state, service of the plaintiff's writ might have been made upon him at the defendant's residence. Proving that the defendant resided in New York did not sustain his replication, nor did it exclude that the defendant was present in the state, so that the plaintiff could not have served his writ

upon him. The point is not raised, nor considered, which is now before us for consideration, nor is there any intimation what the court would have held if it had been presented. The cases in 1 Alk. and in 15 Vt. are not alluded to. *Batchelder v. Barber*, supra, was heard on a referee's report. The action is assumpsit; plea, nonassumpsit, with notice of the statute of limitations. What facts were reported is not disclosed. The attorney for the defendant cited *Stevens v. Fisher* in support of the proposition that the burden was on the plaintiff to establish that the defendant had no known attachable property in the state while he was absent from it. The opinion apparently indorses this contention, and cites *Stevens v. Fisher* as supporting it. No other case is cited by the counsel, or by the court, and apparently no other case was considered. If the facts reported by the referee brought the case within the decision in *Stevens v. Fisher*, as we must presume they did, the case was correctly decided. Such decision would not require any statement in regard to the party upon whom the burden rested to show known property subject to attachment in the state, provided the plaintiff established the defendant's absence from and residence out of the state for a sufficient length of time to prevent the running of the statute of limitations. It is evident that this court, by its decisions in *Stevens v. Fisher* and in *Batchelder v. Barber*, did not intend to overrule the decisions in 1 Alk., 15 Vt., and 49 Vt., above cited. The practice, so far as disclosed by the decisions, has conformed to the decisions in 15 Vt. and 49 Vt. In *Tucker v. Wells*, 12 Vt. 240, the court, in remarking upon the replication, says that, if the defendant had taken issue thereon, "it would have been incumbent on the defendant to have proved that the plaintiff in fact had knowledge of the existence of the property." In *Wheeler v. Brewer*, 20 Vt. 113, in *Russ v. Fay*, 29 Vt. 381, and in *Moore v. Quint*, 44 Vt. 98, from the statement in regard to the order of the trial, it is implied that the defendant assumed the burden of proving that he had known attachable property in the state. We think the decisions in *Hill v. Bellows* and *Rixford v. Miller* are well supported on principle.

The statute of limitations is one of rest from litigation. It does not assume that the debt in suit has been paid, but rests upon the principle that the plaintiff shall have a certain time in which to enforce its payment, and that, if he neglects to take steps during such period to enforce it, he shall no longer be entitled to that right. It is a bar of the right created by statute. The debtor must both plead and establish it. The statute proceeds upon the assumption that during the statutory period the debtor is so circumstanced that his creditor can take steps to enforce collection of his debt, either by a judgment personally binding the defendant,

or by a qualified judgment against his property within the jurisdiction. To effectuate these purposes, the statute limits a period in which different forms of action shall be brought. In assumpsit—the form of this action—the time limited is six years after the cause of action accrues. The periods limited, applicable to the different forms or causes of action, are stated in separate sections of the statute. Then, in a different section of the statute (V. S. § 1211), there is a general provision—applicable to the several preceding sections, limiting the times in which different forms of action shall be brought—for a deduction from the time limited, under certain conditions. This provision, applicable to this action, is, "if, after a cause of action accrues and before the statute has run, the person against whom it accrues is absent from and resides out of the state, and has not known attachable property within the state which can by common process of law be attached, the time of his absence shall not be taken as a part of the time limited for the commencement of the action." This provision for a deduction from the time limited for bringing the different forms of action, being general, contained in another section of the statute, and applicable alike to several preceding sections of the statute, need not be incorporated by the defendant into his plea in bar. His plea, nonassumpsit *infra sex annos*, is sufficient. If either his declaration, specifications, or proof brings the plaintiff's case within the operation of the plea, and he relies upon the deduction from the time limited provided for in V. S. § 1211, the plaintiff must reply "Precludi non," because, etc., defendant was absent from and resided out of the state, and had not known property within the state, etc. He must include in his replication all these provisions of the statute which create the deduction, although that relating to known property is a negative averment, made so by the statute. If the defendant should deem it material to the maintenance of his plea in bar, to make an issue upon whether he had known attachable property within the state, he cannot do so, because it is a negative averment in the replication, by a traverse, but by rejoinder must aver affirmatively that during the time embraced in the replication he had known attachable property in the state, and conclude with a verification. 1 Chit. Pl. 613; *Martin v. Smith*, 6 East, 554; *Story*, Pl. pp. 138, 139; *Mazon v. Foot*, 1 Alk. 282; *Sissons v. Bicknell*, 6 N. H. 557. Having so rejoined, the plaintiff, by surrejoinder, may traverse this fact, and thereby the burden falls upon the defendant to establish that during the time covered by the replication he had known attachable property within the state. This was the order of pleadings pursued in *Sissons v. Bicknell*, supra, and the court held that the burden was on the defendant to show that he had known at-

attachable property in the state. *Mazon v. Foot*, supra, arose on another provision of V. S. § 1211, reading, "If, when a cause of action of a personal nature * * * accrues against a person, he is out of the state, the action may be commenced within the time limited therefor after such person comes into the state." To the plea setting up the statute, the plaintiff replied that the defendant was out of the state; rejoinder, that defendant came and returned within the state, etc.; surrejoinder, traversing the last plea of the defendant. It was held that the burden was on the defendant to show that his return into the state was known to the plaintiff, and was for such length of time that he could have made service of his writ upon him, unless his return was permanent and became a residence in the state. *Hill v. Bellows*, 15 Vt. 727, was an action of book account. The defendant pleaded the statute of limitations. The plaintiff replied as in the case at bar. The defendant traversed the replication as in the case at bar. It is said in disposing of the case, "It is questionable whether this clause of the statute"—the one reading, "and has not known property," etc.—"has any application whatever to the case under consideration, inasmuch as it is found that the defendant resided and was out of the state at the time the cause of action accrued." This intimation must have been on the basis that defendant's traverse of the replication only put in issue the affirmative averments of residence out of and absence from the state contained in the replication, but did not put in issue the negative averment therein that the defendant "has not known property," etc. The court further says, "If it has any application, it was incumbent on the defendant, if he intended to avail himself of its provisions, to prove that he had known and visible property within the state from which the plaintiff could have satisfied his demand by attachment and levy of an execution." This case is identical with the case at bar, both in the form of pleadings and in the holdings of the court. *Rixford v. Miller*, 49 Vt. 319, is an action of book account. The pleadings in the case are not set forth in detail. It is stated that the defendant claimed "that as the cause of action accrued more than six years before suit was brought, and as the plaintiff had not shown that the case came within the provisions of section 15, c. 63, Gen. St. (V. S. § 1211), it was barred by the statute of limitations." This objection was unsustained, and the case decided on the doctrine of *Mazon v. Foot* and *Hill v. Bellows*. Hence, on the authority of these decisions and on principle, the ruling of the trial court was correct. While the statute required that the plaintiff, in his replication, should include the negative averment that defendant, during his absence from and residence out of the state, had not known attachable property in the state, this negative

averment was not traversable, nor put in issue by the defendant's traverse of the replication; that, to have made the subject of known attachable property regularly available to the defendant in support of his plea, he should have rejoined averring affirmatively such known attachable property. This order of pleading places the burden of proving that he had known attachable property on the defendant, and, if he did not follow it, he could ask for no more, on a traverse of the replication, than that he should be allowed—as was questioningly done in *Hill v. Bellows*—the benefit of it, if he proved it.

This result is confirmed by text writers on the subject of "Burden of Proof." Mr. Greenleaf says, "The obligation of proving any facts lies upon the party who substantially asserts the affirmative of the issue." 1 Greenl. Ev. § 74. Mr. Starkie gives substantially the same rule. 1 Starkie, Ev. 376. Both say that the cases in which the plaintiff grounds his right of action upon a negative allegation are an exception to this rule. 1 Greenl. Ev. § 78; 1 Starkie, Ev. 377, 378. An examination of the cases given by these authors as constituting the exception shows that, unless the negative on which he grounds his right of action is established by the plaintiff, the law presumes against the existence of the negative. The test determinative of upon whom the burden of proving a given fact rests is whether, if the fact is not established, it will be fatal to such party's right to recover. 2 Am. & Eng. Enc. Law, 655. This rule and exception thus tested, are, in legal effect, the rule expressed in article 93 of Stephens' Digest of Evidence, thus, "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence or nonexistence of facts which he asserts or denies must prove that those facts do or do not exist." In the case under consideration the plaintiff establishes his right to recover, if nothing more is shown, on producing the defendant's promissory note uncanceled. The defendant says, by his plea, that the plaintiff has become barred from exercising this right because more than six years elapsed after the right accrued before he brought his suit. The plaintiff rejoins "Precludi non," because the defendant was absent from and resident out of the state, and had not known attachable property in the state. If the plaintiff establishes that the defendant was so absent from and resident out of the state, there is no presumption that he had known attachable property within the state during the time of his absence from and residence out of it, but the existence of such property within the state during the time of his absence from and residence out of it is a fact which must be in the case, to establish the defendant's plea in bar. Hence the burden is upon him to establish this fact, if judgment is to be rendered in his fa-

vor. With this fact not brought into the case, the defendant's plea in bar fails, and the plaintiff is entitled to recover on his note. Judgment affirmed.

STARKEY v. WAITE.

(Supreme Court of Vermont. Windham. Oct. Term, 1896.)

REPLEVIN—VERDICT—JUDGMENT.

1. Under V. S. § 1471, providing that the general issue in replevin shall be joined on the plea of not guilty; and section 1481, declaring that, if the goods were unlawfully taken or detained, plaintiff shall have judgment for his damages and his costs,—a general judgment for plaintiff, on a verdict of guilty, is, by implication, a judgment for at least nominal damages and costs.

2. That the clerk, in filing execution on the judgment, omitted the one cent, or nominal, damages, is no ground for setting aside the execution, defendant not being injured thereby.

Audita querela by Alonzo Starkey to set aside an execution issued against him on a judgment of the supreme court (34 Atl. 692), in favor of Fred M. Waite. Judgment for defendant.

Clarke C. Fitts, for petitioner. Waterman, Martin & Hitt, for defendant.

ROSS, C. J. This is audita querela to have an execution set aside, issued on a judgment rendered by this court at its January term, 1896, in favor of the defendant, against the plaintiff. In that action the defendant caused to be replevied a horse, on the claim that it was exempt from attachment, which the plaintiff, as deputy sheriff, had attached on a writ in favor of a creditor of the defendant. The replevin suit was tried in the county court, by the jury, who returned a verdict "that the defendant is guilty in manner and form as the plaintiff in his declaration has alleged." On this verdict a general judgment was rendered by the county court, in favor of this defendant. In terms, the judgment did not mention damages, nor costs, nor did the verdict on which it was founded. This plaintiff brought the case to this court on exceptions, which are immaterial to questions now raised. In this court the judgment of the county court was affirmed. When the clerk of this and the county court came to tax the costs, he included this defendant's costs, not only in this court, but in the county court, and included no damages, not even nominal damages. The plaintiff concedes that under the decision in *Bliss v. Little's Estate*, 64 Vt. 133, 23 Atl. 725, costs in this court were properly taxed in favor of the defendant, but contends that inasmuch as the jury returned no specific finding of damages, and the county court, in its judgment, made no mention of damages nor costs, the costs in that court were illegally and wrongfully taxed. In *Stevens v. Briggs*, 14 Vt. 44, it is held that the recovery of costs by a plaintiff are conse-

quent upon his recovery of debt or damages in the suit. Hence it is necessary to consider what was the legal effect of the verdict of the jury, and a general judgment of the county court thereon in favor of the defendant in the replevin suit. The statute has changed the pleadings in replevin from what they were at common law. Instead of non cepit or non detinet and other pleas allowed or required by the common law, V. S. § 1471, provides that in this class of replevin "the general issue shall be joined on the plea of not guilty." The plea puts in issue the plaintiff's right to the possession of the property replevied, and the wrongful taking and detention thereof by the defendant. Hence the verdict of the jury determined that the plaintiff was entitled to the possession of the horse replevied, and that the defendant wrongfully took and detained it from him. When such is the finding of the jury, V. S. § 1481, is: "The plaintiff shall have judgment for his damages caused thereby, and for his costs of suit." If no damages are shown by the evidence on trial, inasmuch as the verdict of guilty establishes that the defendant has invaded the plaintiff's right to the property replevied, the law implies that the plaintiff is entitled to nominal damages. *Paul v. Slason*, 22 Vt. 231; *Fairbanks v. Kittredge*, 24 Vt. 9; *Fullam v. Stearns*, 30 Vt. 443; *Graves v. Severens*, 40 Vt. 640; *Cole v. Drew*, 44 Vt. 49; *Stevens v. Briggs*, 14 Vt. 44; *Bemus v. Beckman*, 3 Wend. 668; *Cobbey*, Repl. §§ 1074, 1075. The verdict of guilty conclusively established that the plaintiff invaded the defendant's right to the horse replevied, by attaching, taking, and detaining it from the defendant's possession. From the verdict, the law gave the defendant nominal damages (no other damages being shown nor claimed in the trial before the jury) in the replevin suit. The general judgment, rendered thereon by the county court, and affirmed by this court, carried, if not in specific terms, by implication, a judgment for nominal damages and costs, agreeably to V. S. § 1481.

That the clerk, in filing the execution, omitted the one cent, or nominal, damages, furnishes the plaintiff no just ground of complaint. He cannot for such omission have the execution set aside and held void, because he has not been wronged, nor injured thereby. This view, without considering the other questions discussed, is conclusive against the right of the plaintiff to recover in this suit. Judgment for the defendant to recover his costs.

BROWN'S EX'R v. HITCHCOCK.

(Supreme Court of Vermont. Rutland. Oct. Term, 1896.)

NOTE PAYABLE IN ALTERNATIVE—ELECTION—LIMITATIONS.

A devisee executed to the executor, for a loan from him, a note payable on demand, or, at the option of the payee, from the maker's

share of the proceeds of a sale of the decedent's realty; and the payee elected to take payment out of such proceeds, but, without fault of the maker, failed to make such application of the money. *Held*, that assumpsit on the note, not brought within the period of limitations for actions on demand notes, was barred, though the sale was made within the period of limitations.

Exceptions from Rutland county court; Taft, Judge.

Action by Marshall Brown's executor against Charles Hitchcock. From an order overruling a demurrer to a replication, defendant excepts. Exceptions sustained.

J. B. McCormick and Edward Dana, for plaintiff. S. E. Everts and J. C. Baker, for defendant.

TYLER, J. Marshall Brown was the executor of the will of Robert H. Smith, and the defendant was a legatee and devisee under the will. The plaintiff, as executor, seeks to recover of the defendant, on the common counts in assumpsit, the amount of three promissory notes, the first of which, dated August 8, 1873, is as follows: "I, Charles Hitchcock, have received of Marshall Brown, as executor of the will of Robert H. Smith, late of Pawlet, Vt., deceased, four hundred and fifty dollars, which I agree to pay to him on demand, with interest annually at the rate of 7 per cent. per annum from this date, or to allow and apply the same to him on the settlement or division of the real estate of Robert H. Smith, or out of the avails or proceeds thereof, when sold, or of my share thereof as said Brown may hereafter elect, with interest on the same annually, at the rate of 7 per cent. [Signed] Charles Hitchcock." The other two notes are in the same terms, differing only in dates and amounts,—the second dated October 1, 1874, given for \$100; the third dated October 27, 1874, given for \$100. The defendant pleaded—First, the general issue; second, that he did not assume and promise at any time within 6 years and 30 days next before Marshall Brown's death; third, that the causes of action did not accrue within 6 years and 30 days next before that time; fourth, payment. The plaintiff joined in the similiter to the general issue, replied special matter to the second and third pleas, and traversed the fourth. The case comes here upon the demurrer to the replication to the second plea.

The defendant's promise was in the alternative,—to pay the notes on demand, or out of the real estate, or the avails thereof, at the payee's election. The replication alleges that said Brown in his lifetime, and the plaintiff since Brown's decease, made their election not to require payment of said sums on demand, but relied upon the alternative promise, and therefore brought no action in Brown's lifetime. It further alleges that a settlement and division of the estate of said Smith had been made, and that a portion thereof had been decreed by the probate court to the defendant. It alleges no

breach of the alternative promise by the defendant, nor any act of his by which the plaintiff was prevented from applying the proceeds of the sale of said real estate upon the notes at his election. For anything alleged, the plaintiff might have made his election, and applied such proceeds upon the notes. It in fact alleges that the plaintiff did make his election, but failed to make an application of the money received, but through no fault of the defendant. Therefore the second plea is a good answer to the declaration, and the replication, which is only an amplification of the declaration, is no answer to the plea, but it shows that the plaintiff had no cause of action. The form of judgment is adopted as in *Dunklee v. Good-enough*, 65 Vt. 257, 26 Atl. 988. Judgment reversed; demurrer sustained; declaration adjudged insufficient; and cause remanded.

STATE v. BADGER.

(Supreme Court of Vermont. Washington. Oct. Term, 1896.)

CRIMINAL LAW—EVIDENCE—DECLARATIONS.

On an issue as to whether an assault was made with an ax, declarations made by third persons to the person assaulted are inadmissible where they do not form part of the *res gestæ*, and have no tendency to contradict other testimony.

Exceptions from Washington county court; Thompson, Judge.

Harvey Badger was convicted of breach of the peace, and excepts. Exceptions overruled.

J. P. Lamson, for respondent. Zed S. Stanton, State's Atty.

TYLER, J. Indictment for a breach of the peace. The state's evidence tended to show that the respondent called one George Oderkirk to the door of the latter's house in the nighttime, and assaulted him with an ax. The respondent's evidence tended to show that no ax was used by him, and this was a material issue in the trial. It appeared that, after the affray, one George W. Barnett went to Oderkirk's house, was there the remainder of the night, and had conversation with Oderkirk and his wife. The respondent's counsel asked the witness this question: "I want you to state whether you yourself at that time said anything to Oderkirk, whether the wound was or was not made with an ax." It appeared that Oderkirk's wife saw the whole affray, and the respondent's counsel asked the witness Barnett: "Was anything said there that night by Oderkirk's wife to George, whether Badger struck him with an ax or not?" Both questions were excluded, and the respondent excepted. The conversation was not a part of the *res gestæ* of the affray, and it is not claimed that the answers, if given, would have had any tendency to contradict the tes-

timony which the witness had given in the trial. Counsel suggest in their brief no ground upon which the evidence was admissible, and there was none. Judgment that there was no error in the proceedings, and that the respondent take nothing by his exceptions.

TOWN OF GRANVILLE v. TOWN OF HANCOCK.

(Supreme Court of Vermont. Addison. Oct. Term, 1896.)

PAUPERS — LOSS AND CHANGE OF SETTLEMENT — ACTION FOR SUPPORT — LIMITATIONS.

1. V. S. § 3171, relating to support of paupers, provides that if the pauper, when in need, has not resided in the town furnishing the support "for three years supporting himself and family," and is not able to provide such assistance, such town may recover the expense thereof from the town "where he last resided for the space of three years supporting himself and family." *Held*, that the liability for such expense of a town wherein such pauper last resided for three years is not affected by the fact that after such residence he resided for a time outside the state.

2. A pauper was ordered to remove from the town of H. to the town of M., but did not do so, because his wife was sick. On the order of removal being served on M., it supported the pauper and his family for a time in H. *Held*, that though the pauper, in law, resided in M. while supported by it in H., when it ceased to furnish assistance, such implication in regard to his residence ceased, and where he afterwards resided in H. for three years, supporting himself and family, such residence could not be treated as continuing in M.

3. One town is not prevented from recovering against another for aid furnished a pauper within 60 days before the commencement of the suit by V. S. § 3172, which does not allow an action for support of a pauper until 60 days after plaintiff town has given defendant town notice of the condition of the pauper or family, and provides that actions for support thus furnished shall not be brought oftener than every 60 days.

Exceptions from Addison county court; Taft, Judge.

Action by the town of Granville against the town of Hancock for expenses incurred in supporting a pauper. There was a judgment entered on a verdict directed by the court in favor of plaintiff, and defendant excepts. Affirmed.

Button & Button, for plaintiff. Stewart & Wilds, for defendant.

ROSS, C. J. This is an action to recover for supporting a pauper. The court directed the jury to return a verdict in favor of the plaintiff. On the question of the residence of the pauper, in argument, the attorneys have treated as proved all facts which the exceptions state that the evidence tended to prove. We assume that they so treated them when each asked the court to direct the jury to return a verdict in favor of his client. We shall consider the case as though the exceptions stated that the evidence tending to show these facts was uncontroverted, and that the parties waived the right to go

to the jury in regard to the facts established thereby. On this basis, the pauper resided in the defendant town, supporting himself and family, from July, 1873, to January, 1877. In March, 1877, upon proper proceedings, he was ordered to be removed from the defendant town to the town of Middlesex. The return of the officer serving the order shows that the pauper was not removed because his wife was sick and unable to be removed. Middlesex then assumed his support, and supported him for some time, but the exact length of time is not stated. The pauper remained during this time in the defendant town. In 1888 the pauper removed to Northfield, but returned to the defendant in March, 1889. In 1891 he abandoned his domicile in Hancock, and took it up in Massachusetts for about 10 weeks, when he returned and took up his domicile in Hancock. The defendant offered to show—but the offer was excluded, against its exception—that the pauper, after Middlesex ceased to furnish him support, remained in the defendant town, supporting himself and family, for more than three years continuously.

1. On these facts the defendant does not contend that the pauper did not reside in Hancock three years continuously, while supporting himself and family, from July, 1873, to January, 1877, but claims that this residence cannot avail the plaintiff, because of the residence of the pauper in Massachusetts for a short time in 1891. V. S. § 3171, treats of the support of paupers only with reference to the towns of this state, and provides that if the pauper, at the time when he is in need of relief, has not resided in the town furnishing the support "for three years supporting himself and family and is not of sufficient ability to provide such assistance, the town so furnishing the same may recover the expense thereof from the town where he last resided for the space of three years supporting himself and family." There is no limitation in regard to when the "last three years' residence" shall have occurred, with reference to the time when the person is in need of assistance, nor any mention of such residence being unavailing if thereafter the pauper had taken a residence in another state. This section of the statute is framed to fix definitely the town upon which the burden of supporting a person in need of assistance, and who is not of sufficient ability to provide it, shall rest, between the different towns of the state, where the law is operative. It takes no account of such pauper's residence out of the state. Such was the early interpretation of the similar statute in regard to the settlement of paupers. *Georgia v. Grand Isle*, 1 Vt. 461. The reasoning of the court in that decision is applicable to the proper construction of this section of the statute. This contention cannot be maintained.

2. The defendant further contends that the evidence offered by it was erroneously re-

jected by the court. It appeared that in 1877 the pauper was, under the statute then existing, ordered to remove with his family from Hancock to Middlesex; that the pauper's wife was sick, and not able to be removed; and that, upon service of the order of removal upon Middlesex, that town for a time supported the pauper and his family in Hancock. It contends—and such appears to be the import of the decisions of this court—that, while being thus supported, the pauper, although remaining with his family in Hancock, was, because under the control and direction of Middlesex, in law, a resident of Middlesex. It offered to show that, after Middlesex ceased to support the pauper and his family in Hancock, the pauper, still being in Hancock, supported himself and family, without aid from any town, for more than three years, and contended that for these three years the pauper's residence should be treated as continuing in Middlesex, so that the pauper's last three years of residence, under this section, would be in Middlesex, and not in Hancock. This contention is unsound. If, under the decisions, the pauper, while being supported by Middlesex, although remaining in Hancock, was, in law, to be treated as residing in Middlesex, because Middlesex had the right to, and in the eye of the law did, control the pauper's place of abode, and for that reason his residence during that time, in law, was in Middlesex, such implication of the law in regard to the pauper's residence ceased when Middlesex ceased to furnish, and to be under legal obligation to furnish, the pauper assistance. Its power to control the abode or residence of the pauper then ceased. The person who had been assisted, as soon as he became able to and did furnish his own support for himself and family, would have a residence in his own right in the town of Hancock, and not a residence by implication of law in Middlesex. Hence, if the offered testimony had been received, it would have established only a more recent three years' residence of the pauper in Hancock. It would have furnished no semblance of a defense to this action by Hancock. The rejection of the offer was therefore harmless error.

3. The county court allowed the plaintiff to recover for aid furnished within 60 days prior to the commencement of this action. The defendant insists that this was error, and excepted thereto. V. S. § 3172, does not allow an action to be commenced for furnishing assistance to a pauper where support, by reason of residence, is cast upon some other town, until 60 days after it has given notice of the condition of the pauper or family to the town under the legal duty to furnish such support. This time is given, evidently, to furnish the notified town a reasonable opportunity to investigate in regard to its liability and duty to assume the support of such pauper and family. It does not,

in terms, if the town notifying is compelled to bring suit, limit its right of recovery to expenses properly incurred more than 60 days before suit is brought. Nor do we think that such a construction can fairly be given to this section. While it provides that actions for support thus furnished shall not be brought oftener than every 60 days, recovery may be had for all expenses incurred to the time the action is brought. At least, such recovery is not inhibited. If the town notified—after the first action has settled its liability—does not assume the support of the pauper, the court may, in its discretion, impose double costs in subsequent actions. The recovering town must wait 60 days after the first recovery before it can bring a second suit in which the court may impose double costs. We find no error in the action of the county court. Judgment affirmed.

FORBES v. MORSE.

(Supreme Court of Vermont. Rutland. Oct. Term, 1896.)

EVIDENCE—LETTER—ENTICING AWAY SERVANT.

1. An undated letter, written by defendant, which bears intrinsic evidence that it was written after the person to whom it was addressed had contracted to render service to plaintiff, is admissible in an action for enticing away the servant, though it may have been written before the servant entered upon her contract, where it was calculated to induce her to abandon it, without regard to time or circumstances, and it is shown that, after she entered upon the service thereunder, she abandoned it.

2. Where there is evidence that a course of persuasion has been entered upon to induce a servant to break a contract of employment, evidence of opportunity for further persuasion is admissible.

Exceptions from Rutland county court; Taft, Judge.

Action on the case by William H. Forbes against Frank A. Morse for enticing away plaintiff's servant. Judgment for defendant on a verdict directed by the court, and plaintiffs brings exceptions. Reversed.

The letter referred to in the opinion is as follows: "Home, Sabbath, P. M. My Dear Sister: Having a postal to send you, thought you would pardon me if I should add a few lines. I am lonely to-day, and should be so happy if you were here to chat with me. Since I wrote you, I have taken a very short vacation. Left home Thursday at 3:40, for Holyoke, Mass.; stopped over night with cousins in North Adams. Next day went on to Holyoke, and returned last eve. I had as pleasant a time as one would naturally have all alone. Bought quite a bill of stationery. Saw Mr. Dr. Hemner a few moments. Weather was terrible hot, and some rain. Tuesday has been more comfortable. My dear sister, it does seem so strange to have you away from here, and Castleton too. It grows more lonely each day. It seems sometimes as if I never was to see you again.

saw Judge Bromley on the train last eve.; says he heard from pretty good source that Prof. Leavenworth and Miss Wardsworth were to be married before school opened. This is all a secret. What do you think about it; wouldn't we have some talking to do if — was to carry you to Castleton to-night? Must not write more now. Wish you could see my sweet peas. They are just immense. Wish I could pick you some to-night. Lucy, I wish you could have heard Mr. B. last night. It seemed just the thing for you. Of course, we always find some one else for the coat to fit. He said rash promises were far better broken than kept. I do so wish you were back at Castleton. You cannot think how strange it seems to me, coming through there one week ago Sunday eve., to think I could perhaps never stop there, as I have so many times, and receive your pleasant welcome. I think you had better come back. I mean just what I say, and I am sure, unless you feel different from what I think you do, that it is your solemn duty to come. Wouldn't we all try to be happy once more? You do not know how much I miss you. But I must not say so, must I? Would send you some sweet peas if it would do. We have lots of them, and they do look so fine from my window where I am writing. But I must close. I will only add that if you do not like Mr. Forbes, I think it very unkind in him to ask you to leave your school, and sacrifice so much for him. Love to Herbert, and much for yourself, from Brother Frank."

Horace W. Love, for plaintiff. Henry A. Harman and George E. Lawrence, for defendant.

MUNSON, J. On the 30th day of July, 1890, Lucy Wells contracted with the plaintiff to become his housekeeper upon the happening of a certain contingency. She entered the plaintiff's service under this contract on the 8th day of November, 1890, and remained in it until the 1st of May, 1891. The plaintiff claims that she was enticed from his service by the defendant. The plaintiff offered evidence of the contents of an undated letter in the defendant's handwriting, which was found on a stand in Miss Wells' room during her stay at the plaintiff's, having with it an envelope which had the appearance of being new. The court excluded this evidence, on the ground that there was no testimony tending to show that the letter was written after the 30th of July, 1890, the date of Miss Wells' contract with the plaintiff. It doubtless might have been held that there was no evidence tending to show that it was written after the 8th of November, the day Miss Wells entered upon her service; for the letter itself shows that it was written just after a period of extreme heat, and while the sweet peas visible from the writer's window were in full bloom. But

a further consideration is necessary to determine whether there was evidence tending to show that it was written after July 30th, the date of the contract. The whole burden of the letter is the writer's regret for Miss Wells' absence, and for the prospect of her continued absence, from Castleton, where she had been teaching. The last sentence connects the plaintiff by name with the subject-matter of the writer's regret. "If you do not like Mr. Forbes, I think it very unkind in him to ask you to leave your school, and sacrifice so much for him." If this stood alone, it might seem to point to some proposition made, rather than to an arrangement actually entered into. But the writer had just before expressed his regret that she had not heard the recent remark of another, that "rash promises were far better broken than kept," saying, "It seemed just the thing for you." When the two are taken together, they seem to refer to something which Miss Wells has agreed to do for the plaintiff, which is inconsistent with the continuance of her work as a teacher. It must therefore be held that the letter itself affords evidence that it was written after the contract above referred to was made. It is also apparent from this examination of the letter that it contained matters pertinent to the issue. If it had been admitted, there would have been evidence tending to show that the defendant had endeavored to persuade Miss Wells to deprive the plaintiff of a service which he knew she had contracted to render; and this, with the proof of her leaving, would have made a case for the jury, unless a different disposition was required by the fact that she entered upon the service, notwithstanding the letter.

It may be objected that, if the letter was written before the 8th of November, it was written to prevent Miss Wells from entering upon the service contracted for, and failed of its purpose, and that, if repudials of it after the service was entered upon induced her to leave, that was an effect not designed by the writer, and one for which he would not be liable. It would seem, however, that if the language complained of was calculated to induce her to break the contract, without reference to time or circumstance, it would make no difference whether it led her to do this by refusing to commence the service, or by leaving it after it was commenced. It is doubtless true that language might have been used for which the defendant could not have been made liable by reason of an abandonment of the service after it had been entered upon. But it will be noticed that the language used was general, and not suggestive of a breach in any particular manner; and, in view of its scope, we think the question of liability cannot be disposed of as a matter of law on the ground indicated.

With the letter in the case, the deposition showing that Miss Wells and the defendant met at an hotel in St. Johnsbury on the 17th

of October, 1890, and passed the evening together, would be admissible. Perhaps its only tendency is to show opportunity, but, when there is evidence that a course of persuasion has been entered upon, evidence of opportunity is admissible. Judgment reversed, and cause remanded.

REED v. STARKEY.

(Supreme Court of Vermont. Windham. Oct. Term, 1896.)

PURCHASE AT ATTACHMENT SALE—CONDITIONAL SALE—WAIVER OF LIEN—REPLEVIN.

1. One who attaches property with knowledge that the debtor had bought it on condition that it remain the seller's till paid for, and who purchases it at the sale on mesne process under the attachment, gets no title as against the seller.

2. One who sells property on condition that it remains his till paid for does not waive his lien by attaching the property.

3. An officer against whom replevin is brought for property attached by him may avail himself of any title of the person for whom he made the attachment.

Exceptions from Windham county court; Munson, Judge.

Replevin by James A. Reed against Alonzo Starkey. Judgment for defendant. Plaintiff excepts. Affirmed.

Clarke C. Fitts, for plaintiff. Waterman, Martin & Hitt, for defendant.

TYLER, J. Replevin for a wagon, which was taken by the defendant as deputy sheriff, upon an execution issued July —, 1895, in favor of H. R. Brown against J. D. Reed, a son of the plaintiff, upon a judgment duly rendered. It appeared that in May, 1894, Brown sold the wagon to J. D. Reed for the sum of \$67.50, payable in monthly installments of \$10, upon condition that the wagon should remain Brown's property until the price was fully paid. The contract of sale was oral, and only from \$20 to \$30 of the purchase price was ever paid. A few days after this contract was made the plaintiff brought a suit against J. D. Reed, and attached the wagon, with other property, and by an agreement between the parties to the suit all the property attached was on August 20th sold upon mesne process, as provided by statute. The attorney for Brown in the suit upon which this execution was issued, who was also attorney for the defendant in this suit, acted as attorney for the plaintiff in the matter of the sale, and bid off the wagon and some other property for the plaintiff. The plaintiff's evidence tended to show that, subsequent to this sale, the plaintiff and J. D. Reed made an agreement by which the latter should remain in possession of the wagon and the other personal property which had been bid off for the plaintiff at that sale; that J. D. Reed should dispose of the property, and turn the proceeds over to the plaintiff, or apply the same on his account; that the attorney had knowledge of

this arrangement; that, when Brown brought the suit in which this execution was issued, all of such property except the wagon had been so disposed of; and that the wagon had been in the possession or control of J. D. Reed, and never had been in the possession of the plaintiff. At the September term, 1894, of Windham county court, the plaintiff obtained a judgment in his suit against J. D. Reed, an execution was issued, and a return of the sale on mesne process was made on the execution. The plaintiff claimed title to the wagon by virtue of his attachment and his purchase at the sale on the writ. The defendant claimed that the plaintiff had notice of Brown's lien at the time of the attachment and sale, so that the lien was as effectual as to him as though it had been recorded; also, that the proceedings by which the plaintiff sought to acquire title to the property and the possession, use, and disposal of it by his son, under the agreement mentioned, constituted a secret trust between the plaintiff and his son, and that the plaintiff acquired no title.

The plaintiff's counsel contends that there was no evidence tending to show that the plaintiff had notice of the existence of Brown's lien. We think the jury might properly have inferred, from the plaintiff's answers on cross-examination respecting the attachment and sale, that he had such knowledge. The wagon was in the officer's hands, undisposed of, when replevied by the plaintiff, and the plaintiff was bound to show a better title than Brown's in order to maintain his action. If he had notice of Brown's lien when he attached the wagon, or if there was a secret trust between him and his son in respect to the wagon, he did not have a better title than Brown. These questions were submitted to the jury with proper instructions. The attachment of the wagon by Brown did not operate per se as a waiver of his lien. Rob. Dig. Supp. 280, pl. 51. It cannot be said that the plaintiff resorted to inconsistent remedies. Though the defendant held it on Brown's execution when it was replevied, it was Brown's property as against the plaintiff, and the defendant was holding it as such. Judgment affirmed.

LANDON v. BRYANT.

(Supreme Court of Vermont. Rutland. Oct. Term, 1896.)

NOTES—INDORSEMENT AFTER MATURITY—DEMAND AND NOTICE—WAIVER.

That the payee of a note, when selling it after maturity, understood it was bought to give the maker more time, does not show a waiver by him of demand and notice as if the note became due the day he indorsed it.

Exceptions from Rutland county court; Taft, Judge.

Action by Walter C. Landon against John F. Bryant on a note executed to defendant

which, after maturity, he sold and indorsed in blank. Verdict was directed for defendant. Plaintiff excepts. Affirmed.

Horace W. Love, for plaintiff. G. E. Lawrence, for defendant.

MUNSON, J. To charge the indorser of an overdue note, demand must be made and notice given as if the note became due on the day of the indorsement. *Nash v. Harrington*, 2 Aiken, 9. The plaintiff conceded that this had not been done, and sought to hold the defendant on the ground of waiver. The court held there was no evidence tending to show a waiver, and this holding was correct. Giving the testimony the largest scope possible, its only tendency was to show that the defendant understood the note was being bought to give the maker more time. The jury could not be permitted to infer a waiver from the mere fact that the indorser had this understanding. Judgment affirmed.

MCGOWAN v. GRIFFIN et al.

(Supreme Court of Vermont. Washington. Oct. Term, 1896.)

SALE OF BUSINESS—MONEY INCLUDED—ACTION ON COVENANT.

1. A contract by which plaintiff sold "all his right, title, and interest" in a grocery "business" carried on by him and J., and assigned "all accounts due said firm," and defendants agreed to pay all debts and assume all obligations thereof, and pay plaintiff a certain sum, entitled defendants to the money derived from the sale of goods either then on hand or deposited in the bank in the name of plaintiff, who managed the business.

2. Plaintiff sold a business to defendants, they to pay him \$475 and assume and pay the debts of the business; surrender to them of all property belonging to the business and payment by them of the \$475 to be at the same time. He surrendered to them all property belonging to the business except some money which he claimed did not pass, and they retained it without offer to rescind. Held, that he could sue them for the \$405, damages for his breach being easily ascertainable and the subject of recoupment.

Exceptions from Washington county court; Thompson, Judge.

Action by Martin J. McGowan against John H. Griffin and others. Verdict was directed for defendants, and plaintiff excepts. Reversed.

The special findings were to the effect that at the time of execution and delivery of the contract in suit, plaintiff and John P. McGowan were not partners in the grocery business, and the plaintiff and defendants did not then understand that the contract included and conveyed to defendants the money on hand and on deposit in the bank, received from the business mentioned in said contract.

John W. Gordon, for plaintiff. R. A. Hoar and S. C. Shurtleff, for defendants.

ROSS, C. J. The plaintiff insists that the court erroneously ordered a verdict in favor of the defendants.

1. He says the contract under consideration should not be construed to cover the money taken by the plaintiff. By that contract the plaintiff sold and conveyed to the defendants "all his right, title, and interest in and to the business heretofore carried on by him and John P. McGowan under the name and style of the 'Boston Branch Grocery Store,' and under the name of 'Martin J. McGowan, Proprietor,' at North Barre, in the county of Washington." In another clause, he "transfers, conveys, and assigns" to the defendants "all accounts due said firm," and in consideration thereof the defendants agree "to pay all debts and assume all obligations and liabilities contracted for and on behalf of said firm," and to pay the plaintiff a stipulated sum. Annie McGowan (the mother of the plaintiff), one of the defendants, "acknowledges full satisfaction and payment of all moneys borrowed of her * * * for or on behalf of said business." This contract is under seal, and is dated November 15, 1894. This contract is to be read and construed in the light of the circumstances surrounding the establishment and carrying on of the business and attending the making of the contract. These circumstances were, in substance, the following: In 1893, the plaintiff and his brother, John P. McGowan, were in Massachusetts working upon the railroad. John P.'s habits were not entirely good, and he did not save his earnings. Their mother, Annie McGowan, was desirous to have them engage in some other business. For that purpose she purchased a building in North Barre, the first story of which could be used for a grocery store, and the second story for a tenement. She induced the brothers to come there and go into the grocery business. She gave them the use of the building, and furnished them, without interest, some \$1,400 to start the business with. The plaintiff had a wife and child. John P. was unmarried. The plaintiff furnished \$300 or \$350 to put into the business. He borrowed of an aunt \$200, which is a part of the debts contracted on behalf of the business which the defendants were to pay. The mother, the plaintiff and family, and John P. lived in the tenement over the store, out of the store. The plaintiff and John P. devoted their time to conducting the business. Neither of them received wages. On account of the habits of John P. the business was controlled mostly by the plaintiff, but there was an understanding that if John P.'s habits improved he was to have an equal share in the business with the plaintiff. The business was thus started in the name of the "Boston Branch Grocery Store" the 1st of April, 1894, and continued until the time of the sale. During the last part of the time, the plaintiff procured the printing of some bills headed, "The Boston Branch Grocery Store, Martin J. McGowan, Proprietor." Money received from the business had been deposited in a bank, and this account was kept in the plaintiff's name, and he drew the checks to pay for

purchases. John P.'s habits were not always what they should be. About the 1st of November the relations of the brothers became unpleasant, and John P. went to Massachusetts. His mother procured his return, and procured her brother to come and to see if a settlement could not be brought about. After he came and had had some talk with the plaintiff about a settlement, on the evening of Saturday, the 10th of November, the plaintiff, as was his usual habit, took from the money drawer of the store nearly what money there was there and took it to his tenement. This money all came from the business of the store, and was not returned. The plaintiff also had money on deposit in the bank coming from the same source. The parties do not agree in regard to what was said about this money during the negotiations which resulted in the contract. They agree that the negotiations which so resulted were so far advanced that the defendants took possession of the store on Monday morning, November 12th, and continued in possession until the contract was signed. On November 14th the plaintiff drew most of the money out of the bank. Two or three forms of a contract were drawn, and finally the one which was executed, on November 15th. Construed in the light of these surroundings, this money which the plaintiff took belonged to and was a part of the business done under the name of the Boston Branch Grocery Store, as much as the goods in the store. It came from the sale of such goods, and was intended to be used in purchasing goods for the store. It was a part of the capital which the mother and plaintiff had furnished to carry on the business. By conveying to the defendants all his interest in the business the plaintiff conveyed all his right, title, and interest in and to this money, as fully as he did to the goods on hand in the store. It is immaterial whether the plaintiff and his brother were in partnership. A grocery business had been created in the manner indicated, and it is not material to the construction to be placed on the contract to determine the exact legal status of the business, and the rights of the several parties interested therein. It is not contended that it was not the duty of the court to construe the contract. It correctly construed it as conveying this money which came from the sale of goods from the store. It would be too narrow to construe the word "business" to be the good will of the business, as contended by the counsel for the plaintiff. The good will of a business is not the business, but is one result springing out of it. The circumstances do not raise any latent ambiguity, when the language of this contract is applied to the subject-matter thereof. The special findings of the jury were both immaterial to the determination of the legal rights of the parties under the contract. But they were submitted by the court without exception, to determine points on which the parties were at variance in their testimony. The sec-

ond finding is inconsistent with the general verdict ordered by the court. Whether, against the plaintiff's motion to set aside the verdict, the court could reject this special finding, inconsistent with the general verdict ordered, we do not consider.

2. The plaintiff further contends that the court erred in ordering a verdict for the defendants, for that, conceding that the money taken by the plaintiff from the business belonged, by the terms of the contract, to the defendants, the plaintiff was entitled to a judgment for the balance due him under the contract. The action is covenant broken. The plea is that the indenture declared on is not the deed of the defendants. In their testimony the defendants concede that they executed the indenture. They also concede that they have received all the property conveyed except the money taken by the plaintiff which belonged to the business. Its amount is not determined. The defendants at one time offered to pay the plaintiff \$75 as the balance due him under the contract. The testimony does not show that they made him a tender of that sum of money, nor is a tender pleaded and brought into court. Neither has it been determined, if made and kept good as a tender, whether this sum is sufficient to pay the balance due the plaintiff. This action of the court cannot be sustained on the ground that the defendants, before suit, had made, kept good, and brought into court for the plaintiff a tender sufficient to pay him the balance due under the contract. The exceptions state that the defendants offered to pay the plaintiff such a sum as should be found due him, if he would account for the money he had taken which belonged to the business at the time of the sale. This offer would not defeat the plaintiff from recovering such balance in this suit. From the copy of the charge it appears that the court made this ruling upon the ground that the plaintiff had refused to fulfill his part of the contract by claiming, in good faith, that the money belonging to the business which he had taken belonged to him, and did not pass to the defendants by the contract. The covenants of the parties to the contract were, in part, to be performed by them concurrently. The plaintiff was to surrender to the defendants all the property belonging to the business at the same time they were to pay the \$475. This sum was not the entire consideration for his covenant to surrender to them all the property and assets belonging to the business. They were also to pay and save him harmless from all debts and liabilities incurred on behalf of the business. The plaintiff has surrendered to the defendants all the assets of the business except the money taken by him, and they still hold possession of the same. The withholding of this money was a breach of the plaintiff's covenant, but the damages arising therefrom were definitely ascertainable. It being a breach of his covenant in the same indenture on which he had brought his suit, the defend-

ants could recoup the damages arising to them from his refusal to perform, from the contract price, to recover which the plaintiff brought the suit. The tendency of the decisions of this and other courts is to hold mutual covenants or stipulations, to be performed concurrently by parties to a contract, as independent rather than as dependent, and to allow a recovery by a party who has partly but not fully performed, when the damages arising from his nonperformance can be readily ascertained, and, by reduction or recoupment, taken from the amount he is entitled to receive by the terms of the contract for performance of his stipulation or covenant. This subject is fully considered in *Booth v. Tyson*, 15 Vt. 515. After stating that modern decisions make an entire fulfillment requisite to a recovery applicable for the most part to contracts for labor, the doctrine of the decisions summarized and adopted is thus stated: "The principle of these cases seems to be that, although the contract is in one sense entire, i. e. full performance on the part of the promisor is of the consideration of the contract, yet, if it contains, neither expressly or by strong implication, a condition of full performance precedent to any right to claim pay, and is of a uniform nature, and thus capable of just apportionment, the court will consider the promises independent and apportionable, and suffer a recovery for part performance, subject to the deduction of whatever damages the party entitled to claim full performance may have sustained." See, also, *Davenport v. Hubbard*, 46 Vt. 200. The rule thus stated is clearly applicable to this case. The plaintiff has performed a substantial part of his covenant in regard to the sale and delivery of the assets of the business. The defendants have not rescinded, nor offered to rescind, the contract because of his failure to fully perform, but hold the property delivered. His failure to refund the money which he took from the business, and the damages occasioned thereby, are readily ascertainable, and can be adjusted in reduction of the sum to which the plaintiff is entitled by the defendants' covenant, so as fully to compensate the defendants for the plaintiff's failure to fully perform his covenant. Hence, while the court correctly construed the contract in suit against the plaintiff, he was still entitled to recover so much of the stipulated price to be paid him as he should receive under the rule already stated, and the court erred in directing a verdict against him. Judgment reversed and cause remanded.

RATHBUN v. NEW YORK, N. H. & H. R. CO.

(Supreme Court of Rhode Island. April 30, 1897.)
RAILROADS — RIGHT OF WAY — CONSTRUCTION OF
CROSSINGS — EASEMENT RUNNING WITH LAND
— ESTOPPEL.

1. A claim by a railroad company that it has paid for the whole of a strip which separated

portions of a tract, and was therefore entitled to it, free from any right to crossings, is untenable where the award of damages was expressly based on the construction and maintenance of crossings at particular places, and crossings had been constructed and used for 60 years.

2. Where the award in proceedings to condemn, for a railroad right of way, a strip extending through a tract of land belonging to plaintiff's grantor, proceeded on the theory that crossings should be made at particular places, and the company constructed a crossing for the benefit of such grantor, the easement passed to plaintiff, as grantee of a portion of the tract situated wholly on one side of the right of way.

3. Where a railroad company procures a reduction of damages by agreeing to construct a crossing, and continues to maintain it after the land has been conveyed, with knowledge of the conveyance, it is estopped to claim that the grantee is not entitled to the crossing.

Action by Thomas W. D. Rathbun against the New York, New Haven & Hartford Railroad Company. Judgment for plaintiff.

Walter B. Vincent and Dexter B. Potter, for plaintiff. Nathan F. Dixon and John W. Sweeney, for defendant.

STINESS, J. The New York, Providence & Boston Railroad Company located its road through the land of Martha Greene, in North Kingstown, building an embankment for its roadbed, which separated the land into two parts. Upon the complaint of Mrs. Greene a bridge was put in for a passway between the two parts. The building of the road began in 1834, and trains were running in 1837. The date and circumstances when the bridge was put in do not further appear, but we do not think that they are material. The commissioners to estimate damages caused by the layout awarded \$700 to Mrs. Greene, and stated in their report that it "included the damages for the inconvenience which the several landowners would be put to in consequence of being confined to particular places in passing over the railroad"; but they did not report how the passway should be constructed, leaving that to a subsequent report, if the parties should not agree. The award, therefore, under this report, is for land taken, and for the damage arising from the separation of the parcels with passways at particular places. Upon the appeal of the railroad company, the award was reduced, presumably on the same basis, since nothing is changed by the verdict except the amount to be awarded.

The defendant claims that the passway was put in simply as an accommodation, and that as Mrs. Greene sold her land in parcels, and this plaintiff bought land only on one side of the track, the severance of the title terminated the right to a passway, even if it be assumed that it existed before. The defendant also claims that, having condemned and paid for the land, it is to be presumed that it has paid for the whole land, free from any right of way across it. We do not see how this can be so, in view of the statement in the report of the commissioners that the award made was to include passways at par-

ticular places, coupled with the fact that a passway was then put in at this place, which has been used for 60 years. If, then, she was not paid for the complete severance of her estate, she had a right to the passway. We next ask, was that right confined to her, so that, upon sale of her land, her grantees would have no easement of way? The right of way was supposed to have been continued to all purchasers from Mrs. Greene, by grant or reservation in the deeds. There can be no doubt that the purchasers supposed that the passway continued for their benefit. Now, if it does not, let us see what the result is. She has been paid for a strip through her land, with the two parts connected by a passway. From either side there is access to the other, and her damages are assessed accordingly. In time, she wants to sell the land on one side. Now, if on that severance the passway ceases, then her land is cut off by itself, and possibly with no other way to get to or from it. It is worthless. It is practically condemned as much as the land within the layout, but this damage has not been paid for. It would be most inequitable to award damages upon the assumption of a way to and from a piece of land, and then, when it comes to selling it, say that there is none. The loss and damage, for which no award had been made to the owner, would come then. But, if she can sell it with the right of the passway, she sells in accordance with the terms of the award and the plain intent at the time. She gets the value of her land, because it is accessible. But, if she has the right to sell it with the passway, of course the purchaser must have the right to its continuance; otherwise, he is made to suffer the damage without compensation. In 3 Elliott, R. R. § 1149, it is said: "And where the railway company which has put in a crossing, in compliance with an agreement between itself and an adjoining landowner, continues to maintain the crossing after the landowner has conveyed it to another, it may estop itself to claim that the subsequent grantee is not entitled to the crossing." We regret to find that the case cited (*Stewart v. Railway Co.*, 89 Mich. 315, 50 N. W. 852) does not fully warrant the proposition, but, nevertheless, we consider it sound in principle, and we adopt it. It must be so, whether the land is sold as a whole to one person or in parcels to different persons. Unless the right of way goes with the land, the injustice which we have pointed out is liable to occur. *Stewart v. Railway Co.*, simply decides that if a railroad company maintains a crossing, when it is not bound to do so, it must still use ordinary care to prevent damage to those who accept the invitation to use it. A more pertinent authority referred to in the same section is *Swan v. Railway Co.*, 72 Iowa, 650, 34 N. W. 457, where it is held that the purchaser of a railroad is charged with notice of the rights of landowners to private crossings, in use, whether under oral contract or otherwise, and cannot interfere to

destroy or impair such rights. See, also, *Railway Co. v. Dimick*, 144 Ill. 628, 32 N. E. 291. If the purchaser of a railroad is charged with notice of an apparent easement, which would affect the defendant in this case, by parity of reasoning the purchaser of land which such an easement serves is entitled to take notice of its existence, and his purchase under such circumstances is the ground of estoppel on the part of the railroad company. The company, having had the benefit of reduced damages by reason of a passway between the two parcels of land, have no right, upon a severance of title, to impose a new damage to one of the parcels by cutting off a way to and from it, which is preserved by deed through the other parcel. We do not think, therefore, that the verdict was against the evidence. It is suggested in the defendant's brief that the damages were excessive, but this cause is not alleged in the petition for a new trial.

MARSHALL v. PERKINS.

(Supreme Court of Rhode Island. April 17, 1897.)

HUSBAND AND WIFE—LOAN TO WIFE FOR NECESSARIES.

A husband is not liable to one who loaned money to his wife for the purchase of necessities, unless the lender furnished the necessities, or saw that the money was laid out in their purchase.

Exceptions from court of common pleas, Providence county.

Action by Leander O. Marshall against George W. Perkins. There was a judgment for plaintiff, and from an order denying a new trial defendant excepts. New trial granted.

Page & Owen, for plaintiff. David S. Baker, for defendant.

PER CURIAM. The court is of opinion that the defendant is entitled to a new trial upon exception to the refusal of the third request for instruction to the jury, viz.: "That he is in no case liable for money loaned to the wife, even though it be to purchase necessities." In *Gill v. Read*, 5 R. I. 343, Ames, C. J., said: "It is old law that neither a wife nor an infant has credit to borrow money, the credit being for necessities, and not for money to buy them with, which may be misapplied. If, indeed, the lender lays out the money, or sees it laid out for necessities, he may charge them as provided by himself, and thus the application of the loan is left, as it should be, at his peril. If, as we understand the bill of exceptions, the money was furnished by the plaintiff directly to the wife, and there was no evidence that the same was applied by her to the purchase of necessities, which the plaintiff charged, as he might, as furnished by himself, the ruling as to these items was erroneous." The court is of the opinion that that case is

not substantially different from the present. The credit which the law recognizes is for necessities, and not for money to buy them with, which may be misapplied. The present case does not show that the plaintiff either furnished the necessities or saw that the money advanced was laid out for necessities, and hence he is not within the rule. If the testimony of the wife alone that the money was laid out for necessities should be held to be sufficient, it would open the door to the liability for misapplication, which it is the purpose of the rule to prevent. New trial granted, and case remitted to the common pleas division for further proceedings.

O'BRIEN v. MAYOR, ETC., OF CITY OF PAWTUCKET.¹

(Supreme Court of Rhode Island. April 23, 1897.)

CERTIORARI—PROVINCE OF WRIT—REVIEWING EVIDENCE.

On certiorari to the board of aldermen to review a decision dismissing a policeman, the court will not review the admission of hearsay evidence, where other competent testimony was introduced, since the purpose of the writ is merely to correct errors of law, and it will be presumed that the evidence offered in support of the charges was sufficient to authorize the action of the board.

Certiorari by John O'Brien to review the decision of the mayor and aldermen of Pawtucket dismissing him from his office as policeman. Writ quashed.

Hugh J. Carroll, for petitioner. James L. Jenks, for respondents.

PER OURIAM. The petitioner alleges that the respondents permitted hearsay testimony to be introduced at the trial of the charges of misconduct preferred against him in his capacity as a police officer of the city of Pawtucket, and he therefore alleges that the proceeding against him was illegal, and prays that it may be quashed. The return to the writ, which has been issued, shows that the charges were duly preferred in writing; that they were first investigated by the committee on police and licenses, of the board of aldermen, which committee reported that said charges and the evidence thereof were of a character which called for an investigation by the entire board, and thereupon the matter was duly referred to said board. It also appears that, after due notice of said charges and of the time and place fixed for the hearing thereof, a trial was had; that sworn testimony was adduced on both sides, the petitioner being present with counsel; and that the board of aldermen after said hearing duly adjudged that said charges were proved, and thereupon voted that he be dismissed from office. And, while it does appear from said return that hearsay testimony was introduced against the protest of petitioner, yet it also appears that other testimony was of-

fered, so that, even admitting that the hearsay testimony was not legally admissible, as it clearly was not, yet it does not appear from the record that no competent testimony was introduced. Moreover, as this court has repeatedly held, the purpose of certiorari is to correct errors of law, and not to review findings of fact. *Smith v. Town of Burrillville*, Index, QQ., 57, 31 Atl. 578. And therefore, even if the evidence submitted was before us, which it is not, we could not review the same, no question of jurisdiction being raised. It is to be presumed, therefore, that the evidence offered in support of the charges preferred was sufficient to warrant the action of the board of aldermen in discharging the petitioner. And, as said board had full jurisdiction in the premises (Pub. Laws R. I. c. 603, passed May 28, 1886) this court cannot review their action. *Starr v. Trustees of Rochester*, 6 Wend. 584; *Hamilton v. Harwood*, 113 Ill. 154; 4 Enc. Pl. & Prac. 254, 255, and cases cited. The writ is therefore quashed.

LAKE et al. v. WEAVER.

(Supreme Court of Rhode Island. April 21, 1897.)

CROSS-EXAMINATION—TRIAL—RECEPTION OF EVIDENCE.

1. Where a witness who had been employed by his father in his business for a number of years, and had succeeded to the business on his father's death, testified from his general knowledge as to the income received from the business by his father, it was not error to exclude questions on cross-examination as to his own income from the business; it appearing that he had made changes in the business and in the prices charged.

2. Misconduct of parties during the examination of witnesses before a jury is not ground for a new trial where the trial judge, on his attention being called to it, promptly ordered it stopped, and threatened to publicly reprimand the offending parties in case it was repeated.

3. Permitting the introduction of evidence after a case has been closed and the argument begun is within the discretion of the court, and its exclusion is not ground for reversal where the evidence offered was merely cumulative.

Action by Catherine E. Lake and others against Mary F. Weaver, executrix, contesting the validity of a will. Verdict for contestants, and proponents petition for a new trial on exceptions. Petition denied.

Albert A. Baker, for appellants. Irving Champlin and J. C. Quinn, for appellees.

PER CURIAM. We have examined the voluminous record of the evidence submitted to the jury in this case, and, while it appears that the evidence is quite conflicting, yet we cannot say that it is not sufficient to sustain the verdict. It is not strange, especially in will cases, where family differences play an important part, and strong passions are excited, that the testimony should be conflicting, and more or less of a partisan character. It is noticeable, also, that persons called as experts, touching the

¹ For opinion on reargument, see 37 Atl. 530.

mental capacity of a testator, in such cases, are usually far from being in accord in relation to this question; and the evidence shows them to have been so in this case. The question as to the testamentary capacity of the deceased, therefore, was peculiarly one for the determination of the jury. The case was tried at great length, and with that high degree of diligence and thoroughness which are well-known characteristics of the counsel both for the proponents and also for the contestants; the jury evidently had every possible means of becoming acquainted with the mental condition of the testator, practically his whole life for many years next before his death having been placed before them in review. They saw and heard the witnesses, and were in the best possible position to form an intelligent judgment as to their credibility, and also as to the question at issue. They have found that the instrument in question is not the will and testament of Albert Weaver, deceased, and there is evidence sufficient to sustain this finding.

The petitioners allege that the court erred in ruling out certain questions in cross-examination of Charles H. Weaver, to show a comparison between the income of said Charles, who was a son of the deceased, and that of his father, in the teaming business,—particularly that part of it known as the "string-team business." It appeared from the testimony of said Charles, a witness produced by the contestants, that the deceased had long been in the teaming business; that said witness had been in his employ in one branch of that business for many years, and up to the date of his father's death; that it was a very profitable business; and that witness knew in a general way the amount of income derived therefrom by his father, although he had nothing to do with the financial part thereof, or with the keeping of the books. It also appeared that said Charles succeeded to his father's business upon the death of the latter. In view of the fact that proponents had denied that the profits of the business were anything like the estimate put thereon by Charles, and had offered testimony that little or no profit was realized therefrom for several years before the death of the testator, the witness was asked in cross-examination as to the amount of his business, and whether he did not do more than his father, for the purpose of making a comparison between their respective incomes. The question was objected to, ruled out, and an exception taken. Counsel contends that the question was pertinent, as the comparison asked for would have shown that the testimony of the witness was either true or false. He also contends that the question should have been allowed for the purpose of impeaching the testimony of the witness, if for no other purpose. We think the evidence offered was both too remote and too uncertain to have

any material bearing upon the case. The witness had testified that he had materially reduced his prices for teaming since the death of his father, and that he had not carried on the same identical business that his father had carried on; and it also appeared, for other reasons, that the comparison called for could not have thrown any light upon the question at issue. Nor do we see, in the circumstances which appeared in his testimony taken as a whole, that any comparison which he could have made would have tended in any appreciable degree to impeach his testimony. The exception is therefore overruled.

The petitioners allege that they did not have a fair and impartial trial, in that certain witnesses called by the contestants were prompted, while on the witness stand, in the giving of their testimony, by signals and other devices from certain of the contestants, and particularly from Mrs. Lake and Mrs. Coria. In order to constitute any misconduct of this sort a ground for new trial, it must appear that it was called to the attention of the presiding justice at the trial before the jury, and that he neglected to correct it. In this case the record shows that the objectionable conduct was repeatedly called to the attention of the presiding justice; that he warned the witnesses, through their counsel, to desist, and finally threatened to publicly reprimand them if their misconduct continued. In these circumstances, it cannot be fairly inferred that such misconduct was prejudicial to the rights of the proponents, and hence there is no legitimate ground for complaint on account thereof.

Petitioners also allege that they did not have a fair and impartial trial, in that Emily H. Lucas, one of the contestants, testified in rebuttal to the effect that she was blind, and was being treated therefor in a New York hospital, which testimony was corroborated by other witnesses; that this testimony was adduced at so late a period in the trial that petitioners did not have sufficient time and opportunity to fully contradict the same; and that, during the arguments of counsel, petitioners offered in evidence certain letters, then just discovered, written by said Emily while in New York, for the purpose of showing that she was not blind, but the court declined to permit them to be submitted in evidence, on the ground that it was too late. The record does not show that any exception was taken to this ruling, and hence it cannot properly be urged as a ground for new trial. But, even if it had been duly excepted to, we do not think it was of sufficient importance to be a ground for new trial. Moreover, it was clearly within the discretion of the trial court whether, after the evidence had been closed and the arguments of counsel had begun, the case should be reopened to admit further testimony, and more especially when such

testimony was merely cumulative in its character. The petition is therefore denied, and the case remitted to the common pleas division, with direction to enter judgment on the verdict.

GROSVENOR et al. v. FLINT et al.
(Supreme Court of Rhode Island. April 17,
1897.)

EQUITY — JURISDICTION — FIXING RENTAL UNDER
LEASE—SPECIFIC PERFORMANCE—FAILURE
OF ARBITRATION.

1. A court of equity has jurisdiction to appraise the rent to become due under a lease for an ensuing part of the term, where an arbitration as to the amount of such rent, provided for by the lease, has failed.

2. A provision in a lease for a term of years that every five years the rent for the ensuing five years shall be fixed by three appraisers, one to be selected by each party, and the third by such two, is an agreement to arbitrate, and will not be specifically enforced.

3. Where one of two arbitrators, who were empowered to select a third, was governed as to such selection entirely by the wishes and instructions of one of the parties, and, without other reason, refused to agree to any one of several competent and disinterested men proposed by his associate, there is a failure of the arbitration, which authorizes the other party to resort to the courts.

Bill by William Grosvenor and others against Henry S. Flint and others. Heard on bill, answer, replication, and proofs. Decree for complainants.

Samuel Norris, Jr., for complainants. James M. Ripley and John D. Thurston, for respondents.

TILLINGHAST, J. This bill is based upon the alleged nonperformance by the respondents of a covenant in a lease held by them of certain premises owned by the complainants. The lease was given September 11, 1870, and was to run for the term of 30 years. The covenant in question is as follows, viz.: The lessees agree to pay rent therefor "yearly and every year during the first five years of said term the sum of six thousand dollars, and during the subsequent years of said term such sums as may be agreed on or otherwise fixed under the provisions hereinafter contained, said rent to be payable quarterly in equal installments on the eleventh days of December, March, June, and September in each year during said term. And it is agreed between said parties that, at or about the expiration of each (except the last) period of five years of said term, the rent of said demised premises for the then next ensuing period of five years shall be fixed by the award in writing of any two of three disinterested men to be chosen in writing,—one by said parties of the first part, their heirs or assigns, one by said parties of the second part, their executors, administrators, or assigns, and the third by the two so chosen; and in case either party shall neglect, for thirty days

after being requested in writing by the other party so to do, to choose an appraiser in manner aforesaid, it shall be lawful for such other party to choose two of said appraisers, and the two so chosen the third, and the award of either two of the three, in either manner chosen, shall be final and conclusive." The bill sets out, in substance, that, at the expiration of each of the first four periods of five years after the date of said lease, the rent for the then next ensuing period was duly fixed by appraisers chosen in accordance with the provision above quoted, but that at the expiration of the fifth period, viz. September 23, 1895, the respondents neglected and refused to comply with said provision, by neglecting to choose an appraiser within 30 days after the complainants had made choice of one, viz. Henry C. Cranston, and had given due notice thereof to the respondents, but that, shortly after the expiration of said 30 days, the respondents notified the complainants that they had chosen Sylvanus N. Lewis as an appraiser; that, pending an attempt to agree on a third appraiser, said Cranston died; whereupon the complainants chose Addison Q. Fisher as an appraiser, in place of said Cranston, deceased, and notified the respondents thereof; that thereafterwards, after unsuccessful efforts on the part of Fisher and Lewis to agree on a third man, Fisher named six suitable business men of Providence, from whom Lewis had the privilege of selecting one, but that he rejected them all, and without any good reason therefor, and insisted that the respondents should have a third man of their own choice. In view of these allegations, the bill charges that Lewis, acting in behalf and under the direction of the respondents, has been endeavoring to prevent the selection of a disinterested and suitable person as third appraiser, and to procure the selection of some unsuitable person for that position, with a view to an unfair appraisal of said rent. The bill prays that it may be ascertained, by reference to a master, or in such other way as the court may deem proper, what is a fair and reasonable rent for said estate, and for other relief. The answer denies the allegations aforesaid in so far as they charge any misconduct or unfairness on the part of the respondents, and on the part of said Lewis, in the premises, and avers that said Lewis suggested the names of several prominent business men who were disinterested, and that said Fisher declined to accept any one of them as a third appraiser. It also sets up, as a matter of law, that the court has no jurisdiction to appraise said rent through its master. The case is before us on bill, answer, replication, and proof.

The case presents two questions for decision, viz.: (1) Whether the court, by a master, or otherwise, can appraise the rent payable to the complainants, if the arbitra-

tion provided for in the lease has failed; and (2) whether, as a matter of fact, the arbitration has failed.

In answer to the first question, we think it is clear that the court has jurisdiction to do, either directly or by its master, what the appraisers or arbitrators could have done under said provision of the lease, if it is shown that the arbitration has in fact failed. And refusal to agree to a third man constitutes such a failure. *Brock v. Insurance Co.* (Mich.) 81 N. W. 67; *Insurance Co. v. Bishop* 154 Ill. 9, 39 N. E. 1102; *Brown v. Harper*, 54 Iowa, 546, 6 N. W. 747; *Watson v. Duke of Northumberland*, 11 Ves. 153. The covenant to appraise the rent does not stand alone, but is merely a subsidiary part of the lease in question; that is to say, the manner of determining the amount of rent to be paid is a matter of form, rather than of substance. And if it appears that this question cannot be determined in the manner provided for in the lease, by reason of the refusal of one party to the contract to do what in equity he ought to do, the court will determine it, upon the application of the other. Substantially the same rule was adopted by this court in *Town of Bristol v. Bristol & W. Waterworks*, Index SS, 10, 35 Atl. 884. If the lessors are without fault in the premises, and it is by reason of the fault of the lessees that the agreement to arbitrate has become inoperative, it is clear that the former must have a remedy for the wrong and injury thereby sustained. Indeed, it has frequently been held that a failure by arbitrators to agree on an umpire is a sufficient ground for holding that an arbitration has proved abortive, without reference to any responsibility on the part of the party whose arbitrator was at fault. *Bishop v. Insurance Co.*, 130 N. Y. 488, 495, 29 N. E. 844; *Lowe v. Brown*, 22 Ohio St. 463; *Cheslyn v. Dalby*, 2 Younge & C. 170. That the specific performance of an agreement like the one in question cannot be decreed seems to be pretty generally held, such an agreement not being simply a covenant to renew at a fair valuation, but being in effect an agreement to arbitrate, and that equity will not specifically enforce such agreements. *Greason v. Keteltas*, 17 N. Y. 491, and cases cited; *Hopkins v. Gilman*, 22 Wis. 476; *Tobey v. Bristol*, 3 Story, 800, Fed. Cas. No. 14,065; 22 Am. & Eng. Enc. Law, 1000, and cases cited in note 4; *Wat. Spec. Perf.* § 44.

If it be suggested that the lessors have a remedy at law against the lessees for damages occasioned by the breach of the covenant to arbitrate, it is sufficient to reply that this remedy is neither an adequate remedy, nor is it the only remedy in a case of this sort. If the allegations of the bill are sustained by the evidence, the lessors have the right to say to the lessees: "You hold a lease of the premises in question for thirty years. You have agreed to submit the ques-

tion of the amount of rent to be paid therefor to the determination of three appraisers once in every five years of said term. You refuse to execute the said provision for fixing the rent to be paid. We cannot compel you to perform said covenant, and you cannot therefore object to the exercise of the power of a court of equity to fix and determine the rental valuation of the premises which you hold under said lease."

Having thus arrived at the conclusion that the court has jurisdiction in the premises, we next come to the second question above stated, viz. whether the arbitration provided for in the lease has failed. We think the evidence shows that it has. There was considerable delay in the matter of the selection of a third appraiser, caused by the respondents. Mr. Lewis, the appraiser chosen by them, refused to agree to any of the men named by Mr. Fisher, the appraiser chosen by the complainants, without giving any good reason therefor, and insisted that the third man should be one selected by the respondents; he stating, in substance, that the complainants had theretofore had their choice as to the third appraiser, and now the respondents were going to have theirs. The men named by Fisher were prominent business men of ability and good standing, and were suggested by him without any conference with complainant, and, so far as shown in evidence, they were wholly disinterested and suitable men to act as appraisers. Indeed, the respondents admitted at the trial that as to Mr. Charles H. Merriman, one of the men named by Fisher, and rejected by Lewis, there was no objection whatsoever, and they then offered to accept him as the third man. Lewis testifies that he objected to the men proposed by Fisher "on general principles"; that the only objection he had to Mr. Sims was that he "wanted a different man,"—"a man that I thought would be satisfactory to the other side." In short, it clearly appears that Mr. Lewis had made up his mind to refuse to accept any man named by the other side as a third appraiser. The evidence also shows that the men proposed by Lewis, although men of good standing and unquestioned integrity and business ability, yet were so intimately connected with one of the respondents, at least in social, friendly, and professional relations, as to disqualify them to act as appraisers. An arbitration is a judicial proceeding, directly affecting the interests of both parties to the submission (*Wood v. Helme*, 14 R. I. 329); and the plainest principles of justice require that the arbitrators ought to be indifferent and impartial men, both in sentiment and in action. They are the agents of both parties alike, and not of one party only (*Morse, Arb.* 106); and, like other judges, they are bound to exercise a high degree of judicial impartiality, without the slightest regard to the manner in which the duty has been de-

volved upon them. Russ. Arb. (3d Ed.) p. 205. "Like jurors impaneled for the trial of a cause," said Judge Cushing in *Strong v. Strong*, 9 Oush. 560, "arbitrators are invested pro hac vice with judicial functions, the rightful discharge of which calls for and presupposes the most absolute impartiality." See, also, *Bradshaw v. Insurance Co.*, 137 N. Y. 137, 32 N. E. 1055. The same general doctrine is recognized in *Flint v. Pearce*, 11 R. I. 576; *Cleland v. Hedly*, 5 R. I. 163; and *Peckham v. School Dist.*, 7 R. I. 545.

We think it sufficiently appears from the testimony that Lewis was acting under the instruction of the respondents in nominating the appraisers selected, he testifying that he and Mr. Flint conferred together about them, and that the names which he presented to Fisher were given to him on a paper written, as he thought, by some one in the respondents' office. It also sufficiently appears that, in refusing to accept any of those nominated by the other side, he was acting under similar instructions. We therefore decide that the complainants are entitled to relief as prayed.

MOWRY v. MOWRY.

APPLEBY v. SAME.

(Supreme Court of Rhode Island. May 3, 1897.)

TOWN TAXES—VOTE—DESIGNATION OF PROPERTY—OBJECT OF ASSESSMENT—STATUTORY LIMIT.

1. Where the warrant for the holding of a town meeting stated that its purpose was to order a tax for specific purposes stated in the warrant, the fact that the vote subsequently taken at the meeting did not specify the particular purposes for which the tax was to be assessed did not render the tax invalid.

2. The omission of a vote, at a town meeting called to order town taxes, to designate the kind of property to be assessed, is supplied by Pub. St. c. 43, § 1, providing that at such meeting the electors may levy a tax "on the ratable property of the town."

3. A town tax in excess of the limit provided by Pub. St. c. 34, § 18, providing that, with certain exceptions, no town shall assess its ratable property in any one year in excess of 1 per centum of its ratable value, is not void as a whole, but will be sustained as to the portion within the limit, if the rest can be separated by mere computation.

Actions by Albert J. Mowry and John J. Appleby, tax collectors of the town of Smithfield, against Marquis D. L. Mowry, administrator, to recover town taxes. Judgment for plaintiffs for part of relief sought.

James Harris, for plaintiffs. Marquis D. L. Mowry, in pro. per.

DOUGLAS, J. These cases were brought by the collectors of taxes of the town of Smithfield to recover the town taxes assessed against the defendant in that town for the years 1892, 1893, and 1894, and were heard by the court, jury trial being waived. The defendant admits that he possessed rat-

able property in said town at the times charged, but makes many objections to the validity of the taxes ordered in these years. Several of these defenses disappeared at the hearing, as they were contradicted by the evidence produced. It appeared, however, from the town records, that the votes of the electors ordering these taxes, in the years 1892, 1893, and 1894, did not designate upon what kind of property the tax should be assessed, nor what purposes the tax was to be assessed for, and that in 1894 the tax ordered was in excess of 1 per centum of the value of the ratable property of the town. The votes ordering the assessment of the taxes were as follows: For the year 1892: "Voted that not less than twenty thousand dollars, nor more than twenty thousand five hundred dollars, shall be assessed as the tax for the ensuing year." For the year 1893: "Voted that not less than seventeen thousand five hundred dollars, nor more than eighteen thousand dollars, shall be assessed as the tax for the year ensuing." For the year 1894: "Voted that not less than sixteen thousand dollars, nor more than seventeen thousand dollars, be assessed as the town tax for the ensuing year." The meetings at which these taxes were ordered were the regular annual town meetings required by law to be held on the second Tuesday in June "for ordering town taxes." The warrants issued for the warning of these meetings, and which were read therein before the votes were passed, are of similar tenor, and all specify as the object of the meeting "for the purpose of ordering a tax for the support of public schools, for the aid of public libraries, for the repairs of highways and bridges, for the payment of the state tax," etc. These are all lawful objects, for which a town may tax its inhabitants and their property (Pub. St. R. I. c. 34, §§ 3, 5), provided notice be given in the warrant that it is intended to order a tax (Pub. St. c. 35, § 12). We do not regard it as a fatal error that these objects were not specified in the vote itself. As we have said, the meeting was called for the purpose of ordering the annual town tax. No elector present could be ignorant, when called upon to vote upon the proposition that he was to decide, that, if carried, it meant to impose an annual tax of a certain amount upon his property, to be collected and paid into the town treasury, and to be subject to appropriation for the obligations of the town specified in the warrant. Whether the expression of the voter's will in this behalf was by raising the hand, casting a ballot, or uttering a response is immaterial, and so we think is the form of words in which the vote is recorded, provided the record is sufficiently definite to express the real intention of the voters. This conclusion is amply supported by the authorities cited in behalf of the plaintiffs. Cooley on Taxation (page 337) says: "In voting the tax the people will be acting in

their political capacity, and their action is to be favorably construed, and not to be overruled or set aside by judicial or any other authority, so long as they keep within the limits of power bestowed upon them. Technical defects and irregularities should be overlooked, so long as the substance of a good vote sufficiently appears, for the obvious reason that local business is largely and of necessity in the hands of plain people, who are unskilled in the technicalities of law, and unaccustomed to critical, or even accurate, use of language. A strict construction of their doings would inevitably be mischievous, and would defeat the collection of the revenue in very many cases. It will be found, therefore, that the courts sustain such action wherever sufficient appears to make plain the intent of the voters, provided the intent is warranted by the law." If the purpose to levy the tax and have it collected is plainly manifest, the court will hold the levy good, although there may be technical defects, omissions, and irregularities. *West v. Whitaker*, 37 Iowa, 598. In *Shontz v. Evans*, 40 Iowa, 139, the court held that if the object of the tax is made certain by law the levy will be held good, although not definite in terms. So, also, as to the effect of irregularities not controverting the intention of the electors. *Benjamin v. District Tp.*, 50 Iowa, 648; *Jefferson Co. v. Johnson*, 23 Kan. 717. The objection that the vote did not designate the kind of property to be assessed is based upon the assumption that under section 3, c. 34, Pub. St., towns are given the power to raise by tax on real or personal property, or on both, such sums as shall be necessary for certain specified objects, and that hence they have an option to tax either kind of property, and must elect by their vote which kind the tax shall be levied upon. This contention might be tenable if this section referred to were the only provision on the subject, but there are other provisions in the statutes which limit the general enumeration of the powers of towns given in this chapter. Section 3 of chapter 43 provides that "all property liable to taxation shall be assessed at its full and fair cash value"; and section 4 of the same chapter provides: "The assessors shall assess and apportion any tax on the inhabitants of the town, and the ratable property therein, at the time ordered by the town." As is urged by the plaintiffs, if the electors had the right to order the tax upon any but the entire ratable property, it would be impossible for the assessors to assess such a tax under the provisions of sections 3, 4, c. 43. But the power of the town in this regard is defined by section 1 of chapter 43, which provides as follows: "The electors of any town qualified to vote on a proposition to impose a tax, when legally assembled, may levy a tax for the purposes authorized by law, on the ratable property of the town,"

etc. The law then supplied the omission of the vote, and defined the property upon which the tax was to be levied as clearly as the vote could have done. In regard to the tax of 1892, it appears that the tax voted was at the rate of \$1.15 upon each \$100 of the ratable property assessed in the town. Pub. St. R. I. c. 34, § 18, provides: "No town shall assess its ratable property in any one year in excess of one per centum of its ratable value, except for the purpose of paying the indebtedness of such town or the interest thereon, or for appropriations to any sinking fund, or extraordinary repairs for damages caused by the elements." Now, following out the conclusion we have arrived at in discussing the validity of the form of vote, we must hold that the tax, being levied for the purposes named in the warrant, could not be ordered for more than 1 per cent. of the taxable valuation of the property in the town. The defendant contends that the whole tax is therefore void. We do not think so. The town had a right to order a tax of 1 per cent. The exigencies of the town required a tax to be levied, and the excess can easily be separated from the lawful levy. In *Mix v. People*, 72 Ill. 241, the Illinois statute (similar to the one in this state) in article 9, § 8, provided "that the county authorities shall never assess taxes the aggregate of which shall exceed 75 cents per \$100 valuation, except for the payment of indebtedness existing at the adoption of this constitution, unless authorized by a vote of the people of the county." The opinion says that "this provision renders all of this tax void which is in excess of the constitutional limit; but the books abound in cases which hold that, in the exercise of a power, any excessive action beyond that power will not vitiate acts within its power, where the acts well performed can be separated from those that are unauthorized. Here, there can be no question that 75 cents on the \$100 valuation was fully warranted, and that sum can be readily separated from the illegal and unauthorized sum levied in excess of that amount. It requires but a simple calculation to make the separation with precision." And, after citing several Illinois cases, the court continues: "It has been so repeatedly held that an illegal levy of a tax does not vitiate or affect the portion legally levied, where the two can be separated, that the question must be regarded as settled." The same doctrine is held in *De Fremery v. Austin*, 53 Cal. 380; *O'Byrne v. Mayor, etc.*, 41 Ga. 333; *Burlington & M. R. R. Co. v. Board of County Com'rs of York Co.*, 7 Neb. 487; *Bright v. Halloman*, 7 Lea, 306; *Vance v. City of Little Rock*, 30 Ark. 435; *Frazer v. Siebern*, 16 Ohio St. 615. Judgment should be entered for the plaintiffs for the amount of the 1893 and 1894 taxes, with interest, and for 1 per centum on defendant's ratable property for 1892, with interest.

HARRIS v. EATON.

(Supreme Court of Rhode Island. May 5, 1897.)

DOGS—UNINTENTIONAL KILLING—JUSTIFICATION.

1. Where a person voluntarily shoots at a dog, and kills it, the actual injury is not justified by the fact that he did not intend to kill it, but to scare it away from his premises, on which it was trespassing.

2. Under Pub. St. R. I. c. 98, which makes a licensed dog property, and the owner of any dog liable for the damage it may do, a person who kills a licensed dog is liable to its owner, unless when killed the dog is attacking the person who kills it or some one with him outside of its owner's premises (section 6), or is worrying, wounding, or killing some one of the animals protected by section 6, or the person has reasonable cause to believe that it is necessary to kill the dog to protect his other property; and it is no justification that the dog is trespassing and has previously injured property, or that its owner has been notified to keep it from trespassing under pain of its being killed.

Action of trespass by William M. Harris, Jr., against William D. Eaton. Certified on demurrer to defendant's special plea in bar. Demurrer sustained.

J. W. Hogan, for plaintiff. W. B. Vincent, for defendant.

ROGERS, J. The plaintiff demurs to defendant's plea of justification in an action of trespass for killing the plaintiff's dog while trespassing on the close of the defendant's master. The following are substantially the allegations set out with great minuteness in the defendant's plea: "For more than two years prior to the time of the killing, the plaintiff's dog had been constantly and repeatedly in the habit of trespassing on the close of one A. M. Eaton, and had there chased and killed certain fowls and animals, and had been driven off of said close while killing said fowls and at other times while trespassing on said close, being fired at by said A. M. Eaton or by others, his servants or agents; yet nevertheless the said plaintiff, after having been so notified of the killing of said fowls, and that his said dog had been fired at while so trespassing, and after having been requested and told by the said A. M. Eaton to keep his dog chained or shut up, and off of the said close, or he (the said dog) would be shot, refused and neglected so to do, but, on the contrary, continued and has continued down to the time when, etc., to allow his said dog to run at large, and to trespass constantly on the close of the said A. M. Eaton. And when said dog was killed he was again trespassing upon the said close, with the knowledge of the said plaintiff, at the time and soon after eight rabbits had been killed on the said close of said A. M. Eaton, by some dog or dogs or other animal or animals to the defendant unknown, and the defendant had reason to believe, and did believe, that said plaintiff's dog had taken part in killing said rabbits; whereupon he, acting as the agent of said A. M. Eaton, and with knowledge of the premises, and with

knowledge thereof by the plaintiff, who nevertheless was then and there allowing his said dog to run at large, and to continue to trespass upon said close, fired at said dog and other dogs then and there trespassing on said close, with a gun loaded with gun powder and bird shot, not for the purpose or with the intent of killing said dog, but to frighten him and drive him off of said close, and by chance the said dog was struck in some vital spot, and died in consequence thereof." Analyzed and stripped of its verbiage, the plea resolves itself into this: that the plaintiff's dog was trespassing on the close of the defendant's master, under more or less aggravating circumstances, and that the defendant, as agent for his master, fired a shotgun, not with the intent of killing said dog, but to scare him and drive him off of said close, and by chance the said dog was struck by said defendant's shot in some vital spot and died in consequence thereof.

We fail to see how a voluntary act committed by the defendant, which he was under no obligation to do and which resulted in injury to the plaintiff, even if it produced effects not intended or foreseen, can justify such injury, though the lack of evil intent might mitigate the damages, if anything more than compensatory damages are claimed. Williams, C. J., in *Vincent v. Stinehour*, 7 Vt. 62, 68, lays down the rule thus: "When a person is doing a voluntary act, which he is under no obligation to do, he is held answerable for any injury which may happen to another, either by carelessness or accident." See, also, *Wright v. Clark*, 50 Vt. 130, 135; *Underwood v. Hewson*, 1 Strange, 596.

Though the plea alleges that the dog was shot merely by chance, the purpose and intent being to frighten him away and not to kill him, yet, whatever the intent, did any of the circumstances set up in the plea, by way of inducement or otherwise, justify a killing? We think not. Pub. St. R. I. c. 98, defines the legal status of a licensed dog. An unlicensed dog going at large has no apparent protection under the law, and any person may kill him. Section 13. So a licensed dog, not having on a collar with the owner's or keeper's name distinctly marked thereon, may be killed anywhere outside of his owner's or keeper's inclosure (section 4); and any person may kill any dog that may suddenly assault him, or any person of his family or in his company, while the person so assaulted is out of the inclosure of the owner or keeper of the dog (section 6). *Spaight v. McGovern*, 16 R. I. 658, 19 Atl. 246. Any person likewise may kill any dog found out of the inclosure of its owner or keeper, worrying, wounding, or killing any neat cattle, sheep, lamb, horse, hog, or fowl, not the property of the owner (section 6); and any officer charged with the service of an execution in a suit against the owner of a dog for a second recovery of damages committed by

such dog shall kill the offending dog as commanded in such execution (section 3). In section 7 of said chapter 93 is a provision for making complaint to a justice or clerk of a district court wherein, after certain proceedings, authority may be obtained for killing objectionable dogs. Said chapter 93 makes a licensed dog property, and the subject of larceny, and makes the owner of any dog liable for the damage he may do. Defendant's special plea nowhere brings the plaintiff's dog within the provisions of said chapter 93 authorizing any one other than his master to kill him.

Neither the fact that the plaintiff's dog was a trespasser on A. M. Eaton's close, nor that he had previously committed depredations to property there, would afford justification for killing him, for Mr. Eaton could recover reparation for such injuries. In *Brent v. Kimball*, 60 Ill. 211, 213, the court says: "Appellee does not pretend, in his evidence, that the dog, at the time of the killing, was doing any mischief to person or property, but claims, more, it seems, upon suspicion than knowledge, that the dog had previously destroyed his hens' nests or eggs. If the dog had a vicious habit, and appellant had previous notice of it, an action would lie against him for the damages done by his dog. But it does not follow that the party injured may justify the killing of the dog for that reason, any more than he could the killing of a breachy animal breaking into his corn." In this state no notice of the viciousness of his dog would have been necessary before bringing an action for damages done by the dog. Neither is it any justification that the plaintiff had been notified that his dog was in the habit of trespassing, and had been shot at by Mr. Eaton, or was going to be shot at by him if again found trespassing. Notice would be sufficient to justify under the statutes of some states, but not of this; for complaint to a justice or clerk of a district court should have been resorted to, and the required proceedings had, to justify killing the dog. There are decisions in various states that one may defend and protect his property from dogs; and, when necessary for that purpose, to kill the dog. *Anderson v. Smith*, 7 Ill. App. 354; *Liye v. Blackwelder*, 25 Ill. App. 119; *Ten Hopen v. Walker*, 96 Mich. 236, 55 N. W. 657; and *Livermore v. Batchelder*, 141 Mass. 179, 5 N. E. 275. In the latter case, which was tort for killing the plaintiff's dog, it appeared that said dog, with another dog, came upon the defendant's premises, and there killed, and maimed hens of the defendant, which were in his henhouse or shed. The dogs were driven away, and, in about 15 minutes afterwards, came again upon the defendant's premises, and were running towards the same shed and henhouse of the defendant, when the defendant, having reasonable cause to believe that the dogs were proceeding to maim and kill other of his hens in said shed and hen-

house, shot and killed the plaintiff's dog. The court held that killing the dog was not in law justifiable, for to justify the killing the defendant should have shown, not only that he had reasonable cause to believe that the dog was proceeding to maim and kill his hens, but also that he had reasonable cause to believe that it was necessary to kill the dog in order to prevent him from killing the hens. The plea nowhere shows that the plaintiff's dog when killed was worrying, wounding, or killing any of the animals mentioned in said chapter 93, § 6, or that the defendant had reasonable cause to believe that it was necessary to kill the dog in order to protect his property other than the animals mentioned in said section 6. In our opinion, the defendant's special plea in bar sets up no sufficient cause in justification of killing the plaintiff's dog, and the demurrer thereto is sustained, and case remitted to the common pleas division for further proceedings.

LYON v. BROWN UNIVERSITY et al.
(Supreme Court of Rhode Island. April 26, 1897.)

WILLS—RIGHTS OF LEGATEES.

The third and fourth clauses of a will each gave various pecuniary legacies, and provided that, if the residue of the estate "applicable to the payment of the legacies in this * * * clause" should not be sufficient to pay them in full, "said legacies in this clause of my will contained shall be each proportionately reduced in amount." Clause 5 gave the residue to five persons named. Clause 6 empowered the executors to sell all the realty, and directed them to pay the legacies with the proceeds. Held that, where the proceeds of the realty were not sufficient to pay the legacies given by the fourth clause, the legatees named therein, and not the residuary legatees named in clause 5, were entitled to rents collected by the executors before the land was sold.

Bill by Emory Lyon, executor of the estate of Maria M. Benedict, deceased, against Brown University and others.

Edwards & Angell, for complainant. E. P. Allen, Henry J. Spooner, J. C. B. Woods, S. T. Douglas, J. C. Pegram, and W. C. Baker, for respondents.

DOUGLAS, J. This is a bill in equity, brought by the executor of the will of Maria M. Benedict, to determine certain questions arising from the provisions of the will and the condition of the estate. The first clause of the will directs the payment of debts and funeral expenses, and the erection of a monument at the grave of the testatrix; the second bequeaths specifically certain personal and household effects; the third, as modified by the codicil which reduces the amount of two legacies, but alters the will in no other way, decrees pecuniary legacies aggregating \$76,500, "after the payment of my debts and of the legacies hereinbefore contained, and out of the residue of my estate not hereinbefore disposed of," and terminates with these words: "And,

in case the residue of my estate applicable to the payment of the legacies in this third clause of my will contained should not be sufficient to pay all of said legacies in full, then I direct that said legacies in this clause of my will contained shall be each proportionally reduced in amount." The fourth clause, repeating the language of the third, "after the payment of my debts and legacies hereinbefore contained, and out of the residue of my estate not hereinbefore disposed of," bequeaths various sums of money, amounting together to \$18,300, to corporations and societies, defendants to this bill. This clause also provides: "And, in case the residue of my estate, applicable to the payment of the legacies in this fourth clause of my will contained, should not be sufficient to pay all of said legacies in full, then I direct that said legacies in this clause of my will contained shall be each proportionally reduced in amount." The fifth clause is as follows: "(5) After the payment of my debts and of the legacies hereinbefore contained, I give, bequeath, and devise all the rest and residue of my estate, real, personal, and mixed, whereof at the time of my death I shall be seised and possessed, or over which, at the time of my death, I shall have power of testamentary disposition, to the following persons, to them and to their heirs and assigns, and in the following proportions and shares, namely." And then follow the names of five persons, to each of whom is given "one-fifth part of said residue ($\frac{1}{5}$)."

The sixth clause is as follows: "And, for the convenient and speedy execution of my wishes as declared in this my will, I hereby empower and authorize my executors hereinafter named, or any administrator or administrators of this my will, who may be duly appointed to administer my estate under this my will, to sell at either public or private sale, at such times, in such amounts, on such conditions, for such price, and to such persons, as to them or him may seem fit, any or all the realty whereof I may be seised or possessed, or over which, at the time of my death, I may have power of testamentary disposition, to make valid deeds of conveyance thereof, and to give valid discharges therefor; and I direct that no purchaser of any estate that may be sold under my authority given in this my will shall be held responsible for the application of any purchase money after the same shall have been paid to my executors or administrators aforesaid; and I direct that my executors or administrators aforesaid shall apply such purchase money the proceeds of such sales to the payment and satisfaction of the legacies in this my will, hereinbefore expressed and contained." The executors, with the acquiescence of all parties interested, took possession of the real estate of the testatrix, and collected the rents and income thereof, as the same accrued upon each parcel, until it was sold, under the power contained in the will (one parcel still re-

maining unsold), and, after paying, out of this fund, taxes, insurance, repairs, and other expenses, accumulated the net income, and now the surviving executor holds the same, to await the direction of the court.

The provisions of the first three clauses of the will have been fulfilled, and the personal property not specifically bequeathed and the proceeds of the sales of real estate have been nearly exhausted in the payment of legacies under clause 3 and the expenses of administration. The tract of land remaining unsold, estimated at its highest reasonable value, together with the balance of money in the executor's hands remaining of the proceeds of sales of real estate, will be insufficient to pay the legacies given in the fourth clause; and the executor asks whether he shall resort for that purpose to the fund in his hands derived from the rents of the real estate. We think this fund and its accumulations should be applied, so far as it may be needed, to the payment of these legacies. The provisions of this will and the condition of this estate do not differ, in the particulars affecting this question, from those considered in *Pond v. Allen*, 15 R. I. 171, 2 Atl. 302. There, as here, the assets were insufficient to pay the legacies, and the residuary clause was a direct gift in fee of "all the rest and residue of my estate, both real, personal, and mixed, that may be left at the death of my said husband, James Helme, and after the payment of all the foregoing bequests contained in my last will and testament," etc.; and there was no direct gift to the executors. The only feature in the case at bar which does not resemble the case cited is the power of sale given by this will to the executors. It is argued that the direction to appropriate the proceeds of sales is exclusive of a power over the rents accruing before the sales take place, and that the residuary devisees have the right of possession and retention of profits until the land is needed and taken from them.

We do not so construe the power of sale. It was given, as it says, "for the convenient and speedy execution of my wishes, as declared in this my will." It was not given, as we understand it, to limit, but to enlarge, the power of the executors, and to afford them every facility for applying the real estate to the payment of the legacies. It adds nothing to, and takes nothing from, the previous clauses of the will, where the wishes of the testatrix, as to the disposition of her estate, were fully and clearly expressed. Through all these previous clauses runs the purpose to divide the objects of the gifts into classes, each of which should take the whole estate, if necessary, before the next should receive anything. Those mentioned in the third clause are residuary legatees if the estate will go no further than to pay them, and so are the legatees mentioned in the fourth clause with respect to the final residuary devisees. In *Pond v. Allen*, the court say (page 177, 15 R. I., and page 308, 2 Atl.): "Under the will

here, the residuary devisees are entitled to nothing except what is left after the specific legacies are paid, and therefore the specific legatees are as much entitled to the rent or income of the residuary real estate as to the real estate itself, if the rents are needed for the payment of the legacies, and the legatees duly assert their title to them." And so the court directed the rents to be applied to the purposes of the will. In that case, the executors, having no power of sale, were obliged to resort to the court for a decree to enforce the charge of the legacies upon the real estate. It seems to us probable that the power of sale here was introduced to prevent such a necessity. The cases cited for the residuary devisee support the rule that a mere charge of real estate with the payment of legacies will not affect the rights of the heirs or devisees to the rents until the power is executed by a sale, so far as the legal title is concerned. *Gibson v. Farley*, 16 Mass. 280, the leading case in that state, decided, as this court has done in *Draper v. Barnes*, 12 R. L. 156, and *Allen v. Allen*, Id. 301, upon a similar statute, that the power given the executor or administrator through the probate court to sell for payment of debts does not take from the heir the rents accruing before actual sale. The court, in *Gibson v. Farley*, expressly recognize the authority of *King v. King*, 3 P. Wms. 358, and the other early English cases there referred to, because, as the court says of one of them, the intent of the testator was expressed "that the tenant for life was not to have anything until after the previous charges were satisfied." In *Newcomb v. Stebbins*, 9 Metc. (Mass.) 540, 544, it is said: "This estate is not given, as in *Hays v. Jackson*, 6 Mass. 154, 'after the payment of debts,' but it is a devise of the estate, subject to certain charges to be paid at specified times." In *Lobdell v. Hayes*, 12 Gray, 236, the heirs were held entitled to the rents accruing before a sale made by virtue of the statute. In *Brooks v. Jackson*, 125 Mass. 307, it was decided that the rents accruing before sale from lands which the executor had power to sell are not legal assets in his hands, for which he is accountable to creditors in the court of probate, but that he is accountable to the heir. In equity, the rents and profits preceding a sale accrue to the person having the beneficial interest, according to the intent of the testator, not necessarily to the holder of the legal estate. In *Brokaw v. Brokaw*, 41 N. J. Eq. 304, 7 Atl. 414, it is said (page 308, 41 N. J. Eq., and page 416, 7 Atl.): "The heirs at law of the testator have no claim, as such, to the rents and profits of the farm. Their claim to the property is under the will. The testator manifestly did not intend that they should have the rents and profits. * * * Where a testator directs his executor to sell lands for a particular purpose, until such disposition is made of them the heir is entitled to the rents and profits, unless the testator has, by express terms or by implication, otherwise dis-

posed of them; but whosoever is entitled to the beneficial interest of the land, from the death of the testator until it is sold, is entitled to the rents and profits." In *Lyon v. Church of the Redeemer*, 41 N. J. Eq. 391, 4 Atl. 662, the court says: "The residue which is given is whatever (if anything) may remain after paying the legacies. It is clear that the legacies are charged upon the land. Being charged upon the land, the rents, issues, and profits of the property are to be applied to the payment thereof. Further, although the executor had no legal title to the land under the provisions of the will, but a power of sale only, and the legal title to the property vested in the heirs at law after the testatrix's death until the sale and conveyance by the executor, the heirs had no beneficial interest either in the property or the rents. Any surplus of the proceeds of the sale of the property, which might remain after paying the legacies, was given by the will to the residuary legatees, who, on paying the legacies, would have been entitled to the property. Nor are the residuary legatees entitled to the rents as against the legatees. The rents belong to those who are beneficially interested in the property, according to their interests."

The doctrine of equitable conversion, referred to by counsel for the residuary devisee, has no application in this case, as no question arises here between the heirs and next of kin, as in the cases cited.

COLT v. SEARS COMMERCIAL CO. et al.

(Supreme Court of Rhode Island. April 30, 1897.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES—WHEN AVOIDED BY ASSIGNEE—WAIVER OF OBJECTIONS.

1. An assignee for creditors of a mortgagor paid interest on bonds secured by the mortgage and held by a creditor as collateral security, after he learned all about the transaction in connection with which the bonds were received by the creditor, a part of such interest being paid after the latter sold the bonds. *Held*, that the assignee could not afterwards claim that the transfer of the bonds by the assignor was void on the ground of preference, under Pub. St. c. 237, § 15, as amended by Pub. Laws 1882, c. 274.

2. Where an assignee receives property subject to a mortgage by the assignor, and sells the property subject to the mortgage, he cannot afterwards avoid the latter.

3. Where the assignee of a mortgagor, by delaying to question the validity of a pledge of bonds secured by the mortgage for over eight years after it was made, and by treating it as valid has led the pledgee to rely entirely on his security, and to forbear to prosecute his action on the original debt, which has in the meantime as to the assignor become barred by limitations, he cannot avoid the pledge as a preference.

4. Pub. St. c. 237, § 15, as amended by Pub. Laws 1882, c. 274, provides that securities, etc., given by an insolvent, or by one in contemplation of insolvency, within 60 days of the commencement of proceedings against him under sections 12 and 13, shall be void as to creditors receiving them who shall have reasonable cause

to believe he was insolvent, etc. *Held*, that a preference within the meaning of such statute is merely voidable, and not absolutely void.

Bill by Samuel P. Colt, assignee, against the Sears Commercial Company and others. Heard on bill, answer, replication, and proof. Dismissed.

James, Wm. R. & Theodore F. Tillinghast, for complainant. Edwards & Angell, for respondents.

TILLINGHAST, J. The object of this bill is to set aside a transfer of bonds made by the National Rubber Company to the Sears Commercial Company, on the 20th of September, 1887, as collateral security to a note of that date, made by said rubber company to said Sears Commercial Company, for \$20,007.83, on the ground that said transfer was a preference under Pub. St. R. I. c. 237, § 15, and therefore liable to be set aside by the assignee. Said section, as amended by Pub. Laws R. I. 1882, c. 274, is as follows: "Conveyances and payments made and securities given by an insolvent debtor or by a debtor in contemplation of insolvency within sixty days before the commencement of proceedings against such debtor, under the provisions of sections twelve and thirteen of this chapter, shall be void as to all creditors receiving the same who shall have reasonable cause to believe that such debtor was insolvent at the time of such preference, and the assignee of such debtor may sue for and recover the same." The pleadings in the case properly raise the question as to the preference aforesaid, and also the question whether, in case said transfer was a preference, the complainant can now take advantage thereof. The case is before us on bill, answer, replication, and proof.

Even admitting that the evidence shows that the giving of the security in question amounted to a preference, within the meaning of said statute, as to that part of said note which represented the debt due to the Sears Commercial Company, which will hereinafter appear, although it was clearly not a preference as to that part which represented the debt to Grace & Co. (*Burnhisel v. Firman*, 22 Wall. 177), yet we are of the opinion that the complainant, with full knowledge of the transaction, has elected to treat it as valid, and that it is now too late to set it aside. The facts relating to said transaction are these, viz.: On September 20, 1887, the National Rubber Company was indebted to the respondents William R. Grace & Co. in the sum of \$12,182.04, on its demand note of May 19, 1885, then more than two years overdue, as collateral security for which Grace & Co. held the bonds of the rubber company to the amount of \$15,500, together with accumulated interest coupons thereon to the amount of \$2,790. Grace & Co. were indebted to the rubber company in the sum of \$1,795.08 for rebate of insurance on certain syndicate contracts, thus

making the net indebtedness of the rubber company to Grace & Co. \$10,386.96. The rubber company at the same time was indebted to the respondent the Sears Commercial Company upon its time notes given in the regular course of its business, as follows, viz.: Note due September 13, 1887, \$3,000; note due November 9, 1887, \$3,383.53; and note due November 15, 1887, \$3,383.57. These notes were unsecured. An arrangement was entered into between the rubber company, acting through its treasurer, Mr. Augustus O. Bourn, on the one side, and Grace & Co. and the Sears Company on the other, whereby said debts were consolidated; that is to say, the Sears Company advanced to the rubber company \$12,182.04 in cash, with which the rubber company paid off its indebtedness to Grace & Co., whereupon the rubber company gave to the Sears Company a new demand note for \$20,007.83, this amount representing the net indebtedness of the rubber company to Grace & Co., which had been taken up by the Sears Company as aforesaid, plus the debt of the rubber company to the Sears Company, and the bonds which had been held by Grace & Co. were then and there transferred to the Sears Company as collateral security for the last-mentioned note.

Such, then, being the transaction, we will briefly consider the testimony as to the knowledge which the complainant had thereof, and also as to the manner in which it was subsequently treated by him. The rubber company made an assignment to Col. Samuel P. Colt, the complainant, October 15, 1887. The books and papers of the rubber company, which have been in his possession ever since the assignment, contain a complete record of the transaction in question, and as early as November, 1888, he furnished to the Rhode Island Hospital Trust Company, the holder of the trust mortgage, a list of the holders of the bonds of the rubber company, which list purported to show what bonds had been sold and what were held as collateral; and in the latter class the Sears Commercial Company appears as the holder of \$15,500 of said bonds. On February 9, 1888, Grace & Co. wrote to complainant as follows: "New York, Feby. 9th, 1888. Sam'l P. Colt, Esq., Pres't Industrial Trust Co., Providence, R. I.—Dear Sir: We are informed that provision has been made for the payment of the matured coupons of the bonds of the National Rubber Co. Will you kindly inform us if such is the fact, and where we shall send such coupons for payment? Yours, truly, W. R. Grace & Co." On February 13th next following, Col. Colt, in reply to this letter, wrote as follows: "Providence, R. I., February 13th, 1888. Messrs. William R. Grace & Co., Hanover Sq., New York—Gentlemen: Your favor of the 9th inst. received upon my return from New York. Provision was made for the payment of the National Rubber Co.'s bonds that have been sold. If I am correctly informed, the

bonds that you hold are collateral, and in such cases we have asked the parties to wait the adjustment of the affairs of the National Rubber Company. Very truly yours, Sam'l P. Colt, Assignee." On May 3, 1888, Col. Colt, in a letter written in reply to one from Grace & Co. on the 2d, inquiring for information as to where the past-due coupons of the rubber company were to be paid, replied as follows: "Providence, R. I., May 3d, 1888. Messrs. William R. Grace & Co., Hanover Sq., New York—Gentlemen: Your favor of May 2d duly received. There is as yet no provision for past-due coupons of National Rubber Company. In fact, we have not understood that there were any such outstanding, except upon bonds pledged, which, of course, were not expected to be collected. Please advise me what bonds you hold, and how they are held, also if you have any account with the old company, and oblige. Very truly yours, Sam'l P. Colt, Treasurer." And to this letter Grace & Co. replied by giving the information called for therein, said reply being as follows: "New York, May 8, 1888. Samuel P. Colt, Esq., President Industrial Trust Co., Providence, R. I.—Dear Sir: In reply to your inquiry of 3d inst. we beg to advise you that we hold, for account of the Sears Commercial Co., Limited, a note of the National Rubber Co. dated Sept. 20, 1887, for the sum of \$20,097.83, payable on demand, with interest thereon at six per cent. per annum from date, together with 81 bonds of the said company, of \$500 each, and the matured coupons at that date, amounting to \$2,790; said bonds and coupons being pledged as collateral security of said note. Since that date another coupon has matured on these bonds, making present amount of matured coupons \$3,255. Yours, very truly, W. R. Grace & Co. E. P. C." On May 15, 1888, Grace & Co. wrote again, as follows: "New York, May 15, 1888. Samuel P. Colt, Esq., President Industrial Trust Co., Providence, R. I.—Dear Sir: In your favor of the 3d inst. you say: 'There is as yet no provision for past-due coupons of the National Rubber Co. In fact, we never understood that there were any such outstanding, except upon bonds pledged, which, of course, were not expected to be collected.' To this understanding we cannot give our assent, as we consider that the bonds are a prior lien, and that the interest thereupon should be promptly met. Therefore we shall expect provision to be made for the payment of the \$3,255 of past-due coupons, as mentioned in our respects of 8th inst., in default of which provision we shall feel obliged to take steps to enforce our rights in the premises. An early answer to this communication will much oblige. Yours, very truly, W. R. Grace & Co. E. P. C." After further correspondence, which failed to result in any adjustment of the matter, the overdue interest coupons were forwarded to said Hospital Trust Company for collection; and upon notice of this fact being given to

the assignee, the following letter was written to the trustee under the mortgage: "Providence, R. I., February 19th, 1889. Rhode Island Hospital Trust Co., Trustees under Mortgage of National Rubber Company. Dated July 15th, 1884—Gentlemen: Having received notice from you yesterday that certain overdue coupons, Nos. 1 to 8, inclusive, on bonds issued under mortgage of the National Rubber Company to you as trustee, had been presented to you for payment, upon investigation I infer, from the numbers of the bonds from which said coupons are taken (not being advised by you from what source the coupons came, or who presented them), that they are from thirty-one (31) bonds, of \$500 each, alleged by William R. Grace & Company to have been pledged to them as collateral security for a certain note, on September 20th, 1887, together with the matured coupons thereon, at that date. Not having received demand from said William R. Grace & Company for the payment of said note, nor any notice of foreclosure of said bonds and coupons alleged by them to be held as collateral security therefor, I am advised that as assignee of the National Rubber Company I have no legal right to pay said matured and overdue coupons alleged to have been pledged as aforesaid. I herewith inclose certified check to your order as trustee for \$2,790, \$930, the amount of coupons Nos. 7 and 8, maturing since said alleged pledge was made, you may pay from moneys in your hands. \$2,790 you may pay under protest (submitting a copy of this statement), or may hold the same in trust for the payment of said coupons maturing previous to said alleged pledge when the title thereto shall have been determined. Very truly yours, Sam'l P. Colt, Assignee." The following letter, written shortly after the assignment, was sent to Mr. Bourn, who, of course, knew all about the transaction, and who was aiding the assignee in the settlement of the business: "New York, Oct. 26, 1887. Hon. Augustus O. Bourn, National Rubber Co., Bristol, R. I.—Dear Sir: Acknowledging receipt of your favor of the 17th instant, inclosing proposed plan for the reorganization of the National Rubber Co., we have to say that, as far as we are creditors of the company, unsecured by first mortgage bonds, the proposed plan is entirely satisfactory to us. We understand that the bonded debt is to stand as a first lien on the entire properties. Yours, truly, Sears Commercial Co., Ltd. [Signed] M. P. Grace."

From the foregoing and other correspondence, taken in connection with the conduct of the assignee in paying the overdue interest on said bonds, and also in paying the subsequently accruing interest thereon down to that which fell due in July, 1894, a part of which interest was paid after he had learned that the Sears Company had sold the bonds to the respondent Schaefer, the present holder, we feel bound to hold that he had full knowledge of the manner in which said bonds were

held, and that he elected to treat the transaction in question as valid and binding. But, still further, when the assignee sold the rubber company's plant to the National India-Rubber Company, in April, 1888, he made provision for the payment by the latter company of the principal and interest of the outstanding bonds of the rubber company, and the National India-Rubber Company thereafter furnished him with the funds necessary to meet the interest payments as they fell due. One of the terms of sale under which said plant was sold was as follows: "There is a mortgage upon the real estate, factories, buildings, and improvements and machinery for the sum of \$350,000, given by the National Rubber Co. to the Rhode Island Hospital Trust Co., trustee, to secure the payment of bonds issued by the National Rubber Co. to the amount of \$350,000. The estate and property covered by this mortgage will be sold subject to this mortgage and the amount due or to become due thereon." And in the deed of the assignee it is provided that the intention of the parties is that, "while said mortgage and bonds and indebtedness thereby secured should not be assumed by the National India-Rubber Co., nevertheless said mortgage bonds and indebtedness should be fully satisfied and paid out of said property and estates, and without recourse to said Samuel P. Colt, assignee, or to the assets of said National Rubber Company." If, therefore, as contended by respondents' counsel, the assignee should pay the bonds in question, he would have only to demand reimbursement of the National India-Rubber Company, and it must be made as provided, or the assignee may resort to the property. Moreover, it appears, as a matter of fact, that no attempt is being made to collect these bonds from the assets of the National Rubber Company. The holder is looking to his security, viz. the property which is now in the hands of the National India-Rubber Company, and which that company has received upon the express condition that these bonds shall be paid out of it. To quote from another provision of the deed on this subject, the assignee, if he pays or takes up any of the bonds, "shall be subrogated" to the right of the original owner of said bonds against the estate. But if the assignee recovers said bonds without payment, on the ground that the present holders have no rights in them, to what is he subrogated? Subrogation is the "substitution of another person in favor of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt." *Sheld. Subr. § 1*. But if the creditor is in a position where he has no rights, there is no opportunity for subrogation. The legal principle which underlies this discussion, as argued by counsel, is that, if an assignee receives property subject to a mortgage made by the assignor, he must, before he sells the property, determine whether he will avoid the mortgage as a preference, and if he sells the property subject to the mortgage he cannot

thereafter avoid such mortgage. In *Freeland v. Freeland*, 102 Mass. 478, Gray, J., says: "The assignee must, therefore, make his election before selling his interest in the mortgaged real estate. He may either treat the mortgage as valid, and sell the equity of redemption only, subject to the mortgage, or he may elect to avoid the mortgage and sell the whole title in the land." In *Tuite v. Stevens*, 98 Mass. 305, the court held that a sale by an assignee "subject to mortgages" was an affirmation by such assignee of the validity of the mortgages. "Subject to a mortgage" means, of course, subject to the debt secured by the mortgage. And if the assignee in this case had wished to avoid any part of the mortgage deed, he should have done so prior to the sale.

But the complainant contends that, notwithstanding the correspondence and other documentary evidence aforesaid relating to the transaction sought to be set aside, yet he never knew of the Sears Commercial Company as a separate entity from Grace & Co., or of this new pledge of said bonds, until it was disclosed in the affidavits of Fisher and Ivins, filed in equity No. 3,843, in March, 1895, and that he always understood that he was dealing with Grace & Co. solely, and that they held said bonds as collateral. While it is not at all incredible that Col. Colt, occupied as he was in settling the complicated affairs of this large corporation, and at the same time running the works and taking a very active part in the organization of the National India-Rubber Company, should have forgotten the information which he had received relating to the transaction in question, yet the fact remains that he had been fully informed in the premises, and hence his rights as assignee must be determined accordingly. Moreover, by reason of his delaying to question the validity of said pledge for upward of eight years after it was made, and by treating it as valid, he has led the pledgee to rely entirely on his security, and to forbear to prosecute his action on the original debt, which has in the meantime, as to the assignor, become barred by the statute of limitations; so that, in the altered position of the pledgee, it would be inequitable to now allow the complainant to avoid the pledge.

But complainant's counsel contends that, as said transaction constituted a preference, within the meaning of the statute above quoted, it was absolutely void, and not merely voidable. We do not understand that such is or ever was the law in this state. A preference of one creditor over another is not fraudulent, and can only be set aside by a proceeding instituted under the statute. *Perkins v. Hutchinson*, 17 R. I. 450, 22 Atl. 1111. The case of *Hamilton v. Colt*, 14 R. I. 209, relied on by counsel in support of his contention, does not hold, as we understand it, that such a transaction is absolutely void, but only that the defendant in that case, who was in possession of the mortgaged property,

whatever might be thought of his title under the assignment, had a right to maintain his possession against the plaintiff by showing that the mortgage under which the plaintiff claimed was void. In *Snow v. Lang*, 2 Allen, 18, which was an action brought by an assignee of an insolvent debtor to recover the value of property sold by the assignor for the purpose of giving a preference, the defense set up was that plaintiffs, being the assignees of the insolvent, had waived the right to avoid the sale, and had affirmed it. To this it was replied that, as the statute declares the preference void, it could not be waived or affirmed. But it was held at the trial that the transaction was voidable only, and might be affirmed. On a petition for new trial the court held that the ruling was correct, and said: "The word 'void' is not always used in an absolute sense. It has from the earliest times been applied to fraudulent gifts of goods, which, though good against the donor, are said to be void as to his creditors. The transaction falls within the class of acts described as 'void as to some persons only,' and which may be made good by subsequent matter. *Bac. Abr. 'Void and Voidable,'* (B) 2, 3. The legislature have used the customary word; yet, as creditors may affirm the sale, or waive their right to treat it as void, it is also properly called 'voidable.'"

Finally, after a very full and careful consideration of all the testimony in the case, and of the law applicable thereto, we have come to the conclusion that the complainant is not entitled to recover, and that, therefore, the bill must be dismissed.

TAYLOR et al. v. WANDS.

(Court of Errors and Appeals of New Jersey.
May 10, 1897.)

MARRIED WOMAN—POWER TO CARRY ON BUSINESS
—HUSBAND AS AGENT—EARNINGS.

1. A married woman may embark her own money and capital in any separate business or trade, may employ agents to carry on such business or trade, and may avail herself of their skill and ability to make it successful.

2. When a married woman employs her insolvent husband as such an agent, the transaction will be carefully scrutinized; but if there is evidence that the business was established by her with her own money, and no evidence that money or capital of the husband was embarked therein, or that his employment was a device to shield from his creditors property or money which ought to be devoted to the payment of his debts, then the profits and earnings of the business will belong to the married woman, though partly due to the business ability, experience, and energy of her husband.

3. A married woman united with her two sons and her insolvent husband in the formation of a trading corporation, and she and her sons took all the stock issued except one share, which was allotted to the husband, without payment. The money paid in by her on her shares was her own. The husband was employed as president and manager of the corporation, upon a salary not shown to be unreasonable. There was no sufficient proof that the arrangement was devised to cover from his creditors any property of his.

Held, that the undivided earnings of the corporation, represented by her shares of stock, belong to her, though due in part to the skillful management of the business of the corporation by her husband.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill by Frederick J. Wands against William T. Taylor and others. Judgment for complainant. 34 Atl. 142. From the judgment, William T. Taylor and Harry Taylor appeal. Reversed.

G. D. W. Vroom and Chauncey H. Beasley, for appellants. Peter Backs, for respondent.

MAGIE, J. The decree appealed from was made upon a bill filed by Frederick J. Wands, assignee, the respondent, against John Taylor, Harry C. Taylor, William T. Taylor, the Taylor Provision Company, and others, the general purpose of which was to subject certain real and personal property, charged to be property of John Taylor, to a judgment entered by confession in the supreme court on April 7, 1893, in favor of respondent, and against John Taylor and William C. Brandt. The decree gave the relief prayed for by respondent in various particulars. Harry C. and William T. Taylor have appealed from the whole of the decree, but, since they are only affected by it in two particulars, our attention may be confined to them. It adjudged that the surplus (by which was evidently meant the undivided earnings) of the Taylor Provision Company, so far as such surplus represented 48 shares of its capital stock standing in the name of appellants, was subject to the lien of respondent's judgment, and directed a reference to ascertain what surplus the company has. It further adjudged that the lands described in the bill which formerly belonged to John Taylor were also subject to respondent's judgment, and decreed that conveyances thereof made by John Taylor, under which, by divers mesne conveyances, the title to one of the tracts had come to Harry C. Taylor, and the title to the remaining tracts had come to the Taylor Provision Company, should be annulled and set aside. With respect to the part of the decree which dealt with the undivided earnings of the Taylor Provision Company, the issue made by the pleadings, briefly stated, was this: The bill charged that John Taylor, Catharine M., his wife, and Harry C. and William T. Taylor, who are sons of John and Catharine M. Taylor, organized that company, but that all the stock was the property of John Taylor, and the shares held by Harry C. and William T. Taylor were held for John Taylor, and to protect them from respondent's judgment. The prayer was that appellants should be decreed to transfer all their stock in said company to a receiver to be appointed in the cause. Each appellant answered, and denied the charge of the bill in this respect.

With respect to the part of the decree which dealt with the lands, the bill charged that John Taylor, with intent to defraud respondent, and to protect said lands from respondent's judgment, had conveyed them to Edward H. Murphy, who afterwards conveyed them to the Mechanics' National Bank of Trenton, which afterwards conveyed them to Benjamin Van Cleve, who conveyed one tract to Harry C. Taylor, and the remaining tracts to the Taylor Provision Company. The prayer on this subject was that the deeds should be set aside. Appellants' answers contained a specific denial of this charge. The Taylor Provision Company did not at first file an answer, and a decree pro confesso was entered against it. But that decree has since been opened, and an answer has been filed by the company containing like specific denials.

It is scarcely necessary to observe that respondent's decree upon these issues can only be supported by sufficient evidence of the fraudulent character of the impeached transactions. Evidence which merely excites suspicion that fraud may have existed will not be sufficient. It must reasonably justify an inference of the actual existence of fraud. As to the organization and stock of the Taylor Provision Company, the only witnesses called by respondent were John Taylor and the appellants. Upon their evidence, the following facts were established: In 1860, upon the marriage of John Taylor with Catharine M. Taylor, a policy of insurance upon his life for \$5,000 was (in some mode not disclosed by the evidence) made payable to her. It does not appear who kept the policy alive by the payment of the premiums. It does not appear that John Taylor paid any premium upon that policy after incurring the debt whereon respondent's judgment was founded. In August, 1888, the firm of John Taylor & Co., composed of John Taylor and William C. Brandt, failed for a large amount. At that time Mrs. Taylor had held the policy of insurance in question for 28 years, and there is nothing in the case to justify a doubt as to her absolute right to it, free from any claim by John Taylor's creditors. About the 1st of September, 1889, she surrendered the policy to the company which had issued it, in consideration of a present payment to her of \$2,400. On the 4th of September, 1889, the Taylor Provision Company became incorporated by the filing of a proper certificate declaring that its capital stock was to be \$25,000, divided into 250 shares of \$100 each, but that the company would commence business upon payment of \$5,000. It also appears that 50 shares of the capital stock were subscribed, of which Mrs. Taylor took 47 shares, each of the appellants took 1 share, and John Taylor took 1 share. About the same time, appellants obtained some money by the surrender of a policy of life insurance upon the life of their father, payable to them. There is no evidence that

the money thus acquired was not their own, free from any claim of their father's creditors. If the fact were otherwise, it has not been made to appear. All the money procured by the surrender of the life insurance policies was paid into the newly-formed company. Mrs. Taylor paid in \$2,400, and gave her duebill to the company for the difference between that sum and the par value of her 47 shares. John Taylor paid nothing for his share. It is unnecessary to discuss whether this transaction was conducted in accord with the provisions of the corporation acts, for it could only be questioned in that respect by other stockholders or by creditors of the company. Shortly after the formation of the company, Mrs. Taylor became sick, and continued so until her death, in April, 1890. On January 31, 1890, when her death was expected by herself and her family, she transferred 23 of her shares of its stock to one of appellants, and 23 more to the other appellant, retaining one share in her own name. Her certificate was surrendered, and new certificates issued to appellants. No consideration was paid for the stock. The transaction was a gift from the mother to her sons. The vice chancellor criticised this transaction as having been suggested by John Taylor. I am unable to perceive the justice of such criticism. John Taylor was hopelessly bankrupt. If his wife owned these shares of stock, or an interest in them, and died intestate, his creditors could require them to be applied to the satisfaction of their debts. But his duty to his creditors did not extend beyond such property as he had acquired. It did not require him to refrain from advising her as to the disposition of her property. There was therefore no legal or moral wrong in suggesting to her, or even entreating her, to bestow her property upon their sons, either by will or by gift inter vivos. Such a disposition by gift was made, and, in my judgment, appellants thereby acquired all the rights of their mother.

From this résumé of the evidence, it is obvious that the decree prayed for, viz. the transfer of appellants' stock to a receiver for payment of respondent's judgment, was properly denied. There was no evidence to rebut the presumption that the \$2,400 acquired by her by the surrender of the policy of life insurance was her own money. It follows that the shares of stock in the Taylor Provision Company, or such interest therein as she acquired with that money, were hers, and that she transferred her interest therein by the gift to appellants. The right of appellants to the shares originally taken and paid for by them is in no wise challenged. The decree, however, subjects to respondent's judgment the accumulated earnings of the company, which, upon division, would pertain to appellants' shares. In other words, it recognizes the bona fides of the transaction by which such shares were ac-

quired, but decrees that the earnings upon the shares belong, not to appellants, but to John Taylor, and are subject to his debts. The evidence upon which the decree in this respect seems to have been made may be thus stated: The Taylor Provision Company engaged in the same business as that which the firm of John Taylor & Co. had previously carried on. John Taylor became the president and manager of the corporation. It does not clearly appear, but it may be inferred, that the corporation owed its success to his business ability and exertions. It appears, at least, that while he was, as the vice chancellor finds, the controlling spirit of the company, it established a good business, and has accumulated earnings of about \$30,000. From the opinion below, it seems that the conclusion respecting these earnings was based upon the lack of evidence to show any agreement between the company and John Taylor as to accountings or compensation or profits. But this put upon the defendants below a burden which ought not to have been imposed on them. It was for respondent to establish fraud in the transaction. As to accountings, it should be presumed, in the absence of proof to the contrary, that such accountings as shareholders may require from officers of corporations were provided for. The mere fact of large undivided accumulations of earnings justifies no inference of fraud, because the shareholders had a right to leave their earnings undivided, and it may be inferred that there was a necessity for more working capital than that supplied by the original subscriptions. In respect to compensation of the president and manager, there is obvious error, for the evidence shows that John Taylor is and has been receiving a salary of \$3,000 a year as an officer of the company for his services. The decree, in so far as it subjects the accumulated earnings of the Taylor Provision Company, which represent appellants' 48 shares of stock, to respondent's judgment, upon this evidence, is plainly erroneous. In respect to such of the earnings as represent the two shares originally subscribed and paid for by appellants, the decree has no foundation to rest upon. In respect to so much of the earnings as represent the 46 shares subscribed for by the deceased, Catharine M. Taylor, or such interest as she acquired therein by the money she actually paid thereon, it is also without support.

Under our married woman's act and the deliverances of our courts on the subject, it is thoroughly settled that a married woman may embark her own money and capital in any separate business or trade, may make valid contracts respecting the same, may employ agents in carrying on such business or trade, and may avail herself of their skill and ability to make it successful. She may employ her husband as such agent, and make use of his business ability, experience, and energy to the same purpose. Earnings upon or increase of her capital in such business or

trade, though due in part to the services rendered by her husband, will still belong to her, and will not be liable to be seized by the husband's creditors as his property. This was the doctrine declared in the court of chancery by Vice Chancellor Van Fleet, and approved by this court in *Tresch v. Wirtz*, 34 N. J. Eq. 124, 36 N. J. Eq. 356. It was applied in the court of chancery in *Kutcher v. Williams*, 40 N. J. Eq. 436, 3 Atl. 257, and more recently in this court in *Coyne v. Sayre*, 36 Atl. 96.

Had Mrs. Taylor established a business such as was carried on by the Taylor Provision Company, and invested in it the money acquired by her upon the surrender of the life insurance policy, and employed her husband to carry on that business in the same manner as he carried on the company's business, this doctrine would have been plainly applicable; for, while a court of equity will carefully scrutinize the employment of an insolvent husband by a wife in such a case, it could find nothing in the facts to indicate that the husband acquired any interest in the profits or earnings of the business. Had the husband's services been rendered to her gratuitously, such would probably be the conclusion, for the debtor is not obliged to work for the benefit of his creditor; but when, as in this case, the services were rendered upon compensation, not shown to be unusual compensation for such services, it is beyond doubt that the profits and earnings of the business belonged to the wife, notwithstanding they were in part due to the husband's skillful services, precisely as they would do had she employed a stranger of like ability to carry on the business. I am unable to distinguish between the case supposed, and which the vice chancellor concedes would require a different conclusion than that he reached, and the case actually presented by the evidence. Mrs. Taylor, instead of embarking her capital alone, or in partnership with her sons, in the business, organized a corporation to establish the business, and she and her sons took all the stock issued except one share, and paid in all the working capital. Instead of employing her husband as her own agent, or the agent of a firm composed of herself and her sons, the corporation, which they practically controlled, employed him as president and manager. The cases are identical, and the profits and earnings represented by her stock were her own property, and not liable to respondent's judgment. There is nothing in the evidence to indicate it, but it may reasonably be inferred that a large part of the undivided earnings of the company was made after the stock of Mrs. Taylor had been transferred to appellants. With respect to the earnings after the transfer, the evidence is equally insufficient to justify the conclusion that they became the property of John Taylor. For these reasons, the decree in the respect under consideration was erroneous.

It remains to consider that part of the decree appealed from which set aside certain conveyances, and subjected the lands thereby conveyed, to the Taylor Provision Company and to Harry C. Taylor, to respondent's judgment. To support the judgment in this respect, respondent's evidence must show that John Taylor was the owner of said lands, or of some interest in them liable to be taken in satisfaction of respondent's judgment. The only witnesses called upon this subject were John Taylor and Benjamin Van Cleve. Neither Edward H. Murphy nor any officer of the Mechanics' National Bank of Trenton was examined as a witness. From the evidence of John Taylor the following facts appear: All the lands in question belonged to him at the time of the failure of the firm of John Taylor & Co., and the title was in him. The Mechanics' National Bank of Trenton was a large creditor of the insolvent firm. John Taylor conveyed the lands to Edward H. Murphy without any consideration, but with the intent that Murphy should convey them to said bank, which he afterwards did. There was no agreement or understanding with the bank except that it was to credit upon the debt of the firm whatever moneys it should obtain by a sale of said lands. If the evidence of John Taylor is believed (and he is the only witness called respecting the transfer of his title to the bank), it is plain that his conveyances were absolute, and conveyed all his right, reserving no right of redemption. If the peculiar manner in which the title was conveyed to the bank is adapted to excite suspicion of the bona fides of the transaction, such suspicion is not sufficient to justify the rejection of the sworn statements of respondent's witness, to the effect that the design was to prefer the bank to the other creditors of John Taylor. Such a preference is not forbidden by law. Since it thus appears that John Taylor parted with all his interest in the lands upon the transfer to the bank, it is obvious that the decree can only be supported by evidence establishing the fact that he subsequently acquired the title to said lands, or some interest therein. The bank conveyed the lands to Van Cleve, who paid for them partly in cash, and partly by a note which he afterwards paid. Both Van Cleve and Taylor testify that, after Taylor had heard that Van Cleve had agreed to buy the lands from the bank, he expressed a desire to redeem the property at some future time, but both deny, in the most positive terms, that there was any agreement or understanding by which Van Cleve was bound to permit such redemption. If this evidence is credited, it is plain that John Taylor acquired no interest in said lands from Van Cleve. But it is argued in behalf of respondent that facts admitted by these witnesses are at variance with their evidence, and justify a refusal to credit their denial that Van Cleve's purchase of the lands from the bank was for the benefit of John Taylor. The facts relied on are these: Van Cleve and

John Taylor were old and intimate friends. The sales of the greater and more valuable parts of the lands made by Van Cleve to the Taylor Provision Company were made for prices which reimbursed him for his outlay in the purchase from the bank. The conveyance by Van Cleve of one tract to Harry C. Taylor was without consideration. A theory deduced from such admitted facts will not justify discrediting the sworn evidence of unimpeached witnesses in respect to the intent and purpose of the respective conveyances, unless it is absolutely inconsistent therewith. I do not think such inconsistency appears.

With respect to the lands conveyed to the Taylor Provision Company there is no sufficient evidence to show that the prices paid were below the fair market value at the time of the respective conveyances. The lands were conveyed to the company, in which John Taylor had but a nominal interest, as holder of one share of its stock. With respect to the tract conveyed to Harry C. Taylor without consideration, it appears that it was heavily mortgaged. There is no sufficient evidence of the market value of the equity of redemption at the time the conveyance was made, but the fair inference is that it was very small. If John Taylor's friend, being protected from any loss upon his purchase from the bank, chose to convey to his friend's son this equity of redemption, of trifling value, the inference that it was a gift is at least as reasonable as the inference sought to be deduced that the transfer was for the benefit of John Taylor. There is no evidence whatever that Harry C. Taylor accepted the conveyance with any agreement or understanding that he was to hold the tract for the benefit of his father. Whatever suspicion the evidence on this subject may excite, it falls short, in my judgment, of establishing the claim of respondent. The decree in the respect lastly considered is therefore also erroneous. The result is that the decree appealed from in the two respects which have been considered, and which are all in which appellants have an interest, must be reversed.

GREEN v. McCRAVE et al.

(Court of Chancery of New Jersey. April 19, 1897.)

CHattel Mortgages—Household Goods—PREFERENCES.

1. The act of March 7, 1893 (Gen. St. p. 2111, § 41), declares that any chattel mortgage upon household goods and furniture in the use and possession of any family in this state, not given to secure the purchase money for the goods, etc., shall be void unless signed, etc., by both the husband and wife of the family. *Held*, that it must appear by allegation and proof that the household goods were in the use of the family, as well as in their mere possession, before the act would be applied. *Semble*, that if the mortgage included not only household goods but also other property, and the act were applied, it would be *held*, in equity, to make the mortgage void only as to the household goods.

2 A debtor in failing circumstances may secure one or more creditors by chattel mortgage, in preference to others; and such a chattel mortgage, if honestly given simply to secure the favored creditor, and without any design to benefit the debtor or to hinder his other creditors, is a valid security. *Milton v. Boyd*, 22 Atl. 1078, 49 N. J. Eq. 142, distinguished.

(Syllabus by the Court.)

Bill by George G. Green against Kate McCrane and others to set aside a chattel mortgage and for an injunction. A restraining order issued on rule to show cause. Rule dismissed, and order dissolved.

The complainant, George G. Green, is the owner of a farm in Harrison township, Gloucester county. He files this bill against Kate McCrane, John McCrane, and Jeremiah McCrane, defendants. Green had leased his farm to John and Jeremiah McCrane, who were in the possession of a considerable quantity of goods and chattels, consisting of farming stock, implements, etc., and John McCrane was possessed of a large amount of household furniture, all situated on the complainant's farm. On February 1, 1897, John and Jeremiah became indebted to the complainant for \$425 rent, which then came to be due on the lease of the farm made to them by the complainant, and on February 9, 1897, the complainant distrained all the above-named goods and chattels, furniture, etc., and, after seizure, impounded them on the farm. Previous to this seizure John and Jeremiah McCrane had, on January 5, 1897, made a chattel mortgage to the defendant Kate McCrane (who was a daughter of John) upon the goods and furniture subsequently distrained by the complainant. The chattel mortgage, as stated in the bill, is conditioned for the payment of \$943.75 in one month from the date thereof, according to the tenor of a bond bearing even date therewith, given by John and Jeremiah McCrane to Kate McCrane. The bill states that a copy of the chattel mortgage is annexed to the bill. The complainant alleges that this chattel mortgage is without consideration, is not in good faith, that it was made to hinder and delay the complainant in the collection of his claim against John and Jeremiah McCrane, that the mortgage is void and of no effect because the affidavit annexed to it does not conform to the requirements of the statute, and because John McCrane is married, and has a wife residing with him on the farm, and the chattel mortgage is given in part on household goods in the possession of John McCrane and his wife; and the complainant claims that by the terms of the statute passed March 7, 1893 (Gen. St. p. 2111), the mortgage is absolutely null and void. The complainant shows that the chattel mortgagee, on February 19, 1897, advertised the goods mortgaged (excepting the household goods) to be sold at public vendue on February 26th, to pay and satisfy the amount of the chattel mortgage; and the complainant charges that the chattel mortgage is fraudulent, and the

sale under it is also for the purpose of delaying the complainant, and hindering him in the collection of his rent, and he prays for an answer by the defendants John and Jeremiah McCrane, without oath, that the chattel mortgage may be set aside and declared invalid as against the complainant, that the property may be sold under the complainant's distress warrant free from the lien of the chattel mortgage, and the proceeds, so far as may be necessary, may be applied to the satisfaction of the complainant's rent, and that Kate, John, and Jeremiah McCrane may be enjoined from making sale of the goods and chattels of the said John and Jeremiah by virtue of the chattel mortgage and the power of sale therein contained. The bill is supported by the affidavit of the private secretary of the complainant and that of the sheriff of the county, who as bailiff served the distress warrant. A copy of the lease of Green to McCrane is annexed to the bill, and also a copy of the distraint impounding the goods, with a list of the goods themselves. On the filing of the bill a rule to show cause was allowed why injunction should not be granted according to the prayer of the bill, and upon the coming in of the rule the defendant Kate McCrane appeared by counsel, and filed in reply her own affidavit and that of the defendants Jeremiah and John McCrane.

A. H. Swackhamer, for complainant. J. S. Jessup, for defendants.

GREY, V. C. (after stating the facts). The only affidavit of the complainant which impugns the consideration of the chattel mortgage of the defendant Kate McCrane is that of the witness Harrison Livermore, the private secretary of the complainant. The witness states that he believes that the chattel mortgage was given "without any consideration paid by the said Kate McCrane, and for the purpose of hindering and delaying the said George G. Green in the collection of his rent." He further states that the defendant Kate McCrane never carried on any separate business on her own account, always lived in her father's family, and was dependent upon him for support, except at times when she went out at service. So far as the consideration of the chattel mortgage is attacked by this affidavit, I think it doubtful if the showing on the part of the complainant (which is evidently upon information and belief, and not knowledge) would have been sufficient to support any conclusion that the mortgage lacked consideration. When the responding affidavit of the defendant Kate McCrane is considered, it is apparent that the chattel mortgage rests upon a consideration of moneys (earned by her or given to her by other persons than the mortgagors) loaned to the mortgagors, for which they gave her various notes, which all came to be payable, and then an account was stated, the amount

of interest and principal was computed, the due notes were exchanged for the bond, and further time for payment of the aggregate debt was given the mortgagors by the mortgagee. The evidence for the defendant on this point, is, I think, conclusive.

It is further objected that the chattel mortgage is void in toto, under the provision of the statute of March 7, 1893. Gen. St. p. 2111, § 41. This act provides that every mortgage made upon household goods and furniture in the use and possession of any family in this state, not given to secure the purchase money for such goods and chattels thus in use and possession, shall be absolutely void, unless such mortgage shall be first duly signed, etc., by the husband and wife of the family, and be duly recorded as provided by law, etc. The complainant claims that the operation of this act upon the chattel mortgage in question is to make it wholly void because among the things mortgaged there are enumerated sundry articles of household goods and furniture, and he insists that the terms of the act are to be strictly construed, to make the mortgage void and of no effect, notwithstanding the articles of household furniture may be few in number, and the other goods and chattels may constitute the more considerable portion of the goods pledged. The intent of the act is undoubtedly to prevent the disposition, by way of chattel mortgage, of those articles of household equipment which are in the actual use of a family, without the consent of both the husband and wife of the family, obtained by their joining in the execution of the mortgage. The purpose is to protect this household furniture in the use of the family against the mortgagees, not to defeat the mortgagee's lien for the benefit of other lien creditors. The object of the act would be fully accomplished if the mortgage were to be held void to the extent that it includes household furniture. It would seem an absurd construction to give to the act if a chattel mortgage, executed only by the husband, upon a herd of cattle and a drove of horses, should be held to be totally void because it also included a rocking chair in the actual use and possession of the family. An absurd construction will not be given to a statute when the object of the legislation is manifest, and can be secured by a reasonable interpretation, consistent with the words of the act. An act which prescribed a penalty against any one, not licensed by Trinity House, piloting a ship on the Thames, was held to apply only to ships on a voyage, and not to persons in charge of a ship merely shifting from wharf to wharf to unload cargo. *Rex v. Lambe*, 5 Term R. 76.

But, whatever construction may be given to this provision, when its interpretation becomes necessary, it is certainly essential to the raising of this point that the bill should specially allege, and the proofs should make it affirmatively appear, that the instrument

challenged is one of these which the act declares to be void. That it seeks to mortgage household goods and furniture, which may be in storage or in stock, would not put the mortgage within the application of the act. The intent of the statute is plainly that the furniture of the household in actual use by the family shall be secured for its comfort and necessity, unless the two heads of the family shall join in the mortgage. In the case in hand the bill does not allege that the household goods and furniture named in the mortgage are in the use and possession of any family in this state. The bill asserts that the said "John McCrane was possessed of a large amount of household furniture, all situated on the complainant's farm," and in another part states that "he is married, and has a wife residing with him on the said farm, and the said chattel mortgage is given upon the household goods in the possession of the said John McCrane and his wife." The affidavits annexed to the bill do not deal with this question at all, and throw no light upon the point whether or not the household furniture was in either the use or possession of the family. All that is proven is that the bailiff seized the goods and chattels of John McCrane situated on the demised premises; so that, even if the allegation of possession by the family necessarily implied use, there is no proof of such possession to support the allegation. The chattel mortgage itself is executed by John McCrane and Jeremiah McCrane, and states that "all the goods and chattels mentioned in the schedule hereunto annexed, and now in our possession," etc. So far as the chattel mortgage itself is evidential on the point, it shows that the possession was in John and Jeremiah McCrane, the mortgagors. But whether the furniture consists of household goods in the use and possession of the family is not stated. For all that appears on the face of the bill and in the proofs, the household furniture might have been in the possession of McCrane and his wife, but stored upon the complainant's farm, and not in the use of the family. The essential element required, in order that the act may apply to make the mortgage void even as to household furniture, is that it should affirmatively appear, not by allegation alone, but also by proof, that the household furniture was not only in the possession, but actually in the use, of the family. It is not intended that possession merely, without use, should create the condition under which the statute would apply; and as the remedy sought is in the nature of an enforcement of a penalty, making void a contract which save for the act would be valid, the complainant must certainly make distinct averment and also explicit proof of those circumstances the existence of which he claims entitles him to the administration of so severe a judgment. To declare such a mortgage totally void, the attacking party would probably be compelled

to resort to the courts of law for his remedy. Equity will in a proper case relieve against penalties. It never hungers for their enforcement.

The chattel mortgage was further objected to on the ground that the affidavit was faulty, in that it states "that there is due on the said mortgage the sum of \$943.73, beside lawful interest thereon from the 5th day of January, 1897"; the complainant claiming that by the condition of the mortgage it is shown that it secures a bond payable in one month, while the affidavit in its terms indicates that the money is payable at once, at the time of taking the affidavits. The chattel mortgage act, in requiring the affidavit of consideration, prescribes that it be made by the holder of the mortgage, stating the consideration "of the said mortgage and as nearly as possible the amount due and to grow due thereon." The use of the words "as nearly as possible," applicable to the specifications of the amount due or to grow due on the mortgage, indicates that the act does not require precise and exact naming of a definite sum, but only a statement as nearly as possible of the amount due. The word "due" has been defined in this state to signify sometimes simply indebtedness without reference to the time of payment, and at other times it means that the day of payment or render has passed. *Scudder v. Coryell*, 10 N. J. Law, 345; *Hoyt v. Hoyt*, 16 N. J. Law, 143. In the statute requiring an affidavit of the plaintiff or his agent on the confession of judgment on bond and warrant of attorney, the affiant is required to swear that the amount for which judgment is confessed is justly due and owing; and in the case of *Scudder v. Coryell* the word "due" is defined to have been used in this statute in the sense signifying simply indebtedness. For the purpose of the inquiry in this case, it is immaterial whether the word "due" is defined to be limited to a definition of the existence of the indebtedness, or to an indication that the day of payment has passed, because the affidavit, under the authorities discussing this statutory requirement, must, in cases referring to the chattel mortgage, be considered to make the mortgage a part of the affidavit, and they are required to be read together. In *Fletcher v. Bonnet*, 51 N. J. Eq. 615, 28 Atl. 601, the court of errors held that, where the affidavit expressly refers to matters stated in the mortgage, these matters must be regarded as part of the affidavit, citing previous cases to the same effect. In the case in hand, the affidavit is annexed to the mortgage, the affiant opens her affidavit by swearing that she is the mortgagee named in the foregoing mortgage, she further swears that the true consideration of the said mortgage is, etc. No one can read the affidavit without being referred to the mortgage. The statement of the consideration in the affidavit and recital of the

sum due in the condition of the bond must stand together, and, so taken, they notify the reader that the amount due on the mortgage, in the sense of the amount owing on the mortgage, is the sum of \$943.73, and that that amount is also secured to be paid by a bond wherein it is specified that it shall come to be due, in the sense of payable, in one month from the date thereof. The affidavit and the chattel mortgage, when read together, sufficiently comply with the statutory requirements. The attacks upon the chattel mortgage for defects by reason of supposed noncompliance with statutory requirements fail, and it stands, so far as these criticisms are concerned, as a valid mortgage, vesting in the defendant a legal right to the benefit of the security, and therefore not void as to the complainant or any other creditor who may subsequently have obtained a lien upon the mortgaged property.

The complainant also claims that he has a lien on the goods named in the chattel mortgage by virtue of his distraint, and, although it was levied subsequently to the making and recording of the defendant Kate McCrane's chattel mortgage, he charges that it is prior thereto, because he alleges that the mortgage was without present consideration, and was made for the purpose of defrauding and delaying creditors, and changing the title to the chattels to avoid the lien of the complainant's distraint, and he claims that as a creditor he is entitled to disregard the lien of the defendant's mortgage. This assertion of priority requires an examination of the nature of the disputing claims of the several parties, and how far the proofs sustain the complainant's charges. The claim of the complainant is based upon a rent which accrued on the 1st day of February, 1897. He levied, under his landlord's warrant, on the 9th day of that month. The lien of his distraint attached at the time of the actual seizure under the warrant. *Woodside v. Adams*, 40 N. J. Law, 419. It was this levy which so fastened his claim upon the mortgaged goods that he is in a position to be considered a creditor within the meaning of the chattel mortgage act, holding a status by which he can question the efficacy of precedent liens. *Haston v. Castner*, 31 N. J. Eq. 687; *Currie v. Knight*, 34 N. J. Eq. 487; *Button Co. v. Spielmann*, 50 N. J. Eq. 123, 24 Atl. 571. Before the rent accrued it was not an asset or credit of the complainant. A money rent not due, such as is reserved in the complainant's lease, is not "*debitum in presenti solvendum in futuro*." It becomes a debt for the first time when it accrues. Had the complainant died before the rent accrued, it would not have gone, as part of his assets, to his personal representatives to pay his debts, but with the land, as incident to the reversion, to the succeeding holder of the title. If the complainant, during this period before the rent

came to be due, could assert the holding of even a latent equity, it is certainly as favorable an attitude as he could possibly claim. He had no charge or lien whatever on his tenant's chattels. It required the statute of 8 Anne, c. 14 (Gen. St. N. J. p. 1915, § 4), to save the landlord's rent from the sweeping effect of a *fiel facias* levied on the tenant's goods. It was while the complainant's claim was in this undetermined condition, a mere latent equity, of the existence of which the defendant is not shown to have had any knowledge, that her chattel mortgage was made, delivered, and recorded, and she thereby acquired a fixed legal right against the mortgagor's chattels. The complainant's equity, if it may be so defined, became fastened on the mortgagor's chattels more than a month after this by the distraint. The complainant, to secure this lien, parted with neither money nor anything of value, and made no change whatever in his position. He is neither a subsequent bona fide purchaser, nor a bona fide mortgagee, such as the chattel mortgage act contemplates. He is simply a creditor who has secured his claim by obtaining a lien upon the property of his debtor, subject to antecedent liens. The fact that his debt is charged as a lien upon the goods does give him a status from which he can attack other liens claimed to be precedent, but it does not *ipso facto* give him a right superior to such preceding liens. That superiority depends upon the existence of some infirmity in the apparently precedent lien which makes it, as to his claim, inferior.

Turning to the claim of the defendant under her chattel mortgage, the proofs show beyond all question that the consideration of her mortgage was money that she had earned by her own labor while at service, or which had been given to her by other persons than the mortgagors. This money she had from time to time loaned to the mortgagors, and had received their notes as evidences of their debt. The notes had all come to be due and payable when the chattel mortgage was taken. The complainant's rent was not yet due. If there had been a purpose to defraud the complainant, as he alleges, the mortgage could have been made immediately payable, and the property sold before the complainant could have acquired a lien. Instead of this, time was given to the mortgagors, and proceedings to sell were only taken after the complainant had himself seized the goods by his distraint, and thus forced a realization. Any doubts which might have been raised by the fact that one of the mortgagors is the father of the mortgagee are dispelled by the proof of the origin and character of her claim, exhibited in her frank statement, which is probable in itself, and wholly unrefuted. There is no showing in the case of any indication that there was any purpose to benefit the mortgagors, or to defraud or delay their creditors. On the contrary the proof is clear that the

sole intention which induced the giving of the mortgage was to secure the payment of the mortgagee's debt. The mortgagee obtained from her debtors, without any fraudulent purpose or action, a preference by way of chattel mortgage. The complainant afterwards, when his rent accrued, pursued his legal remedy, and secured a lien on the mortgagors' chattels.

The question is narrowed down to the single inquiry, can debtors who owe two or more creditors secure one of them by giving her a valid lien upon their property, where it is done without fraudulent design and simply to prefer the favored creditor? I do not think it has ever been denied that they can. In *Holbird v. Anderson*, 5 Term R. 235, such a preference was sustained, though the disputing creditor had judgment, and was about to issue execution, and these facts were made known to the preferred creditor before he was given his preference. And it makes no difference if an honest preference of one creditor defeats the claims of the others. *Hendricks v. Mount*, 5 N. J. Law, 850. So long as the debtor exercises this right honestly, his acts, whether the preference be created by sale or pledge, are unimpeachable. *Essex Freeholders v. Lindsley*, 41 N. J. Eq. 194, 3 Atl. 391; *Jones v. Naughtright*, 10 N. J. Eq. 298. "That a debtor in insolvent circumstances may prefer certain creditors has been too long the received law of this state to be questioned now." *Bank v. Sprague*, 21 N. J. Eq. 539. And in *Bank v. Cummins*, 39 N. J. Eq. 580, the right to prefer was supported even when the preferred creditor was aware at the time that the vendee, who gave him such a lien for a debt due from his vendor, had taken his title in fraud of the creditors of the vendor. Such a proposition was held not to be a participation in the fraud, but, on the contrary, to put the property to its legal use by applying it, though by a preference, to the payment of the debts of the fraudulent vendor. The tests turn, not upon the right of the creditor to prefer, nor on the failure of the nonpreferred creditor to secure, his claim, but upon the honesty of the parties to the transaction, in simply giving and receiving a preference, and the absence of any intent to secure a benefit for the debtor, or to hinder or delay his other creditors.

The case of *Milton v. Boyd*, 49 N. J. Eq. 142, 22 Atl. 1078, to which my attention has been called, has no application to the case now before the court. In that case the mortgage of the complainant, Milton, was made in consideration of a present value passed for it, and, without any recording, gave to Milton a legal title, as against the mortgagor and all the world, except creditors and subsequent purchasers and mortgagees in good faith, under the fourth section of the chattel mortgage act. The mortgage of the defendant, Boyd, was subsequently given to secure a preceding debt, but was recorded before the Milton mortgage. The court held that the previous

record of Boyd's mortgage did not protect him against the superior equity of the prior, though unrecorded, mortgage of Milton, because Boyd was not such a bona fide mortgagee as the statute contemplated, in that he paid nothing, and parted with nothing, and did not change his position in any way, at the time he received his mortgage. He took the interest which the mortgagor had, but subject to the equities with which it was then charged, one of which was Milton's mortgage. There was also, in that case, strong evidence of a fraudulent design on the part of the defendant, Boyd, because he secreted the fact that he had an agreement for a mortgage for several years before he took it, and thus enabled the mortgagors to secure a credit by their apparent ownership of their goods, though they were bound to him all the while, to pledge their goods to secure his debt. There is, however, in the case cited, a distinct and express recognition of the right of preference to be exercised by a debtor in failing circumstances, by which he may secure a favored creditor, provided his action and that of the creditor be free from fraudulent design to protect the debtor or defraud his creditors. *Id.*, page 153, 49 N. J. Eq., and page 1082, 22 Atl.

In the case now before the court the complainant had at the most a mere latent equity, of which the defendant mortgagee is not shown to have had any notice until after her legal right had been fastened upon the mortgagor's goods by the delivery and record of her mortgage. After this had been fully accomplished, the complainant for the first time acquired a lien by his own sole act without giving anything for it or surrendering any right. Neither his equity nor his legal right is in any way superior to that of the defendant. He is, of course, not a bona fide purchaser or mortgagee, as contemplated by the statute and interpreted in *Milton v. Boyd*, nor is he even a bona fide lien holder within the spirit of that case, because he secured his lien as a mere volunteer, uninvited, and without the passing of any present consideration. He cannot successfully attack the defendant's mortgage as a creditor under the chattel mortgage act, because her mortgage is prior in point of time of its delivery and the mortgagee has complied, as above shown, with all the requisities prescribed by that act, which are necessary to make her chattel mortgage valid against creditors and subsequent bona fide purchasers and mortgagees.

This branch of the case has been considered in the most favorable light for the complainant that the circumstances shown would justify, treating the chattel mortgagee as if her mortgage had been given simply to prefer a pre-existing debt, and not as a bona fide mortgagee who had changed her position to her debtor in order to secure her lien. I have discussed her equities as only equal to those of the complainant, and becoming superior by the recording of her mortgage, by which they

were developed into an actual, legal right before the complainant acquired any lien upon the property. There is another view which might be taken of her status, which would place her in a much more substantial position as to the consideration of her mortgage. When she gave up the due and payable notes which might have been prosecuted immediately, and took a bond payable at a future date, in consideration that its payment should be secured by the chattel mortgage, it might be claimed that she gave up her then existing and perfected right to collect her money, as a consideration for her present lien, and that she thus became a bona fide mortgagee in the broadest sense of the term. All this time the complainant had no fixed and ascertained charge on the property, and it is only after the defendant's equity had become an actual legal right that his own claim became a lien by his purely voluntary act. The point was not argued, and I do not deem it necessary to pass upon it.

I see no reason in any of the objections to the defendant's mortgage which would justify the issuing of an injunction. I will advise that the rule to show cause be dismissed, and the restraining order dissolved.

WOODBURY v. PORTLAND MARINE SOC. et al.

(Supreme Judicial Court of Maine. Feb. 24, 1897.)

CORPORATION—CHARITABLE RELIEF—INJUNCTION.

1. The Portland Marine Society, a corporation of ancient origin, was created for the purpose of extending relief, as occasion might require, to "decayed and disabled seamen, and to the poor widows and orphan children of deceased seamen, and for the promotion of seamanship and navigation." It has accumulated considerable property and funds from the entrance fees paid by members and annual dues. Lately, in order to keep up a social interest in the society, and promote its welfare, it has been accustomed to give to its members an annual dinner. The complainant, one of its members, sought by a bill in equity to suppress the practice, by inhibiting such an entertainment after it was contracted for and virtually in readiness to be partaken, and, failing to obtain an injunction in the court below, now, upon appeal to this court, insists that the cost of the banquet, already long ago paid for out of the plentiful funds of the society, shall be collected from those members of the society who participated therein. *Held*, that while the court is unwilling to declare the practice to be legal, or to authorize or encourage its continuance, it does not deem it expedient to sustain the bill under the circumstances now existing.

2. The bill also sought to enjoin the payment of \$15, which the society voted that its treasurer pay to a poor and worthy person, the bill alleging that such person does not belong to that class of beneficiaries of the society entitled to relief from its charitable funds. But the defendants claimed that the person belongs in fact to the class to whom the society may extend charitable aid.

Held, that the officers of the society, acting in good faith, may decide such questions for themselves, when trivial amounts only are involved. Equity does not stoop to pick up pins.

(Official.)

Appeal from supreme judicial court, Cumberland county, in equity.

Bill by Benjamin F. Woodbury against the Portland Marine Society and others. From a judgment refusing an injunction, plaintiff appeals. Bill dismissed.

Eben Winthrop Freeman, for appellant.
H. & W. J. Knowlton, for appellees.

PETERS, C. J. This bill in equity, instituted by a single complainant, as a member of the Portland Marine Society, against that corporation and its president and treasurer, to restrain the society from contracting for a banquet for its members on a certain public occasion, or to prevent payment for the same from the funds of the society if already contracted for, was heard below, and comes to this court by appeal from a decree by the sitting justice refusing to sustain the bill.

The decree recites the more material facts, and states the reasons for refusing the equitable aid asked for, and is as follows:

"This case came on for hearing on bill, answer, and proofs, and has been argued by counsel, and it appeared:

"That in 1796 the defendant society was created by the commonwealth of Massachusetts for 'the promotion of the knowledge of navigation and seamanship, the relief of decayed and disabled seamen and the poor widows and orphans of deceased seamen,' and empowered to hold property to the amount yielding an annual income of six thousand dollars for such purpose.

"The by-laws limit two-thirds of its members to persons who are or have been masters of vessels, and restricts aid to such persons, their widows and children. The society has accumulated a fund of over \$27,000, and its annual income is about \$1,700. In 1889 the membership had decreased to 20, and an effort was then made to renew interest in the society, and increase its membership, resulting in raising the same to about 60 (now 56). To this end, annual dinners were inaugurated, to be paid for by the society, at a cost of from \$101.10 in 1889 to \$136.95 in 1894. In 1895 the society paid nothing for the purpose. In December, 1895, the society appropriated \$300 for a dinner, it being its centennial anniversary. To this use of the funds, the plaintiff objected, and filed his bill to restrain payment. A preliminary injunction was moved, but denied by a justice of this court, and the funds were applied to this purpose, viz. \$282.30.

"It is considered by the court that while such expenditure may not come within the scope and purpose of the charity created by the founders of the society, and is of questionable propriety, still, inasmuch as done in good faith and with honest motives, and the scope of the plaintiff's bill is so narrow as to embarrass the granting of adequate relief, and the other ground has no merit, it is therefore ordered, adjudged, and decreed that the

plaintiff's bill be dismissed, but without costs."

The decree rather understates than overstates the case, and a few other facts may be added. There were only two members of the society voting against the appropriation complained of, and no part of the principal funds of the society were encroached upon for the expenses of the entertainment, the necessary amount having been taken from certain unexpended interest money remaining at the time on hand.

Much is said in behalf of the complainant concerning the society as an institution strictly for charitable purposes. It was not altogether or even principally a charitable association. The act creating the society declares "that the end and design of the institution of said society is the promotion of the knowledge of navigation and seamanship, the relief of decayed and disabled seamen, and the poor widows and orphans of deceased seamen."

Quite onerous duties are imposed on members of the society. Article 9 of the by-laws provides as follows: "It is enjoined on every maritime member of this society, on his arrival from sea, to communicate to the president his observations respecting the variation of the needle, the soundings, courses, and distances, and all other things remarkable about this coast, as well as any particular observations promotive of nautical knowledge, in writing, to be examined and digested by the committee appointed by the society for that purpose, and lodged with the secretary, to be recorded in the books of the society."

The marine or regular members are required upon their admission to pay the sum of \$20 each, and pay an annual assessment afterwards of 10 cents a month for at least 25 years; and honorary members may be admitted in consideration of donations to the society of not less than \$12 each, and the latter are not eligible to office in the society, and are not entitled to any benefits from its funds; and certain social duties and obligations are also imposed upon all the members alike.

The language of the decree hardly describes fully the stimulating influence of the efforts made in 1889 to increase the membership of the society, and awaken an interest in its general welfare, by converting it into a more social organization, the new feature being an annual entertainment and dinner for its members. The by-laws were revised, by which the admission fee of regular members was raised from \$12 to \$20, and more new members were added in two years after that time than had been admitted for the 30 years before, and there is every reason to believe that the new social feature of the society caused such increase of its prosperity. It was a means of bringing all the members together at least once each year, and the movement was decidedly a popular

one. A participation in the annual banquet was the only compensation received or that was ever expected to be received by the members for all their contributions and services in behalf of the society. Who ever heard of an objection to our colleges providing a dinner for their graduates on commencement day? And still it is to be presumed that there is no clause in any college charter permitting it. The college receives its compensation for the outlay in the promotion which the occasion invites for its welfare. Municipal corporations are constantly appropriating small sums for different sorts of public, though not technically legal, purposes; and a court of equity is rarely called upon to restrain them by injunction, although such municipal practice may not be in all cases even a commendable one. The question is not without some authority. In *Grant on Corporations* (an old English work), it is said, at page 80: "A by-law involving an expenditure of the funds of the corporation, without an adequate advantage accruing to the corporation, is bad, as being unreasonable; and therefore a by-law to compel the giving of a dinner must show that it is for a beneficial purpose, or that an interest of the corporation is in some way promoted by it, or it will be invalid." To this text the author cites quite a number of old decisions.

The extraordinary remedy of injunction should be applied, so the leading authors say, only in very clear cases; and whether the remedy shall be granted or withheld must depend, they also say, upon which course may be required upon the grounds of expediency and sound public policy; especially where public rather than private rights are involved. In the present case an injunction was refused, the money for the entertainment has been expended, and it does not impress us as expedient or feasible to attempt to reclaim it. While we do not decide, and there is no occasion for our so deciding, that the practice of the society in providing annual entertainments to be paid for out of its ordinary funds is strictly legal or justifiable, we feel that this particular bill, under the circumstances, would better not at this stage of the proceedings be sustained. Future entertainments of the kind would better, perhaps, be paid for by a fund to be contributed by the members of the society for such special purpose.

There is another claim presented by the bill, not specifically mentioned in the decree. The bill claims that the society voted to pay \$13 as a charitable contribution to a certain poor woman named, and that she did not belong to the class of persons entitled to receive a benefit as a beneficiary of the society. But the defendants claim that, as a matter of fact, she does come within the description of persons to whom the society may extend charitable aid. The officers of the society must be entitled, acting in good

faith, to decide such questions for themselves when trivial amounts only are involved. Equity does not stoop to pick up pins.

Bill dismissed, without costs.

WYMAN v. GAY.

(Supreme Judicial Court of Maine. Feb. 25, 1897.)

INSOLVENCY—PREFERENCE—EXEMPTIONS—WAIVER.

1. Exempted property is a personal privilege of the debtor. He may waive it, and does waive it when he conveys the property to another; and if the conveyance works a fraudulent preference under the insolvent law the assignee may recover the property or its value.

2. This doctrine applies to policies of life insurance where the annual premium on each is less than \$150.

(Official.)

Report from supreme judicial court, Lincoln county.

This was an action of trover by Samuel D. Wyman for the conversion of certain personal assets, viz. a horse, calf, sleigh, robe, blanket, cow, harness, pung, etc., sold by Alfred W. Huston, an insolvent debtor, to Gilbert E. Gay, on January 26, 1894, in fraud of the provisions of the insolvency law.

It was admitted that the articles enumerated in the writ excepting the sleigh, were sold by the insolvent to the defendant, and that the policies of life insurance described in the writ were assigned by the debtor to the defendant on the day alleged. The following question was submitted to the jury, and by them answered as a special verdict:

"Did the defendant have reasonable cause to believe that Alfred W. Huston was insolvent when he took the bill of sale and the assignments from him in partial payment of preceding debts on the 26th of January, 1894?"

"Answer. Yes."

A question arose at the trial whether such articles in the sale and assignments as are exempt from attachment or seizure on execution could be the subjects of fraudulent preference under the insolvency law, it being admitted that the insolvent did not have at the time of the transfer duplicates of any such articles of property.

It was admitted that said Huston went into voluntary insolvency on the 24th of March, 1894, and that the proceedings are still pending.

One of the policies, dated January 1, 1894, was a paid-up policy at the time of the assignment. The value of the different policies is \$153.06 on paid-up policy, and the other \$192.40, making \$345.52, the total value.

The annual premium on each of said policies was \$100.36.

The case was reported to the full court upon the finding and admissions, to say

whether the plaintiff can recover, and, if so, for how much. Judgment for plaintiff.

W. H. Hilton, for plaintiff. T. P. Pierce, for defendant.

HASKELL, J. Trover, by the assignee of an insolvent debtor, against a creditor, to recover the value of chattels conveyed to him by the debtor in fraud of the insolvent law.

The case found the conveyance to have been fraudulent, but the defendant claims that the chattels, when conveyed to him, were exempt from attachment, and therefore do not belong to the assignee. This defense is groundless. Exempted property is a personal privilege of the debtor. He may waive it, and certainly does waive it when he conveys it to another. His interest in the property is then gone. He cannot reclaim it or recover it. If it serves a fraud, his assignee may do so, and thereby prevent an unequal distribution of his assets among his creditors. *Nason v. Hobbs*, 75 Me. 396, is directly in point. There the assignee sued to recover the value of a yoke of oxen, sold by the debtor before his insolvency in fraud of creditors. Exemption of the oxen from attachment was set up as a defense. The court says at the date of the insolvent proceedings the debtor "did not then own the oxen, for he had sold them the day before to the defendant, and he could not legally claim sold oxen as exempt." The jury found the value of the chattels on the day of their conveyance to the defendant to have been \$147.35, which sum the plaintiff may recover, with interest from the date of conversion.

The plaintiff also sues to recover \$345.52, the agreed value of two policies of insurance on the insolvent's life, conveyed by him to the defendant in fraud of the insolvent law, and thereby converted to his own use. The same defense as to the chattels is interposed. Rev. St. c. 49, § 94, is invoked. That section exempts all such policies where the annual premium is less than \$150, meaning on each one, from "attachment and from all claims of creditors, during the life of the assured." This statute means to allow the assured such property, while he holds it, free from the claims of creditors; but when he sells it for cash, he will have received its equivalent, and the purchaser will hold an investment—a security—that is just as much a part of his estate as a bond or promissory note would be.

So, when the insured assigns his policy in payment of a debt, the policy becomes assets in the hands of a creditor, and he should not thereby be permitted to gain a fraudulent preference in his own favor over other creditors of the same debtor. When the assured parts with his policy, he places it without the protection of the statute. It then becomes the same as any chattel, and the title goes to the assignee in insolvency, rather than to work a fraud. Any other doctrine

might be made to thwart the equality of creditors, and make it possible for a dishonest debtor to give his property to a single creditor. He might take his entire assets, and procure numerous policies of insurance, with annual premiums of not over \$150 on each as in this case, and appropriate the whole of them to a favored creditor.

We think the defense of exemption does not apply to the policies any more than to the chattels, and that the plaintiff may recover for their conversion the agreed value of \$345.52; but, as the case does not show when that value attached, it must be presumed as of the date of the verdict, from which time interest should be added.

Judgment for plaintiff.

JONES v. GRANITE STATE FIRE INS. CO.

(Supreme Judicial Court of Maine. Feb. 25, 1897.)

INSURANCE—VACANT BUILDINGS—PRESUMPTION—EVIDENCE—REV. ST. CH. 49, § 20.

1. The decision in the case of *White v. Insurance Co.*, 22 Atl. 167, 83 Me. 279, again reported in 26 Atl. 1049, 85 Me. 97, does not deny that the general burden of proof lies on an insurance company to prove that an insurance risk is increased by the vacancy or nonoccupancy of dwelling houses, but only that such burden may be aided by the common and natural presumption to that effect; and that, in a case utterly devoid of any evidence as to the situation or circumstances, such presumption would be sufficient to sustain the burden which the statutory provision casts upon the company.

2. The presumption belongs to the class of mixed presumptions of law and fact, or of presumptions of fact which are sanctioned by the law, because they are in consonance with reason and experience, and because from their importance and frequency of occurrence they have attracted the attention of the law and received its commendation; in principle, like the presumption that all bills and notes are given or indorsed for value, or the presumption which prevails in favor of innocence, or sanity, or against fraud, and other presumptions that might be enumerated.

3. While this presumption has the effect of prima facie proof,—until counteracted by evidence,—when any evidence is adduced on either or both sides, then the burden of proof is upon the insurance company, aided as it may or may not be by the presumption, to make out the proposition it undertakes to maintain; and if the proofs stand in equilibrio on the proposition, then the company fails.

4. In this case the house destroyed by fire had been both vacant and unoccupied for more than a year, was situated in the outskirts of Ellsworth, in a secluded and isolated location back from the road, without any near neighbors, at a distance so great from the center of the city as not likely to receive any protection from its fire department, and there was quite a tempting opportunity for evil-minded persons to visit the premises without being seen either coming or going. The fire broke out at midnight in the ell where laborers had been working during the day. Had the house been occupied at the time the fire might not have occurred, or might have in its early inception been prevented.

Held, that on these facts, and such others as the evidence discloses, an action against the insurance company cannot be maintained.

(Official.)

Report from supreme judicial court, Hancock county.

This was an action of assumpsit by Harry S. Jones on an insurance policy issued by the Granite State Fire Insurance Company on December 9, 1892, on a two-story frame dwelling house and addition and other buildings owned by plaintiff and situated on his farm in Ellsworth. The policy covers the dwelling house and addition, which was insured for \$500, and other outbuildings, which were insured for \$1,250, making a total of \$1,750.

A fire occurred on the 4th day of May, 1895, causing the loss of the dwelling house and addition, and this action was brought to recover the sum of \$500, the amount of insurance thereon.

The writ is dated September 4, 1895. The plea was the general issue, with the brief statement: "That the entire policy of insurance declared on by the plaintiff in this action had been rendered void because of the buildings therein described becoming vacant or unoccupied in March, 1894, and so remaining until the time of the fire, a space of about fourteen months, without the written consent or agreement of the defendant indorsed on said policy or added thereto, as was required by its terms and conditions, and that by reason of said vacancy and nonoccupancy the risk on said buildings was materially increased."

The statute (Rev. St. c. 49, § 20) invoked by the defendant is as follows: "A change in the property insured, or in its use or occupation, or a breach of any of the terms of the policy by the insured, do not affect the policy unless they materially increase the risk." Judgment for defendant.

A. W. King, for plaintiff. L. O. Cornish, for defendant.

PETERS, C. J. The contention in this case is whether the risks of an insurance on the house in question were or not materially increased by its nonoccupancy, the terms of the policy (which must have been well understood by the insured) declaring the policy to be void for such cause when not consented to by the insurance company. The facts are not in dispute.

An insurance of \$500 was obtained by the plaintiff December 7, 1892, on his two-story frame building and ell, the property having been estimated at the time as worth \$1,750. The insurance came within the denomination of a "farm risk." The buildings became vacant and unoccupied in March, 1894, and continued so, without the consent or knowledge of the company, for 14 months, when, May 4, 1895, the same were totally destroyed by fire.

The house was situated on a large and finely-cultivated farm, having a frontage of nearly half a mile on a country road, being Main street extended, running past it in a northerly and southerly direction. The farm

extends easterly two miles to the easterly boundary of the city of Ellsworth, the easterly section of the same consisting variously of field, pasture, and woodland. The uncultivated portion of it is traversed by the Maine Central Railroad, which runs northerly and southerly across it. The house, 60 years old and more, and in rather an indifferent state of repair, was located about 20 rods back from the road, and two barns that were not burned (nor insured, that we are aware of) are still standing on the premises about 20 rods east of the location of the house. The farm on which the house stood is really in the outskirts of the city of Ellsworth, in quite a secluded and isolated situation, being four-fifths of a mile from the Maine Central Railroad station, which is itself quite out of the central part of the city. There were at the time of the fire a few neighbors scattered along the road, on both the north and south sides of the plaintiff's land, living in small, ordinary houses, but not in close proximity to it; the nearest on the other side being 85 rods distant from the house. The city had an imperfect and inadequate fire system, but unavailable for the protection of such buildings as these situated two-thirds of a mile away. The fire department attempted to offer relief, but failed to do so. The counsel for the plaintiff regards the fact as important that there is a running brook not far distant from the buildings, but neither firemen nor neighbors had any means by which its waters could be used to extinguish the fire.

The fire was first discovered in the ell and shed attached to the main house, at 2 o'clock in the night, and soon resulted in a total loss. The premises were well cared for by the owner and his hired man in the daytime, on account of his barns of hay and stock of cattle kept there, but neither owner nor laborer stayed on or near the premises during the night. It was customary for some one at work on the farm to visit the buildings daily or oftener, and on the afternoon preceding the fire the owner was about the house overseeing the work of his men, who were engaged in repairing the stone foundation under the ell. He closed the house at about 7 o'clock and went home, seeing no signs of fire or of anything unusual about the premises.

We feel constrained to declare, in view of all the facts respecting the condition and situation of the property, that its exposure to the risks of fire was seriously increased because of the vacancy of the unoccupied buildings. Whether the fire was caused either by accident or design, had there been some person living in the house at the time the chances are that it might have been discovered in season to control it, or that it never would have occurred. The reasoning of the court in *Lancy v. Insurance Co.*, 82 Me. 492, 20 Atl. 79, is applicable in this case, although of more forcible application in that case than in this.

It is doubtful if the meaning of the court, in its interpretation of the statute which

casts the burden of proof on insurance companies to show in case of loss of unoccupied houses that the nonoccupancy materially increased the risk, as enunciated by the court in *White v. Insurance Co.*, 83 Me. 279, 22 Atl. 167,—the case again reported in 85 Me. 97, 26 Atl. 1049,—was correctly understood in the present case at the argument. The court does not deny that the burden of proving that fact rests on the insurance company, but decides that such burden, in a case devoid of any proof of the attendant circumstances, may be sufficiently sustained in the first instance by the natural presumption to that effect, which is based upon the observation and experience of intelligent men generally. In most courts the opinions of witnesses or the experience of companies on this point cannot be testified to, for the reason that it is the common knowledge of mankind generally rather than the peculiar knowledge of specialists and experts. The court does not suppose that the legislature intended to deprive the insurance company of the aid of this common and natural presumption in support of the burden of proof, which, perhaps rather illogically, rests upon it.

It is not pretended that the general burden of proof shifts from the insurer to the insured; and if, after all the facts on both sides are presented, the case in its proofs stands in equilibrio, then the company does not prevail, and the issue must be determined against the company. The principle is illustrated in the case of a suit on a piece of commercial paper, where the general burden is on the plaintiff to prove value for the defendant's promise, and that burden does not change in any stage of the evidence in the case, although it is sustained, until weakened by other evidence, by the presumption of value which attaches to commercial paper. *Small v. Clewley*, 62 Me. 135.

Mr. Best, in his valuable work on Evidence, says that presumptions or presumptive evidence is as original as is direct evidence, and that the presumption of a fact is as good as any other proof of such fact when the presumption is legitimate. As illustrations of the principle that presumptions stand for proof until rebutted by evidence, the author remarks in this way: "Although the law presumes all bills of exchange and promissory notes to have been given and indorsed for good consideration, it is competent for certain parties affected by these presumptions to falsify them by evidence. * * * To this class also belong the well-known presumptions in favor of innocence, and sanity, and against fraud, etc., the presumption that legal acts have been performed with the solemnities required by law, and that every person performs the duties or obligations which the law casts upon him." Best, Ev. *426.

The presumption which in this case is strong enough to stand as *prima facie* proof, until contradicted by evidence, is denominated a presumption of fact sanctioned by the

law, or a mixed presumption of law and fact. The law authorizes its adoption because it is in consonance with reason and experience, and because from its importance and frequency of occurrence it has attracted the attention of the law and received its commendation.

The fact that any property is not in the possession or under the close supervision of its owner naturally produces a belief that it is exposed to more than usual risks, such risks being more or less, according to circumstances. Insurance companies invoke the benefit of this sort of presumption, and we think they are entitled to it in aid of the burden of proof which the statute imposes on them. At the same time, any construction of the statute has but little, if any, pertinency in a consideration of the facts disclosed in the present case.

Judgment for defendant.

BACON v. CASCO BAY STEAMBOAT CO.
(Supreme Judicial Court of Maine. Feb. 26, 1897.)

**NEGLIGENCE—COMMON CARRIER—DEGREE OF CARE
—EXCEPTIONS—EVIDENCE.**

1. The degree of care which the law requires shall be exercised, for the protection and safety of its passengers, by a steamboat company plying the waters of Casco Bay with its boats, after it ceases to be acting as a common carrier, and becomes merely a tenant or occupier of a wharf at which it makes landings, and over which its passengers pass in going to or departing from its boats, is that of reasonable diligence, or of common care and prudence; and what is reasonable care must depend on the circumstances. It is to be measured by the conditions and situations to which it is to be applied.

2. Exceptions do not lie to the admission of testimony which is either slightly corroborative of other proper testimony, or else immaterial.

(Official.)

Exceptions from supreme judicial court, Cumberland county.

Action by Elbridge Bacon against the Casco Bay Steamboat Company. Verdict for defendant, and plaintiff excepts. Exceptions overruled.

Edward Woodman, for plaintiff. Clarence Hale and Stephen C. Perry, for defendant.

PETERS, C. J. This is an action on the case for negligence. The verdict was for the defendants. The principal facts and the rulings of the judge are embodied in the bill of exceptions, as follows:

It appeared in evidence that the defendant was a common carrier of passengers for hire, operating a line of steamboats between the city of Portland and the islands in Casco Bay, and that it had acquired the exclusive right to land passengers at a wharf on Cushing's Island, to which its steamboats made regular trips, for the accommodation of travelers, both day and evening; that one of its

employees lived upon said wharf, and was charged with the duty of taking the steamer's lines, setting lights in the nighttime, and handling baggage and freight upon the wharf.

It also appeared that the plaintiff, on the 16th day of August, 1894, purchased a ticket of defendant, entitling him to passage upon said steamboats from Portland to Cushing's Island, and thence back again to Portland; that he was carried to Cushing's Island on one of the defendant's steamboats, on the afternoon of that day, and returned to their wharf on Cushing's Island after nightfall, at about 8 o'clock; and that, while waiting upon the wharf for a steamer, he fell into a rectangular opening in the planking of said wharf, used as a driveway, and broke his leg.

Plaintiff declared upon the negligence of the defendant in failing to provide said opening with a suitable guard rail, and also for failing to properly light the same after nightfall.

Both plaintiff and defendant introduced plans and photographs of the wharf in evidence, which are to accompany this bill of exceptions. There was also a view of the premises by the jury.

The evidence tended to show that the customary path for the ingress and egress of passengers to and from defendant's steamboats was by a gangway passing along the easterly side of the opening in which defendant fell, which gangway is denominated the "passenger platform" on defendant's plan of the premises, and that plaintiff fell into the opening from a similar gangway passing along the westerly side of said opening, which gangway is denominated the "freight platform" upon defendant's plan.

The latter gangway or freight platform led to the door of a room called on said plan the "baggage room," which room contained a closet, above the door of which was the sign "Men's Toilet."

Plaintiff testified that after passing over the usual gangway or passenger platform to the outer portion of the wharf, and remaining there a short time, he felt cold, and, seeing a light in the baggage room, he sought shelter in that room, remained there a few minutes, and that, thinking that he heard some one say that the boat was coming, he came out, and turned to walk towards the outer end of the wharf, and, while walking along the so-called "freight platform," he stepped off the edge of it, and fell.

Defendant introduced evidence tending to show that the plaintiff, while waiting for the steamer, was wandering about upon the wharf in a rather idle and aimless manner, and that, in passing to the baggage room, he necessarily passed directly by the open door of another room called upon the plan the "waiting room," which room was the one provided for passengers to resort to for shelter, and that when returning from the baggage room towards the outer end of the

wharf, where he was to go on board the steamer, he swayed about, lost his balance, and fell into the opening in question: that there was no light placed within the waiting room, which was lighted only by a lantern standing outside upon the westerly corner of the wharf, in such position that a portion of its light came in through a window in the front of the waiting room. As to the position of the lights on the wharf and their sufficiency, the evidence was conflicting.

Upon the question of the duty of the defendant to maintain a safe and convenient landing place for its passengers, the presiding justice charged the jury as follows:

"As the defendant attempted to provide a landing place in the shape of a wharf at Cushing's Island, the law required of it reasonable diligence in making that place of exit, of ingress, and egress from their steamers—that is, an opportunity to go ashore and to come on board—safe. It required of them reasonable diligence to make that chance to go ashore and to come on board safe; and that diligence must be measured under the particular time and circumstances and place and occasion when their passengers desire the opportunity to exercise it. For instance, in midday reasonable diligence might require of them to provide a different opportunity to go ashore and to come on board than would be required in the evening or after dark. In midday, no lights would be required; after dark, lights might be required. Now, at this time it appears that the defendant company maintained a wharf, or were in use of a wharf for passengers to go upon, to remain and take passage upon their steamers; and for them to do that, both by day and by night, they were required to use reasonable diligence to make that chance to go on board their boats safe for their passengers."

Counsel for the plaintiff, at the close of the charge, requested the following instruction to the jury:

"It was the duty of this steamboat company to keep in safe condition all parts of this platform, as well as its approaches thereto, to which its passengers were expressly or impliedly invited, and to which they would be likely to resort while waiting for the arrival or departure of its boats." This request was refused, excepting as already given in the judge's charge.

We think that the exception to the rule given by the judge as to the degree of care required of the company cannot prevail, nor can the exception to the refusal to give the instruction requested.

The rule given was that of ordinary and reasonable care, while the rule asked for would virtually amount to insurance. Reasonable care, caution, and prudence were to be necessarily exercised by the company. The expression used by the judge was "reasonable diligence," meaning, of course, that diligence which would be deemed reasonable by reasonable and prudent men under the

circumstances. The more the risks, the more is the diligence required in order to be regarded as reasonable. A diligence more than reasonable—an unreasonable diligence—was not required.

There are a great number of definitions of "negligence" and "diligence" (correlative terms), given by authors and judges, to be found in the law dictionaries, all of which mean about the same thing, although differently expressed. Perhaps a definition of "negligence" approved by the Pennsylvania court is the most comprehensive of any: "The absence of care according to circumstances." A definition favored by the United States supreme court is this: "The failure to do what a reasonable and prudent person would do under the circumstances of the situation, or the doing what such a person under the existing circumstances would not have done." Mr. Bigelow, in his book on Torts (page 261), says: "It is conceded by all the authorities that the standard by which to determine whether a person has been guilty of negligence is the conduct of the prudent or careful or diligent man." The standard of care required by the judge in the present case embodies a definition tantamount to those above quoted, although it might have been more expanded or intensified in its terms, but that was by no means necessary.

We are not aware, however, that the plaintiff contends that the ordinary standard of care was not correctly and sufficiently defined by the court; but the contention is that more than ordinary care, really extraordinary care, should have been exercised by the company, in order to insure absolute safety for the plaintiff in his going and coming, and the able counsel for the plaintiff relies on scattered cases in the reports, where may be found expressions like that contained in the requested instruction, to the effect that the company was bound to keep its wharf and its approaches safe and convenient. Such language is not altogether inappropriate, but it is not exact enough, when applied to the present case, and only means in most cases that carefulness and prudence must be exercised to effect security or safety, but not that such a result shall positively and absolutely be secured. The latter rule is the doctrine of this state, at least as settled in the late case of *Lasky v. Railway Co.*, 83 Me. 461, 22 Atl. 367. See authorities there cited.

Furthermore, the force of the distinction between common or ordinary care and extraordinary care, the highest degree of care,—a distinction found in the civil law, and adopted by English and American courts principally as applicable to the law of bailments,—has been greatly diminished in modern times, for the reason that extraordinary diligence is no more than an ordinary requirement in extreme situations and conditions. The tendency with many courts is to call all

cases of the kind simply cases of negligence, ignoring the ancient classification. In all cases the amount of care bestowed must be equal to the emergency, however the standard be denominated. We do not mean to say that the distinction between ordinary and gross negligence, or between ordinary and extraordinary care, does not still exist; but, in reply to the suggestion made by the plaintiff's counsel that the same extreme degree of care should be exercised by the defendants when wharfingers, or tenants of a wharf used in conjunction with their boats, as is imposed on them while common carriers of passengers, we do mean to say that we perceive no reason for imposing so extreme an obligation upon the defendants when they have completed their trip, and ceased to be longer performing the duties of common carriers; and the authorities do not support any such application of the rule of extraordinary care as is contended for. In fact, the tendency of decision is, as before intimated, more likely to be the other way, if there be any solid difference between negligence of one degree and negligence of another degree, or between reasonable care and extraordinary care.

Another question arose during the trial, where an exception was taken to the admission of certain, as it is claimed, inadmissible testimony. The question is presented by a portion of the reported case, reading as follows: "The plaintiff introduced evidence tending to show that, at the time of the accident and injury complained of, the place where the accident occurred was dark, and that there was no light at or near that place. The defendant introduced evidence tending to show that there was at that time a light hanging on the wall between the doors of the baggage room and the waiting room, in such a position that the whole scene of the accident was brightly and sufficiently lighted, and that the wharf was otherwise sufficiently lighted. The plaintiff called a witness who testified, in substance, that after the accident, and before the boat arrived, he went to the place where the plaintiff fell, and that it was dark; that there were no lights there. Thereupon the defendant called the wharfinger, who testified that said light was, within a brief time after the accident, discovered by him upon the floor just within the door of the waiting room, and that he again, and before the arrival of the steamboat, hung it upon the wall between the doors of said two rooms; and then the captain of the boat, that arrived some five or ten minutes after the accident, was allowed to testify in behalf of the defendant that, at the time of the arrival of the boat, a light hung on the wall between the two doors of said rooms."

While this does not appear to be at all an important question, we are of opinion that the admitted testimony had a tendency to slightly corroborate the employé of the company, who had previously testified, in a part

of his statement, or else had no effect whatever, and was therefore entirely immaterial. It had some force to repel any argument that the employé's story was an entire fabrication. Exceptions overruled.

STATE v. WHITTEN.

(Supreme Judicial Court of Maine. Feb. 1, 1897.)

GAME LAW—INDICTMENT—CONSTITUTIONAL LAW.

1. The offense of transporting trout, except in the possession of the owner, is sufficiently set out in a complaint which avers that the respondent, at a place and on a day certain, "was guilty of catching, killing, netting, and having in his possession for the purpose of transportation, and did send the same, marked to 'C. V. Whitten, 6 Winthrop Sqr., Boston, Mass.,' one trout, of the weight of four and one-half, not being in the possession of the said respondent," etc.

2. The averment that the trout weighed four and one-half is not an averment of any weight, and the penalty recoverable must be that for the transportation of one trout, without any additional penalty to be assessed according to its weight.

3. *Held*, that the statute is constitutional. (Official.)

Exceptions from superior court, Kennebec county.

Charles Whitten was convicted of violating the fish and game law. He demurred to the complaint in the superior court, and excepts. Demurrer overruled.

Geo. W. Heselton, Co. Atty., for the State. Edmund F. and Appleton Webb, for defendant.

PETERS, C. J. The complaint against the respondent runs as follows: "C. B. Bunker, of Belgrade, in the county of Kennebec, state of Maine.

"On the twentieth day of May, A. D. 1895, in behalf of said state, on oath complains that Charlie Whitten, of Belgrade, in said county, on the 20th day of May, A. D. 1895, at said Belgrade was guilty of catching, killing, netting, and having in his possession for the purpose of transportation, and did send the same marked to 'C. V. Whitten, 6 Winthrop Sqr., Boston, Mass.,' one trout, of the weight of four and one-half, not being in the possession of the said Charlie Whitten, against the peace of said state, and contrary to the form of the statute in such case made and provided."

Upon his arraignment the respondent pleaded that he was guilty of "shipping" the trout as alleged, was found guilty, and fined in the sum of \$72.50 for the offense. From this sentence he appealed. In the court above, without withdrawing his plea of guilty, and without leave of court, he demurred to the complaint, these steps constituting rather an irregular proceeding, but possibly permissible, inasmuch as the demurrer was duly joined by the prosecuting officer.

The complaint alleges a violation of Rev. St. c. 40, § 54, as amended by chapter 81 of the Laws of 1895, which is as follows: "No person shall take, catch, kill or have in possession, at any one time, for the purpose of transportation, more than twenty-five pounds of land-locked salmon or trout, in all, nor shall any such be transported except in the possession of the owner thereof, under a penalty of fifty dollars for the offense, and five dollars for every pound of land-locked salmon or trout, in all, so taken, caught, killed, in possession, or transportation in excess of twenty-five pounds, and all such fish transported in violation of this section, may be seized, on complaint, and shall be forfeited to the prosecutor. Whoever has in his possession more than twenty-five pounds in all of such fish, shall be deemed to have taken them in violation of this section. Provided, however, that the taking of one fish additional, when having less than twenty-five pounds shall not be regarded as a violation of the law."

It would be ignoring the indisputable meaning of words to declare that here is not a clear allegation that the respondent had in his possession a trout for the purpose of illegal transportation, and transported it while not in his possession, and that is the offense which the government is prosecuting, although the same offense is also variously, and perhaps literally, set forth in several ways. If the respondent "sent" the trout, he transported it without accompanying it personally. For this offense the penalty is \$50.

But as the words "four and one-half" may have meant either pounds or ounces, they mean nothing at all, and must be rejected. Therefore the penalty to be imposed must be a fine for the sum named, without any sum in addition "according to the weight of the trout."

Any objection to the complaint for the alleged unconstitutionality of the statute cannot avail. That question has been settled adversely to the objection in many states, and similar enactments have been for many years accepted in this state without any such question. Numerous cases in behalf of the validity of the law are cited on the exhaustive brief filed in behalf of the prosecution.

Demurrer overruled.

UNION WATER-POWER CO. v. CITY OF AUBURN.

(Supreme Judicial Court of Maine. March 2, 1897.)

TAXABLE PROPERTY—WATER POWER—DAM.

1. Water, as an element, is not property, any more than air; but when used its potential power becomes actual, by operating upon real property, thereby giving it value, and that value is the basis for the purposes of taxation.

2. *Held*, that the plaintiff's dam and the land upon which it stands, within the city of Auburn,

—the established place of business of the plaintiff corporation being in the city of Lewiston, and where the power from the dam is applied,—may be properly taxed in Auburn at a reasonable valuation, exclusive of the water power created thereby. Such water power is potential, and not taxable, except indirectly, in the valuation of mills with which it is used.

See *City of Auburn v. Union Water-Power Co.*, 90 Me. 71, 37 Atl. 335.

(Official.)

Exceptions from supreme judicial court, Androscoggin county.

This was a petition of the Union Water-Power Company of Lewiston, filed in this court sitting below, praying for an abatement of city, county, and state taxes assessed by the assessors of the city of Auburn upon a portion of its real estate and property rights in that city. The proceeding in this case was under the statute of 1895, c. 122, and after the assessors of the city of Auburn had refused to make an abatement upon the plaintiff's petition and application. To the judgment defendant excepts. Overruled.

The grounds upon which the abatement was claimed and set out in the petition were as follows:

First. Because the assessment and valuation of the property of said company as above set forth is greatly in excess of its value.

Second. Because the property of said company is not rated and valued equitably and proportionally, as compared with other property of like nature and kind in said Auburn.

Third. Because the assessors have included in said assessment and valuation property and property rights for which the said corporation is not liable to be taxed in said city.

Fourth. Because it did not have, possess, or own the water power and water rights in the city of Auburn upon which said tax was assessed to it, as hereinbefore set forth.

Fifth. Because said tax is illegally and improperly assessed.

The plaintiff introduced evidence to show the following facts:

That there is a dam across the river at Lewiston Falls, composed of four granite structures, called dams Nos. 1, 2, 3, and 4, for convenience. That the river is the dividing line between the cities of Lewiston and Auburn. That dam No. 1 adjoins the Auburn shore. That the length of these dams is as follows: No. 1, 136 feet; No. 2, 269 feet; No. 3, 147 feet; No. 4, 159 feet; the heights varying from 8.70 to 16 feet. That the structures are all built with a cut granite face on the down-river side, and the top of the same material, while the backs are made of rough stone. That these dams flow back some 2 or 2½ miles, and that the Union Water-Power Company owns the right for such flowage. That dam No. 1 makes its connection with the Auburn shore at and against the Auburn abutment of the

Maine Central Railroad bridge, and that the company owns no land in Auburn at the end of the dam, nor below it, nor in its vicinity, other than the ice-house lot referred to in the case, and taxed as a separate item. That the town line between Lewiston and Auburn intersects the dam at the extreme westerly end of dam No. 2, so that it may be said, in general terms, that dam No. 1 only is in Auburn. That these dams were built in 1863 and 1864. That the total cost of the four dam structures at the time they were built was \$86,977.33. That dam No. 1 represents less than 20 per cent. of the original total cost, which would make the cost of this dam about \$18,000. That this dam No. 1 could now be reproduced for some \$10,000 to \$11,000. That the total available constant power which can be created by these dams is about 13,000 horse power. That all but 600 to 1,000 horse power of this total is owned by various mills in Lewiston, under a contract giving them a perpetual right to draw the same in accordance with the terms of the leases. That the 600 to 1,000 horse power not covered by the leases is used and paid for by the mills in Lewiston, in addition to that owned by them, by permission of the Union Water-Power Company, without any contract for its permanent use, and is excess water.

The Union Water-Power Company are the owners of this whole dam system and flowage rights, with the canals, gates, and water ways which make the water power available for power in Lewiston, and subject to the contracts or leases above referred to, held by the various mills and other parties using the water for power in Lewiston. It also owns mill sites and other lands in Lewiston. There are no gates, canals, or water ways in Auburn by which any part of this water could be used for power there, nor does the company own any land in Auburn upon which this power could be used.

The assessors of Auburn assessed a tax for the year 1894 upon the dam and water rights on a valuation of \$500,000, and upon the ice-house lot on a valuation of \$5,000. This tax was levied by a supplemental assessment under date of February 4, 1895. The Union Water-Power Company seasonably filed its petition for an abatement of this tax, which was refused by the assessors, and the company took its appeal to this court as before stated.

This appeal was heard by the presiding justice, who reduced the valuation upon the dam and rights connected therewith to \$20,000, and upon the ice-house lot to \$2,000. No exception was taken to the latter, but to the former the defendant took exception.

Upon the hearing in the court below the defendant moved the presiding justice to make the following findings:

"First. To find as matter of fact, upon the evidence introduced at the hearing, that the water power created by the granite dam

of the Union Water-Power Company mentioned in said supplementary assessment is appurtenant to said dam, and to the real estate of said Union Water-Power Company flowed thereby, and that, so far as the same is situate within the limits of the city of Auburn, it was properly taxable therein, and legally subject to the supplementary assessment aforesaid.

"Second. All that is asked in the foregoing request, as a finding of fact, is also hereby respectfully requested of the presiding justice to be made as a ruling of law upon all the evidence in the case, or upon such findings of fact as the presiding justice shall make therefrom."

These requests were refused by the presiding justice, except as appears in the following findings and rulings:

"I find as a matter of fact, and rule as a matter of law, upon all the evidence introduced, that the water power created by the granite dam of the Union Water-Power Company named in the said supplementary assessment is appurtenant to said dam, and to the real estate of said company flowed thereby, in the sense that the capacity of such dam and real estate for valuable use is fully considered in fixing their valuation in the city of Auburn, but find and rule that it is not appurtenant to such dam and real estate in the sense that the water power, which is taxed in connection with the mills in the city of Lewiston, can be a distinct subject of taxation in the city of Auburn."

To these rulings and findings the defendant took exceptions. A full report of the evidence introduced at the trial was made a part of the exceptions.

W. H. White, S. M. Carter, and J. A. Merrill, for plaintiff. N. W. Harris, J. A. Pulsifer, W. W. Bolster, A. R. Savage, J. W. Symonds, D. W. Snow, and C. S. Cook, for defendant.

HASKELL, J. This is an appeal from the action of the assessors of Auburn in refusing an abatement of taxes. It comes up on exceptions to the rule for valuation applied below to a dam from the center of the river to the Auburn shore holding back water that is taken by canal on the opposite shore in Lewiston, and there used for mill power.

It is contended that Auburn may assess the power created by the dam within its own limits, although applied elsewhere. This contention seems to have been partially sustained by the court below, and we think it erroneous. Water power, until applied to mills, is potential, not actual, in the sense that it is property subject to taxation. When applied to the mills, it becomes a part of the property, thereby giving them value, the proper subject of taxation. It then becomes the main element of value, not as water, not as power, but as an integral part of the mills themselves. Without it, what value could a

water mill have? If the rule should be held otherwise, it would overturn the present method of taxation throughout the state. We have three principal rivers, taking their rise in lakes in the northern wilderness. At the outlet of these lakes immense dams hold back and store water for the use of mills below. If the rule of taxing the potential use of water should be adopted, it would send the principal part of the power of these rivers for taxation into unorganized and remote districts, and deprive cities and towns of that element to be considered as estimating the value of water mills for purposes of taxation. Under that rule, their value might be almost nominal, because their power is the controlling agency that makes value. But it is said that the owner of the dam may not be the owner of mills; that he simply stores up water for sale to the mill owner. That should make no difference. The water itself is not property, although he alone may use it. When he does so, the power it produces attaches to the mill, and becomes an element in the value of the mill. When he sells it, the same result follows as if he applied it to his own mill. The mill where it is applied becomes the more valuable thereby. It there, indirectly, becomes the subject of taxation, as a part of the mill property. The water in a mill pond cannot be regarded as property apart from the mill that uses it, and separate ownership makes no difference. Water, as an element, is not property, any more than air. When used, its potential power becomes actual, by operating upon real property, and thereby giving it value, and that value is the basis for the purposes of taxation.

The first case brought to our notice is Boston Manuf'g Co. v. Newton (1839) 22 Pick. 22, the facts of which were precisely like the facts in the case at bar in all material particulars. The plaintiff owned a dam across Charles river, one-half in Newton and the other half in Waltham. The mills were wholly in Waltham. Newton assessed one-half the dam and one-half the water power. The tax was paid under protest, and suit brought to recover it back as an unlawful assessment upon the water power. Mr. B. R. Curtis was of counsel for the plaintiffs, and Mr. Rufus Choate counsel for the defendants. The opinion of the court was by Chief Justice Shaw, and the court says: "Water power for mill purposes is not a distinct subject of taxation. It is a capacity of land for a certain mode of improvement, which cannot be taxed independently of the land.

"But the objection to this mode of taxation is not the only or the principal objection to the tax in question. The court are of opinion that the water power had been annexed to the mills; that it went to enhance the value of the mills, and could only be taxed together with the mills, as contributing to increase their value. As the mills were wholly situated in Waltham, and were taxable there, they were not liable to be taxed in

Newton." That doctrine has been recognized in Massachusetts ever since.

In *Lowell v. Commissioners*, 6 Allen, 131, a corporation owned certain canals, with appurtenances, whereby it was enabled to furnish certain mills, owned by its stockholders, water for power. For nine months in the year it had a surplus of water for sale to other takers, and the court held that the canals were assessed in the valuation of the mills to the proportion of the power furnished to them, and that their value for retaining the surplus of water, if any, might be directly assessed to the corporation, but does not authorize the assessment of water power per se. In this state, very likely, the canals would be assessed wholly to the owner, and the power included in the assessment of the mills only.

In *Pingree v. Commissioners*, 102 Mass. 76, it was held that a dam and structures were taxable independent of the water power which they had created. The court says: "They are capable of being estimated by a reasonable valuation, not dependent upon nor including the worth of the water power with which they are connected." It explains *Lowell v. Commissioners*, supra, by saying: "There was no diversity of right or jurisdiction in that case, which made it necessary to determine whether the canals and land adjoining them could be taxed to the mill owners as water power against a conflicting interest."

Fall River v. County Com'rs, 125 Mass. 567, holds that right of flowage is an easement in land that cannot be taxed independently, and the court say that it forms part of the water power which is taxed in connection with the mills, as enhancing their value.

Water Co. v. Lynn, 147 Mass. 31, 16 N. E. 742, holds that one who owns the right to maintain a dam and sluiceways upon the land of another, and is in the enjoyment thereof, may be deemed as in possession of real estate for the purposes of taxation, and that the soil may properly be taxed to him. This is the doctrine of *Paris v. Water Co.*, 85 Me. 330, 27 Atl. 143.

Lowell v. Commissioners, 152 Mass. 381, 25 N. E. 469, holds that land enhanced by the ownership and use of the water power appurtenant thereto may be so taxed, notwithstanding existing statutes.

The plaintiff's dam and the land upon which it stands, within the city of Auburn, may be properly there taxed at a reasonable valuation, exclusive of the water power created thereby. That is potential, and not taxable, except indirectly, in the valuation of mills with which it is used. The doctrine held in *Paris v. Water Co.*, supra, is analogous.

We are aware that a different doctrine prevails in New Hampshire, but do not think it so well comports with our state polity, and would give so just and equal basis for taxation as the one we are constrained to adopt. *Cocheco Co. v. Strafford*, 51 N. H. 455; *Man-*

ufacturing Co. v. Gilford, 64 N. H. 337, 10 Atl. 849; *Amoskeag Manuf'g Co. v. Town of Concord*, 66 N. H. 562, 34 Atl. 241.

Although the ruling below seems to be incorrect, yet, as it is more strongly in the defendant's favor than it is entitled to have, the exceptions must be overruled.

Exceptions overruled.

EMERY, J. I find myself unable to fully acquiesce in the reasoning of the learned opinion, though it seems to have support in the cases cited from Massachusetts. The case bears to me a different aspect, and, in view of the great importance of the question in a state like Maine, a consideration of the case in this aspect may not be useless. I venture, therefore, to express my views in a separate opinion.

I do not see the necessity, and I doubt the expediency, of undertaking to determine whether what is called "the water power" is wholly appurtenant to the dam, or wholly appurtenant to the mill, or partly appurtenant to each, or whether it is incorporated into either.

If by the term "water power" is meant the "water fall" or the "mill privilege," then it is simply a parcel of land over which a stream of water flows and falls, and is to be taxed in the town in which it is situated. So far as the land is more valuable by reason of the stream and fall upon it, so far are these to be considered in the valuation of the land, and no further. This consequent increase of value is a question in commercial economics, and requires for its determination the consideration of possible revenues to be drawn from the land, and the possible price to be obtained for it.

If by the term "water power" is meant the force, energy, or, to quote from the opinion, the "potentiality," of falling water, then it is not appurtenant to, nor annexed to, nor an integral part of, any particular parcel of real estate. It is just force, as gravitation is force. It may be exerted by or upon some material object, but it is no part of that object, either as an appurtenance or otherwise. Gravitation affects all matter, but it is not in nor appurtenant to matter.

The intensity of the force exerted by falling water is according to the height from which it falls. While this force is exerted to some extent throughout the whole length of a river, it is usually only at comparatively few places that the fall is sufficiently sharp to develop intensity enough to be made practically serviceable as a mechanical power. It is only at these places, these "falls" thus formed by nature, that successful efforts have so far been made to utilize this force.

But under our law such utilization can be made only by leave of the owner of the land under and abutting the falls on either side. However great the intensity of the force exerted by the water at the particular falls in question, however easy its utilization, how-

ever great the demand and imperative the need for its utilization, the owner of the land holds the indispensable key. He can impose his own terms for its use. This rule of law may often give a monopoly of great value. The falls upon his land may be the only one on a large river and within a wide territory. He has, in such case, not a monopoly of the force exerted by the water of the river, but a monopoly of the only practical means or opportunity for its utilization.

This monopoly, thus valuable, is an incident of the ownership of the land, and may often be the principal element in the value of the land. Large revenues may often accrue to the landowner solely from this monopoly. This monopoly, this revenue or chance of revenue from it, should be included in an estimate of the value of the land. The whole value of the land, with all these incidents, is to be assessed and taxed in the town in which the land is situated.

The Union Water-Power Company owns land in Auburn under and abutting the falls on the Androscoggin river known as the "Lewiston Falls." Upon this land it has erected dams for the utilization of the force exerted by the water in plunging over the falls. The force thus utilized is of immense power, and is in great demand in that neighborhood for the propulsion of the machinery of numerous large factories. The force is great enough to furnish power for much additional machinery, if ever needed. The Union Water-Power Company has the monopoly, not strictly of the force, the power, but of the land upon which must be placed the essential appliances to utilize it. The company owns, not strictly the power, but the gateway through which alone the power can be captured and led out. It can thus impose such toll as it will upon all use of the power. It can make every mill and machine using the power a tributary to its exchequer. This monopoly, this power of exacting tribute from the increasing needs of the community, may be of much more value than the cost of the dam and the value of all the other incidents of the land. This monopoly value is an incident of the land, and should be included in an estimate of the value of the land for taxation in Auburn. If only part of the land is in Auburn, there should be a proportional division of the whole value. The determination of this monopoly value is likewise a question in commercial economics.

I do not see, therefore, the need or expediency of declaring whether "water power" thus made available through the company's land is appurtenant, wholly or partly, to that land, or whether it passes on down the canals, and becomes annexed to or incorporated in the mills below. As well try, it seems to me, to determine whether the force of the electric current is appurtenant to the dynamo or to the lamp or motor; whether the force that propels a cannon ball is appur-

tenant to the cannon or to the target; whether the wind is a part of the bellows or of the fire. The force is being continually expended, if continually renewed.

As to the mills, all that can be annexed to or incorporated in them, as to water power, is the somehow-acquired right against the owner of the dam to have the water power transmitted to them. If such a right has been acquired by the mill owners, either personally or as an incident of the ownership of the mill, the value of such right is to be estimated in assessing the owner of the mill. The existence of a contract or covenant between the owner of the mill and the owner of the dam, which contract runs with the mill and the dam, may add to the value of each, instead of subtracting from the value of either. It should not be assumed that taxing in Lewiston the right of the mill to have water power from the dam in Auburn should reduce the tax in Auburn upon the corresponding right of the dam to receive compensation therefor. The water power is not to be taxed in either town. The increased value of the real estate by reason of the incident natural monopoly or incident acquired rights is to be taxed in the town in which the real estate is situated.

The request of the city of Auburn was that the presiding justice consider the water power as appurtenant to the dam, and as properly taxable in the same municipality. The presiding justice declined to do this in terms, but I infer from the language of his finding that, in fixing the valuation of the real estate of the Union Water-Power Company in Auburn, he did fully consider and include its capacity for valuable use as indicated in this note. I think this was all the city could require of him. His estimate of that value after considering and including all the proper elements is conclusive. There is no provision for an appeal therefrom.

Exceptions overruled.

CITY OF AUBURN v. UNION WATER-POWER CO.

(Supreme Judicial Court of Maine. March 2, 1897.)

CITY COUNCIL — MEETINGS — NOTICE — OFFICER — ELECTION — EXCEPTIONS.

1. In action of debt to recover a tax, the defendant objected to the validity of its assessment because the meeting of the city council at which the tax was levied had not been legally called. The record showed that "the city council met pursuant to the call of the mayor."

Held sufficient, it appearing that the city charter empowers the mayor to call meetings of the city council, although it does not provide who shall serve the notification to be given, or that any return shall be made or preserved; also that at an adjourned meeting the records of previous meetings were read and accepted.

2. Whether an assessor and collector have been duly elected by the city clerk casting the vote of the convention, there being but one candidate for each office, the court does not decide,

because it appeared that the assessor assumed thereby that he had been elected, and, if not so, held over from a regular election of the previous year; also, *held*, that whether the collector was legally elected is immaterial in this case.

8. Exceptions do not lie for refusing a requested ruling that is equivalent to asking a nonsuit.

4. See *Union Water-Power Co. v. City of Auburn*, 90 Me. 60, 37 Atl. 331.

(Official.)

Exceptions from supreme judicial court, Androscoggin county.

This action was brought by the city of Auburn against the Union Water-Power Company under the provisions of Rev. St. c. 6, § 175, to recover a tax of \$10,100 assessed against the defendant in the city of Auburn, by supplemental assessment made in the year 1894. The sum of \$100 was a tax assessed upon a lot of land known as the "Ice-House Lot," valued at \$5,000, and the sum of \$10,000 was a tax assessed upon the granite dam, located in the Androscoggin river, between the cities of Lewiston and Auburn, with the appurtenances and the flowage rights connected therewith, valued at \$500,000.

The writ is dated April 11, 1895, and was returnable at the September term, 1895, of this court sitting below. At the same term the defendant entered an appeal, under the provisions of the statute of 1895 (chapter 122), from the adjudication of the assessors of the city of Auburn, refusing to abate any portion of the tax for which this action was brought. Exceptions overruled.

N. W. Harris, J. A. Pulsifer, W. W. Bolster, A. R. Savage, J. W. Symonds, D. W. Snow, and C. S. Cook, for plaintiff. W. H. White, S. M. Carter, and J. A. Morrill, for defendant.

HASKELL, J. This is an action of debt by the city of Auburn and city treasurer to recover a tax assessed in 1894, duly authorized by the mayor. The whole evidence is reported, and it therein appears, from the assessment lists and commitment thereof by warrant to the collector, that the tax sued for was due. No question is made as to the regularity and sufficiency of these documents. They, therefore, make a *prima facie* case, sufficient to sustain the action. *Norridgewock v. Walker*, 71 Me. 181; *Howe v. Moulton*, 87 Me. 120, 32 Atl. 781; *Bath v. Whitmore*, 79 Me. 182, 9 Atl. 119. To overcome the apparent validity of these documents, it is necessary to show the illegality of the tax. The plaintiff introduced in evidence (that might well have been omitted) a copy of the records of the meeting of the city council and adjournment thereof, at which the taxes were levied. This record runs, "The city council met pursuant to call of the mayor," and then specifies the business transacted, including the levy of the tax in question.

1. Exception is taken to the refusal of the

presiding justice to rule that the meeting was not legally called, and that therefore the tax was levied without authority of law. This was not error, for it appears *prima facie* that the charter requirements as to the calling of the meeting had been complied with. The record states: "Met pursuant to call of the mayor." The charter empowered the mayor to call the meeting by causing a "notification to be given in hand, or left at the usual dwelling place of each member." It does not provide who shall do it, nor that any return of the fact shall be written, made, or preserved anywhere. Neither did the act relating to town meetings, prior to Rev. St. 1841, c. 5, § 6, mention the mode of service of a town-meeting warrant, and up to that time our statute was the same as the Massachusetts statute of 1787.

In Massachusetts: "That he had warned all the inhabitants of the district as the law directs" was held sufficient *prima facie*. *Saxton v. Nimms*, 14 Mass. 320. "That he had warned the inhabitants by posting up copies" was held good. *Thayer v. Stearns*, 1 Pick. 100. "Pursuant to the warrant I have notified," "Agreeable to the within warrant," etc., "That he had notified as the law directs," were held sufficient. *Briggs v. Murdock*, 13 Pick. 305. "That he had warned the inhabitants" was held sufficient in a suit for taxes. *Houghton v. Davenport*, 28 Pick. 235; *Com. v. Shaw*, 7 Metc. (Mass.) 52; *Rand v. Wilder*, 11 Cush. 204; *Com. v. Brown*, 147 Mass. 592, 18 N. E. 587. The doctrine of these cases seems to be that the notice is presumed to comply with the requirements of law, from the general language of the return, saying "that the officer had warned the inhabitants agreeable to the warrant," "pursuant to the warrant," "as the law directs," etc. In *Gilmore v. Holt*, 4 Pick. 257, it was held that the notice of an annual town meeting was presumed to have been legal until the contrary be shown. So in *Ford v. Olough*, 8 Greenl. 343, where the statute required such notice "as the town shall agree upon," it was presumed to have been such as the town agreed to. The court distinguishes the case of *Tuttle v. Cary*, 7 Greenl. 426, where, under the parish act, seven days' notice was required to be posted on the outer door of the meetinghouse. So in *Bucksport v. Spofford*, 12 Me. 490, where the return did not show the meeting had been warned, the court presumed it to have been legally done, and distinguished *Tuttle v. Cary* as controlled by statute.

In *State v. Williams*, 25 Me. 561, considered after the act of 1841 requiring town meetings to be warned in a particular way and a return showing how the same had been done, the court held a strict compliance with the statute necessary, and that the return of the officer was the only competent evidence upon the question; and so have all the later cases. *Christ's Church v. Woodward*, 26 Me. 172; *Fossett v. Bearce*, 29 Me. 523; *Allen v. Arch-*

er. 49 Me. 346; Brown v. Witham, 51 Me. 29; Clark v. Wardwell, 55 Me. 66; Hamilton v. Phippsburg, Id. 193.

It should be noticed that the Massachusetts cases, and the Maine cases prior to the act of 1841, recognize a presumption in favor of regularity to arise from the most general language contained in the return of the officer who served the warrant, although that seems to have been the only proper evidence to be considered on the question.

In this case the charter empowers the mayor to call special meetings by causing notifications to be given in hand, or left at the usual dwelling place of each member. No length of notice is required. No particular person or officer is named who shall leave the notices. The mayor is to cause the notices to be given. Most likely a city clerk would be charged with the duty. He would probably make and sign the notices, and either deliver them himself, or see that some person, perhaps the city messenger, did so. It is his duty to keep a true record of meetings of the council. His record recites in this case, "Met pursuant to call of the mayor." That recital may as well be held to raise a presumption of legal notice as the general language of the officers' returns in the cases above noticed, and we think it does. If he performed the service as city clerk, by direction of the mayor, it may be said that he acted within the scope of duty, and the records of such officers are always competent evidence, and presumed to be correct. Bruce v. Holden, 21 Pick. 187. Moreover, at an adjournment of the meeting the record recites, "Records of previous meetings read and accepted,"—a direct indorsement by the body of the statement in the previous record that the council "met pursuant to the call of the mayor," meaning on his call properly served upon each member of the city government. Precaution would recommend a written call, signed by the mayor, bearing a return showing what notification had been given, which should be recorded as a part of the records of the meeting. This method has recently been adopted by some cities, and might well be by all. But the old method, that preserves no particular evidence of the call and service besides the mere recital, "Met pursuant to call of the mayor," at the head of the record of the meeting, which has very generally prevailed, we cannot say raises no presumption of legality. To hold otherwise would overturn an established usage, and work irreparable mischief.

2 Exception is taken to the refusal of the presiding justice to rule that one of the assessors and the collector had not been legally elected. The evidence of their election is the city record: "The following officers, there being but one candidate, were each elected by the city clerk casting the vote of the convention, and each was declared elected." This is an irregular method of electing officers required by statute to be elected by ballot, and

whether valid or not it is unnecessary to now decide, inasmuch as the assessor thereby assumed to have been elected, and, if not so, held over from a regular election of the previous year. Bath v. Reed, 78 Me. 276, 4 Atl. 688. Whether the collector was legally elected is immaterial here.

3. Exception is taken to the refusal of the presiding justice to rule that the action was not maintainable upon the evidence submitted, thereby showing that all the evidence reported was intended to be made a part of the exceptions. The ruling excepted to was equivalent to denying a nonsuit, to which no exception can be taken. The remedy is by motion. Bunker v. Inhabitants of Gouldsboro, 81 Me. 195, 18 Atl. 543; McKown v. Powers, 86 Me. 291, 29 Atl. 1079.

Exceptions overruled.

Damages to be assessed below.

EDWARDS v. ALLEGHENY COUNTY.
(Supreme Court of Pennsylvania. May 18, 1897.)

COUNTIES—ASSISTANT DISTRICT ATTORNEYS
—COMPENSATION.

Act 1891 (P. L. 314), fixing the salary of the first assistant district attorney in counties of a certain class, does not apply to the office of assistant district attorney specially created for Allegheny county by Act Feb. 6, 1867 (P. L. 140), which specifies the duties of the incumbent, in the performance of which duties he is wholly independent of the district attorney.

Appeal from court of common pleas, Allegheny county.

Action by Albert J. Edwards against the county of Allegheny to recover compensation for services as assistant district attorney. From a judgment for defendant, plaintiff appeals. Affirmed.

D. T. Watson, Johns McCleave, and G. W. Williams, for appellant. W. B. Rodgers, for appellee.

McCOLLUM, J. The question on this appeal is whether the assistant district attorney of Allegheny county is entitled to a salary of \$1,500 a year or to a salary of \$4,000 a year. In 1871 his salary was fixed at the former sum, and it has been regularly paid to him since. It is his salary now, unless the act of 1891 (P. L. 314) has changed it. The court below held that the salary as fixed by the act of 1871 had not been changed by subsequent legislation, and entered a judgment accordingly.

The act of 1891 fixes the salary of the first assistant district attorney in counties having over 500,000 and less than 800,000 inhabitants at \$4,000 a year, and the contention of the plaintiff is that, as he is the only assistant district attorney in Allegheny county, he must be considered as within the purview of the act, and entitled to the salary attached to the office of first assistant district attorney in counties of this class. The contention,

however, assumes too much. It is not a necessary conclusion from the undisputed fact on which he relies that he is entitled to the salary he claims. The duties which pertain to the office he now holds are specifically defined by the act which created it, and they have not been changed by the act of 1891 or any other act. The office was created for Allegheny county by the act of February 6, 1867 (P. L. 140). No other county in the commonwealth has such an office. In *Com. v. Grier*, 152 Pa. St. 183, 25 Atl. 628, Ewing, P. J., said of it: "The office of assistant district attorney in Allegheny county is an anomaly in the law of Pennsylvania. The office was created in fact for a special purpose, and has been continued because it is difficult to repeal such an act. The officer is in no way dependent on the district attorney, nor accountable to him, nor can he be called on officially to assist him. The duties are specified in the act, and he is made an assistant only in name." It is an elective office, and the person chosen to fill it is entitled to hold it for the term of three years, subject, however, to removal therefrom for such causes as authorize the removal of a district attorney. The duties of it are defined in section 5 of the act which created it as follows: "It shall be the duty of said assistant district attorney to attend to all preliminary hearings in criminal cases arising in said county when the public interests may require it; to prepare all bills of indictment for offences cognizable in the courts having jurisdiction thereof within said county, and to submit the same to the grand jury with the commonwealth testimony and to affix to said bill of indictment the name of the district attorney: provided that nothing herein contained shall interfere with the right of the district attorney to prepare a bill of indictment ex officio as heretofore when proper occasion may arise." By the act of 1867 the assistant district attorney was allowed as compensation for his services one-third of the fees pertaining to the district attorney's office. By the act of 1871 (P. L. 476) these fees, when collected, were payable into the county treasury, the salary of the district attorney was fixed at \$4,000, and the salary of the assistant district attorney at \$1,500. The act of 1891, if applicable to the anomalous office of assistant district attorney of Allegheny county, would add 166% per cent. to the salary of the plaintiff, while it adds but 50 per cent. to the salary of the district attorney. It seems to us that the assistant district attorney of Allegheny county is not a first assistant district attorney, within the scope and meaning of the act of 1891. As we have already seen, his duties are limited to preliminary hearings in criminal cases, to the preparation of and affixing the name of the district attorney to the bills of indictment, and to the submission of the same, with the commonwealth's testimony, to the grand jury. In the performance of these duties he is in

no sense subordinate to the district attorney, but, on the contrary, he is absolutely independent of him. He cannot be officially called to the assistance of the district attorney in the performance of the duties that remain to him. This, we think, is not the kind of assistant district attorney who is entitled to the salary which the plaintiff now claims. In our opinion, the legislature, in fixing the salary of a first assistant district attorney, had in view an officer who was an assistant of, and subject to, the district attorney in the performance of the duties of his office, and not an officer who was independent of the district attorney, and whose duties were defined by a special act. As we think that the act of 1891 has no application to the office of assistant district attorney created for Allegheny county by the act of February 6, 1867, it is not necessary to consider whether the plaintiff now holds a salaried office or a fee office. We may say, however, that, as we understand the facts, the incumbent of the office has received no fees for his services since 1871, and that since that time the county has paid to him the full salary of \$1,500 a year. We do not discover in the act of 1871, nor in any subsequent act, anything to warrant a conclusion that he is now entitled to fees. Judgment affirmed.

HINKSON v. LEES.

(Supreme Court of Pennsylvania. May 17, 1897.)

WILLS—CONSTRUCTION—VESTING OF REMAINDER.

Under a devise to P. during his life, and after his death "to his lawful child or children, and their heirs and assigns," with devise over contingent on P. dying "without leaving issue surviving him, or leaving issue who should not live to the age of 21 years, nor their lawful issue," P. having had no children at death of testator, but thereafter having had three, all of whom reached the age of 21 years, and one of whom died before P. did, leaving a daughter who also, after attaining full age, died before P., the remainder to the children of P. vested before his death, so that the interest of his son, who died before he did, descended to his daughter, and was the subject of devise by her.

Appeal from court of common pleas, Delaware county.

Action by John B. Hinkson, executor and trustee under the will of Lizzie May Pike, deceased, against Thomas Lees, trustee under the will of John L. Pearson, deceased. Judgment for plaintiff. Defendant appeals. Affirmed.

E. H. Hall, for appellant. John B. Hinkson, for appellee.

MCOLLUM, J. This is an appeal from a judgment entered against the defendant in a case stated. It involves the construction of the eighth clause of the will of John L. Pearson, deceased, of whose estate the defendant is trustee. By the clause in question the testator devised the real estate therein

described to Perry C. Pike during his life, and after his death "to his lawful child or children, and to their heirs and assigns." As it appears from the case stated that Perry C. Pike died leaving lawful issue, and that his sons, his daughter, and his granddaughter attained the age of 21 years, the principal question for our determination is, when did the estate in remainder vest in his children? The defendant claims that it did not vest "until after his death," and the plaintiff claims that, as Perry C. Pike had no children at the death of testator, it was contingent until the birth of a child to him, at which time it vested, subject to open and let in after-born children, and subject, also, to a contingency which might divest it. It seems to us that the plaintiff's claim accords with the true interpretation of the devise and the decisions in like cases. *Keller v. Lees*, 176 Pa. St. 402, 35 Atl. 197; *Blanchard v. Blanchard*, 1 Allen, 227. But it makes no difference in the result in this case whether the estate vested in the children at their birth or on their attaining the age of 21 years. The contingency on the happening of which the estate might have passed, under the will, to the children of Price or of Smith, was the death of the life tenant, "without leaving lawful issue to survive him, or leaving such issue who should not live to the age of 21 years nor their lawful issue." The contingency did not occur, and therefore the only persons now interested in the estate, or in the question when the remainder vested, are the children of the life tenant and their heirs and assigns. Perry C. Pike had three children, who, in his lifetime, attained the age of 21 years. One of them, Pearson Pike, died in the lifetime of his father. He left to survive him a daughter, who attained full age and died before the life tenant. The fund created by the sale, under the Price act, of the land devised as aforesaid, was in existence in the lifetime of Pearson Pike, and he was receiving interest by direction of his father on \$5,000 of it. The fund was a substitute for the land sold. What was the interest of Pearson Pike in this fund? We think it was a vested interest, which could not be divested, if at all, except by the occurrence of the contingency on which the devise over depended. The extent of the interest could not have been definitely ascertained at his death, because it might be reduced by the birth of other children entitled to share in the fund. It was, however, a descendible and devisable interest. The devise in question was to the lawful child or children of the life tenant and to their heirs and assigns. It was a devise to the whole class, without restriction to the member or members who survived him. It was unlike the devise in any case cited by the defendant to sustain his contention that the interest of the children of Perry C. Pike did not vest until after his death. The contest for the fund being virtually between the devisee of

the daughter of Pearson Pike and the surviving son and daughter of Perry C. Pike, there is no room for the application of the rule or principle for which *In re Stewart's Estate*, 147 Pa. St. 383, 23 Atl. 590, is cited as authority. For the reasons above stated, we concur in the conclusion of the learned court below that the plaintiff is entitled to one-third of the principal and one-sixth of the income, as defined by the case stated. Judgment affirmed.

RODGERS et al. v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. May 17, 1897.)

WIDENING STREET—CHANGING GRADE—SEPARATE PROCEEDINGS FOR DAMAGES.

Widening a street and a change of grade therein two years thereafter, not completed till after report of jury to assess damages for the widening, are separate acts; so that a proceeding for damages for the one is not a bar to a proceeding for the other.

Appeal from court of common pleas, Philadelphia county.

Proceeding by Samuel M. Rodgers and another against the city of Philadelphia. Judgment for plaintiffs. Defendant appeals. Affirmed.

E. Spencer Miller, Asst. City Sol., and John L. Kinsey, City Sol., for appellant. A. T. Freedley, for appellees.

FELL, J. The proceeding in the common pleas was an appeal by the plaintiffs from the award of a jury appointed in 1890 to assess the damages and benefits arising from the widening of Kensington avenue from 30 to 70 feet. It was a part of the plan for the improvement of the avenue that a new bridge should be erected over Frankford creek. This bridge was to take the place of a covered bridge which spanned the creek, and was to be erected at the same elevation. No change of grade was then contemplated. In 1892, after the proceedings before the road jury had been ended, and while the plaintiffs' appeal was awaiting trial in the common pleas, the grade of the avenue at the south side of the bridge was changed. The Belt Line Railroad had been constructed in 1891, and, in order to avoid crossing it at grade, Kensington avenue, at the south end of the bridge, was elevated seven feet. A jury of view was appointed in 1892 to assess the damages occasioned by the construction, and awards were made to the plaintiffs and others whose property had been injured. The plaintiffs' land taken in 1890 by the widening of the street was on the North side of Frankford creek. The land injured by the construction of the abutment of the bridge in 1892 was on the south side of the creek.

If the proceedings of 1890 and those of 1892 related to different and distinct properties, or if they related to the same property, and the

change of grade for which damages were recovered under the proceedings of 1892 was a separate act of the municipal authority, and done so long after the opening of the street that the damages resulting therefrom could not be recovered with the damages for the opening, the trial was free from error. The pursuit of the first inquiry involves the ascertainment of facts from the voluminous record and testimony, and it is unnecessary to enter upon it, as the answer to the second inquiry brings the case within the rule stated in *Clark v. City of Philadelphia*, 171 Pa. St. 31, 33 Atl. 124. The claim of a property owner for the opening of a street must be asserted as an entirety, and, if any part of it be omitted, he is estopped from afterwards setting it up. He must submit the whole claim, and no second process can be had for a part of it. The value of the land taken, the condition of what remains as affected by the lines of the street, and the elevation or depression of the natural surface, are elements in the calculation, but they are not distinct claims. But claims for opening and for grading a street may be enforced at different times, and by different proceedings, when the opening and the grading are distinct municipal acts, and are so far separated in time that the damages for the grading cannot be recovered with those for the appropriation of the land. *Pusey v. City of Allegheny*, 98 Pa. St. 522; *Righter v. City of Philadelphia*, 161 Pa. St. 73, 28 Atl. 1015; *Clark v. City of Philadelphia*, 171 Pa. St. 30, 33 Atl. 124. The proceeding in 1890 was to recover damages occasioned by the widening of the street at the then established grade, and it was not a bar to the proceeding in 1892, which was founded upon a distinct cause of action, for which a recovery could not have been had in the first proceeding, as the elevation of the surface of the street was not in contemplation until after the report of the jury was filed. Nor was a recovery in the later proceeding a bar to the further prosecution of the first. It was for consequential damages for the injury done by the change of grade of a street, and in this proceeding there could have been no recovery for the value of the land taken two years before by the opening, and which had been the subject of inquiry and ascertainment by another jury. The judgment is affirmed.

PHOENIX BREWING CO. v. RUMBARGER et al.

(Supreme Court of Pennsylvania. May 17, 1897.)

BONDS — INDEMNITY — EXTENSION OF TIME — RELEASE OF SURETIES — INTOXICATING LIQUORS — BRANDING CASES — BURDEN OF PROOF.

1. A bond executed to a brewing company by a liquor dealer, to secure payment for liquors to be delivered in future, provided that the principal should pay the accounts for liquor "as often as the same may fall due, or when thereunto legally required." No contract was there-

after made as to the time within which payments were to be made, but liquors were purchased every few days, and payments made from time to time. The principal thereafter, of his own motion, and before any balance had been struck between the parties, sent to the company two judgment notes at three and six months for a balance that appeared on his books to be due, but the receipt of the notes was not acknowledged, and they were not credited on the books of the company, but at the end of three months payment of the whole account was demanded, and, at the request of the principal, the company waited until the maturity of the second note before entering judgment thereon. There were no sales after the notes were given, but, when they were sent, plaintiff expected, on the principal's representations, that the business would continue. Held, that since an allowance of credit was contemplated by the parties, and a six-months credit was not unusual or unreasonable, there was no such change in the contract or extension of time as would release the sureties.

2. Act April 14, 1863, § 2, requiring the branding of barrels and casks in which liquors are sold, and the giving of a certificate to the purchaser, does not prohibit the prosecution of the offender's business when its provisions are not complied with, but merely provides a penalty for failure to observe them.

3. In an action by a brewing company on a bond given by a liquor dealer for liquors, the burden of proving that plaintiff had not complied with Act April 14, 1863, § 2, requiring the branding of barrels and casks in which liquors are sold, and the giving of the certificate to the purchaser, is on defendant.

Appeal from court of common pleas, Clearfield county.

Action by the Phoenix Brewing Company against W. E. Rumbarger and others. Judgment for plaintiff, and defendants appeal. Affirmed.

A. L. Cole, W. C. Pentz, and H. A. Moore, for appellants. Frank Fielding, for appellee.

FELL, J. The facts established by the evidence furnish no ground for the application of the theories on which the defense was based, even if it were conceded, as argued by the appellants, that the taking of a note payable at a future day for an existing debt implies prima facie an agreement to wait until the note matures, and discharges the parties secondarily liable for the payment of the debt as sureties or guarantors,—a proposition by no means in accord with our cases. See *Shaw v. Presbyterian Church*, 39 Pa. St. 226; *Hutchinson v. Woodwell*, 107 Pa. St. 510; *Buck v. Wilson*, 113 Pa. St. 423, 6 Atl. 97. The right of the principal to postpone the fulfillment of the contract is at variance with that of the surety to demand its punctual performance or to perform it himself and sue for indemnity; and, generally, any act of the creditor which prevents the surety from insisting on the fulfillment of the contract as originally made, or which entitled the principal debtor to delay, is a ground of defense in an action against the surety. But, in order to exonerate the surety, it must appear that the original obligation was changed by a binding agreement, and the new contract must be such as would be a valid defense by

the principal debtor to an action on the original agreement. Notes to Rees v. Berrington, 2 White & T. Lead. Cas. Eq. 1906; U. S. v. Howell, 2 Am. Lead. Cas. 472, Fed. Cas. No. 15,405.

The bond on which the action was founded was not for the payment of any amount at a fixed time. It was in the nature of a bond of indemnity, and the condition was that Rumbarger, the principal in the bond, should pay all accounts for beer and liquors purchased by him of the plaintiff in pursuance of a contract made, and a course of dealing established, "when and as often as the same may fall due, or when thereunto legally required." Nothing was due when the bond was given. It had reference to future dealings only, and its delivery was a condition precedent to the opening of the account. No contract as to the time within which payments were to be made was afterwards entered into, and none can be implied from the course of dealing between the parties. Beer was purchased every few days, and payments on account appear to have been made from time to time and without any fixed rule. The balance due steadily increased, and at the end of 14 months it amounted to \$1,700. Without an agreement between the parties as to the amount due on the open account, Rumbarger, without any request and wholly of his own motion, sent two judgment notes, one at three and one at six months, to the plaintiff, for the balance that appeared from his books to be due. The receipt of these notes was not acknowledged by the plaintiff, they were not credited on its books, and at the end of three months payment of the whole account was demanded; but, at the request of Rumbarger, the plaintiff waited until the maturity of the second note, when judgment was entered on it and execution issued. As the bond was given to cover the amount of sales which might be made for an indefinite period in a continuing business, it must be presumed, in the absence of any stipulation on the subject, that it was contemplated by all the parties that there would be an allowance of the usual credits. But it is unnecessary to resort to presumptions, as by the terms of the bond there could be no default, except by the failure of the principal to pay when due, according to an express or implied agreement between him and the plaintiff. The allowance of credits usual under the custom of the business would not have varied the contract, and, in the absence of all testimony on the subject, the court could not assume that the allowance of three or six months was unusual or unreasonable. The notes were not given or accepted for a balance ascertained after all business arrangements between the parties had ended, which was then due and demandable. It is true that there were no sales after the dates of the notes, but when they were sent it was the expectation of the plaintiff, based on the representations of Rumbarger, that the business would contin-

ue. It cannot, therefore, be said that there was a satisfaction or merger of the original debt, or a giving of time to the principal debtor, which varied the contract and exonerated the sureties. The objection that there was no affirmative proof by the plaintiff that it had complied with the second section of the act of April 14, 1863, requiring the branding of barrels and casks in which liquors are sold, and the giving of a certificate to the purchaser, is without force. The act does not prohibit the prosecution of the business when its provisions are not complied with, but provides a separate penalty for a failure to observe them. The burden of proof, if any defense could have been based on the act, was with the defendants. *Horan v. Weiler*, 41 Pa. St. 470. The judgment is affirmed.

FLANAGAN v. PHILADELPHIA, W. & B. R. CO.

(Supreme Court of Pennsylvania. May 17, 1897.)

INJURY TO PASSENGER—ALIGHTING FROM WRONG SIDE OF TRAIN—CONTRIBUTORY NEGLIGENCE.

No recovery can be had for injuries to a passenger who was familiar with defendant's depot grounds, and knew that there was an overhead passageway across the tracks, and that a safe platform had been provided on the side next to the depot, where he alighted from the other side of the train, and, without stopping to look or listen, started across the tracks, towards a point opposite the depot, and was struck by a train on another track.

Appeal from court of common pleas, Philadelphia county.

Action by John J. Flanagan against the Philadelphia, Wilmington & Baltimore Railroad Company for damages for personal injuries. Judgment for defendant, and plaintiff appeals. Affirmed.

A. S. L. Shields, for appellant. Edwin Jaquett Sellers and David W. Sellers, for appellee.

FELL, J. The reciprocal duties of railroad companies and of passengers alighting from or getting on cars at stations or stopping places have been very clearly defined in the decisions. It is the duty of the railroad company to provide a safe and convenient means of passage to and from its passenger cars, and it is the duty of a passenger to comply with the company's reasonable rules and regulations for entering and leaving the cars by using the way provided. Knowledge by a passenger that a safe and convenient platform has been provided is notice to him of a rule that passengers should get off and on the cars at that place. *Railroad Co. v. Zebe*, 37 Pa. St. 420; *Drake v. Railroad Co.*, 137 Pa. St. 352, 20 Atl. 904. In the opinion in the case first cited, it was said by Thompson, J.: "If a safe platform or other equally safe means be provided for exit, it is as much the duty of a passenger to

leave by it as it is for him to remain inside the cars when running. The existence of such means of exit indicates as distinctly their purpose, and that it is a regulation of the carriers that they be so used, as do the cars that their purpose is to carry passengers inside, instead of on the top. It is as much negligence of the passenger to disregard the proper use of one as of the other." In *Drake v. Railroad Co.*, supra, the plaintiff was acquainted with the locality, and knew that there was no platform or place provided for passengers to alight on the side on which he got off, and that a safe and convenient platform had been constructed on the other side of the track; and it was said by our Brother McCollum that this knowledge was notice of a rule of the company, with which the plaintiff was bound to comply.

It is true that the duty of a person about to cross a railroad track to stop, look, and listen for an approaching train is not always applicable to a passenger at a station going to or from his train. The obligation upon him may be totally different from that of a person at a public crossing. *Railroad Co. v. White*, 88 Pa. St. 327; *Kohler v. Railroad Co.*, 135 Pa. St. 346, 19 Atl. 1049. If the way provided is across a track, he may rely upon the performance by the company of the duty to keep the track clear while passengers are in the act of passing between the train and the station. But this is when a way is provided, and the passenger is impliedly invited to take it. If a passenger disregards the rules of the company by passing to or from the cars on the opposite side from the station or platform provided, he does so at his peril. At the station where the plaintiff was injured, there were five tracks. An elevated platform extended along the side of the track nearest the station, and from this platform steps led to two overhead crossings, one north and one south of the station. The space between the tracks had been planked, for the convenience of the employes of the road and of passengers who might want to reach the fifth track, which at this point branched from the main line. The plaintiff, who was familiar with the locality, came to the station on a train which ran on the second track, alighted from the train on the side away from the station and platform, with the intention of walking across the third, fourth, and fifth tracks, in order to reach by a shorter route the works at which he was employed. The morning was dark and stormy, and, as he stepped upon the third track, he was struck by a car which was running at the rate of 6 or 8 miles an hour, and which could have been seen by him when it was at least 60 feet distant. He was struck almost immediately after alighting from the train. He testified: "It was a kind of a misty, dark morning, raining; and, as I got off the train, the rain was in my face as I got

off, and all I done was to button my coat." "As soon as I got off, I was hit. * * * I just stepped off the train. I buttoned my coat, and got hit." He said, in answer to the question, "Did you look both ways when you got off?" "Yes, sir, certainly; I looked where I was going." He could have seen the car, which was moving towards him at a very moderate rate of speed, when it was fully 60 feet away; and, as he walked less than 10 feet, the car must have been within 20 or 30 feet when he started, and almost upon him when he stepped in front of it. If the plaintiff looked, he must have seen the car; and, if he then went on without regard to the danger, he is in no better position than if he had exercised no caution whatever. *Carroll v. Railroad Co.*, 12 Wkly. Notes Cas. 348; *Blight v. Railroad Co.*, 143 Pa. St. 10, 21 Atl. 995. The defendant is not therefore answerable unless the plaintiff was, under the circumstances, relieved of the obligation to stop, look, and listen. He had a safe way to alight from the train on the station side of the track. Here he could have waited until the car had passed, or, by the use of one of the overhead crossings, he could have avoided altogether the danger of crossing the tracks. He was not invited to get off where he did, and he was under no imperious necessity to do so. The invitation was to alight on the other side, and, in disregarding it, he violated a reasonable rule, which it was his duty to observe. The judgment is affirmed.

KEENAN v. WATERS et al.

(Supreme Court of Pennsylvania. May 17, 1897.)

INJURY TO EMPLOYE—DANGEROUS MACHINERY.

Absence of guard rails on an ironing machine, to prevent the hands of the operator getting between the rollers, does not make the employer liable, the machine being of a kind in general use, and which cannot be operated with guard rails attached, and no safer machine being shown to be in general use, though other machines with guard-rail attachment, which can be operated with less risk of accident, are in use.

Appeal from court of common pleas, Philadelphia county.

Action by Sarah Keenan against G. Waters and another, trading as G. Waters & Son. Judgment for defendants. Plaintiff appeals. Affirmed.

C. Percy Willcox and Joseph Hill Brinton, for appellant. Henry C. Terry, for appellees.

FELL, J. This case belongs to an increasing class in which the attempt is practically to hold employers liable as insurers of the safety of their employes. The plaintiff was employed to work in a laundry connected with an hotel, and, while engaged in operating a machine used for drying and ironing clothes, her hand was caught between the rollers and

injured. The general grounds of negligence alleged were the failure to provide a reasonably safe machine, and the failure to inform the plaintiff of the danger incident to the operation of the machine by which she was injured. It is claimed that the machine was defective and dangerous because of the absence of a guard rail to prevent the hands of the operator from getting between the rollers. It appeared from the testimony that the machine was in perfect working condition, and was of a kind that was in general use; that guard rails were not used on machines constructed as this was; and that such machines could not be operated with guard rails attached. Proof that other ironing machines differently constructed, and furnished with guard rails, were in use, and that their operation might be attended with less risk of accident, imposed no liability on the defendants. It was not shown that the machine in question was not in general use, nor that guard rails had been or could be used on such a machine, nor that any safer machine was in general use. In order to save himself from liability for accidents to his employes, an employer is not bound to provide the safest machinery or the newest or most approved appliances. "If the machinery be of an ordinary character, and such as can with reasonable care be used without danger to the employé, it is all that can be required of the employer; this is the limit of his responsibility and the sum total of his duty." *Payne v. Reese*, 100 Pa. St. 301. Generally machinery in operation is dangerous, and the test of the liability of the employer is not whether the employé has been exposed to danger, but whether he has been so exposed through neglect to provide reasonably safe machinery, and the test of reasonable safety is ordinary use. *Ford v. Anderson*, 139 Pa. St. 261, 21 Atl. 18; *Kehler v. Schwenk*, 144 Pa. St. 348, 22 Atl. 910. In *Titus v. Railroad Co.*, 136 Pa. St. 618, 20 Atl. 517, it was said by our Brother Mitchell: "All the cases agree that the master is not bound to use the newest and best appliances. He performed his duty when he furnished those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of the implement or nature of the mode of performance of any work, 'reasonable care' means according to the usages, habits, and ordinary risks of the business." If any duty rested on the defendants to instruct the plaintiff in the use of the machine, it was fully discharged. She was not of immature age or without experience in the use of laundry machinery. She was 24 years old, and had been employed in a laundry for 2 years, and had worked for several weeks at an ironing machine. At the time of her employment she told the defendants what knowledge and experience she had, and they might well have assumed that she needed no instruction. The engineer in charge of the machine before starting it questioned her to see whether she was familiar with the use of this machine, and stood by and watch-

ed her operate it until he was satisfied that her statement as to her knowledge and experience was correct, and that she was a skilled laundress. More than this could not be required. There was an entire failure to establish any ground of negligence on which a recovery could be sustained, and the direction to the jury to find for the defendants was properly given. The judgment is affirmed.

BRADY et al. v. ELIOT et al.
(Supreme Court of Pennsylvania. May 17, 1897.)

CONTRACT—ESTOPPEL.

Voluntary payments by some of those signing an agreement by stockholders in a corporation to pay to the assignee thereof, for purpose of paying its debts, a sum proportionate to their several interests in it, "whenever the solvent members * * * shall sign this stipulation," does not estop them to deny the binding force of the agreement, it not having been signed by all the solvent members, and the payments having been in anticipation of its becoming binding, or in discharge of their liability under the act of incorporation.

Appeal from court of common pleas, Erie county.

Suit by John O. Brady, assignee for the benefit of creditors of the German Savings Institution of Erie, a corporation, and Samuel C. Harple and another, for themselves and all others having debts against said corporation, against John Elliot and others, stockholders and members of said corporation, on an agreement. Decree for defendants. Plaintiffs appeal. Affirmed.

The agreement signed by certain of defendants is as follows: "We, the undersigned, for value received, hereby severally agree and bind ourselves to pay to John O. Brady, assignee of German Savings Institution, of Erie, for the purposes of paying the debts of said institution, a sum of money proportionate to the interests we severally have in said institution, whenever the solvent members of said association shall sign this stipulation; our respective interests therein, or shares of stock set opposite our respective names; a part of this stipulation being that John Elliot shall repay to said institution the amount paid to him for his interest therein, with interest on same."

Fish & Crosby, for appellants. E. L. Whitelsey and Theo. A. Lamb, for appellees John Elliot and John W. Ryan's estate. S. A. Davenport and J. M. Sherwin, for appellees Lloyd G. Reed and John Gensheimer.

FELL, J. Unless shown to be erroneous, the finding that not all the solvent stockholders had signed the agreement of August 29, 1885, is conclusive of the plaintiffs' right to recover. The claim was based wholly upon this agreement, which was not binding unless signed by all the solvent stockholders. The condition was a valid one, and, unless

it was complied with, no one was bound. We see no reason to doubt the correctness of the finding of the learned judge that two of the stockholders who did not sign were solvent. The contention that Varnum was not a stockholder cannot be sustained. True, he had not paid for his stock, and it may be that as between him and the transferor the equitable ownership was in the latter, but the transfer had been made with his knowledge and consent six years before. He considered himself a stockholder, and was so considered by all parties in interest, and at the time of the assignment for the benefit of creditors he was acting as secretary of the company and as a member of the board of directors. It is, however, unimportant whether he was a stockholder or not, as the failure to procure the signature of Catharine Stevenson to the agreement was fatal. The allegation that the parties agreed at the time as to which of the stockholders were solvent, and thus absolved the assignee from the duty of further inquiry, is not sustained by the evidence. There was a general conversation among some of those who signed in relation to the solvency of the stockholders, but there was no express agreement, and nothing was said from which an agreement on the subject can be implied. Nor was there any ground of estoppel. Voluntary payments made by some of those who signed the agreement in anticipation of its becoming binding, or in discharge of their liability under the act of incorporation, do not estop them from now asserting that the agreement has no binding force. No one was misled to his injury, or induced to change his position, or to waive any right or remedy. The decree is affirmed at the cost of the appellant.

TILLINGHAST v. BOOTHBY.

(Supreme Court of Rhode Island. April 30, 1897.)

CONTRACTS IN RESTRAINT OF TRADE—VALIDITY.

There is no manifest unreasonableness in a contract whereby one agreed that he would not, after the termination of his employment with plaintiff, be concerned in the practice of dentistry in the county of such employment, which authorizes a court to declare it invalid.

Bill by Warren H. Tillinghast against William M. Boothby. Heard on demurrer to the bill. Overruled.

Cooke & Angell, for complainant. Joseph Osfield, Jr., for respondent.

PER CURIAM. This bill seeks to restrain the defendant from violating the terms of his agreement, by which he was employed to work for the complainant as a dentist, with a stipulation that he would not, after the termination of the contract, "either directly or indirectly, carry on, or be employed or concerned in, the practice of dentistry in the county of Providence, Rhode Island." The

ground urged upon demurrer to the bill is that the restrictions are unreasonable. It was decided in *French v. Parker*, 16 R. I. 219, 14 Atl. 870, that such a contract was valid, though unlimited as to time; and in *Herreshoff v. Boutineau*, 17 R. I. 3, 19 Atl. 712, and in *Manufacturing Co. v. Garst*, 18 R. I. 484, 28 Atl. 973, that the reasonableness of a restriction in a contract is the test of its validity. There is no manifest unreasonableness in the contract before us, and hence there is no ground apparent in the bill upon which we can declare it to be invalid. The demurrer is overruled.

DUBOIS, Attorney General, v. SHERRY.
(Supreme Court of Rhode Island. April 20, 1897.)

HIGHWAYS—ABANDONMENT—VALIDITY.

Where a highway is laid out wholly over the land of one who owns the land abutting on the north, the abutting owners on the south are not interested in the highway, within Pub. St. c. 64, §§ 4-8 (relating to the taking of land for a highway, and, under section 28, applying equally to the abandonment of a highway), which provide that the committee shall agree, or attempt to agree, as to damages with the owners of the land over which the highway to be abandoned is laid out, and that the town council shall notify all persons interested in said land to appear and be heard.

Bill by Edward C. Dubois, attorney general, against Louis Sherry, to which respondent demurs. Demurrer sustained.

Clarence A. Aldrich and F. C. Olney, for plaintiff. Albert B. Crafts, for defendant.

MATTESON, C. J. This is a bill by the attorney general, on the relation of certain persons, to enjoin the respondent from obstructing and maintaining an obstruction upon the highway, and to compel the removal of an obstruction already erected. It sets forth the laying out of the highway, its use by the public during the summer season in going from the Boston Neck road to the bathing beach at Narragansett pier, from its layout until July 18, 1896; its obstruction at that date by the respondent, by the erection of a plank walk across it; the threat of the respondent to still further obstruct it by the erection of a building upon it, by which the public and the relators will be wholly deprived of its use; the request of the relators and others to the respondent to remove the obstruction, and not to erect another obstruction, and his refusal to comply with the request, on the ground, as alleged by him, that the highway has been abandoned by certain proceedings of the district council of the district of Narragansett, and is, therefore, private property. The bill avers that the proceedings of the district council relating to the abandonment of the highway, copies of which and of the plat accompanying them are annexed to and made a part of the bill, were illegal and void, because the committee ap-

pointed by the district council did not agree, or attempt to agree, with the owners of the land abutting on the southerly side of the highway, for the damages sustained by them by reason of the abandonment, and because the district council did not, either after the filing of the report of the committee or at any other time, give notice to such owners of the pendency of the proceedings, or to appear and be heard on the reception of the report. The respondent has demurred to the bill.

The principal question raised by the demurrer, and the only one which it is necessary to consider, is whether the proceedings of the district council in the abandonment of the highway were invalid because of the omission of the committee appointed by the council to agree, or attempt to agree, with the owners of the land abutting on the southerly side of the highway abandoned, for the damages sustained by them, if any, by the abandonment, and the omission of the district council to give notice to such owners of the filing of the report of the committee, that they might be heard thereon. The plat accompanying the report of the committee shows that the respondent was the owner of all the land over which the highway was laid, and of all the land abutting on the highway on the north. The respondent being the owner of all the land over which the highway was laid, the owners of land abutting on the highway on the south had no interest in it. *Healey v. Babbitt*, 14 R. I. 533. Pub. Laws, R. I. c. 710, § 3, of March 22, 1888, confers on the district council of the district of Narragansett the powers within the district possessed by the town councils of the several towns in their respective towns. Pub. St. R. I. c. 64, § 28, authorizes the abandonment of highways by town councils, and provides that in such abandonment like proceedings shall be had in all respects, so far as applicable, as are provided in that chapter in case of the taking of land for a highway, and the ascertainment of damages to the owners of land taken. The proceedings for the taking of land for a highway, and ascertaining the damages to the owners of land taken, are prescribed by sections 2 to 8, inclusive, of the chapter. By section 4, the committee appointed by the council is required to agree, or to attempt to agree, with the owners of the land over which the highway is laid out, for the damage they shall sustain, and, in case they cannot agree, the council is required to value and appraise the damage, if any. Section 5 provides that, after having laid out the highway, the committee shall cause a plat of it to be made, which, together with the report of their doings in writing, by them signed, shall be presented to the council. Section 6 further provides that on the presentation of the plat and report the council shall cause notice to be given to all persons interested in the land over which the highway is laid to appear, if they

shall see fit, and be heard for and against receiving the report. No provision is made for ascertaining the damages sustained by any person or persons, or for notice on the report of the committee to any person or persons, except such as are owners of or interested in the land over which the highway is laid out. Inasmuch, therefore, as the highway was laid out wholly on the land of the respondent, on whose application the abandonment was decreed, and to whom, therefore, no notice was necessary, and inasmuch as the owners of the land abutting on the southerly side of the highway had no ownership or interest in the land covered by the highway, we are of the opinion that the committee were not required to agree, or to attempt to agree, with them respecting the damages sustained by them, if any, in the abandonment of the highway, and that the council were not required to give them notice of the filing of the report of the committee. The demurrer is sustained.

LUBRANO v. IMPERIAL COUNCIL OF THE ORDER OF UNITED FRIENDS.

(Supreme Court of Rhode Island. April 17, 1897.)

SERVICE OF PROCESS—FOREIGN INSURANCE CORPORATIONS.

Where a foreign insurance company, served by leaving a copy of the writ with the insurance commissioner, does not appear, and the record affirmatively shows that defendant has not appointed such commissioner its attorney to accept service, as required by Gen. Laws, c. 182, § 3, to enable it to legally transact business in the state, the suit must be dismissed for want of service.

Action by Michael Lubrano against the Imperial Council of the Order of United Friends to recover on a contract of insurance. The case was dismissed by the common pleas division for want of service, and plaintiff petitions for new trial. Petition denied.

Willard B. Tanner, for plaintiff.

TILLINGHAIST, J. This case is before us on the plaintiff's petition for a new trial. It was brought in the common pleas division, was not answered by the defendant, and was dismissed by the court for lack of service. The record shows that the defendant is a corporation of the so-called "fraternal class," incorporated in the state of New York; that it is doing business in this state; that the plaintiff was a member of a subordinate lodge, organized under said corporation, in the city of Providence; and that this action is brought upon a liability incurred by said defendant. The writ in the case was served by leaving an attested copy thereof with the insurance commissioner of this state. The record shows, however, that he had not been appointed by the defendant as its attorney to accept service, under Gen. Laws R. I. c. 182, § 3, which is as follows: "No insurance company not incorporated under the authority of

this state shall directly or indirectly issue policies, take risks, or transact business in this state, until it shall have first appointed in writing the insurance commissioner of this state to be the true and lawful attorney of such company in and for this state, upon whom all lawful process in any action or proceeding against the company may be served, with the same effect as if the company existed in this state. Said power of attorney shall stipulate and agree on the part of the company that any lawful process against the company which is served on said attorney shall be of the same legal force and validity as if served on the company, and that the authority shall continue in force so long as any liability remains outstanding against the company in this state. A certificate of such appointment, duly certified and authenticated, shall be filed in the office of the insurance commissioner, and copies certified by him shall be received in evidence in all the courts in this state. Service upon such attorney shall be deemed sufficient service upon the principal."

The first question which we are called upon to decide is whether the contract on which the action is based is a contract of insurance, within the meaning of our statute. We think it is clear, upon the evidence submitted, that it is such a contract, and that the defendant is doing an insurance business in this state. The making of a contract like the one in suit, whereby a benefit is to accrue to the plaintiff upon his death or physical disability, which benefit is or may be conditioned upon the collection of an assessment upon persons holding similar contracts, is declared to be a contract of insurance by Gen. Laws R. I. c. 184, § 2. See, also, *Com. v. Wetherbee*, 105 Mass. 149; *State v. Nichols*, 78 Iowa, 747, 41 N. W. 4; *Nibl. Ben. Soc. & Acc. Ins.* § 3, and cases cited.

The main question in the case, however, and the one which, in view of the authorities cited by plaintiff's counsel, has caused us to hesitate in deciding, is whether there has been any valid service of the writ. The plaintiff's counsel contends that the service was sufficient, because the defendant is estopped to deny that it has appointed the insurance commissioner its attorney to accept service, after having done business in the state, and received the benefits thereof. While it is probably true, and indeed such seems to be the well-settled law, that the defendant would be estopped to deny that it has complied with the statute as to the appointment of an attorney to accept service, yet a difficulty arises in the application of the principle to this case. The defendant makes no appearance; so that, no question of estoppel, as it seems to us, can properly be raised or considered. See *Anthony v. Brayton*, 7 R. I. 53, 54. The writ was not served upon an agent of the defendant corporation, as was the case in *Moch v. Insurance Co.*, 10 Fed. 606, and other cases cited

by plaintiff; nor was it served upon any person authorized by the defendant to accept service thereof. Moreover, the fact appears of record, and from the plaintiff's own showing, that the defendant failed to comply with the statute first above quoted, and hence that there was no service of the writ whatsoever, unless we can hold that service upon the insurance commissioner, with the actual knowledge on our part that he was never authorized to accept the same, gives jurisdiction. It seems to us that to so hold would violate the very foundation principle of all judicial proceedings, which principle requires that, in order to give the court jurisdiction over a defendant where it is a proceeding in personam, he must have notice, either actual or constructive, of the proceeding instituted against him. In this case the defendant had neither. And that fact appears, not by reason of the defendant's setting up the same, as it does in the cases relied on by plaintiff, but from the record itself. And herein lies the difference between this case and those which have been cited by plaintiff's counsel. In those cases there was an appearance for the defendant, either general or special, at some stage of the proceeding, and the question of jurisdiction was litigated and decided adversely to the defendants respectively. Such was the case in *Hagerman v. Slate Co.*, 97 Pa. St. 534, where the writ was served on an agent of the defendant found in the state. The defendant had not complied with the statute in the appointment of an agent on whom process might be served. The court held that "when a foreign corporation, transacting business in this state, has failed to establish an office, and report the name of its agent to the secretary of the commonwealth, but has some person therein who acts as its agent, it must be presumed that the corporation has substituted such agent as one on whom service is authorized to be made." Moreover, under a statute of that state, service of process against a foreign corporation may be made upon any officer, agent, or engineer of the corporation, either personally or by copy. In *Ehrman v. Insurance Co.*, 1 McOrary, 123, 1 Fed. 471, the defendant appeared and filed a plea to the jurisdiction, which plea was held to be defective. The court, however, considered the main point intended to be raised by the pleader, and held that the defendant could not be heard to say that service of the summons on the state auditor was not a good personal service on the company. It also held that, from the fact of the defendant's doing business in the state, the presumption of its assent to service in the mode prescribed by the statute arose, and that no averment or evidence to the contrary was admissible to defeat the jurisdiction, and that the defendant would not be permitted to relieve itself from a liability which the written stipulation required by the statute would have imposed, by pleading its own

fraud on the law of the state and her citizens, under the maxim that no man shall take advantage of his own wrong. *Foster v. Lumber Co.*, 5 S. D. 57, 58 N. W. 9, was a defaulted case in the court below, where, after judgment, the defendant appeared, and moved to set aside the judgment, on the ground that the writ was not served on any authorized agent of the defendant, which motion was denied, and an appeal was taken. The record showed that the writ was served on two of the managing agents of the defendant. The defendant had failed to comply with the statute in the appointment of an agent authorized to accept service of process. The court held that, in the first place, the service on the managing agent of defendant was good, under the statute of that state, which expressly declares that such service shall be good, and, in the second place, that the failure to comply with the laws of the state, in the appointment of an agent on whom process might be served, could not be taken advantage of by it. *Sparks v. Association*, 73 Fed. 277, was a defaulted case in the court below, the record of which court shows "that personal service was had upon defendant, in accordance with the laws of this state, as provided by section 5912 of the Revised Statutes of Missouri of 1889, by serving the writ, with a copy of the petition, upon the superintendent of the insurance department of this state, the person authorized by law to receive such service, more than thirty days before the first day of this term." In an action on the judgment the defense set up was that the court rendering the same was without jurisdiction, and hence that the judgment was void. The defendant asserted that it never appeared in said action wherein the judgment was rendered. It denied that it was ever served with process, and also asserted that it never appointed the superintendent of the insurance department of the state of Missouri, or any other person on whom service might be made. The court held that, by the fact of doing business in the state, the defendant asserted a compliance with the laws thereof; and after enjoying the benefits of the business, and receiving the money of the assured, it could not be heard to say that it never submitted to the jurisdiction of the state. *Moch v. Insurance Co.*, 10 Fed. 606, in which the general question of obtaining jurisdiction over a foreign corporation is very fully and ably discussed, was a case where the plaintiff served his writ upon an agent of the defendant in the state of Louisiana, and obtained judgment by default. Shortly afterwards the defendant appeared specially by its attorney, and moved that the suit be dismissed, on the ground that the defendant had not been legally cited, and hence that the court was without jurisdiction to render judgment in the case. This motion was denied, and no appeal was taken

therefrom. Upon the judgment thus obtained, suit was subsequently brought in the United States circuit court of Virginia, the defendant having its principal office in Richmond, in said state. The defendant pleaded, among other things, that the person on whom the writ was originally served in Louisiana was not its agent for the purpose of accepting service, and that the court below had no jurisdiction by reason thereof. It was held that where a court of general jurisdiction in another sovereignty has passed upon the question of its own jurisdiction, when expressly raised by plea, the parties to such a suit are bound in the home court, under the principle of *res judicata*. It was also held that an insurance company, chartered and resident in one state, which does business in another state, through an agent there, may be sued in that state, if its statute law does not forbid, by service of process on that agent, whether he has express power of attorney to receive or accept such service or not; and that this is especially so where the law of such state requires every foreign insurance company doing business therein to appoint an agent in the state empowered to receive service of process. See, also, *Osborne v. Insurance Co.*, 51 Vt. 278. A collection of the cases on the general question before us may be found in *Foster v. Lumber Co.* (S. D.) 23 Lawy. Rep. Ann. 490 et seq.; s. c. 58 N. W. 9.

It will thus be seen that in those cases where the defendant appeared and pleaded to the jurisdiction, by setting up the fact that it had not appointed some one authorized by it to accept service of process, as required by statute, the courts uniformly held that this could not be allowed, the defendant being estopped from setting up its own misconduct. It will also be seen that in those cases where judgment was rendered by default the return on the writ showed a valid service *prima facie*, and nothing was brought upon the record by the plaintiff to contradict the same, so that the court was fully warranted in exercising its jurisdiction; that is to say, the court, having no knowledge to the contrary, was bound to presume that the defendant had discharged its statutory duty by appointing the person therein designated as its agent to accept service, and hence that service upon such person was good. Here, however, no such presumption can be said to arise, in the face of the record before us, which shows that, as a matter of fact, the defendant had not complied with the statute first above quoted; and hence the court cannot stultify itself by holding that any such presumption exists. Indeed, it would be absurd to say that a presumption arises as to the existence of a certain jurisdictional fact when the court is judicially informed that it does not exist. So that, even recognizing the full force and authority of the decisions cited in support of

the plaintiff's position, yet we do not think that, in the circumstances aforesaid, they are decisive of the question before us.

The case of *Knapp v. Insurance Co.*, 30 Fed. 607, is clearly in point. That was a case in the United States circuit court of Missouri, where the statutory requirement as to the appointment of the insurance commissioner by a foreign corporation doing business in the state is similar to the one here. Service of the writ was made upon said insurance commissioner, who declined to receive the summons and copy of the petition which was handed to him, but he gave no reason therefor. No appearance was entered by the defendant, and the plaintiff asked for a default. The court (Brewer, J.) held that the service was good if the insurance commissioner had power to receive the same, and that, as it was alleged in the petition that the company was doing business in the state, having agents and officers there, the court would presume that it had complied with the law, and therefore prima facie, at least, the service was good, whereupon a judgment by default was entered. Had it come to the knowledge of the court, however, from the plaintiff's own showing, as it does in the case before us, that, as a matter of fact, said commissioner was not authorized to receive service of the writ, it is evident that the court would have held that there was no service, and hence no jurisdiction. The petition for new trial must therefore be denied.

MURPHY et al. v. BULLOCK et al.

(Supreme Court of Rhode Island. April 19, 1897.)

DEEDS—CONSTRUCTION—RIPARIAN RIGHTS—TIDE LANDS—PUBLIC USE—OBSTRUCTION.

1. Plaintiffs claimed by riparian right the bed of a stream in front of their premises. Prior to 1823 the land in question was flowed by the tides. The M. river then emptied into a salt-water cove at some distance above the place, and a canal company was authorized to erect dams to cut off the tides, and to construct necessary basins. A dam was built below the land in question, and a large area, including said land, was inclosed for a boat basin. The company afterwards conveyed the westerly portion of the basin to a railroad company. In connection with the grant to the canal company, a street was laid out along the easterly side of the basin and in front of plaintiffs' estate, and this street and the land occupied by the railroad company on the opposite side made a narrow channel, through which the M. river was brought down to the cove basin subsequently built. Such prolongation has since been called the M. river, and at the point in question there is a slight rise and fall of the tides. In 1849 the charter of the canal company was repealed on condition that the lands covered by the canal should revert to the original owners, and the land in question reverted to the state. At the same time the city of P. was authorized to maintain the dam for reservoir purposes. *Held*, that a deed to the city of P. in 1870 of all the state's interest "in and to the 'cove lands,' so called, * * * being all

the lands in said city of P. now or heretofore flowed by tide water," passed the land in suit.

2. The place did not cease to be public waters when the public right of navigation and fishing were destroyed by the erection of dams and locks to make the canal basin, since the canal use was a public use, and when the charter was repealed the general public use was reinstated.

3. Riparian owners have no right to construct wharves and other improvements in front of their lands on tide lands owned by a city, where it will obstruct and deflect the flow of the water.

Action by James Murphy and others against William D. Bullock and others. Judgment for defendants.

William H. Greene and P. J. McCarthy, for plaintiffs. Francis Colwell and Albert A. Baker, for defendants.

STINESS, J. The question raised in this case is whether the plaintiffs are the owners by riparian right of the bed of the stream, formerly a part of the Blackstone Canal basin, and since called the Moshassuck river, in front of their land on the east side of Canal street. From the testimony we find that prior to 1823 the land in question was flowed by the tides. The Moshassuck river then emptied into a salt-water cove at some distance above the place, and authority was given by the general assembly to the Blackstone Canal Company to erect dams and to construct necessary basins. A dam was built below the place in question, and a large area was inclosed for a boat basin, extending up to Mill bridge, and including these premises. This state of affairs continued until January, 1849, when, the canal having been superseded by the Providence & Worcester Railroad, the general assembly authorized the canal company to discontinue its canal, and to become discharged of its duty to maintain the same, on condition that the lands covered by it should revert to the owners at the time of the location. According to this act the land in question reverted to the state, and authority was given in the same act to the city of Providence to maintain the dam for the purpose of providing a supply of water for extinguishing fires. Meanwhile, by acts of October, 1841, and May, 1845, the general assembly had forbidden encroachment upon the public waters above Weybosset bridge, except under a grant from the city council of Providence for railroad purposes. The canal company had also conveyed the westerly portion of the basin to the Providence & Worcester Railroad Company. In connection with the grant to the canal company, Canal street had been laid out along the easterly side of the basin and in front of the plaintiffs' estate. This street, and the land occupied by the railroad company on the opposite side, made a narrow channel, through which the Moshassuck river was brought down to the cove basin subsequently built, and since that time this prolongation has been called the Moshassuck river. It now appears, however, that at the

point in question there is a slight rise and fall of tides. Under these facts the question comes, to whom does the land of the present river bed, or the right to its control, belong? There have been several attempts to settle this question, but a review of the previous litigation shows that it has not been before the court in such a way as to admit of its full decision. In 1870 the state made a deed to the city of Providence of all the right, title, and interest which the state then had "in and to the 'cove lands,' so called, in said city of Providence, being all the lands in said city of Providence now or heretofore flowed by tide water above Weybosset bridge." In 1883 the city of Providence brought an action of ejectment against Edwin C. Budlong, who occupied a part of the old state prison lot, which was claimed to be a part of the "cove lands, so called." This was followed by a suit in equity by the attorney general, on behalf of the state, against the city, to restrain the suit against Budlong, upon the ground that the deed was not intended to have so broad a scope as was claimed for it, but that it was only intended to convey land to which the city had an equitable claim by previous filling, and that the general description in the deed was a mistake, and was used because of the difficulty in describing the land by metes and bounds. The proof showed that the deed did not apply to the case, because the state prison lot, being upland, was not within the description of "cove lands." The rescript is as follows: "The court are of opinion that the deed from the state to the city mentioned in the bill conveyed simply the 'cove lands, so called,' and that the 'cove lands,' so called, do not include any portion of the state prison lot. The words added, 'Being all the lands in said city of Providence now or heretofore flowed by tide water above Weybosset bridge in said city of Providence,' are merely descriptive, and do not enlarge the grant. The mistake, therefore, is a mistake in description. A false description does no harm. It amounts to only prima facie evidence. The defendant, in order to succeed in its suit at law, must show, what, upon the evidence before us, appears not to have been the fact, that the 'cove lands, so called,' included the lot in controversy, before it can recover. Bill dismissed." The question next came up in *Brennan v. Viall* (see rescript Law No. 3,008, April Term, 1887), where the plaintiffs claimed title to a part of the same river bed, as lessees of the city, upon the ground that the town of Providence had acquired title to the tide lands within its limits, under the colonial law of 1707. The rescript of the court was as follows: "The court is of opinion that the plaintiffs have not shown by evidence, documentary and other, which they have submitted, that they have, or that the city had when they took their conveyance from it, any title to the premises in suit. The court thinks that the act of May 28, 1707 (4 R. I. Col. Rec. 24), referred to by the plaintiffs, did

not directly convey to the then town of Providence any property in the coves, creeks, rivers, waters, and banks within its borders, but only authority to appropriate them, or portions of them, by building houses, warehouses, wharves, laying out lots, or by other improvements, etc., as the body of freeholders and freemen, or the major part of them, might see fit for their most benefit; and it does not appear that the premises in suit have ever been so appropriated." In *Prior v. Comstock*, 17 R. I. 1, 19 Atl. 1079, the railroad company, having interfered with the plaintiff's possession, sought to justify its interference by a vote of the city council, the authority for which was claimed under the acts of 1845 and 1848. The court held that, as the authority given to the city extended only to "land covered by public waters," and as the land in question was at that time inclosed as a canal basin, it could not be presumed to be within the meaning of the acts of the general assembly which authorized the city to make a grant of them for railroad purposes. It was also held that upon the repeal of the charter of the canal company the land reverted to the state, and, as the state had not intervened, the defendants, servants of the railroad company, had shown no right to interfere with the possession of the plaintiff, even though he might have no title as against the state.

It thus appears that in 1870, when the deed of the state was given to the city of Providence, the state was the owner of the "cove lands," and that the designation applied to land which could be identified as such. The deed contains the descriptive phrase "now or heretofore flowed by tide water," as explanatory of its meaning. Land flowed by the tide in 1870 would naturally fall within the designation of "cove lands," for that is what the cove originally was. But there was also a large tract of land, which had formerly been a part of the cove, and was still called "cove lands," where the tide had ceased to flow because of the filling by the city in 1867, and this was clearly intended to be covered as land which still retained its character and designation. Hence "cove lands," according to the explanation of the deed, was to cover land that was then flowed by the tide and land which had been a part of the cove, and was still traceable as such, and which had not been already made the subject of legal grant or appropriation. The plaintiffs offered testimony from a number of witnesses that they had never known this place to be called "cove lands"; but, as the land in question was a part of the old salt cove, and is now flowed by the tides, it is clearly within the definition of the deed from the state to the city. In *Prior v. Comstock* it was stated in the agreed statement of facts that the tide had not flowed upon the premises since the building of the canal, but this is now shown to be the other way. The plaintiffs claim, however, that this place ceased to be public waters when the pub-

lic rights of navigation and fishing were destroyed by the erection of dams and locks to make the canal basin. It did to a certain extent, but not wholly. The canal use was a public use, and when the charter was repealed the express provision was that the land should revert to the original owners, as it would have done without such a provision. The title of the state was simply relieved of the use granted to the canal company, and the general public use was reinstated.

The plaintiffs further claim that, even if the title be in the city, the riparian owners have the right to construct wharves, buildings, and other improvements in front of their lands, if they do not thereby impair the public use. This rule is recognized in cases where an individual seeks to interfere with the riparian owner's use of tide-flowed lands, but it is not recognized against the state, or those who act under its authority. *Folsom v. Freeborn*, 13 R. I. 200. It is also a rule which is more applicable to a good-sized body of water than to a narrow stream. In this case, for example, it is evident that any occupation of the land itself must obstruct and deflect the flow of the water, and it is also shown that piles, posts, and braces to inclose a space or to support a structure, are serious obstacles in the stream, on account of their holding silt and driftwood, and for other causes. Under the title given by the deed, therefore, to say nothing of the effect of previous acts or of public municipal rights and duties, we think the city had the right to remove the obstruction put upon the premises in question. The case has been elaborately argued, and many questions have been discussed; but, in our opinion, the language of the deed, applied to the facts in this case, is conclusive of the title of the city. Judgment for the defendants.

WHITE et al. v. McCaughey et al.
(Supreme Court of Rhode Island. April 19, 1897.)

INSOLVENCY — DISCHARGE — EFFECT — ACTION BY FOREIGN CREDITOR.

1. Gen. Laws, c. 274, § 50, provides that a discharge in insolvency shall release the insolvent from all provable debts due to citizens of the state, and to all others who shall prove their claims; and hence a suit by foreign creditors who have not proved their claims is not within section 25, requiring suits founded on claims, "from which a discharge in insolvency shall be a release," to be stayed till the debtor shall be adjudged insolvent.

2. A debtor's discharge in insolvency does not affect an action against the sureties on an attachment bond given by the debtor in a previous suit in which judgment was rendered against him.

Action by Hunter C. White and others against Bernard McCaughey and another for breach of attachment bonds. Judgment for plaintiffs.

Thomas P. Barnefield, for plaintiffs. Hugh J. Carroll, for defendants.

PER CURIAM. The defense in this case rests upon the point that the original judgments in the cases in which the attachment bonds now in suit were given were erroneously entered, because Gen. Laws, c. 274, § 25, requires that all suits, "founded upon the claims from which a discharge in insolvency shall be a release, shall be stayed until the debtor shall be adjudged insolvent." But section 26 provides that after adjudication the court may proceed with the case. Moreover, section 50 provides that a discharge shall release an insolvent from all his provable debts due to citizens of this state, and to all other parties who shall become parties to the proceeding by proving their claims. It is admitted that the plaintiffs in the attachment suits were not citizens of this state, and that they have not become parties to the insolvency proceedings by proving their claims. This being so, the discharge would be no release as to them, and the statute does not affect them. The judgments, therefore, were not irregular. The insolvent not being a party to the present suit, the discharge is of no effect in this suit, which is against sureties for a breach of the bond. The plaintiffs are entitled to judgment.

WHITE et al. v. MURRAY et al.
(Supreme Court of Rhode Island. April 19, 1897.)

INSOLVENCY — DISCHARGE — EFFECT — LIABILITY OF INSOLVENT'S SURETIES.

1. A judgment suffered by an insolvent to be entered against him by default within four months of filing his petition in insolvency is not invalid, in the absence of proof that he intended to hinder, delay, or defraud his creditors, or that plaintiffs in said suit, or even defendant himself, knew that, if forced to pay their debt, he could not continue his business.

2. A debtor's discharge in insolvency proceedings, instituted after judgment against him in an attachment suit, releases him from liability on the attachment bond.

3. Under Insolvency Act, § 52, providing that a discharge in insolvency shall not alter the liability of a surety for the insolvent, the sureties on an attachment bond given by a debtor, in a suit in which judgment was entered against him before the institution of insolvency proceedings, are not released by his discharge.

Action by Hunter C. White and others against Martin Murray and others on an attachment bond. After judgment for plaintiffs, a stay of execution was entered, which plaintiffs now move to take off. Granted as to defendant sureties.

H. C. Curtis, for plaintiffs. Hugh J. Carroll, for defendants.

STINESS, J. Upon the decision of the exceptions in this case, the plaintiffs moved to take off the stay of execution which had been entered, but the defendants oppose it. They say that the judgment obtained in the case in which the attachment bond now in suit was

given was suffered to be entered by default by the insolvent within four months of the filing of the petition. This is true, but it was a suit brought and judgment obtained before the proceedings in insolvency were commenced, and there is nothing to show that there was any knowledge on the part of the plaintiffs in the prior suit, or even on the part of the defendants, that Murray was not able to go on in business if he should be forced to pay their debt, and nothing to show that the judgment was suffered to be entered against Murray with the intent to hinder, delay, or defraud his creditors. The judgment was entered October 1, 1896; execution issued October 3, and the petition in insolvency was filed October 5, 1896. It is claimed for the plaintiffs that, as this suit on the bond was not brought until November 17, 1896, therefore it is not within the insolvency proceedings, and is not affected by Murray's discharge. We think the cause of action accrued upon the entry of the judgment, and hence that this was a provable claim against Murray, and so is covered by his discharge. Judgment having been entered in the suit, the discharge cannot be pleaded, because the suit is at an end, but the insolvent is none the less entitled to the benefit of it. This, however, does not affect the sureties, since the entry of the judgment against Murray fixed their liability under the bond, because that was the contingency upon which the liability depended. But, this suit being upon a bond in which Murray was principal and the other defendants were sureties, the insolvency act provides for the exigency in section 52: "The liability of a person who is a co-debtor with, or guarantor, or in any manner surety for a person who has been adjudged insolvent and thereafter been discharged, shall not be abridged or altered by such discharge." The defendants claim that this refers only to sureties for the original debt. But this clearly is not so. They were sureties for the judgment, if any should be entered. The debt is merged in the judgment, and it is from the judgment that Murray is released by his discharge. This judgment existed before, and is discharged as to Murray by the insolvency proceedings against him. Hence the other defendants were his sureties, within the provisions of the act. *Carpenter v. Turrell*, 100 Mass. 450. The discharge of Murray, however, does not operate to discharge the sureties after their liability has become fixed by the happening of the contingency of the bond. *Clafin v. Cogan*, 48 N. H. 411; *Dyer v. Cleaveland*, 18 Vt. 241; *Towle v. Robinson*, 15 N. H. 408; *Hall v. Fowler*, 6 Hill, 630; *Garnett v. Roper*, 10 Ala. 842. See, also, notes of decisions on corresponding provision of the United States bankruptcy law in *Bump, Bankr.* (8th Ed.) § 5718, p. 726. The plaintiffs being entitled to their execution against the sureties, their motion to take off the stay is granted as to them, and a perpetual stay is ordered as to Murray.

STANBERY v. BAKER et al.

(Court of Chancery of New Jersey. April 19, 1897.)

CHANCERY PRACTICE — FRIVOLOUS DEMURRER — MOTION TO STRIKE—POWER OF CHANCERY COURT—WHEN EXERCISED.

1. Chancery rule 213, allowing objections to any pleading to be made on motion, does not authorize a motion to strike out a demurrer.

2. A court of chancery has inherent power to strike out a frivolous demurrer on motion.

3. Where, pursuant to statute, a demurrer to a bill is accompanied by defendant's affidavit that it is interposed in good faith, and the certificate of counsel that it is well founded, and it has been set down for hearing at the next term, such demurrer will not be stricken out, on motion, as frivolous, unless it appears that complainant will be prejudiced by the delay necessary to bring the case on for hearing.

Bill by William S. Stanbery against Eva M. Baker and others. Motion by complainant to strike out demurrer to bill. Denied.

W. R. Coddington, for motion. W. S. Angleman, opposed.

EMERY, V. O. This motion to strike out a demurrer is made upon the ground that it is frivolous, uncertain, and without merit. The motion cannot be considered as made under the 213th rule, allowing objections to any pleading to be made upon motion; for such motion, under this rule, is one which is made in lieu of a demurrer or exception, and is a waiver of demurrer or exception, by the express provision of the rule. The rule, therefore, does not authorize a motion to strike out a demurrer. *Nolan v. Nolan* (N. J. Ch.) unreported (Chancellor McGill). The notice of motion here does not purport to have been given under the rule, and it may therefore be considered as based upon the general power of the court of chancery to strike out a frivolous demurrer on motion. The existence of such right is denied by the defendant, but I think the court of chancery has the power, inherent in every superior court, of striking out a demurrer clearly frivolous, or clearly intended for the sole purpose of delay. *Bowman v. Marshall* (1841) 9 Paige, 78, 80 (Chancellor Walworth). And this seems to be the opinion of Chancellor Green. *Travers v. Ross* (1862) 14 N. J. Eq. 254, 258. This right of the court of chancery to overrule and suppress pleadings as sham and frivolous would seem to be necessary for the due administration of justice, and to be the same in its character as the right constantly exercised in our superior courts of common law. Such right to strike out sham and frivolous pleas and demurrers in these courts has been expressly affirmed by our court of errors and appeals in *Brown v. Warden* (1882) 44 N. J. Law, 177, 178, in which case it was, moreover, held that the order striking out a demurrer as frivolous was not reviewable on error. And by a later case (*Mershon v. Castree*, 57 N. J. Law,

484, 31 Atl. 602), the same rule was applied to the review of an order striking out a plea as sham and frivolous. In order to guard against the filing of frivolous demurrers to bills, the statute expressly requires (Chancery Act, § 27) an affidavit of defendant that the demurrer is interposed, not for delay, but in good faith, and also the certificate of counsel that he has read the bill, and that the demurrer is well founded. And, in order to avoid delay in the hearing of a demurrer, the party demurring is required within 10 days to notice the cause for argument at the next term. Gen. St. p. 406, par. 174; P. L. 1893, p. 199, § 8. And if, upon the argument of the demurrer, it appears to be frivolous, or intended for the purpose of delay, it shall be overruled as frivolous; and no order extending the time to answer shall be granted, unless, on full examination of the circumstances of the case, evident injustice will be done unless the extension is granted. Chancery Act, § 28. Where the case is set down regularly for hearing at regular term, and the demurrer is found frivolous, the bill may then be taken as confessed at once, and proper decree entered, unless time to answer is given. These strict and punitive statutory regulations of the practice relating to frivolous demurrers are manifestly sufficient to reach all ordinary cases of demurrers claimed to be frivolous, and to allow the disposition of them under the practice prescribed by statute without any unreasonable delay; and the summary relief of striking out should not be resorted to unless the circumstances of the case are such that the complainant will be prejudiced by the delay necessary to bring the case on regularly for hearing. In the present case the statutory affidavit and certificate are annexed to the demurrer, and the demurrer has been set down for hearing at the May term. The case, moreover, as presented by defendant's counsel, strikes me as one where the court, at the hearing, even if it overrules the demurrer as frivolous, ought perhaps to permit an answer and cross bill to be filed, in order to reach the real questions which defendant desires to present for adjudication. If the demurrer should be stricken out on motion, the court would not be in a position to exercise this power. The case, therefore, should come regularly to hearing; and the motion to strike out is denied, but without costs.

GOODWIN v. GOODWIN.

(Supreme Judicial Court of Maine. Feb. 24, 1897.)

SALE—DELIVERY—RETAINING POSSESSION—FRAUD.

1. While it is necessary, in order that an absolute sale of chattels shall be effectual as against second purchasers or creditors, that such sale be accompanied by an actual delivery, consisting of a complete relinquishment of the prop-

erty by the vendor and as complete an acceptance of it by the vendee, still those acts may be considered as consummated where, after a formal delivery of the property, its possession is retained by the vendor by a contemporaneous agreement with the vendee as his agent or bailee, providing the contract of sale be a bona fide transaction.

2. A vendor sold five cows to a vendee by a bill of sale in which this agreement occurs: "I agree to keep said cows for what milk they give, without further expense to said Goodwin [vendee], until the 20th day of March, unless Goodwin disposes of them or takes them home before that time." The testimony shows that the cows were either partially or wholly paid for when the bill of sale was made, February 20, 1895, and that on that day, the parties being present at the vendor's barn, where the cows then were in their stalls, the vendor pointed out the cows to the vendee, and said to him, in the presence of a witness, "I deliver you this stock free from all incumbrance." *Held* that, if the jury believed this testimony, and that the transaction was not fraudulent, they were authorized to find that a sale was made accompanied by an actual delivery sufficient as against creditors of the vendor, who attached the cows before they were removed from his possession.

(Official.)

Exceptions from supreme judicial court, Penobscot county.

Action of replevin by Charles H. Goodwin against Frederick O. Goodwin. Verdict for defendant, and plaintiff excepta. Exceptions sustained.

On exceptions by plaintiff. The title was in issue, and both parties claimed under Alphonso S. Rand.

The plaintiff claimed title under a bill of sale dated January 20, 1896. This bill of sale was not delivered on the day of its date, but within a week thereafter, the payment for the cows being made at the time of the delivery of the bill of sale. At the time of the delivery of the bill of sale, the cows were in Rand's barn, on his farm in Stetson. The plaintiff did not at that time take away the cows, but claimed to have left them in the care of Rand under the arrangement stated in the bill of sale.

The defendant was an execution creditor of Rand, and placed his execution in the hands of a deputy sheriff, who, under the defendant's direction, proceeded on the 6th day of February, 1896, to the barn of Rand, and there on execution seized the same cows, put a keeper over them, and then advertised them for sale upon execution, and afterwards, upon the 13th day of February, sold the same upon execution to the defendant.

The defendant contended that the sale to the plaintiff was fraudulent as to Rand's creditors, but this contention was negatived by the jury in a special finding.

The defendant further contended that there had been no sufficient delivery of the cows from Rand to the plaintiff, as against him (the defendant), and also contended that he had no notice of any such sale prior to the time of the seizure on execution, and prior to the day of the sale on execution, but admitted that on the day of the sale, and be-

fore the sale on execution, he was apprised of the sale to the plaintiff by being shown the bill of sale. The plaintiff, in turn, contended that there was a delivery, good as against creditors and innocent purchasers, and that the defendant did have notice prior to the seizure, and also contended that notice after seizure and before sale was sufficient.

The presiding justice instructed the jury that, if the defendant's contention was true, the sale to the plaintiff was not valid as against him (the defendant). To this ruling the plaintiff seasonably excepted.

The presiding justice, upon the question of delivery, further instructed the jury as follows:

"The second point is that, whether this was genuine or not, he was an innocent creditor, having no knowledge of this transaction at the time; that the property was in the possession of Mr. Rand and he thereupon seized it; and that, whatever may be Mr. Charles Goodwin's good faith, it is a case between two innocent parties, and he having first got the possession is entitled to keep it. Well, to repeat: That is the rule of law. If one man purchases a piece of property, and leaves it with his vendor,—does not take it away or take delivery of it,—and then another man, a creditor, finding it there with his debtor, and not knowing of the prior sale, has it seized, then, both parties being innocent, the second one is protected because he was the first one who made the blunder by leaving the property where it might be seized by his vendor's creditors. If there be a delivery made, which I will explain a little later, then the purchaser is protected against all parties. If he takes delivery, as I shall explain to you, that protects him; or, if the subsequent party creditor or other purchaser had notice of the first sale, the first purchaser is protected. The second purchaser can only protect himself by showing that he had no notice, and that there was not a delivery. Now the defendant says both. He says here there was no delivery, and that he had no notice; and, if both of these things appear, then no matter how bona fide the sale was, it won't avail the plaintiff because of his neglect to take over the property, or his neglect to give notice of it. As between parties, when they are concerned themselves, gentlemen, there is no need of delivery. Mr. Foreman, I may have heard of your horse, or know about your horse, and I ask you what you will take for him, and you say, 'One hundred dollars,' and he is down in Bangor House stable now, and I say, 'I will give it,' and you say, 'It is a trade.' Is it my horse? And I say, 'Yes; it is my horse and your money.' Now, if we both understand that the whole title passes from you to me, as between us two, the horse is mine; and if the stable burns up, and the horse burns up, it is my loss, and not yours. But if, after this talk with me, and after I pay you the one

hundred dollars, you meet another man, and he says, 'I will give you one hundred and twenty-five dollars,' and you say, 'All right, I will take it,' and sell it to him. But now I have bought it once, and he has bought it. Now, if I have left that property there in that stable, there being no signs of its ever being transferred from you to me, and the second man comes and gets it first, he holds it. He was honest. He paid his money, as well as I paid my money; and he got the property first, and the law assists the most vigilant always. Or, if a creditor of yours, finding the horse there, and not knowing of my purchase of it, levies upon it, he will hold it; and if I complain, he will say: 'Why didn't you go and get your horse? What did you leave it for?' So you see that while, as between the parties, there need be no delivery, yet if a purchaser wants to hold the property against other purchasers, or against creditors of his vendor, he must take delivery or else give notice. [So Mr. Foreman, in the case I suppose, while I was safe, so far as you were concerned, to hold the property against you, if I desired to perfect my title, and make it good against other parties, whether your creditors or your subsequent vendees, I was bound to go and get that horse into my own hands,—get it out of your possession into mine in some way;] so that, when other parties came to take it, I should say, 'Not only did I buy it, but I took delivery.' And here the question is not so much about a delivery between the two, as whether or not, as against Mr. F. O. Goodwin, Mr. Charles Goodwin had acquired the possession of these cows by the delivery to him by Mr. Rand.

"What is a delivery? It must be a transfer from the dominion of one to the dominion of the other. You have a horse in your possession; you control it. Now, to deliver it, you must turn it over, so that the other man has the control and dominion over it. The ordinary way, of course, is the turning the article over. If I sell my watch to one of the counsel, and deliver it to him, the natural way is to take it off and hand it to him. If it is a ship at sea, it is done in some other way,—by transfer, by bill of sale. If a drive of logs, it is done symbolically; going onto the drive,—onto the lumber pile,—and turning it over to the other man for him to take charge of.

"Now the plaintiff says, even as against other parties and against this defendant, that there was a delivery. And the defendant says, 'No.' He says that the possession ran right along with Mr. Rand, and there was no delivery. And right here, although out of order, I should, I think, recur again to the matter of fraud. The defendant claims that the very fact that the cows were allowed to remain in Rand's stable is evidence of fraud, going so far almost as to say that it was almost conclusive evidence of fraud. But it is not conclusive evidence of fraud. It is a

circumstance. The fact that a man claiming under a sale did not take the property, did leave it with his vendor, while it would appear to all the world as belonging to the vendor, is evidence of fraud. How weighty evidence, how good evidence of fraud, is for the jury to say,—how it affects your minds. It is regarded by the courts always as a little indication of a bogus transaction, but it may be explained satisfactorily, and in this case the plaintiff says he has explained it by showing you the reason of leaving it there,—that it might be cared for by Mr. Rand. [Now, is there in this case sufficient evidence to convince you of a delivery? There must be such evidence, arising from the conduct of the parties, as shows a relinquishment of ownership and possession of the property by the vendor, and an assumption of these by the vendee. By the vendor we mean the man who sells, and by the vendee the man who buys. The doctrine of delivery rests upon the ground that the vendee—that is, the purchaser—should have the entire control of the property, and that there should be some notoriety attending the act of sale, and hence proof of delivery will not be dispensed with on account of the relation of the parties with respect to the property at the time of the sale.] Now, was there such turning over of the possession and control of this property from Mr. Rand to Charles Goodwin as constitutes a delivery as against other parties? Now, what did take place? You heard the story of Mr. Goodwin himself, who says he took delivery. He does not say how. And you have heard the story of the young man Goodwin. Does the evidence convince you? Is it true, in the first place? Is what they say true? And, secondly, if true, does it explain all satisfactorily,—that there was a relinquishment on the part of Mr. Rand of the control and possession on the one hand, and the assumption on the other by Mr. Charles Goodwin? Well, if there was a delivery, and Charles Goodwin did all he ought to have done to protect himself against subsequent purchasers and creditors, as I have detailed to you, then the defendant falls on that part of his case; because, if there was a delivery, an actual turning over, with some degree of publicity, then the defendant, Mr. F. O. Goodwin, must suffer from it. But the want of delivery is not enough to protect Mr. Goodwin, the defendant, from this sale. It must also appear that he had no notice of the sale, and for the purposes of this trial I will rule to you that it must appear that he had no notice before the actual seizure, which was on the 6th day of February. If, after he caused it to be seized, he took it into his possession, even though then he was notified before the day of the sale, it did not matter; but if, when he seized it, it had not been delivered, and he had no notice of the sale, he is protected. It is too late, after that, for the purchaser to come and notify him of its having been sold."

To those rulings in the above charge of the presiding justice that are inclosed in brackets and also the following statement by the presiding justice in his charge to the jury (not included in the part of the charge above given) viz.: "If, however, even if it was bona fide, if there was no delivery, and F. O. Goodwin had no notice before the moment of the seizure, then he is protected,"—the plaintiff seasonably excepted.

The evidence for the plaintiff upon the question of delivery was from the plaintiff himself, who testified as follows:

"Q. Now, you say this bill of sale was signed at night?

"A. No, sir; that bill of sale was made at my house, and carried down to Mr. Rand's, and signed down there.

"Q. When?

"A. The next day, or a day or two after, when he delivered me the stock.

"Q. What I want to know is just the date of that. Was it the 22d or 23d that Rand signed this?

"A. I could not say exactly. I know it was within a day or two.

"Q. If you paid him a part at your house, and a part in Bangor, how can you state to the jury that you had paid him all when he signed this bill of sale?

"A. I do state and say that it is so, and he delivered me the stock that day. I paid him every dollar that I owed him when he signed that."

And from the plaintiff's son, Heman Goodwin, who testified as follows:

"Q. You speak about delivery. I want to find out what they did about that.

"A. I went into the south part of the barn,—into the north part of the barn on the south side of the road; and he pointed the cows out, Mr. Rand did, and he says, 'I deliver you this stock free from all incumbrance.'"

F. J. Martin and W. S. Townsend, for plaintiff. P. H. Gillin, for defendant.

PETERS, O. J. One Rand, by a bill of sale with an agreement included, January 20, 1896, sold five cows to the plaintiff at Rand's barn in Stetson, the bill of sale and agreement being as follows:

"Stetson, Jan. 20th, 1896.

"Sold and delivered to C. H. Goodwin. Five cows Standing in my New Barn in the North end of the Barn meaning No-3-5-6-7-S-Three Five Six Seven and Eight all grade Housteins Color Four Black and white and one Black. I have received One Hundred and Twenty-five Dollars in full payment for the same and I agree to Keep Said Cows for what milk they give without further expense to Goodwin until the twentieth day of March unless Goodwin disposes of them or takes them home before that time.

"Wit. H. G. Goodwin. A. S. Rand."

The evidence of delivery came from the plaintiff himself, and from his son, who wit-

essed the bill of sale. The father testified that the bill of sale was made at his own house, and carried down to Rand's house, and signed there; that the signing was done on the next day, or within a day or two after the bill was made out, and on the day when he took a delivery of the stock; and that he paid Rand every dollar due as the consideration for the sale when the bill of sale was signed.

The son testified to what took place between the parties as follows: "Q. You speak about delivery. I want to find out what they did about that. A. I went into the south part of the barn,—into the north part of the barn on the south side of the road; and he pointed the cows out, Mr. Rand did, and he says, 'I deliver you this stock free from all incumbrance.'"

The cows had not been taken from the barn of Rand at his farm on the 6th day of February, 1896, on which day they were seized upon an execution in favor of the defendant against Rand, as Rand's property, and at a later date were sold by the officer to the defendant, who took them away. Thereupon the plaintiff replevied the cows from the defendant.

Two questions were submitted to the jury, upon which special findings were returned. The jury found that the transaction of sale was not fraudulent as against the vendor's creditors, and also that there was not a valid delivery. The general verdict was, therefore, necessarily for the defendant. It is contended by the plaintiff that, if the testimony on the subject of delivery was believed by the jury (and there is no sign in the case to the contrary), the two verdicts cannot logically stand together, and that the finding as to delivery was erroneous. The plaintiff further contends that the jury committed the mistake in consequence of a partially erroneous interpretation of the law of the case by the justice presiding. Whether that be so or not is the question presented.

It is not denied by the plaintiff that an actual, and not merely a constructive, delivery was necessary; but he contends that the delivery was actual, although, perhaps, not a strictly manual delivery.

The reason of the rule requiring delivery throws some light upon the question as to what may constitute a sufficient delivery. In the old case of *Ludwig v. Fuller*, 17 Me. 162, Shepley, J., comments on the subject as follows: "The reason why a sale, when the price is paid, is not good, as respects other parties, without a delivery, is that the law regards the purchaser as in fault, and as acting unfairly and fraudulently, in allowing the seller, by retaining the possession, to hold out the apparent evidence of ownership, and thereby induce others to purchase or to credit him to their injury." We apprehend that another reason for the rule may be that contracts of sale without delivery are more

likely to be uncertain and indefinite as to the property really sold, and that a formal act of delivery would insure a better identity of the articles intended to be covered by the sale. But the learned judge was speaking of the rule as it formerly stood by the old common law, and, while deprecating a change of the rule, remarks further upon it as follows: "It must be admitted that the strength of the reasoning upon which the rule rests, that there must be a delivery as respects other parties, has been greatly impaired in this and other states, where the common law has been so modified as to allow the purchaser to prove that the sale was not fraudulent where possession did not accompany and follow it. What will amount to proof of delivery has been the subject of much discussion; and it is rendered more difficult, and would probably be found impracticable to state any general rule applicable to all cases, especially in those states where the law has been so modified as not to require an actual and permanent change of possession, and where delivery is, therefore, rather nominal and symbolical than actual. But, because the reasoning upon which the rule of law was established does not operate as formerly, and the rule itself is less convenient in practice, that does not authorize a court of law, contrary to a uniform course of decisions, to declare that the rule no longer exists. However one may regret that a modification of one rule of law should be found to impair the reason upon which another rule was established, it may afford a lesson that, when one is dealing with the common law, stare decisis is judicial wisdom. And if experience has taught that this modification has been productive of litigation, and afforded greater facilities for the commission of frauds, it would lead to a like conclusion."

So far as the likelihood of fraud existing in cases where the articles sold are not taken away by the purchaser, that objection does not lie here; nor could there be any uncertainty of the property intended to be sold, inasmuch as its description is in writing. And there was no after purchaser to be misled by the seller's having an apparent ownership of the property, although there was a creditor to attach it. There certainly was evidence enough to authorize a jury to find an actual delivery. The parties were present with the cows, the sale was expressly made in the presence of a witness, the price was paid, and the seller for a consideration became the bailee of the property for the purchaser. The possession of the cows was no longer in the seller as owner. His possession was thereafterwards the purchaser's possession, and not his own. We do not see how any more formal or particular act of delivery would have been of any consequence. It was a natural mode of consummating the bargain, and anything

more demonstrative might well excite a suspicion that the sale was merely pretended and fictitious.

We think the jury may have been led, by the tenor of some portions of the charge of the judge, to believe that all these acts were not of themselves sufficient to constitute a legal delivery. The illustrations which were given of a watch sold and delivered by going out of the seller's into the purchaser's pocket, and of the delivery of a horse made effectual by the buyer's act of taking the horse and leading him away, would tend to incline the jury to suppose that the purchaser in this case should have taken the cows away in order to constitute an actual delivery. The learned judge emphasized to the jury that, in order to constitute sale and delivery, there must be a "relinquishment of the ownership and possession of the property by the vendor, and an assumption of these by the vendee." It was further said that the vendee must have the entire control of the property. But it was not explained to the jury that there might be a relinquishment by the vendor and an assumption by the vendee of the ownership, control, and possession of the property, without any removal of the property away, and that the purchaser could have the legal control and possession of the property while in the seller's hands as his agent or bailee, if there be no fraudulent purpose meditated by the parties. Although the doctrine found in the charge, as an abstract proposition, was technically correct, still it was an imperfect and rather inadequate presentation of the rules respecting delivery as applicable to the facts of the case before us, especially when we take in view the position taken in behalf of the plaintiff at the trial. The instructions were absolutely sound as applicable to a case of sale where no explanation is given or attempted to be given for the possession remaining in the seller's hands, indicating an apparent ownership in him. But the bill of sale and the agreement incorporated therein give sufficient explanation of that fact if the transaction was not fraudulent. Numerous authorities maintain the doctrine that when such a transaction is not fraudulent slight acts are sufficient to prove delivery.

In *Stinson v. Clark*, 6 Allen, 340, it is said by Metcalf, J., "that when a contract of sale is bona fide, and payment is made, in full or in part, of the price, slight acts are sufficient to show a delivery that will avail the buyer against the claims of third persons," and certain pertinent cases are cited in the opinion of the court. The acts in that case showing delivery were not more significant than were the acts here. The statement in that case was that a blacksmith sold to a purchaser 60 horseshoes for \$40, and, holding up one of the shoes, said: "Take them. There are the shoes. I deliver them to

you." The shoes by agreement were allowed to remain in the shop for some time, and were attached afterwards while remaining there by a creditor of the seller. It was held that the delivery was sufficient as against the creditor.

The doctrine of the case just cited is maintained in many cases, a few of which only need be examined in corroboration of our view of the pending question. In *Calkins v. Lockwood*, 17 Conn. 154, the parties to a sale of iron met at the place where the iron was, and agreed upon the price and the mode of payment, and thereupon the seller said to the buyer, "I deliver you the iron at that price." The iron remaining a while unmoved, a creditor of the seller attached it, but the court held the delivery to be sufficient. In *Cutter v. Copeland*, 18 Me. 127, the court, upon facts not unlike the present, announced the statement that there was no legal objection in a mortgagee's making the mortgagor his agent to hold possession of the goods mortgaged; the court in effect remarking that in such case the apparent possession of the one would be the real possession of the other. And this principle was adopted in the subsequent case of *Hotchkiss v. Hunt*, 49 Me. 218, where the question was exhaustively examined, and the following rule as to delivery enunciated: "When, by the terms of an agreement of sale, the article sold is to remain in the possession of the vendor, for a specific time or for a specific purpose, as a part of the consideration, and the sale is otherwise complete, the possession of the vendor will be considered the possession of the vendee, and the delivery will be sufficient to pass the title even as against subsequent purchasers." That case was approvingly cited by the Massachusetts court in *Thorndike v. Bath*, 114 Mass. 116, the court quoting from the opinion in that case, and relying on that and quite a number of other pointed and relevant decisions in support of the rule thus enunciated. In the case last cited it was held that evidence that a person, seeing an unfinished piano in the maker's shop, offered to purchase it of him if he would finish it, that the offer was then and there accepted, that a bill of sale was then and there made, and that the price was paid at a subsequent day, the piano being left to be finished, will authorize a jury in finding a delivery of the piano sufficient to pass the title as against a subsequent purchaser. The case of *Barrett v. Goddard*, 3 Mason, 107, Fed. Cas. No. 1,046, is apropos. In that case goods lying in a warehouse were sold by marks and numbers, and paid for, it being a part of the bargain that the goods should remain at the option and for the benefit of the buyer at the seller's warehouse, rent free, for the time being; and it was held by Judge Story that on these facts the delivery was sufficient as against subsequent purchasers. To

the same effect in *Beecher v. Mayall*, 16 Gray, 376, where steam boilers were purchased and left in the seller's possession for the accommodation of the purchaser. And many other significant cases might be added. But we deem those cited to be sufficient.

Exceptions sustained.

PARKS v. LIBBY.

(Supreme Judicial Court of Maine. March 1, 1897.)

JUDGMENT—ESTOPPEL—DIFFERENT ISSUES.

1. Whenever an issue of fact is once judicially settled between parties, it is forever settled between such parties and their privies, and the result inures in favor of the winning party in any other litigation between such parties where the same issue is involved.

2. In order, however, that a judgment shall have such potential effect, it must appear that the facts in question are the same in each case; the issues must be identical.

3. The defendant contracted to drive certain logs on Sebasticook river to Clinton for the plaintiff, who sold the same logs to McNally to be delivered at Clinton. McNally sued the plaintiff for a shortage in the logs delivered, and recovered against him, of which suit this defendant was notified and requested to defend, and he did assist in defending it. The plaintiff sues the defendant for negligence in driving the logs, claiming that the defendant is bound by the judgment which McNally recovered against him. It is held by the court that the issues do not appear to be exactly the same, for the following reasons: First. Because the case finds that the "main" question in the prior suit was whether the logs were all driven down and delivered according to plaintiff's contract with McNally. Secondly. Because by plaintiff's contract of sale the logs were to be driven to McNally's boom, while by the defendant's contract for driving they were to be driven to boom or booms in Clinton. Non constat that the places for delivery were the same. Thirdly. Because the plaintiff was to deliver the logs "before summer," while no time was specified within which the defendant should drive the logs. Fourthly. Because the rule for recovery of damages would not be the same; in one case the amount recoverable being damages, if any, for waste by negligent driving, and in the other damages for logs bargained and sold, but not delivered.

(Official.)

Report from supreme judicial court, Somerset county.

Action by David M. Parks against Oren E. Libby. On report. Action to stand for trial.

S. S. Brown, for plaintiff. F. W. Hovey and F. J. Martin, for defendant.

PETERS, C. J. It is a well-settled doctrine in this state that, if any issue be judicially established between parties to a litigation, the benefit of the finding will inure in favor of the winning party, whenever such issue again arises between the same persons or their privies in any other suit. This is upon the principle of estoppel which declares that an issue or fact once judicially proved is forever proved. But it must clearly appear, in order that a judgment

shall have such a potential effect, that the facts in question are the same in each case. The issues must be identical.

The plaintiff here invokes this principle of estoppel, and claims that its application is complete.

The facts bearing on the question presented in the present suit are reported to us as follows:

"February 1, 1896, the defendant made a written contract with the plaintiff to drive the plaintiff's logs and cedar to the booms in Clinton. Afterwards, the same winter or spring, the plaintiff sold the logs and cedar named in the contract to one McNally, to be delivered before the next summer of 1896 at the booms in Clinton. In the early part of the summer McNally complained to the plaintiff, Parks, of shortage, and on October 6, 1894, McNally began an action against the plaintiff, Parks, returnable to the superior court for Kennebec county at the November term, 1894, to recover damages for breach of the said contract between McNally and Parks in not delivering the logs and cedar as agreed. The plaintiff, Parks, thereupon notified the defendant, Libby, of the beginning and pendency of the said action, and requested him to assume and provide for the defense thereof, informing him that he should hold him responsible for all costs, expenses, and damage. The action, McNally and Parks, was tried in the superior court for Kennebec county at the April term, 1895. In the preparation of the case for trial, and at the trial, Mr. Libby, the defendant, was consulted, and advised to some extent, and was present and testified at the trial. In that trial the main question at issue was whether the logs and cedar had been driven down and delivered at the booms in Clinton, and the said logs and cedar were the same referred to in the written contract between the plaintiff and defendant. The verdict was for McNally in said action, and judgment was rendered for McNally against Parks, the plaintiff, for the sum of four hundred and two dollars and sixty-seven cents (\$402.67) damages, and costs of suit taxed at ninety-one dollars and sixty-seven cents (\$91.67). The date of the judgment was the 28th day of May, 1896. This judgment the plaintiff, Parks, paid. The plaintiff, Parks, in the preparation and defense of said action of McNally, disbursed, in counsel fees, witness fees, and incidental expenses, the sum of one hundred and fifteen dollars and eighty-one cents (\$115.81). The plaintiff, Parks, also spent some time in preparing the case for trial and in attendance upon the trial, for which he makes a charge of one hundred (100) dollars, he testifying that he spent twenty-five (25) days, himself and teams, and calling four (4) dollars per day a reasonable compensation.

"The defendant, not contesting any of the foregoing propositions except the charge for personal services in preparing and trying.

said case, offers in defense of this action evidence tending to show that he did in fact drive the logs and lumber named in his written contract to the booms in Clinton within the time specified.

"To this evidence the plaintiff objects, on the ground that the defendant, Libby, having been notified to defend the former action, had had his day in court upon that question, and it is not now open to him."

We think the facts disclosed by the report do not clearly show of themselves, without the aid of any other evidence, that the issues in both cases were alike. A want of complete identity is easily discoverable upon close examination.

In the first place it is stated that the "main" question at the first trial was whether the logs had been driven down and delivered as the defendant in that suit had agreed to do. That is not exact enough for such certainty as is required to allow the doctrine of strict estoppel to defeat a claim.

And this criticism is the more apropos when we notice from a recital of the two contracts in the writ (and the contracts are not otherwise copied), that the defendant in the former suit was required to deliver the logs to the purchaser "before summer," while the time within which this defendant was bound to drive the logs to some boom is not specified in his contract. Non constat that the defendant in this suit was compelled by his contract to drive the logs within the same period of time, or that he could do so. Sometimes the early freshets do not furnish sufficient water for successful log driving.

Another discrepancy between the two contracts appears to be that the driving contract of the defendant was to deliver the logs in boom at Clinton, but the contract of sale by the plaintiff was to deliver the logs into McNally's boom, and it nowhere appears that the two destinations or places of delivery are the same.

McNally's boom may not be the same as Clinton boom or booms.

Finally, another objection to subjecting the defendant to the judgment against the plaintiff, with the same effect as if found against himself, is that the rule of damages in the two actions is not the same. This defendant may be liable for such damages as might arise from his negligence, while the plaintiff in the other action against him was liable for damages arising for not delivering a certain quantity of logs according to an agreement of sale. One stands in the position of a bailee and the other in that of seller of the logs. The damages for negligent driving might be, and ordinarily would be, widely different from damages for not delivering logs bargained and sold. The one might be no more than amounting to a part of the value of the missing logs. The other might be the total value of the missing logs themselves.

The evidence offered by the plaintiff should be excluded, and, according to the terms of the report, the action is to stand for trial.

Action to stand for trial.

PORTERFIELD v. PORTERFIELD.

(Court of Appeals of Maryland. April 30, 1897.)

WILLS—CONSTRUCTION—POWER OF SALE.

Testatrix devised to her son in trust a certain farm, to be held for seven years for the use of her children, providing, however, that the farm might be sold at any time within such period if a majority of the children should elect. *Held*, that the executor had no power of sale over such real estate at the request of a majority of the children, but they alone could exercise control over the transfer of the title.

Appeal from orphans' court, Washington county.

Petition by Joseph L. Porterfield, executor of Helen O. Porterfield, for leave to sell land. To the order Milton W. Porterfield excepts. From an order overruling the exceptions, he appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, ROBERTS, and BOYD, JJ.

D. W. Doub, for appellant. A. C. Strite, for appellee.

BRISCOE, J. This case involves the construction of certain clauses of the last will and testament of Helen O. Porterfield, of Berkeley county, W. Va. There is a single question presented by the record, and that is whether Joseph L. Porterfield, the executor named in the will, had authority to make sale of the real estate devised in trust by the fourth clause of the will, under the provisions of section 282 of article 93 of the Code. It is admitted that the will confers no express power of sale, but the appellee contends that the power arises by necessary implication of law. By the second clause of the will the testatrix gave, devised, and bequeathed all the rest and residue of her estate, real, personal, and mixed, to all her children in fee simple, to be divided among them share and share alike, subject to the third and fourth clauses of her will. The fourth clause, and the one upon which the decision of this case depends, is in these words: "I do hereby will, bequeath, and devise to my son Milton W. Porterfield, of Washington county, in the state of Maryland, my farm, known as the 'Moler Farm,' lying along the Williamsport and Hagerstown turnpike road, in the county and state last aforesaid, to be by him held in trust, however, for all my children, including himself, for the period of seven (7) years from the date of the probate of this my will. provided, however, the said farm may be sold or divided between or among all my said children share and share alike, at any time within the said period of seven (7) years, if

a majority of all my children then living may so elect. My purpose in this provision of this, my will, is to prevent a sale or division of my said Moler farm until the end of said period of seven (7) years, or until a favorable opportunity for the sale or division of said farm may occur at any time within said seven-year period that may be satisfactory to a majority of my then living children." By the sixth clause, she appointed her son Joseph L. Porterfield executor, and requested that neither her executor nor Milton W. Porterfield, whom she had named as trustee, should be required to give bond. The remaining clauses of the will relate to certain special devises and bequests, but do not throw any light upon the question here presented.

It appears from the record that on the 22d of January, 1897, letters testamentary on the estate were granted to the executor named in the will, and, upon his application to the orphans' court of Washington county, an order was procured, directing a sale of this property, under the fourth clause of the will. There was filed with the application the written consent of all the heirs of Helen O. Porterfield, except one, to "an immediate sale of that portion of the Moler farm which our mother in her lifetime laid off into building lots, believing the present a favorable time and opportunity to sell that portion of said farm." The executor sold at private sale, to Milton W. Porterfield, one of the lots, designated as lot No. 1, and to the ratification of which exceptions were filed by the purchaser, upon the ground that the executor, under the terms of the will, had no authority to sell, and could not give a good and sufficient deed therefor. These exceptions were overruled, and, from the order ratifying the sale, this appeal has been taken. Looking, then, to the will itself, we fail to find any expression which indicates an intention upon the testatrix to confer an express power to sell upon either her executor or trustee. By the second clause of her will, she devised a fee-simple estate in the property to her children, subject to the proviso in the fourth clause that the "Moler Farm" should be held in trust for all her children for the period of seven years, unless a majority of her children then living should elect within that period to sell or to divide; and she distinctly states the purpose and object of this provision of her will to be to prevent a sale or division of the Moler farm until the end of said period of seven years, or until a favorable opportunity for the sale or division of the farm may occur at any time within the seven-year period that may be satisfactory to a majority of her then living children. The legal estate in the property here devised is clearly vested in the children of the testatrix, and they can exercise control over the transfer of the title if they can agree among themselves, or in case they cannot agree, and a majority should elect to sell

or divide, as provided by the fourth clause, then by the intervention of a court of equity.

As to the doctrine of implied powers, relied upon by the appellee, it is only necessary to say that it has no application to this case. The law is well settled in both this country and England "that where a testator directs that his real estate shall be sold, and the proceeds of sale are to be disbursed or distributed by the executors, the power to sell is an implication of law." *Ogle v. Reynolds*, 75 Md. 150, 23 Atl. 138; *Magruder v. Peter*, 11 Gill & J. 226; *Peter v. Beverly*, 10 Pet. 565; *Doe v. Hughes*, 6 Exch. 223. It follows that the order of the orphans' court appealed from must be reversed, and the petition dismissed. Order reversed, and petition dismissed, with costs.

HOOPER, Mayor, et al. v. BALTIMORE CITY PASS. RY. CO.

(Court of Appeals of Maryland. April 1, 1897.)

STREET RAILROADS—ERECTION OF TROLLEY POLES
—AUTHORITY OF MAYOR—EXTENT OF
FRANCHISE.

1. Acts 1890, c. 271, amending the charter of the Baltimore City Passenger Railway Company, and authorizing it to use improved methods of traction, and any system of propulsion which the mayor and council may authorize other corporations to use within the city, when supplemented by Acts 1892, cc. 210, 232, authorizing other companies to use the trolley system, authorizes such company to erect trolley poles in streets, since they are a necessary part of such a system.

2. Acts 1890, c. 370, giving the mayor and council of Baltimore power to require all wires to be placed underground, does not authorize the mayor to prevent a street-railway company from erecting trolley poles in the streets under a charter power to use the trolley system, where the city council has taken no action under such act as to trolley wires.

Appeal from circuit court of Baltimore city.

Suit by the Baltimore City Passenger Railway Company against Alcæus Hooper, mayor, and others, for an injunction. From a decree granting the writ, defendants appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, PAGE, BRISCOE, RUSSUM, BOYD, and FOWLER, JJ.

Thomas G. Hayes and Thomas I. Elliott, for appellants. Arthur W. Machen and Bernard Carter, for appellee.

FOWLER, J. Nearly four years ago the Baltimore City Passenger Railway Company filed a bill in the circuit court of Baltimore city for an injunction to restrain the then mayor of the city of Baltimore and others from preventing or obstructing the erection on Baltimore street, or any other street, in the city of Baltimore, along the lines of any of that company's railway tracks, of suitable iron poles for the use of what is known as the "trolley system." To the bill just referred to the then defendants demurred; but after a

full hearing this demurrer was overruled, and it was held, in conformity with the opinion of the learned judge below, that the plaintiff was entitled to the relief prayed,—that is to say, that the Baltimore City Passenger Railway Company had the right under its charter to use the trolley system of propelling its cars on Baltimore street, or on any other street in that city on which it had its tracks. From that decree no appeal was taken, and the railway company at once proceeded to introduce the trolley system on its Baltimore street and some other lines. Recently, desiring to discontinue the cable system on its "Blue Line," and in its place to use the trolley system, it was preparing to make the change; and for that purpose, in compliance with certain city ordinances, permission was sought from and given to it by the city commissioner to erect iron trolley poles, but the appellant, as mayor of Baltimore city, refused to allow poles to be erected as requested. Whereupon the railway company filed the bill in this case, which makes substantially the same allegations that are made in the former bill, and also alleges that the appellant intended to make use of the authority of his official position and of his influence with the police of the city to prevent said company from making the desired change in its method of traction and motive power, and that such intended forcible obstruction of the proposed work was unlawful, not only because it was an unjustifiable interference with the rights and privileges of said company granted to it by the legislature, but also because it was contrary to the decree passed in the former case. The court below ordered the injunction prayed for to issue, and the mayor and the other defendants have appealed.

Although much was said at the hearing as to the binding effect in this case of the decree in the former case, and it was very earnestly contended by the appellee company that these appellants are concluded by it; we will not stop to consider any of the preliminary or technical questions arising out of the attempted application of the doctrine of *res adjudicata*, for we are all of opinion that conceding, as contended by the appellants, that the former decree has no force or effect whatever in this case, the facts appearing in this bill and the answer and exhibits, and the laws and ordinances by which the rights and duties of the respective parties are to be determined, fully warranted the decree appealed from. We will proceed to state the grounds of our conclusion.

The Baltimore City Passenger Railway Company, the appellee in this case, is the oldest company of the kind in the city of Baltimore, having been the first one incorporated by the legislature of Maryland (chapter 71, Acts 1861-62). Ever since its incorporation it has owned and used several railway tracks laid in the streets of that city. Under its original charter, the appellee was authorized to use only horses as a motive power, but by an amendment thereof, by the act of 1890, c. 271, it was

authorized to use improved methods of traction and motive power different from horses upon its railways, and to increase its capital for that purpose. By the first section of this act it was authorized to "use upon any or all of its railway tracks in the city of Baltimore any cable system or other system of propulsion by means of stationary engines, any pneumatic motors, stored electricity motors, and any motive power, and means of traction which the mayor and city council may sanction or which shall be authorized to be made use of in the city of Baltimore by any other corporation exercising street-railway franchises thereon." Since the passage of the foregoing act almost all, if not all, the street-railway companies have been authorized to use the trolley system; and, in the case of the traction company, the legislature has by the act of 1892, c. 210, authorized it "to place and use upon any and all of its tracks" the trolley system. Also, by an act of the same year (chapter 232), the Baltimore, Hampden & Lake Roland Company was given authority to propel its cars in certain streets by the same system. It would seem to follow clearly from the act of 1890, c. 271, and the subsequent action of the city and the legislature in authorizing the other companies to use the trolley system, that the appellee is, by the very words of that act, empowered to use that system on "any or all of its tracks in the city of Baltimore." But, in answer to what appears to be the plain meaning of the act in question, the appellants contend—First, that the act of 1890, c. 370, which was passed at the same session and approved on the same day as the act of 1890, c. 271, repealed or modified chapter 271, so that the right to use the trolley system conferred by the legislature upon the appellee company cannot be exercised by it without the consent of the mayor; second, that even if the act of 1890, c. 271, gave to the appellee the power to use its trolley system on its tracks in Baltimore city, the power so conferred "is limited to a grant of the kind of motive power which may be used, and not to the mode and appliances" to be placed in the streets of the city in order to use such power; and, third, that express power has been conferred upon the mayor and city council to require all telegraph, telephone, electric light, or other wires to be placed underground after such reasonable notice as they may prescribe.

1. It would seem to be too clear for controversy that the appellee has the right, by virtue of legislative grant, to use the trolley system, whatever that may be. Nor is it to be supposed that the legislature would grant this right, and that, too, in the language in which the grant is made to the appellee, and at the same time place it in the power of the mayor to destroy this right, not by any affirmative action, but merely by refusing to give his assent to the erection of iron poles. The right to use this system is given to the appellee in two ways: First, it may use any system of propulsion by means of stationary engines;

and, second, it may use any system of propulsion which shall be authorized to be used by any other street-railway company in Baltimore city. We cannot believe that the legislature intended to give to the mayor any such power as is claimed for him here; for it must be remembered that this is not the case of a corporation upon which the legislature has merely conferred a franchise, the exercise of which in the city of Baltimore may depend upon the consent of the mayor or of the municipality, but this appellee, by virtue of its charter, had been for many years before the act of 1890 in the full exercise of its franchises in the streets of Baltimore, subject, of course, to the right of the city to regulate the use of its streets. If, therefore, as we have said, and as seems to us must be conceded, the act of 1890, c. 271, operated as a legislative grant to the appellee to use that something which is called the "trolley system," it necessarily follows that the mayor and city council cannot qualify or abridge that grant, nor, of course, could the mayor alone, by refusing to issue a permit to place the poles, make that unlawful which the legislature had declared to be lawful. In the case of *State v. Latrobe*, 81 Md. 222, 31 Atl. 788, *McSherry, C. J.*, delivering the opinion of the court, it is said: "If the act to be done be a lawful one, and be sanctioned by legislative enactment, * * * and if the persons or body corporate proposing to do it be duly empowered to perform it, the mayor and city commissioner cannot, nor can either of them, make the act illegal, or prevent its performance, by refusing to issue a permit."

2. But, in answer to this view, it is contended by the appellants that, by a fair and reasonable construction of the act of 1890, c. 271, the legislature conferred upon the appellee only the right to use a certain kind of motive power, and that the legislative grant did not include the mode of construction and appliances to be placed in the street; and therefore the mayor has the right, and it is his duty, under the circumstances of this case, to refuse to permit the appellee to do that which it has no right to do. We think, however, that this view, and the distinction on which it is based, is more ingenious than sound. It will be observed that the grant to the appellee includes "any motive power," as well as "any means of traction," authorized to be used by the other companies. The motive power which the appellee proposes to use, and which it is conceded it has been authorized to use, is electricity, and the means by which that motive power is to be made available are stationary engines and overhead wires. This appellee has been for some years using on its "Blue Line" what is known and what is called in the act of 1890 "the cable system," which is generally understood to imply a stationary engine and an underground cable; and the "trolley system," which the traction company was authorized to use, and which, therefore, this company has the right to use, is

just as generally understood to imply the use of a stationary engine and overhead wires strung on poles. We cannot suppose that where the legislature granted to the appellee the right to use the "trolley system," as it undoubtedly did, it did not intend to include in its grant the right to use overhead wires and suitable poles, which are the distinctive characteristics of that system. If we are correct in the meaning and force we have attributed to the expression "trolley system," it follows that, when the legislature gave the traction company permission to use this system on all its tracks in the city of Baltimore, it at the same time authorized the use of overhead wires and poles. We cannot suppose that a different meaning is to be attached to these words when construing the grant made to the appellee. Without discussing this question further, we think it very clear that the legislature intended to permit the appellee to use the trolley system, and that this system, as generally understood, and therefore as authorized to be used by the act of 1890, c. 271, includes electricity as a motive power and overhead wires and poles as a means of traction. Legislative grants, either to individuals or corporations, are not to be weakened or destroyed by strained and unreasonable constructions of statutes, based upon ingenious suggestions and theories. The right to use the trolley system granted to the appellee in express terms is not to be taken from it because, in the opinion of the appellants, some other system may be more desirable and safer, nor because the mayor refuses to do what it is his duty to do, namely, to grant the permit which it was also the duty of the appellee to request. If the trolley system is so dangerous to the public safety and so objectionable as was contended, the legislature, or the municipality, if power has been given to it, and not the mayor alone, should correct the alleged evil.

3. It was also urged that, if the mayor or the city had not the power claimed for him, the act of 1890, c. 370, which gave the city power to require all wires to be placed underground, would be nugatory. But the effect of that act is not in any manner involved in this case. The power conferred by it has not yet been exercised, and the only ordinance which thus far has been proposed to be passed in pursuance thereof, "to construct a general system of conduits under the streets for the reception of wires," expressly excepts trolley lines. Doubtless when the city of Baltimore determines to exercise, through its mayor and city council, the power given it by the legislature to order all wires to be placed underground, it will be able to do so without difficulty; but, whether this be so or not, we cannot now determine. It is sufficient for the present purpose to say that neither the appellee nor any of the railway companies using the overhead wires in Baltimore city have been yet required to place them underground. It follows that the decree appealed from must be affirmed. Decree affirmed.

CHASSAING et al. v. DURAND.

(Court of Appeals of Maryland. April 1, 1897.)

BEQUEST TO EXECUTOR—COMPENSATION FOR SERVICES.

A testator bequeathed certain goods to the person named as his executor, who had also been a warm personal friend of the testator, and requested the legatee to comply with instructions given in a private letter, and in a codicil bequeathed to him an additional sum in money, stating, "And I thank him in advance for his services in closing up my estate as testamentary executor." *Held*, that the bequest of money was not intended as compensation for services as executor, and therefore the legatee did not forfeit it by renouncing the trust.

Appeal from circuit court of Baltimore city.

Action by Ferdinand E. Chatard, administrator with the will annexed of Emile Ducatel, deceased, against the Orphan Asylum in Baltimore, Alfred B. Durand, Joseph Henry Chassaing, and others, for a construction of the will. From a decree allowing defendant Durand a legacy given him in the will, defendants Chassaing and others appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Joseph C. Mullin, for appellants. Ferd. O. Dugan and Jos. W. Hazell, for appellee.

ROBERTS, J. Emile Ducatel, late of Baltimore city, in this state, died in the city of Paris, republic of France, in the month of June, 1894, leaving a last will and testament, and certain codicils thereto, all of which have been duly admitted to probate in the orphans' court of Baltimore city; and letters of administration with the will annexed, of said deceased, were by said court granted to Ferdinand E. Chatard, one of the executors named in said will, who accepted said trust, and, in due course of administration, passed his first account in said court. The other executor, Alfred B. Durand, named in said will, renounced the trust. Among the numerous other bequests contained in said will, the testator, in the twentieth clause thereof, provided as follows: "I give and bequeath to my friend Alfred B. Durand all my furniture of No. 9 Rue Clapeyron, including my library and other books and pamphlets, wines, &c., and in fact all that is to be found in said premises, free of all testamentary expenses, requesting him to follow some instructions given in my private letter to him." By codicil No. 1 to said will, the testator bequeathed as follows: "I bequeath to my friend Alfred B. Durand the sum of two thousand dollars, in addition to my household effects in No. 9 Rue Clapeyron; and I thank him in advance for his services in closing up my estate as testamentary executor." Doubts have arisen as to the construction proper to be placed upon certain parts of said will and of the codicils, and certain of the residuary legatees have objected to the

payment of the legacy to said Durand; contending that, by a proper construction of codicil No. 1, the said legacy of \$2,000 was intended by the testator as compensation for the services which Durand was to render in the settlement of the testator's estate, and having renounced "all right and claim to letters testamentary on said will, or to act as executor thereof," he thereby disentitled himself to claim or receive said legacy. Because of the uncertainties attending the administration of said estate under said will, and the conflicting views entertained concerning the testator's true intent and meaning as to the bequest to said Durand, a court of equity has, by this proceeding, been appealed to for its direction and protection. There is, however, but one inquiry before us on this appeal, the other questions having been satisfactorily disposed of by the court below. The question lies within very narrow limits, and has frequently been before the courts, both in England and in this country, for consideration and determination. So that we are only to ascertain and declare the testator's intention as to the legacy claimed by Durand. The facts of this particular case, and the language employed by the testator in conveying his wishes, should control the result. The testator was unmarried, and had a numerous family relationship, to most of whom he bequeathed something, either of considerable or inconsiderable value. In the will, dated the 22d of September, 1885, there is bequeathed to Dr. Chatard the sum of \$2,000, and to Mr. Durand the bequest hereinbefore stated; but of none of his relations who are beneficiaries under his will has he requested the performance of any trust, or given to them private instructions as to matters not set out in this will. This language significantly points to Mr. Durand as his trustworthy friend, to whom he committed the execution of certain private instructions which he wanted carried out, but which he manifestly intended should not be made public. We think it defines in very expressive terms the close and intimate relationship existing between the testator and Mr. Durand, and sufficiently accounts for the bequest to his friend. Five years later on, the testator, by codicil No. 1, executed at Paris, and dated June 5, 1890, bequeathed to his friend Mr. Durand the sum of \$2,000 in addition to his household effects in No. 9 Rue Clapeyron; but he nowhere intimates that the legacy to Mr. Durand or to Dr. Chatard is given in lieu of commissions as executors, or in consideration of the discharge of their duties as executors. There can be no controversy as to the rule of construction generally applied in cases of this character. The late Mr. Justice Robinson, delivering the opinion of this court in Halsey's Case, 75 Md. 285, 23 Atl. 783, said: "Where a bequest is made to one as executor, the presumption is that the legacy is given to him in his character as executor,—in other words, the gift is annexed to his office; and

if he refuses to act as executor, or dies before taking upon himself the trust, the legacy fails. But this presumption may be rebutted, and if, upon a fair construction of the entire will, and taking into consideration the circumstances under which it was executed, it appears that the bequest was made to him, not in his fiduciary character, but as an individual, and from personal regard or affection, then in such a case the intention of the testator must prevail, and the executor will be entitled to the legacy, even though he should refuse to discharge the duties of the office." To the same effect is the law as settled in many well-considered cases. The case of *Reed v. Devaynes*, 2 Cox, Ch. 285, relied upon by the appellants in support of their contention, can scarcely be regarded as authority for their claim, since we find Sir John Leach, V. Ch., in delivering the judgment of the court in *Cockerell v. Barber*, 2 Russ. 592, says: "The question is whether it does appear upon the face of this will that the testator meant that Mr. Palmer, in respect of his trouble as executor, should be confined to the particular legacies which he has here given him. There is only one judge who has adopted the opinion, broadly, that a legacy given to an executor was to be considered as given on an implied condition, and that he could not take the legacy without taking upon himself the duties of the office. Even the judge who expressed that opinion never carried it the length of a decision, for in *Reed v. Devaynes* the point ultimately was not decided. That case, in truth, was one which might well warrant strong expressions of doubt on the part of the judge; but those expressions of doubt induced the executor to take upon himself the office, and thereby put an end to the question." Then, after stating in full his reasons for the conclusion which he reached, which are clearly in accord with the views herein expressed, he adds: "For these reasons, I am of opinion that this will and codicil furnish clear and decisive evidence that the testator, in his bounty to Mr. Palmer, regarded him not simply in the character of executor, but in the character of a near and dear friend, whom he considered as a special object of his regard." This case was, on appeal, affirmed by Lord Eldon (Id. 590), and is supported by *In re Denby*, 3 De Gex, F. & J. 350; *Dix v. Reed*, 1 Sim. & S. 237; *In re Mason*, 98 N. Y. 533; *Burgess v. Burgess*, 1 Colly. 367; *Wildes v. Davies*, 1 Smale & G. 475; *Slaney v. Watney*, L. R. 2 Eq. 418; *Pollexfen v. Moore*, 3 Atk. 272. It is needless to pursue this inquiry further, as the doctrine which must control us in declaring the testator's intention in making the bequest to Mr. Durand has been announced in the *Halsey Case*, supra, and is fully sustained by the English authorities, and is strictly in accordance with the canons of interpretation accepted as rules in the construction of wills. We think it only necessary to add that the will, upon its face, clear-

ly demonstrates the fact that the testator was a man of intelligence, capable of knowing his own wishes and intentions, and of expressing them in plain and exact terms, and that, nearly five years before he bequeathed the legacy of \$2,000 to his friend Durand, he had nominated him as one of the executors of his will executed in 1885, and it is only reasonable to suppose that if he had intended the legacy to be accepted by him in his capacity of executor, or in lieu of his commissions, he would have employed apt words to convey his intention. The will executed in 1885 contains no less than 23 paragraphs, and there were subsequently, from time to time, executed eight codicils to the will; the first dated 1890, and the last in 1893. So that, if the testator had desired to affix any condition to the acceptance of said legacy to Mr. Durand, he had his will frequently under consideration, and had the fullest opportunity of accomplishing his purpose. We find nothing in the record of this appeal to justify us in construing the will and codicils in accordance with the contention of the appellants, and must therefore affirm the decree of the court below. Decree affirmed, with costs.

BAKER v. HEDRICH.

(Court of Appeals of Maryland. April 30, 1897.)

WIFE'S SEPARATE ESTATE—EVIDENCE.

Under Code, art. 45, § 7 (authorizing a married woman earning any money or other property to hold the same and the profits thereof to her sole use), where a husband deposits money in a savings bank in the name of himself and wife, and there is evidence that he acknowledged that his wife was the owner of such deposit, and it was shown that for many years she had been selling farm products on her own account with his full knowledge and consent, held sufficient to show, after the death of the husband, that such deposits were the property of the wife.

Appeal from circuit court, Anne Arundel county, in equity.

Bill by Laura A. M. Baker, administratrix of Henry Hedrich, against Anna Hedrich. From a decree dismissing the bill, complainant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, ROBERTS, and BOYD, JJ.

James M. Munroe and Frank H. Stockett, Jr., for appellant. J. Wirt Randall and James R. Brashears, for appellee.

BOYD, J. The bill of complaint in this case was filed by the appellant against the appellee to recover certain cash, United States bonds, a certificate of Baltimore city stock, and deposits in the Eutaw Savings Bank and the Savings Bank of Baltimore. The court below decided in favor of the appellee as to all the items, and dismissed the bill. The appellant, after taking an appeal, filed an agreement, wherein it is stated that

the appeal was not intended to apply to the portion of the decree which adjudged the United States bonds to be the property of the appellee, and has made no claim for them in this court. Nor do we understand her solicitors to contend that the claim for the cash has been established. So far as there seems to be any room for controversy, it is reduced to the question as to whether the titles to the Baltimore city stock and the amounts in the savings banks were in Henry Hedrich, the appellant's intestate, or in the appellee, who is his widow. The certificate of the Baltimore city stock stands in the name of "Henry Hedrich, or Anna Hedrich." The form of entry in the book of the Savings Bank of Baltimore is, "Henry Hedrich and his wife, Anna Hedrich, subject to the order of either or the survivor;" and in the book of the Eutaw Savings Bank, "Henry Hedrich, Anna Hedrich, and the survivor of them, subject to the order of either."

From the view we take of the case, it would serve no useful purpose to discuss what is necessary to make a gift *inter vivos* or a *donatio causa mortis*, as that could only become material in the event that we found this property originally belonged to Henry Hedrich, and not to his wife. The cases in this court involving the title to deposits in savings banks are quite numerous, and, while there is no conflict between them, the results reached in them have necessarily differed, as the facts in the respective cases presented different questions. For example, in *Murray v. Cannon*, 41 Md. 466, the deposit was to the credit of "James Cannon, subject to his order, or to the order of Mary E. Cannon," who was his daughter. It was held that the money belonged to James Cannon, and his daughter only had the power as his agent to draw it out of the bank. At his death the agency ceased, and, as the proof in the case was not sufficient to establish a perfected gift of the money, it did not pass to the daughter. The case of *Gardner v. Merritt*, 32 Md. 78, was relied on as conclusively disposing of the principal question in the case. There Susanna A. Merritt, the grandmother of the appellants, deposited sundry sums of money in the Savings Bank of Baltimore to their credit, in accounts opened in the name of each of them, as a minor, "subject to the order of Susanna A. Merritt on Susanna Merritt." Susanna was the daughter of Susanna A. Merritt, and, after the death of the latter, withdrew all the money from the bank, and claimed it as belonging to the estate of her mother. The evidence showed that the deposits were made for the benefit of the grandchildren, as Mrs. Merritt herself had stated, and the provision that they were subject to the order of the grandmother and her daughter was in accordance with the by-laws of the bank. This court held that the moneys thus deposited were perfected gifts, and belonged to the grandchildren. In *Taylor v. Henry*, 48 Md. 550,

the appellees' intestate made a deposit in the Eutaw Savings Bank of Baltimore of \$1,850, as he was about to take a trip for the benefit of his health. The account was opened and the money credited to Joseph Henry and Mary Henry, his mother, and the survivor of them, subject to the order of either. Some time afterwards Henry changed the account so as to read, "Joseph Henry, Margaret Taylor, and the survivor of them, subject to the order of either." This court said that "the whole question depends upon the meaning and intention of the deceased in making the deposit in the form adopted, as gathered from the entry in the bank book and all the circumstances surrounding the deceased at the time," and held that the words "and the survivor of them," when taken in connection with those which precede and those which follow in the entry, did not import a gift *inter vivos* or a gift *causa mortis*. In *Dougherty v. Moore*, 71 Md. 248, 18 Atl. 35, the account was originally opened in the name of the husband in 1864, and so continued until February, 1868, when the name of his wife was added, and an entry made, "Lawrence McDonald, Sarah McDonald, and the survivor, subject to the order of either." McDonald continued to make deposits and to draw on the account as he saw proper. It was held that it was not a gift *inter vivos*. In *Bank v. Murphy*, 82 Md. 314, 33 Atl. 640, the account was originally in the name of the husband, but was in 1885 changed to himself and wife, and was "subject to the order of either. The balance, at the death of either, to belong to the survivor." He lived three years, and during that time he did not draw out any of the money, and did not retain possession and control of it, as was done in *Dougherty v. Moore*. For that reason, and because of the express language of the contract that the balance should belong to the survivor, we held that the bank was right in paying it to the survivor.

Under these and other cases that might be cited, if we were to be governed by the language of the entries in the bank books, without having any other light on the subject, it might be difficult to sustain the position of the appellee; but this case presents facts altogether different from those in any of the cases above referred to. Aside from the single fact that the husband alone seems to have been present when the accounts were opened, there is nothing in connection with the opening of the accounts to suggest that the husband had any more interest in the money than his wife had. They were opened originally in their joint names, without any legal evidence that the money belonged exclusively to Mr. Hedrich, for there can be no doubt that the testimony of the witnesses produced on behalf of the plaintiff to prove the declaration of the deceased in his own favor is not competent, and cannot be considered by us. But a number of witnesses on the part of the defendant establish the

fact that Mr. Hedrich acknowledged that his wife owned the property in controversy. It is shown that she had been for years selling poultry, butter, eggs, and other products on her own account, with the full knowledge and consent of her husband. One of the witnesses said "she produced all that could be produced. From my house I could always see her at work, and the people going there; and indeed I have often remarked to my people that Mrs. Hedrich's was about like a store; people were going in there buying things continually." Another said that Mr. Hedrich told him that the money for the butter and eggs was his wife's, and he put it in the bank with the other money she had there, because he had no right to spend it. He told one of them that, when he married Mrs. Hedrich, she had \$700 in bank in California, and, when he came to Baltimore, he invested it in government bonds. In answer to the inquiry whether he wanted to leave his wife an interest in the farm, he told Dr. Cheston, his physician in his last illness: "No, doctor, I have made no will, and it is not necessary that I should. She has got enough. This is mine; this house and lot are mine; and her money is invested in the name of both of us." There is other testimony in the record which we need not quote, going to show that Mrs. Hedrich was for years before her husband's death actively engaged in carrying on an extensive produce business, and that it was fully understood between her husband and herself, as well as the persons dealing with her, that the profits and earnings from that business belonged to her, and not to her husband. It is true that the earnings of a wife ordinarily belong to the husband, unless there be some agreement or understanding between them to the contrary; but she can undoubtedly engage in labor for her own benefit, and independent of her husband, if she choose. *Neale v. Hermanns*, 65 Md. 477, 5 Atl. 424.

Section 7 of article 45 of the Code authorizes a married woman who, by her skill, industry, or personal labor, earns any money or other property, to hold the same, and the fruits, increase, and profits thereof, to her sole and separate use, and, when the proof shows with sufficient certainty that the money or property in controversy has been thus earned, the court cannot deprive her of it. By the constitution of this state, her property is protected from the debts of her husband, and a court of equity should the more readily shield it from the claims of her husband or of his next of kin. In this case we are not embarrassed by a contest between creditors of the husband, on the one side, and his wife or widow, on the other; for, although the bill was filed by the administratrix, it is not proven or even alleged that there are any creditors unprovided for. If there had been creditors whose claims could not be paid out of the prop-

erty in the hands of the administratrix, it could very readily have been shown, as the testimony was not concluded for more than a year after the death of Mr. Hedrich. We do not mean to intimate that the testimony falls to establish the appellee's claim, even if there were unpaid creditors of her husband; but a court should scrutinize the evidence more carefully before deciding a question of this kind in favor of a wife, as against creditors, than would be required in a case between her and her husband or his next of kin. That Mrs. Hedrich, although a married woman, had the power to conduct an independent business, cannot now be questioned, and that she did so, we think, is thoroughly established by the testimony. She might have thrown more light on all the transactions before us than any other living person could do; but her evidence must be excluded, as it was inadmissible, and exceptions to its competency have been filed. The testimony properly in the case has, however, satisfied us that the money invested in the Baltimore city stock and the deposits in the savings banks belong to her. They were probably made payable to the order of the two for convenience, as Mr. Hedrich doubtless visited Baltimore and attended to that character of business more than his wife did; but, however that may be, his declarations establish the fact that they belonged to his wife, and it is shown that she had money prior to her marriage, and continued to earn it afterwards, and that her husband laid no claim to it. Under such circumstances, we can have no hesitation in affirming the action of the court below in dismissing the bill of complaint.

It was suggested that, whatever be our conclusions, the plaintiff should not be required to pay the costs, as the claim was made in good faith, and in accordance with what she deemed to be her duty. If that be conceded, it is not a sufficient reason to require the appellee to pay the costs of proceedings unsuccessfully conducted against her. If there be sufficient funds in hand, the orphans' court can determine whether the appellant should be allowed her costs out of the estate, but that is not before us. Decree affirmed, with costs to the appellee.

LEONARD v. MEDFORD.

(Court of Appeals of Maryland. April 30, 1897.)

GROWING TREES—VERBAL SALE—STATUTE OF FRAUDS.

1. A sale of growing trees, to be presently cut and removed by the buyer, is not a sale of an interest in lands, within the statute of frauds (section 4).

2. Where a verbal contract for the sale of growing trees is within the statute of frauds (section 17), requiring part acceptance, part payment, or a written memorandum, where the consideration exceeds a certain amount, there is a sufficient compliance with the statute where the seller goes with the buyer to the woods, helps

to choose a location for the buyer's portable sawmill, points out the lines of the tract whereon the trees are standing, and the buyer fells some of the trees before the seller seeks to rescind the contract.

Appeal from circuit court, Talbot county.

Bill by James M. Leonard against Frank Medford for injunction. From a decree in favor of defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

J. Frank Bateman, for appellant. William R. Martin, for appellee.

McSHERRY, C. J. There are two questions presented by this record. The first one is this: Does the verbal contract set out in the bill of complaint fall within the fourth section or the seventeenth section of the statute of frauds? and the second one is, if the contract be one covered by the seventeenth section, was there such a part performance by a delivery and acceptance as to gratify the terms of that section? The facts out of which these questions arise are, in brief, as follows: Leonard, the appellant, being the owner of a farm, part of which was in timber, verbally agreed on October 15, 1896, to sell to William Taylor all the growing oak trees thereon which measured 18 inches and upward across the stump, and which then stood within a designated area containing from 140 to 150 acres of land. The price and the dates when payments of the purchase money were to be made were specified. At the time the verbal agreement was made, Taylor's sawmill was loaded on the cars at some distance away, ready to be transported to such point as he might be able to procure timber for cutting, and, upon the appellant being informed of this fact, he told Taylor to let the mill come on down to his (the appellant's) woods. On the 20th of October, Medford, the appellee, who was an employé of Taylor, reached the appellant's lands with the portable sawmill, the boiler, and engine, and at once notified Leonard of his arrival, and on the following day Leonard went to the woods and helped to locate the place for the boiler and mill to be set. At the same time Leonard pointed out the lines of the woodland, and stated that all the oak timber within those lines was Taylor's. The engine and boiler were at once put in place, and wells for supplying the necessary water to operate the engine were immediately sunk. Subsidary stipulations provided that Taylor should cut down some pine trees for temporary shade, but these structures were to remain the property of Leonard. Leonard selected and pointed out the pine trees to be felled for these purposes, and they were cut as he directed. On the 24th of October, Leonard wrote Taylor a letter, which, while neither admitting nor denying the verbal contract that it is conceded in the statement of facts was really entered into, suggested a different mode for ascertaining the amount to be paid and the quantity of

timber to be cut. This letter led to another interview, in which Leonard insisted that the standing red oak trees should be excluded from the sale, but in which Taylor claimed that the original bargain should be adhered to. Taylor then presented a written agreement embodying the terms of the verbal understanding, and tendered the cash payment, and the notes for the deferred payments; but Leonard refused either to sign the written agreement or to accept the money and the promissory notes. Medford, in behalf of Taylor, began at once to cut the oak timber, and continued to work until, on the 18th of November, a bill was filed on the equity side of the circuit court for Talbot county by Leonard against Medford, praying that an injunction might be issued restraining the further cutting of the timber, and an injunction as prayed for was issued. Medford promptly answered. An agreed statement of facts was made up and signed, and a motion to dissolve was immediately filed. On February 2, 1897, the motion was heard and the injunction was dissolved, the bill was dismissed, and each party was required to pay his own costs. From that decree the pending appeal was taken.

If the first of the two questions here involved were an open one in Maryland, it would be quite interesting to examine and weigh the numerous and conflicting decisions, both in England and in this country, which have been pronounced upon this vexed and difficult subject. The early English cases are widely divergent, and cannot possibly be reconciled. To illustrate: Treby, C. J., in 1 *Ld. Raym.* 182, reported that he had ruled at nisi prius that a sale of standing timber was not within the statute, but was merely a sale of a chattel interest; while Lord Mansfield held in *Emmerson v. Heelis*, 2 *Taunt.* 38, that a sale of a crop of growing turnips was within the fourth section of the statute of frauds. Perhaps it may be safely said that the more recent English cases are susceptible of the following classification, representing distinct, but not inharmonious, though often closely allied, principles: First. That an agreement to transfer the property in anything attached to the soil, but which is to be severed from the soil and converted into goods before the property is transferred to the vendee, is an agreement for the sale of goods. *Washburn v. Burrows*, 1 *Exch.* 107. Secondly. That, where there is a sale vesting the property at once in the purchaser before severance, a distinction is made between what is *fructus naturales* and *fructus industriales*. The former, the natural growth of the soil, as grass, timber, etc., which at the common law are part of the soil, are an interest in land, and a sale of them is within the fourth section of the statute; while the latter are chattels, because by the common law growing crops produced by labor and expense were, as the representatives and results of that labor and expense, treated as independent chattels. *Evans v. Roberts*, 5 *Barn. & C.* 829, 12 *E. C. L.* 377. But there has been superadded of late, by mod-

ern English cases, a qualification which seems to be founded in reason, and which may in a great measure, by a judicious application, furnish a more satisfactory and stable rule for determining whether a sale of that which is the natural growth of the soil is or is not within the fourth section of the statute. It having been held in *Smith v. Surman*, 9 Barn. & C. 561, that an agreement for the sale of growing timber at a designated price per foot, and which the vendor was to cut and had actually commenced to fell, was within the seventeenth, and not the fourth, section of the statute, because, as intimated in *Earl of Falmouth v. Thomas*, 1 Crompt. & M. 105, the seller was to convert the standing trees into chattels, it was afterwards determined by *Coleridge, C. J.*, and *Brete and Grove, JJ.*, in *Marshall v. Green*, 1 C. P. Div. 35 (decided in 1875), that the sale of growing timber to be cut by the purchaser was not within the fourth section, because, as there was no intention that the purchaser should derive any benefit from the continuance of the timber in the soil, there was no agreement for the sale of an interest in the land. *Brete, J.*, who afterwards, as *Lord Esher*, became master of the rolls, said: "Where the things are not fructus industriales, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining. Then part of the subject-matter of the contract is the interest in land, and the case is within the statute." And *Grove, J.*, observed: "Here the trees were to be cut down as soon as possible, but, even assuming that they were not to be cut for a month, I think that the test would be whether the parties really looked to their deriving benefit from the land, or merely intended that the land should be in the nature of a 'warehouse' for the trees during that period." This suggestion that the land was merely a warehouse for the trees was made use of by *Rolfe, B.*, in *Washburn v. Burrows*, supra. In *Greenl. Cruise*, p. 55, § 45, note, it is stated that, "in contracts for the sale of things annexed to and growing upon the freehold, if the vendee is to have a right to the soil for a time, for the purpose of further growth and profit of that which is the subject of sale, it is an interest in the land, within the meaning of the fourth section of the statute of frauds, and must be proved by writing; but where the thing is sold in prospect of separation from the soil immediately, or within reasonable and convenient time, without any stipulation for the beneficial use of the soil, but with a mere license to enter and take it away, it is to be regarded as substantially a sale of goods only, and so not within that section of the statute, although an incidental benefit may be derived to the vendee from the circumstance that the thing may remain for a time upon the land."

In Maryland, Massachusetts, Maine, Kentucky, and Connecticut sales of growing trees,

to be presently cut and removed by the vendee, are held not to be within the operation of the fourth section of the statute of frauds. *Smith v. Bryan*, 5 Md. 141; *Purner v. Piercy*, 40 Md. 212; *Claffin v. Carpenter*, 4 Metc. (Mass.) 580; *Nettleton v. Sikes*, 8 Metc. (Mass.) 34; *Bostwick v. Leach*, 3 Day, 476; *Erskine v. Plummer*, 7 Me. 447; *Culter v. Pope*, 13 Me. 377; *Cain v. McGuire*, 13 B. Mon. 340; *Byassee v. Reese*, 4 Metc. (Ky.) 372. While in *Smith v. Bryan* no other authorities are cited than 1 Greenl. Ev. § 271, and no discussion of the subject was attempted, still the bare statement of the principle by so eminent and distinguished a jurist as the late Chief Justice Le Grand is entitled to the highest consideration and the greatest weight. That decision, delivered in 1853, established the law in Maryland to be that a parol sale of growing timber is not within the fourth section of the statute of frauds; and though many, perhaps most, of the courts of last resort in other states of the Union have taken the opposite view, we have no disposition to unsettle a doctrine that has been accepted, and not questioned, in Maryland for more than 40 years. It seems to us that the conclusion reached in *Smith v. Bryan* is sound. In transactions of the kind there and here involved, it is obvious that the intention of the parties to the contract—the owner of the timber on the one side, and the purchaser of it on the other—was not to deal with an interest in the land upon which the timber stood, but, respectively, to sell and acquire the product of the soil, and nothing more. If the manifest intention of both the vendor and vendee, as disclosed by the terms of the contract entered into by them, is to be regarded at all,—if what they meant to do, as evidenced by what they have agreed to do, is to be considered, instead of imputing to them a design to do something wholly different,—then their intention, when apparent, ought to be given effect, provided it violates no rule of law or fixed legal policy. "The object of a party who sells timber is not to give the vendee any interest in his land, but to pass to him an interest in the trees, when they become goods and chattels." *Littledale, J.*, in *Smith v. Surman*, supra. It is precisely because, "in the contemplation of the parties," the transaction is "evidently and substantially a sale of goods only," that it ought not to be treated as a sale of an interest in land. In *Purner v. Piercy*, 40 Md. 212, while this precise point was not at issue, yet it was reasserted as originally announced in *Smith v. Bryan*. As the law now stands in Maryland, the parol contract for the sale of Leonard's growing timber was not one within the fourth section of the statute of frauds, and it only remains to inquire whether the agreement is void under the seventeenth section. By the section just named, no contract for the sale of any goods, wares, and merchandise for the price of £10 sterling and upward is good unless the buyer shall accept part of the goods so sold and actually receive the same, or shall

give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by parties to be charged by such contract. Though, therefore, the contract be verbal, it will be still good if the articles sold, or some of them, are actually received and accepted by the vendee. Receipt and acceptance presuppose delivery, and a delivery may be either actual or constructive. Both delivery and acceptance may be inferred as conclusions from the attendant circumstances. As remarked by Erle, J., in *Parker v. Wallis*, 5 El. & Bl. 21: "If the vendee does any act to the goods of wrong, if he is not owner of the goods, and of right, if he is owner of the goods, the doing of that act is evidence that he has accepted them." And Lord Ellenborough observed in *Chaplin v. Rogers*, 1 East, 192, in determining whether a stack of hay had been delivered and accepted, that, "where goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by that which is tantamount." To the same effect the recent case of *Corbett v. Wolford*, 84 Md. 426, 35 Atl. 1088. The appellant actually put the purchaser in possession of the trees, and pointed out the lines of the tract whereon the timber to be cut then stood, and the appellee, as the employé of Taylor, proceeded to fell the trees, and had, in fact, cut down some of them, in part performance of the contract, before the injunction was applied for or issued. Here, then, the vendee in felling the trees did an act "of wrong if he" was not the owner of them, "and of right if he" did own them, and "the doing of that act," coupled with the lawfulness of his entry on the land, "is evidence that he had accepted them." Under the agreed statement of facts, it is conceded that the appellant placed Medford, the agent of the purchaser, in full possession of the timber, and it is now too late for the vendor to repudiate the contract on the ground that it is void under the seventeenth section of the statute of frauds. As we find no error in the decree from which the pending appeal was taken, it will be affirmed, with costs in this court. Decree affirmed, with costs in this court, the costs below to be paid as directed by the decree.

BERGER v. BULLOCK et al.

(Court of Appeals of Maryland. April 1, 1897.)

CANCELLATION OF DEED—FRAUD.

There was evidence that complainant, a widow, was induced to execute a trust deed of all her property to her daughter and the latter's husband, by her son, who apprehending that, if left to dispose of her property, complainant would cut him off in her will, excited her fears by telling her that his wife was about to sue her for slander, and that complainant must place her property beyond the reach of a judgment; that the terms of the deed, as finally executed, limiting the property over after complainant's death to her son and daughter, were dictated by

the son-in-law; and that the instrument was not read to complainant. The son did not testify. *Held*, that the deed should be canceled for fraud.

Appeal from circuit court of Baltimore city.

Bill by Emma G. Berger against Mary H. Bullock and another to annul a deed of trust. From a decree dismissing the bill, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and RUS-SUM, PAGE, BOYD, and FOWLER, JJ.

W. Pinkney Whyte and Joseph Whyte, for appellant. John P. Poe & Sons, Robert H. Smith, and H. N. Abercrombie, for appellees.

McSHERRY, C. J. The bill of complaint filed in this case seeks to have a deed of trust executed by the appellant to her daughter and her daughter's husband vacated and annulled, on the ground that it was procured by fraud and misrepresentation, and, consequently, was not the free, voluntary, and deliberate act of the grantor. This is the single question in the case. Generally, it is not easy to prove fraud. Often its presence is intuitively felt rather than made visible, as the means resorted to for the accomplishment of its designs are frequently remote and seemingly trivial. Sometimes negative circumstances are quite as cogent in manifesting its influence as are affirmative and direct statements. In every investigation involving a charge of fraud, explicit denials may usually be expected from those against whom the accusation is made, though such denials are of little avail when confronted by and contrasted with conditions which observation and experience teach are the accustomed badges of guilt. But when the charge is distinctly made, and is not denied by one who, if innocent, could truthfully repel it, his silence, when he ought to speak, becomes, if not convincing, at least persuasive, evidence of the bad faith imputed to him. The record before us is not voluminous, the amount involved is not large, and the facts are comparatively few. The appellant is a widow with two grown children, one a son, the other a daughter, and both are married. Her husband died in the fall of 1895, leaving to her by his will all the property he possessed, and this was not great in value. Shortly afterwards the son's wife made threats that she would contest the will, and these threats caused the appellant considerable solicitude. The son went to his mother's home, and asked her to allow him to board there for a couple of weeks, as he had been compelled to leave his wife because she wished to break his father's will; and it was then, for the first time, suggested by the son that his mother should execute a deed of trust. This was the beginning of the ultimately successful scheme. The pretended separation of the son from his wife was a plan invented to excite the mother's sympathy and to gain her confidence; and the threat that the daughter-in-law, who could

have had no standing in a court of justice to attack the will, would assail it, was manifestly resorted to for the purpose of deluding the appellant into making the deed, for the making of the deed was suggested by the son as the means of preventing an assault on the will. The unguarded declaration of the son to the witness Johnson, that he, the son, had gone home to stay "until he made his scheme," leaves no room to doubt as to the motive that prompted him to sham a separation from his wife, to take up his abode with his mother, and finally to urge the execution of the deed upon a pretext that was as shallow as it was sinister. Stay at her house he did until the deed was finally executed, when he returned to his wife. Being disquieted by these threats of a contest, she consulted her counsel, Mr. Lucas, and she was told by him that the daughter-in-law could not attack the will, and no deed was then made. The caveat device having failed, another was at once resorted to, and it was this: The daughter-in-law declared that she would sue the appellant for slander, and would strip her of all her property. The appellant was beset with a fear that this new threat inspired, and her son, the husband of the woman who menaced her with impoverishment and want, advised her to make her property over in order that it might be placed beyond the reach of his wife, and protected from seizure for damages. The appellant declared that she was "in mortal fear of losing" her property. She was told by the son that his wife had the suit ready to file, and then it was, she says, that "for fear of losing my property I went and made the deed." The appellant's statements, as just outlined, stand without a word of contradiction from any one. The son, though a party to the cause and though a competent witness, gave no testimony at all, and did not venture to go on the witness stand. His failure to deny what was thus imputed to him, when it was his duty to speak, was an undoubted admission of the truth of the charges made against him. His silence was a confession of his guilt. *Hiss v. Welk*, 78 Md. 439, 28 Atl. 400; *Zimmerman v. Bitner* 79 Md. 128, 28 Atl. 820.

That this fear, thus inspired by the son's wife through the agency of the son, influenced the appellant, and induced her to execute the deed, is beyond cavil or controversy. This is conspicuously apparent on nearly every page of the record. "He told me," says the appellant, "if I wanted to save myself I had better make it, as I had very little, and he didn't want to see it taken away from me. I went to Mr. Lucas then, and told him my son's wife was going to sue me. He said, 'Mrs. Berger, you don't seem to know what you want;' and I told him I wanted it made right away, to save myself." This, though not recollected by Mr. Lucas, is not explicitly denied by him. The pretense that the son did not wish to see his mother's property tak-

en away from her by his own wife in a suit for slander, and the further pretext that he was actually intervening between his wife and his mother for the latter's protection against the former, were studied and systematic steps in the scheme to extort the deed, and thereby to deprive the mother of the full and unconstrained dominion over her own estate, with the management and disposal of which her husband had but a few months previously absolutely intrusted her. One, at least, of the motives which induced this unfilial conduct on the part of the son was an apprehension that, if the mother were left in the control of her property, she would, in disposing of it, entirely cut him off. The evidence of this will appear in a moment. After a deed of trust had been written, it proved not to be satisfactory to the son-in-law, because, as he says, "it left her to will that property as she pleased," and the son-in-law thought she might exclude the son, a result which the son-in-law wished to prevent. Accordingly, without consulting the appellant, another deed was prepared conforming to the views of the son-in-law, whose judgment as to the ultimate disposal of the property was substituted for hers, and the property was in the second deed limited over, after the appellant's death, to the son and daughter, and the deed containing that provision is the one the appellant eventually signed, without knowing, so she declares, what its contents really were. When she did discover what the provisions of the deed were, she expressed her intention, in the presence of two disinterested witnesses and her son, to revoke the deed, and to repossess the property; but the son said to her: "I see you getting it, for I've felt the sting of poverty once, and I don't intend to let this thing slip through my fingers." The deed being assailed by the grantor under the pending proceedings, begun 37 days after the date of the deed, the son, whose fraudulent conduct was chiefly instrumental in procuring the instrument, refrained, as we have said, from going on the witness stand, and failed to repel a single one of the serious accusations made against him; but the son's wife, who had threatened to bring suit for slander, and who, had she been serious or sincere in this respect, would have been anxious to have the deed set aside (because, so long as it stands, it interposes an obstacle to the satisfaction of any judgment she might obtain), singularly enough appeared as a witness to sustain and support the deed. Inconsistency so flagrant as this cannot be explained upon any hypothesis of good faith, but is in perfect keeping with the sinister methods by which the instrument was procured.

It appears from the testimony of Mr. Lucas, who drew the deed and who seems to have acted throughout purely from motives of friendship, that he had been spoken to about a deed of trust by Bullock, the son-in-law, during February, 1896, but that the first in-

terview which he had with Mrs. Berger on the subject was in March following. She offered to make him the trustee, but he suggested the daughter and the daughter's husband, and without any instructions from her relative to the terms of the trust, and without other statement than that she had concluded to execute a deed of trust, a deed was prepared. Mr. Lucas did not read it over to her, and does not intimate that she gave any directions as to what disposition was to be made of the property by the deed. It is very apparent, when his and Bullock's testimony are considered together, that Bullock, and not Mrs. Berger, dictated the details of the deed. Perhaps it was a knowledge of this that induced Mr. Lucas to say to Bullock or John Berger, after the deed had been executed, that he thought the deed would not stand. The only witnesses who pretend that the deed was read to Mrs. Berger are Bullock and his wife, and in this they are contradicted by Mrs. Berger. That the appellant requested Mr. Lucas to prepare a deed of trust is true beyond dispute. But whether she knew what she had done or proposed to do by that request is not so much a matter of consequence as is the ulterior inquiry, how the intention to do what she did do was produced. Though she knowingly executed a deed of trust, and intended to execute one, still, if that intention was brought about by fraud, misrepresentation, and deception, the deed so produced was no more her free and voluntary act or choice than if the instrument had been executed under the dominion of coercion directly in antagonism to her expressed intention. The person who, of all others, could have most effectually denied the exertion of the sinister methods and influence attributed to him, remained stolidly silent, except when he proclaimed in advance his design "to make his scheme," and asserted afterwards his purpose not to let the fruits of his consummated plan slip through his fingers. That the intention on her part to make the deed resulted directly from the devices of her son and her son's wife, and that the terms of the deed were dictated by her son-in-law, and not by herself, are facts about which the evidence leaves no room for controversy. If this be so, upon what principle can the deed be upheld? Were her testimony unsupported, or were it questioned by disinterested witnesses, we should hesitate to strike the deed down, as the case is now presented. But her statements are corroborated in a most satisfactory manner by the failure of the chief conspirator to deny or dispute the accusations made against him. While courts ought to be slow in setting aside, at the instance of the grantor, a conveyance seemingly made with deliberation, they would fall far short of their plain duty if they failed to rip up and annul an instrument executed by a person whose intention to make it has been brought about by such deception and fraud as this record discloses.

We cannot sustain this deed without giving sanction and countenance to the reprehensible means that were resorted to in procuring it. We must, therefore, reverse the decree appealed from, and remand the cause, that a new decree may be passed conformably to this opinion. Decree reversed, with costs above and below, and cause remanded.

MOALE v. SMITH.

(Court of Appeals of Maryland. April 30, 1897.)

APPEALABLE JUDGMENT.

A declaration alleged that plaintiff let to defendant a house for one year at \$1,500 a year, of which rent one quarter was due and unpaid. Defendant pleaded under oath (1) that he was never indebted as alleged; (2) that he did not promise as alleged; and (3) a special plea. Plaintiff moved for judgment notwithstanding such pleas. *Held*, that a denial of the motion as to the first and second pleas was not a final judgment, or a judgment against plaintiff, from which an appeal would lie.

Appeal from superior court of Baltimore city.

Action by William A. Moale against Walter P. Smith to recover rent, in which defendant filed three pleas, and plaintiff moved for judgment notwithstanding the pleas. From an order overruling the motion as to the first and second pleas, and sustaining it as to the third, plaintiff appeals. Dismissed.

Argued before McSHERRY, C. J., and BRISCOE, BRYAN, PAGE, BOYD, FOWLER, and ROBERTS, JJ.

J. J. Alexander, for appellant. John P. Poe and Wm. H. Dawson, for appellee.

McSHERRY, C. J. This suit was brought under the local practice act of 1886, c. 184, relating to Baltimore city, and was instituted to recover one quarter's rent alleged to be due by the appellee to the appellant. The declaration is very brief, and is verified by affidavit. It alleges that the plaintiff let to the defendant a house for one year at \$1,500 a year, payable quarterly, of which rent one quarter was due and unpaid. The defendant pleaded, under oath—First, that he never was indebted as alleged; second, that he did not promise as alleged; and, third, a special plea, which need not be described or set forth. Thereupon the plaintiff moved the court to enter judgment for him against the defendant, notwithstanding the pleas pleaded, because, as he insisted, the pleas were defective in sundry particulars. This motion was overruled as to the first and second pleas, but was sustained as to the third, and forthwith the plaintiff appealed to this court. A motion has been made to dismiss the appeal, and that motion must prevail. There is no final judgment in the case. The refusal of the superior court to enter a judgment in favor of the plaintiff was obviously not a judgment against the plaintiff at all. If, instead of a motion for a judgment, there

had been a demurrer filed to the pleas, and the court had overruled the demurrer, and had entered no final judgment precluding the right of the plaintiff to recover, there could be no pretense that an appeal would lie. So here. There has been no disposal made of the case. It still stands on the docket, awaiting trial, and it by no means follows that, because a judgment notwithstanding the pleas was refused, a judgment may not be entered for the plaintiff when a trial shall be had. Until there is an ultimate determination denying the right of the plaintiff to recover at all, the case is still open and undisposed of; and, if still open and undisposed of, an appeal from an interlocutory order is undoubtedly premature. Appeal dismissed, with costs.

HOPKINS v. HOPKINS.

(Court of Appeals of Maryland. April 30, 1897.)

EQUITY—JURISDICTION—REMEDY AT LAW.

A bill alleged that, after death of complainant's mother, who was sole beneficiary of a policy on his father's life, and until the father's second marriage with defendant, complainant paid the premiums on the policy, under an agreement with his father that he should be sole beneficiary; that, after the second marriage, defendant, with knowledge of such facts, was made sole beneficiary, under an agreement with her husband that at his death complainant should receive a fair share of the policy, but that on her husband's death defendant collected the insurance, and refused to pay any part thereof to complainant. *Held*, that complainant's remedy, if any, was at law.

Appeal from circuit court of Baltimore city.

Bill by John T. Hopkins against Eleanora C. Hopkins, to which a demurrer was sustained, and complainant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, PAGE, ROBERTS, BOYD, and BRISCOE, JJ.

John T. Hopkins and S. O. Long, for appellant. Charles J. Bonaparte, for appellee.

BRISCOE, J. This appeal is from an order sustaining a demurrer to a bill in equity, and the question is whether the plaintiff presents such a case by the bill as entitles him to relief. The bill charges that Frederick E. Hopkins, father of the appellant, died in the year 1896, leaving one son and a daughter by his first wife, and two daughters by his second wife; that at the time of his death he held a policy of life insurance for the sum of \$3,000 in the Catholic Benevolent Legion, payable to Eleanora C. Hopkins, his second wife, who has collected the full amount, and deposited it in her individual name, in "the Border State Saving Bank of Baltimore"; that from the death of Elizabeth Hopkins, his first wife, and mother of the appellant, in the year 1888, who was at that time the sole beneficiary of the policy, to the father's second marriage,—a period of 1 year and 11 months,—the entire amount of the expenses of

membership in the company was paid by the plaintiff; that this amount was paid by an agreement with the father that he (the plaintiff) should be the sole beneficiary of this policy, but shortly after the second marriage Eleanora C. Hopkins was made the sole beneficiary, and was such at the date of his father's death. The bill further charges that the second wife was made the beneficiary on the condition, and by an agreement with her husband, that upon his death the plaintiff should receive a fair and reasonable share and proportion of the policy; that while no particular, specific, or ratable part was named, yet it should be a fair and reasonable proportion; that all these facts and circumstances were made known to the wife before she was made the beneficiary, and with this knowledge she agreed that the plaintiff should share as co-beneficiary in its benefit; that, notwithstanding this agreement, she now refuses to pay the plaintiff any part thereof, although requested so to do. The bill then alleges that the plaintiff was without remedy except in a court of equity, and the prayer of the bill is for an injunction to restrain the bank from paying over the sum of \$1,000 of the policy of insurance until the rights of the parties are determined in a court of equity, and concludes with a prayer for general relief. An injunction was granted on the 17th of November, 1896, but was afterwards, on the 18th of the same month, dissolved. A demurrer to the bill was interposed by the defendant, Eleanora C. Hopkins, upon the ground "that it does not clearly appear whether the bill of complaint is intended to establish and enforce an alleged trust or to secure specific enforcement of an alleged contract, but that in either event there is no cause of action as entitles the complainant to maintain this suit." This demurrer was sustained and the bill dismissed.

We have carefully examined the statements in the plaintiff's bill, and, assuming them to be true, it seems clear to us that the plaintiff's remedy, if any, is at law, and not in a court of equity. The alleged contract is entirely too indefinite and uncertain to be enforced by specific performance in a court of equity. In *Stoddert v. Bowie's Ex'r*, 5 Md. 28, this court said it is not only necessary to prove that an agreement was made, but the terms of the agreement must be so clearly and fully shown as that the court can have no difficulty in knowing what the terms are, so as to be certain of carrying into effect the contract made by the parties. Passing a decree for specific execution upon proof short of this, instead of executing the agreement of the parties, would be making one for them, which the court certainly has no authority to do. In the case now before us it appears that the alleged agreement between the father and son as to the payment of the premiums upon the policy had been abandoned or rescinded after the marriage of the father, and on or about the time when the second wife was

made the beneficiary of the policy. No premiums were paid by the plaintiff after this date, nor any effort made by him in the lifetime of the father to recover what is stated to have been paid. Nor does the allegation that there was a contract between the father and the second wife that the plaintiff should be paid "a fair, just, and reasonable share and proportion" of the policy aid the plaintiff in this suit. If the plaintiff has any remedy, it would be in a court of law, and not in equity. Being, then, of opinion that the plaintiff has entirely failed to set forth in the bill any cause within the jurisdiction of a court of equity, the order of the court below, sustaining the demurrer and dismissing the bill, will be affirmed. Order affirmed, with costs.

MILLER et al. v. GITTINGS.

(Court of Appeals of Maryland. April 8, 1897.)

LOCAL CITIZENS — SUITS IN FOREIGN COURT — INJUNCTION.

Where the transactions out of which an alleged debt arose occurred in Maryland, and are within the statute prohibiting gambling, and both parties are citizens and residents of that state, a court of equity of Maryland will restrain the creditor from proceeding against the debtor in another state to which the creditor has resorted to evade the Maryland laws prohibiting imprisonment for debt, where the foreign court must, through imperfect methods of proof, ascertain the statute on which the debtor relies to avoid the transactions, and where there must be difficulty and expense in obtaining evidence.

Fowler, J., dissenting.

Appeal from circuit court of Baltimore city.

Bill by Ernest Gittings against Emanuel H. Miller and another to enjoin the prosecution of suits against complainant. From an order granting an injunction, defendants appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, BOYD, and RUSSUM, JJ.

John P. Poe and B. Rosenheim, for appellants. Rich & Bryan and Frank Gosnell, for appellee.

BRYAN, J. Ernest Gittings filed a bill in equity against Emanuel H. Miller and Arthur E. Wilson. It was alleged that Gittings was a citizen and resident of the state of Maryland and of the city of Baltimore; that Miller and Wilson were also citizens and residents of the same city and state; that in the month of September, 1895, Gittings and Charles C. Allen, who is a resident and citizen of the state of New York, formed a partnership for the conduct of the stock brokerage business in the city of Baltimore under the name of Gittings & Co., and that in said business Gittings was the active member, who alone saw the customers, and conducted the operations with them; that in the summer and early fall of 1896 Miller and Wilson had a large number of transac-

tions with Gittings & Co. in relation to stocks; that said transactions were in the form of purchases and sales of stock made by Gittings & Co. for the account and risk of Miller and Wilson, but were in reality gambling transactions, and that there was no intention or belief by any of the parties to the transactions that the stocks should ever be actually delivered, but that the sole purpose was that there should be an accounting and settling as the stocks rose or fell in price; that all these gambling transactions were entered into in the city of Baltimore, and all settlements were also to be made in the city of Baltimore; that for the purpose of indemnifying Gittings & Co. against loss in executing their orders Millers and Wilson placed in the hands of Gittings, as margins, 10 bonds of the par value of \$1,000, and 200 shares of the preferred stock of the Southern Railway Company; that these bonds and shares of stock were delivered to Gittings with the express intention and expectation on the part of Miller and Wilson that he would hypothecate them for the purpose of obtaining money to enable him to aid Miller and Wilson in their gambling transactions; that the amount of money which would have been necessary to purchase the stocks and carry them until Miller and Wilson should elect to order the sale of them to make their settlements with Gittings & Co. would have been over \$200,000, and Miller and Wilson both knew that neither Gittings nor Gittings & Co. had any such sum, and Miller and Wilson had no such sum with which to make payment for the stocks, as it would be necessary for them to do, if it had been intended that there should be an actual delivery of them; that Gittings hypothecated the 10 bonds in the First National Bank of Baltimore for the sum of \$8,000, for which sum the account of Miller and Wilson was duly credited by him on the books of Gittings & Co.; that this hypothecation was made with the full knowledge at the time it was made of Wilson and of William H. Miller, the father of Emanuel Miller; that at that time Emanuel Miller was absent from Baltimore, and that on his return, a day or two afterwards, he was informed of it by Gittings; that the Southern Railway stock was also hypothecated in accordance with the understanding and expectation of the parties when it was delivered to Gittings; that it was hypothecated with Cuthbert & Co., stockbrokers in the city of New York, through whom Gittings acted in carrying on the greater part of the speculative transactions for Miller and Wilson.

The bill of complaint further alleges that on the 10th day of September, 1896, Gittings & Co. were unable to settle with Miller and Wilson for the winnings to which they would have been entitled if their dealings had not been illegal gambling transactions; and that Gittings would not have felt justified in mak-

ing such a defense but for the perjuries and fraud and the oppressive and dishonest conduct of said Miller and Wilson, hereinafter set forth. It also alleges: That on the said 10th day of September, Gittings gave to Miller a check on the Continental National Bank for \$8,000 in part payment of said winnings; and that at the time the check was given Miller knew that there were no funds to meet it, and that it would not, and could not be good, unless Allen, the partner of Gittings, should provide for its payment, which he did not do. That Miller and Wilson brought two actions in the city of New York against Gittings and the said Allen, claiming in one of them about \$8,000 for nonpayment of the check, and in the other \$17,000 for the alleged conversion of the bonds and stock deposited as margin, and for the alleged conversion of the different stocks on whose fluctuations in price Miller and Wilson had been gambling. That Gittings was summoned to appear to these actions when he was in New York. (This was at the time hereinafter mentioned, when he was arrested, and held to bail.) That Gittings has filed his answers to these actions, and copies of the answers are filed with the bill of complaint. That the complainant believes that Allen has also filed answers, but that complainant is not possessed of copies of them, and cannot, therefore, file them. That he believes, and therefore avers, that by the law and practice of the state of New York the complaints and answers in actions are kept in the offices of the attorneys of the several parties until the cause is ready for trial, and that the complainant believes, and therefore avers, that Allen's answer is not filed in any public office from which a duly-certified copy could be obtained. The bill of complaint further alleges that the right of Miller and Wilson to recover in these actions depends on the question whether the aforesaid transactions are wagering or gambling transactions, and that their validity depends on the law of Maryland; that the complainant has a right to have their legality decided by the law of Maryland; that, if these causes are tried in New York, it will be necessary to aver and prove the Maryland law as a fact, while, if they are tried in Maryland, the law of the state will be judicially recognized, and more equal and complete justice can be done; that the complainant submits his rights to the jurisdiction of the court, and is willing that such decree may be passed as is just between himself and Miller and Wilson; that the said Miller and Wilson went out of the jurisdiction in which both they and the complainant resided, for the purpose of evading and escaping the Maryland law, and of obtaining a judgment in New York, to which they are not entitled by the law of the place where the transactions arose and where the parties are domiciled. The bill of complaint further alleges that they obtained an order for the arrest of the complainant from a jus-

tice of the supreme court of New York in the second of the above-mentioned suits upon certain affidavits made by them and others, which state, among other things, that the complainant wrongfully and without the knowledge and consent of Miller and Wilson hypothecated the before-mentioned bonds; that the said statement was false, and was known to be false by Miller and Wilson, and was made for the deliberate, malicious, and unlawful purpose of enabling them to have the complainant arrested suddenly, when away from home, and dishonestly and oppressively coercing him and his friends to pay their unlawful and fraudulent claims in order to secure complainant's liberty; that the complainant was arrested when in the city of New York, and held to bail in the city of New York in the sum of \$15,000; that the complainant moved by his attorney to vacate the order of arrest, but the court overruled the motion without filing an opinion; that the said Allen has stated through his attorneys that he will voluntarily appear in this suit, if made a party defendant. The prayer of the bill of complaint was for an injunction prohibiting the further prosecution of the suits in New York, and from any further proceedings looking to the arrest or imprisonment of the complainant in said suits, and that the court would assume jurisdiction, and for general relief. Process was prayed against Miller and Wilson and against Allen. The court granted the injunction. Miller and Wilson, having filed an answer, appealed.

It is stated in the appellee's brief that Allen has appeared as a defendant, and submitted himself to the jurisdiction of the court. He was represented by counsel at the argument in this court. It appears by the exhibits filed with the bill of complaint that the suits were brought in the city of New York about the 16th of September, 1896, and that the order for the arrest of Gittings was issued on the 27th day of October. He was arrested on the same day, and gave bail, by which he and his surety became bound that he should at all times render himself amenable to any mandate which might be issued to enforce a final judgment against him in the action. After his release on bail,—that is, on the 4th of December,—he filed his answers to the two suits against him and his partner, Allen. The plaintiffs in the suits, in anticipation of Gittings' visit to New York, prepared their own affidavits in the city of Baltimore on the 17th of October, and obtained about the same time the affidavits of other persons in the same city. The plaintiff Wilson made an additional affidavit in New York City on the 27th of October. The bail given by Gittings required him to obey any mandate which might be made to enforce a final judgment in the action, and made it, therefore, necessary for the protection of his rights that he should answer and resist the complaint filed in the suit. It is not a question in this case whether it was lawful

for the plaintiffs in the New York suits to cause Gittings to be arrested. The declaration of the constitution is unconditional and absolute: "No person shall be imprisoned for debt." Const. art. 3, § 38. The payment of debts is to be obtained from the property of the debtor. His body cannot be taken in satisfaction of it. Neither can it be seized and held in restraint as a means of coercing or inducing him to make payment. An attempt made in this state by a creditor to do so would subject him to serious consequences. It is presumed that no one would contend that the citizens and residents of the state are not bound to yield obedience to the supreme law of the land. The important inquiry concerns the powers of a court of equity to interfere and protect the citizens of the state in their constitutional rights when the processes of legal tribunals are inadequate to the purpose. An examination of authorities of high character will assist us in the decision of this question. In *Keyser v. Rice*, 47 Md. 203, it appeared that Keyser and Rice were both residents and citizens of the state of Maryland, and that Keyser was an employé of the Baltimore & Ohio Railroad Company at Cumberland, and that the railroad company was indebted to him for wages in an amount less than \$100, and that Rice had caused an attachment to be issued in the state of West Virginia, and laid in the hands of the railroad company, for the purpose of condemning the debt due to Keyser in payment of a debt due by him to Rice. The debt to Rice accrued subsequently to the passage of Act 1874, c. 45. This act exempted from attachment the wages or hire due to any laborer or employé by any employer or corporation to the amount of \$100. This court decided that Rice should be prohibited by injunction from prosecuting his suit for the condemnation of the wages due to Keyser. In its opinion it stated very explicitly certain principles applicable to cases of the kind. We will quote some of them: "As long as a citizen belongs to a state, he owes it obedience; and, as between states, that state in which he is domiciled has jurisdiction over his person and his personal relations to other citizens of the state." "The power of the state to compel its citizens to respect its laws, even beyond its own territorial limits, is supported, we think, by a great preponderance of precedent and authority." It also said that the jurisdiction to prevent by injunction suits in other states was not founded "upon any right to interfere with or control the proceedings of other tribunals in other states, but on the clear authority vested in courts of equity over persons within their jurisdiction, and amenable to process to restrain them from doing acts which will work wrong and injury to others, and are contrary to equity and good conscience." It also strongly condemned the effort by a creditor to evade the laws of his own country by a resort to a tribunal of another state for the purpose of obtaining a preference to the injury of other creditors, and

said it was against equity to do so. And it also said, at the conclusion of the opinion. "We think the intention to evade is necessarily presumed, when the act is persisted in after knowledge, and still inchoate, against the protestation of the complainant and the process of the court." Many high authorities were cited by the court in support of their opinion. We may say that the decision in *Keyser v. Rice* has been quoted with approval in courts of the highest repute. In *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, this question was considered very fully and elaborately. *Keyser v. Rice* was quoted, and many of the cases which this court had cited in its opinion. The learned court also quoted with approval *Dinsmore v. Neresheimer*, 32 Hun, 204, "where the supreme court of New York held that an express company could maintain an action in New York to restrain the defendant, a resident of the state of New York, from prosecuting actions against the company in the District of Columbia, brought to avoid a decision of the court of appeals of New York, differing from the rule upon the same subject in the District of Columbia." And it also said, adopting the words of another court, "that in the courts of a state any citizen of that state may be enjoined from resorting to the courts of any other state for the purpose of evading the exemption laws of his own state." The facts in *Cole v. Cunningham* were as follows: Two citizens of Massachusetts, who were partners, becoming aware of the insolvent condition of another citizen of the same state, assigned their claim against him without consideration to one Fayerweather, a resident of New York, and caused funds of their debtor in New York to be attached in Fayerweather's name, but for their own benefit. While these attachments were pending, the debtor in Massachusetts was adjudicated an insolvent. The supreme court of Massachusetts, at the suit of the assignee in insolvency, decided that the Massachusetts creditors should be restrained by injunction from prosecuting the attachment in New York in the name of Fayerweather, saying: "As residents of this state, they cannot be allowed to this extent to defeat the operation of the assignment, and thus to obtain a preference over other creditors, residents here. They are within the limits of the jurisdiction of this court, and amenable to its process, and should be enjoined from prosecuting a suit the effect of which, if successful, will be to work a wrong and injury to other residents of the state." 6 N. E. 782. This decision was affirmed by the supreme court of the United States. The principle involved is sustained by a vast weight of authority, as may be readily seen by an examination of the opinion by the learned court.

There are other cases which we think it proper to mention. In *Talleyrand v. Boulanger*, 3 Ves. 447, two complainants filed a bill in equity against the defendant for an injunction. It appeared that all the parties were Frenchmen sojourning in England, and

that one of the complainants, while in France, had become indebted to the defendant, and that by the law of France there could not be an arrest of the person in a suit on the obligation which had been given for the debt. The complainants and defendant fled from France, and came to England, during the revolution. The debtor was arrested in England at the suit of his creditors, and to procure his release he paid some cash, and gave bills of exchange and a bond, to all of which the other complainant in the equity suit became a surety. After the first bill of exchange had been paid, the complainants refused to make any more payments, whereupon they were arrested in four actions, and held to bail at the suit of the defendant in the equity suit. An injunction was granted against proceeding with the suits, and it was continued by the lord chancellor. He said that the proceeding on the part of the defendant had been extremely oppressive and immoral; and that, if the case stood on the original contract, "it would be contrary to all the principles which guide the courts of one country in deciding on contracts made in another to give a greater effect to the contract than it would have by the laws of the country where it took place." He also said: "I cannot suffer these bills of exchange so obtained to have effect. I cannot suffer these actions to proceed." This case is remarkable from the circumstance that the court extended to domiciled aliens, in respect to the contracts made in their own country, the protection due to its own fellow subjects under similar circumstances. It has been made the subject of adverse criticism and disapproval in *Liverpool Marine Credit Co. v. Hunter*, 3 Ch. App. 486. Nevertheless it was pointedly approved by the house of lords in *Don v. Lippmann*, 5 Clarke & F. 18; Lord Brougham delivering the opinion. In the same opinion, *Melan v. Fitzjames*, 1 Bos. & P. 138, was approved on the same point. It is unnecessary in this case to determine the question in respect to aliens, as we have before us only citizens and residents of our own state claiming the protection of its laws. The *Liverpool Company Case* is thus stated: "A British ship, mortgaged in England by a British subject to British subjects, was arrested at New Orleans by creditors of the mortgagor, also British subjects resident in England; and, as the courts of New Orleans do not recognize such mortgages of ships, the mortgagees, in order to protect the ship from sale, gave bonds for the amounts claimed by the creditors. The mortgagees afterwards filed a bill to restrain the creditors from suing on these bonds. Held that, though the decisions of the courts of New Orleans might be open to the reproach of injustice, yet, as the creditors owed no duty to the mortgagees, and had a right to proceed against the property of their debtor wherever they found it, the bill could not be maintained." Whatever credit may be due to this decision,

it is proper to say that it is in direct conflict with *Simpson v. Fogo* (in the high court of chancery) 1 Hem. & M. 195. The principle, however, on which it is decided, can have no bearing on the questions in the present case. It is stated that the creditors who proceeded against the ship owed no duty to the mortgagees. In *Bushby v. Munday*, 5 Madd. 297, and in *Portarlington v. Soulbey*, 3 Mylne & K. 104, gambling debts were contracted in England, and the defendants were enjoined from prosecuting suits on them in Scotland and Ireland respectively. In *Bushby's Case* the court said that the English court was a more convenient jurisdiction than the Scotch court for determining the question between the parties, which depended on the law of England. And also said: "The substantial ends of justice would require that this court should pursue its own better means of determining both the law and the fact of the case, and it must necessarily follow that it must bind the interests of the parties by its own conclusions." In *Clafin v. Hamlin*, 62 How. Prac. 284, it was alleged that a suit in Illinois, brought by a citizen of New York against other citizens of the same state, was instituted for blackmailing purposes, and upon causes of action obtained by fraud. It was held that it should be enjoined; the court saying that it was not brought in good faith, but for the purpose of vexing, annoying, and harassing the parties sued.

The authorities show that equity will enjoin suits in other states where there is fraud, oppression, vexation, injustice, or unconscientious advantage; and most especially where there is an attempt to evade or defeat the operation of the laws of the state where both parties to the suit reside. The transactions in this case all occurred in the city of Baltimore. The parties to this controversy are all citizens and residents of that city. The evidence would naturally be there, and readily obtainable; and courts are established there with jurisdiction competent to determine the rights of the parties according to the law of Maryland, of which they have judicial knowledge. The complainant is subjected to prosecution before a tribunal in another state, which must ascertain the law through imperfect methods of proof; where there must be much difficulty and expense in obtaining the evidence of the witnesses; and where the legal processes have features of severity and harshness from which citizens of Maryland are protected by the constitution of the state. Ever since the adoption of the constitution of 1851, arrest of the person has been forbidden in the prosecution of civil actions. The *capias*, both as *mesne* and *final* process, has been unknown. Collection of a debt cannot be coerced either by imprisonment, or threats of imprisonment. In the present case the complainant was arrested, and presented with the alternative of going to prison or giving bail, which bound him at all times to "render

himself amenable to any mandate which may be issued to enforce a final judgment against him in the action." It is believed that no one would seriously contend that such a proceeding would be lawful in Maryland. When this cause of action arose, Miller and Wilson well knew that by the constitution Gittings was protected from any such invasion of his liberty as a mode of enforcing the payment of what was alleged to be due from him. And yet they deliberately violated his constitutionally guaranteed right of personal liberty. A court of law has not adequate power to relieve him from this imposition. If redress is to be afforded, it must come from a court of equity. This court has solemnly decided that a statute for the protection of the property of a citizen of the state shall not be violated by another citizen through the instrumentality of a suit in another state. When the statute says that the citizen's property shall be unmolested, no other citizen shall disobey the laws, even beyond the bounds of the state. But here the sacred right of personal liberty is violated in contempt and defiance of the constitution. The person of a citizen is seized as a portion of the proceeding for litigating a civil liability. The complainant below has every title to relief which has been established in the adjudicated cases. All the transactions arise from, and are parts of, gambling contracts made between citizens of this state. In *Bushby v. Munday*, 5 Madd. 297, a contract of this kind was made in England, and the court of chancery prohibited the prosecution of a suit on it in Scotland, although the complainant was a resident of Scotland, and had real estate there. A gambling contract was void in Scotland as well as in England; but, as the court had better means of determining both the law and the facts of the case than the Scotch court, it thought that justice required that it ought to try the case, and enjoin the suit in Scotland. In *Portarlington v. Soulby*, 3 Mylne & K. 104, Lord Brougham enjoined a suit in Ireland on a gambling contract in England. It is not questioned that by the law of New York Miller and Wilson could sue Gittings in the state of New York. The question in the cases where equity has intervened has not been whether the plaintiffs at law had a right to sue at law, but whether there were not equitable circumstances which ought to prevent the exercise of such a legal right. If they had no right to sue according to the course of the local law, there would have been no necessity for equitable relief. The suit here is not only brought on a contract made in a gambling transaction, but, although the bonds and stock were delivered to Gittings with the express intention and expectation that he should hypothecate them, it is alleged that he had wrongfully hypothecated them without the knowledge and consent of Miller and Wilson, and on this allegation an order has been obtained for Gittings' arrest.

In the long line of cases on this subject, beginning at Lord Hardwicke's decision in *Mackintosh v. Ogilvie*, cited in 4 Term R. 193, and coming down to the present time, it has been uniformly held that a suitor shall not, by impleading a fellow citizen or fellow subject in the court of a foreign country, deprive him of a right or benefit given to him by the laws of their own country. When they owe a duty to each other, this duty must be observed both abroad and at home. And on this footing courts of equity exert their jurisdiction to give the relief which cannot be obtained in a court of law. The further prosecution of the suits in New York ought to be enjoined, and the controversy ought to be determined by the court granting the injunction which has power to do full and complete justice between the parties. If the suits should be continued against Allen alone, and result in a judgment against him, it could be enforced against the partnership property, and would thus affect the interest of Gittings in the partnership effects as fully as if the judgment had been rendered against him. *Johnston v. Mathews*, 32 Md. 368; *Folsom v. Fertilizer, etc., Co.* (Oct. Term, 1896) 36 Atl. 446. The fact that Allen is a resident of New York might distinguish this case from those relied on to sustain the right of a court of equity to interfere, under ordinary circumstances, but the appeal admits, for the purposes of this case, the allegation in the bill "that the said Miller and Wilson went out of the jurisdiction in which both they and this plaintiff resided, and still reside, for the purpose of evading and escaping the Maryland law, and of obtaining a judgment against the plaintiff in New York"; and that the statement upon which the plaintiff was arrested "was known to be false when sworn to by said Miller and Wilson, and was made for the deliberate, malicious, and unlawful purpose of enabling the said Miller and Wilson to have the plaintiff arrested suddenly, when away from home, and of thus enabling said Miller and Wilson to dishonestly and oppressively coerce him and his friends, in order to secure the liberty of the plaintiff, in paying the said Miller and Wilson's unlawful and invalid claims against this plaintiff." If it be true, as the appeal admits, that the proceedings were instituted in New York for those purposes, and not because Allen resided there, his residence is immaterial. On this appeal we are obliged to assume that all the allegations of the bill of complaint are true.

We have considered the questions before us exclusively upon the allegations of the bill of complaint, as it was our duty to do. We have given considerable prominence to the arrest of the complainant, but we think that we have mentioned other circumstances which show that the bringing of the suits in New York was oppressive and unreasonable, that it tended to embarrass and defeat

justice in the settlement of the controversy between the parties, that it was an unconscientious and inequitable attempt to obtain an advantage over the parties who were sued. Order affirmed, with costs, and cause remanded.

FOWLER, J., dissents.

STATE v. RYAN.

(Supreme Court of Errors of Connecticut. Feb. 23, 1897.)

STATUTES—RETROACTIVENESS—INTOXICATING LIQUORS—SEPARATE OFFENSES—INDICTMENT—AIDED BY VERDICT.

1. Prosecutions for offenses committed against Gen. St. § 3087, relating to intoxicating liquors, before the going into effect of Pub. Acts 1895, c. 331, substituting new penalties for such offenses, are not affected by said act.

2. The offense of selling liquors without a license and of keeping such liquors with intent to sell without a license are distinct offenses, and the fact that an indictment for both of them avers that they were committed on the same day does not raise a presumption that they arose out of one transaction, namely, the sale of liquors without a license, which liquors, up to the time of sale, defendant had kept with intent to sell without a license.

3. On a prosecution under Gen. St. § 3087, relating to intoxicating liquors, for a "second offense," a statement of the first offense, of which defendant is claimed to have been convicted, which is defective in that it is uncertain, is cured by verdict.

Appeal from superior court, Windham county; George W. Wheeler, Judge.

Matthew Ryan was convicted of offenses against the liquor laws, and appeals. Affirmed.

William C. Case and Joseph L. L. Barbour, for appellant. Edgar M. Warner and John L. Hunter, State's Atty., for the State.

TORRANCE, J. In the court below the defendant was prosecuted for a violation of the laws relating to the sale of spirituous and intoxicating liquors. The information contained five counts, the first of which alleged a sale of such liquors by the defendant, without a license, at the town of Putnam on the 9th day of July, 1895; and the fourth count charged, as a second offense, that on the same day, and in the same town, the defendant owned and kept such liquors with intent to sell them, without having a license therefor. The defendant was found guilty on the first and fourth counts, and not guilty on the other counts. After verdict, and before judgment was rendered, the defendant filed a motion in arrest of judgment upon certain grounds, the substance of which may be stated as follows: (1) Since the date of the offenses charged in the first and fourth counts, chapter 331 of the Public Acts of 1895 has abolished the penalty which at the date of the commission of said offenses was provided for them, and has substituted in lieu thereof a penalty for said offenses, "enlarging the punishment therefor,

and compelling the court to impose a more severe penalty than might have been imposed at the time of the commission" of said offenses. (2) The fourth count of the information "does not charge the commission of any first offense upon which a charge of a second offense can legally be based; and does not charge the commission of the second offense as any legal crime with the certainty and precision required by law, so as to apprise the defendant of the precise offense of which he stood charged, or so as to enable him to prepare his defense, or so as to enable the court to render judgment upon said fourth count. (3) Both the offenses of which the accused was convicted are alleged to have been committed on the same day, and constituted but one offense,—the offense of owning and keeping intoxicating liquors with intent to sell, as set forth in the fourth count, culminating and being merged in the sale of such liquors as set forth in the first count; and therefore, if the court should pass judgment and impose sentence upon both counts, the defendant would be twice punished for one offense." The court overruled said motion, and sentenced the defendant to pay a fine of \$30 on the first count, and on the fourth count to pay a fine of \$50, and to be imprisoned in jail for 30 days. During the trial the defendant objected to the admission in evidence of certain exhibits offered by the state, but the court overruled the objections, and admitted the evidence. The errors assigned upon this appeal are: First, the admission of the exhibits in evidence; and, second, the overruling of the motion in arrest.

The claimed errors relating to the admission of the exhibits in evidence were not pressed before this court, and with respect to them it is perhaps enough to say that the rulings upon evidence complained of were right. With reference to the overruling of the motion in arrest, we are of opinion that it was properly overruled.

The first ground of arrest stated in the motion is not tenable. The offenses charged in the first and fourth counts of the information were committed prior to the time when chapter 331 of the Public Acts of 1895 went into effect, and when committed were punishable under section 3087 of the General Statutes. They remained punishable under that section, notwithstanding the fact that the conviction of the defendant occurred after the aforesaid act of 1895 took effect; for that act only affected offenses committed after it took effect, and did not affect the punishment for the offenses of which the defendant was convicted. *State v. Sanford*, 67 Conn. 283, 34 Atl. 1045; Gen. St. § 1.

The third ground of arrest is equally untenable. The offense of selling spirituous and intoxicating liquors without a license therefor may, of course, include the previous owning and keeping them with intent to sell without a license; but the offenses are nevertheless distinct offenses. The offense of an illegal

sale may be committed without a previous owning and keeping of the liquors sold with intent to sell them without a license therefor (State v. Wadsworth, 30 Conn. 55); and, of course, the latter offense may be committed without an actual illegal sale. The defendant's claim upon this point is based upon the assumption that the record shows that the charge of selling in the first count, and the charge of owning and keeping with intent to sell in the fourth count, are based upon one and the same transaction, namely, the sale of certain liquors without a license, which liquors, prior to and up to the time of said sale, he had owned and kept with intent to sell without a license. If this assumption were well founded, the record would present a different question from the one we are here called upon to consider; but the assumption is not well founded, and the claim based upon it falls with it. It is true, the information alleges that the offenses were committed on the same day, and in the same town; but from this it by no means necessarily follows that they were committed at the same time, or that the act or acts which constituted the one formed any part of the act or acts which constituted the other. For aught that appears of record, the one may have been committed at one time and with reference to certain liquors, and the other at an entirely different time and with reference to other liquors; and, for aught that appears to the contrary, this may have been the precise state of facts proved. This ground of arrest was properly overruled.

This leaves for consideration the second ground of arrest relating to the sufficiency of the fourth count of the information. That count alleges: "That heretofore, to wit, on the 9th day of July, 1895, said Matthew Ryan, of said town of Putnam, in said Windham county, with force and arms, without having a license therefor, did own and keep certain spirituous and intoxicating liquors, with intent to sell and exchange the same, against the peace and contrary to the form of the statute in such case made and provided; and that at a justice court holden in the town of Putnam on the 12th day of March, A. D. 1895, before Charles H. Chesebro, Esq., justice of the peace for said county, a court having jurisdiction of said offense, said Matthew Ryan was convicted of a similar offense charged in this count of this information, and that the judgment of said conviction has never been annulled, reversed, or set aside, and that in consequence thereof the offense herein charged in this count is a second offense by the said Matthew Ryan of owning and keeping spirituous and intoxicating liquors, with intent to sell the same, against the peace, and contrary to the form of the statute in such case made and provided." It may be conceded that this count is not drawn as a careful and skillful pleader would have drawn it, and it may well be that it would not have withstood the test of a demurrer, had one been interposed; but the question here is whether this count is sufficient after verdict,

upon a motion in arrest of judgment. The defect alleged and relied upon in the motion is, in substance, that the first offense is not described with that degree of certainty which is required by the rules of pleading, and therefore the count as a whole is defective. Where, as in this fourth count, the offense attempted to be charged is what is known as a "second offense," the existence of a first offense is, of course, one of the essential elements of the charge, and must be alleged in some way, or the charge will be fatally defective, not only upon demurrer, but also upon a motion in arrest of judgment. In the case at bar it is not claimed that the allegation of a first offense is entirely omitted, but only that it is not alleged with the certainty required by the rules of pleading; and this may be conceded. That the defendant committed a first offense at all is only charged indirectly and inferentially, and the description of that offense is somewhat ambiguous and uncertain; but still the commission of a first offense is charged, and the nature of that offense is described, however imperfectly and defectively. It is a case where there is a defective statement of an offense, rather than a case where a defective offense—i. e. no offense at all—is stated; and the question is whether such a defective statement is cured by verdict. It is clear that in civil causes certain defects are cured by verdict (Gould, Pl. c. 10, §§ 1-25); and the rules upon this matter are the same in criminal as in civil causes (State v. Keena, 63 Conn. 329, 28 Atl. 522; Heymann v. Reg., L. R. 8 Q. B. 102; State v. Freeman [Vt.] 22 Atl. 621). One of the general rules upon this subject is that laid down by Lord Mansfield in *Rushton v. Aspinall*, Doug. 669, the substance of which is usually stated as follows: A verdict cures the statement of a title defectively set out, but not the statement of a defective title. The principle at the foundation of this rule is that in support of a verdict the court will presume any fact to have been proved upon the trial. The existence of which was involved in or was inferable from the proof of those facts which were alleged, and which the verdict has found. Gould, Pl. c. 10, § 20. "The rule is based upon the supposition that the facts which are not specifically alleged are presumed to have been shown upon the trial, and therefore the defendant is not harmed, and should not be permitted 'in the last stage of a cause to unravel the whole proceedings,' by an objection which might have been fatal if early interposed." Taft, J., in *State v. Freeman*, supra. In *Heymann v. Reg.*, supra, the offense was complete if the persons charged had agreed and conspired to remove certain goods "in contemplation of an adjudication [in bankruptcy] being obtained"; otherwise there was no offense. The indictment did not allege that the conspiracy was formed in contemplation of such an adjudication, but only that the defendant, "then being a trader, and liable to become a bankrupt," conspired with others to remove the goods. After verdict it was held that the

allegation that the conspiracy was formed in contemplation of an adjudication being obtained, though not expressly made, must be taken to have been proved to the jury, and that the defect was cured by the verdict. In *Newton v. Brown*, 49 Vt. 16, the general allegation of a conspiracy to cheat, swindle, and defraud by false and fraudulent representations was held sufficient after verdict, as it would be presumed that particular acts constituting the conspiracy were proved on the trial. In *State v. Freeman*, supra, a complaint for profane swearing alleged that the defendant "did profanely curse," without setting forth the language used. Upon a motion in arrest it was held that the verdict cured the defect. In *State v. Wolfarth*, 42 Conn. 155, 157, the complaint was made and signed on the 26th of August, 1874, and the offense charged was alleged to have been committed on the 30th of August, 1874, and the court said: "It is laid down, it is true, that the offense should not be alleged to have been committed on an impossible day, or on a future day. But we think the objection should be taken specifically, either before trial by special demurrer, or on the trial by exception to evidence if proof is offered of an offense committed after the filing of the complaint. If the party goes through with the trial without objection, and a verdict is rendered against him, it will be presumed that the prosecution proved the offense to have been committed on some day prior to the date of the complaint." In *Wall v. Toomey*, 52 Conn. 35,—an action for malicious prosecution, wherein the fact that the vexatious suit had terminated (an essential fact) was not alleged,—it was held that this defect was cured by verdict. We are of the opinion that the defects in the fourth count of the information set forth in the motion in arrest were cured by the verdict. There is no error. The other judges concurred, except **ANDREWS, C. J.**, who dissented on the last point.

LAUFER v. BRIDGEPORT TRACTION CO.

(Supreme Court of Errors of Connecticut. Jan. 14, 1897.)

TRIAL—INTRODUCTION OF EVIDENCE—EXPERT EVIDENCE—ELECTRIC CARS—UNDUE SPEED—USE OF STREET—CONTRIBUTORY NEGLIGENCE.

1. Where, in an action against a railroad company, defendant introduces witnesses who had made reports as to the accident, and plaintiff calls for such reports, that fact does not make it obligatory on him to put them in evidence.

2. In an action for injuries caused by an electric car, experts in the management of such cars may be asked as to the management of the car which ran into the plaintiff.

3. Pub. Acts 1893, c. 169, § 13, conferring on local authorities power to regulate the speed of electric cars, with a restriction that a greater rate than 15 miles an hour should not be allowed, was not a ruling that any rate of speed less than that could not be considered reckless.

4. An electric street-railway line has no right to the use of the street as a highway superior to that of a person driving on such highway.

5. Where a driver of a wagon is on the wrong side of a street, on the track of an electric car which is approaching him, and knows that another car is approaching from behind, and that it is so far away that, if it goes at its ordinary rate of speed, he can safely cross to that side of the street, he is not negligent in so doing, and in assuming that the car would not be run at a dangerous rate of speed.

Appeal from superior court, Fairfield county; George W. Wheeler, Judge.

Action by Anton Laufer against the Bridgeport Traction Company for injuries received by a collision with an electric car while crossing a drawbridge over a river forming a part of the highway on which the said defendant had laid its double-track trolley railway. Judgment for plaintiff for \$1,500, and defendant appeals. No error.

Stiles Judson, Jr., for appellant. Alfred B. Beers and Edward F. Hall, for appellee.

ANDREWS, C. J. The plaintiff, while driving in a one-horse wagon across the Congress street drawbridge, in the city of Bridgeport,—a much-traveled highway in that city,—was run into by a car of the defendant, and seriously injured. He brought this suit to recover for that injury. The defendant suffered a default, and there was a hearing in damages. The court found that the defendant was negligent, that the plaintiff was not negligent, and assessed the damages to him at the sum of \$1,500. These findings are conclusive, and cannot be disturbed unless some error by the trial court has vitiated them. The defendant has appealed to this court, and has assigned very many errors,—some in respect to the admission of testimony, some in respect to the findings of negligence by the defendant, and others in respect to the finding that there was no contributory negligence by the plaintiff. The assignments in respect to evidence can be readily disposed of. The defendant introduced as a witness a Mr. Malone, one of its conductors, who was a passenger on the car that ran into the plaintiff, and a Mr. Stroh, another of its employes. They testified in relation to the collision. On cross-examination it appeared that they had each made a written report of the accident to the defendant at the time it occurred. The plaintiff asked that these reports be produced. The defendant refused to do so, and thereupon the court ordered them to be produced, and they were brought into court. The plaintiff offered in evidence only two statements from the report of Mr. Malone, and did not offer the report of Mr. Stroh at all. The defendant asked that the plaintiff be required to lay in the whole of both reports. The court denied the request. The defendant then claimed the right to lay in the whole of both reports as a part of its own evidence. The court overruled the claim, but ruled that the defendant might lay in any part of the report of Mr. Malone in relation to the matters contained in the statements

which the plaintiff had put in. We think these rulings were correct. The mere calling for a paper or writing does not make it obligatory on the party to put it in evidence. 1 Phil. Ev. (Cow. & H. Notes) 441. As to the report made by Mr. Malone, if the whole of it in fact related to the same matter to which the two statements laid in related, then the whole was admissible, under the ruling, and the defendant was not harmed by it. In the case of *Kenny v. Clarkson*, 1 Johns. 386, 394, Spencer, J., in giving the opinion, says, "It appears to me that the notice to produce a paper, and calling for its inspection, ought to be considered as analogous to a bill for discovery, where most certainly the answer is not evidence but for the adverse party." *Sayer v. Kitchen*, 1 Esp. 209; *Kidder v. Barr*, 35 N. H. 235. The plaintiff called as witnesses Mr. Radel, the president of the defendant, and Mr. Kehr, its inspector, each of whom is an expert in the management of an electric railway car, and interrogated them as to the management of the car which ran into the plaintiff. We think this testimony was admissible, because it showed to the court what sort of management of an electric car would be reasonable.

A Mrs. Barnes testified, as did also a Mr. Conger, in behalf of the plaintiff, that the car which ran over the plaintiff was moving very rapidly on the same trip at other places than on the drawbridge. It was the claim of the plaintiff that this car on this trip was behind schedule time, and was trying to make up. This testimony tended to establish that claim. The testimony of Mr. Victory that it was the custom and practice to have but one car on the bridge at a time was properly ruled out. The defendant could not show that it was not negligent on this occasion by proving that it was prudent and careful on other occasions. *Morris v. East Haven*, 41 Conn. 252; *Russell v. Cruttenden*, 53 Conn. 564, 4 Atl. 237. Moreover, it was not claimed that such practice was known to the plaintiff, nor was there any offer to show such knowledge. The rulings upon the inquiry made of Mr. Bradley and the one of Mr. Phillips were correct. Even if incorrect, they did the defendant no harm.

The defendant asked the court to hold that the legislature, by section 13, c. 169, Pub. Acts 1893, had established 15 miles an hour as the maximum rate of speed for electric cars in any town or city street, and that any rate of speed less than that could not be considered a reckless rate. The court did not so hold. We think the court held rightly. The legislature by the section named did not undertake to fix any rate of speed for electric cars. It conferred power on local authorities to regulate the speed of such cars in their streets, with the restriction that a greater rate than the one named should not be allowed.

So many of the assignments as go to the weight of evidence, this court cannot con-

sider. Whatever view is taken of chapter 100, Pub. Acts 1893, it could not affect this case, as all the evidence is not certified up. Those assignments which refer to the admission of evidence, we have passed on. All the others are intended to be included, and are considered, so far as it is necessary to consider them, in the remaining part of this opinion. Of these, there are various assignments in respect to the finding of the court that the defendant was negligent. These proceed on the assumption that the court required of the defendant a higher degree of care than the law requires. There are various other assignments in respect to the finding of the court that the plaintiff was not guilty of contributory negligence. These proceed upon the assumption that the court required of the plaintiff a less degree of care than the law requires. If the claim of the defendant in either of these classes of assignments is correct, then there is error in the judgment, and it must be set aside. *Morrissey v. Bridgeport Traction Co.*, 68 Conn. 215, 35 Atl. 1126; *Nolan v. Railroad Co.*, 53 Conn. 461, 472, 4 Atl. 106; *O'Neil v. Town of East Windsor*, 68 Conn. 150, 27 Atl. 237.

In the defendant's argument there is one claimed rule of law underlying it, which runs all along through, and upon the correctness of which its claims upon both these classes of assigned errors must stand, if they can be sustained at all. The court had held that the plaintiff had the same right to drive his wagon in Congress street that the defendant had to propel its cars there; that the defendant had no right to the use of the street as a highway superior to that possessed by the plaintiff or any other traveler. To this rule the defendant objected, and in its brief the objection is stated in this way: "We complain that the court, in weighing the conflicting evidence in this case, denied to us the benefit that arises out of the proposition that the defendant's right to the use of that portion of the highway occupied by its tracks was superior to that of *Laufer's* at the time he turned over upon the east-bound track." All the assignments of error in the two classes which we are now considering are framed upon the theory that the proposition so stated is correct in the law. If, on the other hand, the rule applied by the court is the right one, then the defendant has nothing in this part of the case of which it can justly complain. In its argument the defendant has sought to enforce the correctness of its proposition in various ways, and to strengthen it by the citation of authorities. In some parts of the argument it is stated as though the defendant, as a corporation, had a superior right in the highway over other travelers. This claim cannot be supported, as the charter of the defendant gives it no such superior rights. Its charter authorizes it to lay its tracks in the streets, and to run its cars over them for the carrying of passengers, but gives no rights

in the streets greater than an omnibus company engaged in the same business would have. The streets of Bridgeport are public highways. They have been made such by appropriate proceedings. Every traveler has an equal right therein, and to every part thereof, with any other traveler. The legislature could not give to the defendant any right superior to that of other travelers in any part of a public highway, even if it should make the attempt, without providing that such superior right should be taken by condemnation, and the payment of damages to the landowner. It is sufficient for the present purpose to say that it is not claimed the legislature has attempted to do any such thing. In other parts of the argument the claim is stated as though a car of the defendant, while passing along a street, had a right upon its tracks superior or paramount (the latter word being used in the sense of the former) to that of other travelers. But if the defendant, as a corporation, has no right in the street superior to that of any other traveler, it is certain that one of its cars has no such superior right. Congress street, in the city of Bridgeport, is a public highway. It is such a highway because, and only because, every traveler has an equal right in it with every other traveler. If a car of the defendant has in that street any right superior to the right of the humblest person who has occasion to travel in it, then it is not a highway. A highway is a public way open and free to any one who has occasion to pass along it on foot, or with any kind of a vehicle. In every highway the king and his subjects may pass and repass at pleasure. 3 Bac. Abr. 494; Holt, C. J., in *Reg. v. Saintiff*, 6 Mod. 255; 4 Vin. Abr. tit. "Chimin Common"; 1 Swift, Dig. 106; 3 Kent, Comm. *432; Ang. Highw. §§ 1, 2; *Harding v. Medway*, 10 Metc. (Mass.) 460; *State v. Harden*, 11 S. C. 360, 368. The late Chief Justice Butler, in a case tried a few years before his death, where a collision in a highway between a heavily loaded team and a light wagon was the subject of inquiry, charged the jury in this way: "In the actual use of a common and public highway, every person has an equal right to use it for his own best advantage, to suit his own convenience or pleasure, but at all times with a just regard to the like rights of every other person. So far as rendering himself liable to damages is concerned, a man may drive fast or slow, with a light wagon or with a loaded team, with a well-broken horse or with an ill-broken one, along a crowded thoroughfare as well as a vacant street, provided he does not interfere with the just rights of any other person. If a man wishes to drive fast, he must do so with respect to the rights of those who drive slow. If he desires to drive slow, he must do so with respect to those who desire to drive fast. The loaded team and the light wagon must each pay a due regard to the rights of the other.

If one drives in a crowded street, he must exercise reasonable care not to endanger other travelers. If he drives an ill-broken horse, he must keep it so well in hand as not to expose others to unreasonable hazard." This is an accurate statement of the law, when applied to the different forms which travel in a highway may take. At that time electric street cars were not known. But the rule so given has only to be extended a little to include such cars. They have a common right in the highway with every other traveler, and they must be so managed as not to interfere unreasonably with the like rights of others. Every person, in the use of a highway, is bound to use it with reasonable care. A traveler and a railroad company, when using a public highway in common, must each look out for the presence of the other,—the one, to avoid being injured; the other, to avoid inflicting injury. *Hanlon v. Railway Co.*, 104 Mo. 382, 16 S. W. 233. The strongest case cited by the defendant on this part of its argument is *Ehrisman v. Railway Co.*, 150 Pa. St. 180, 24 Atl. 506, where it is said that the electric car in the street has a superior right over that of the traveling public. But in what the superior right consists is explained in another part of the opinion, i. e. that it is the duty of a foot passenger, or of one using a horse and wagon, to afford the car an undisturbed passage along its track; that is to say, that the car should be allowed the preference, in passing along on its track, over other travelers. This duty is no more than the application of the rule of reasonable care. In the exercise of reasonable care, it would be the duty of a foot passenger or of the light wagon to turn out of the way of the car with all reasonable quickness, so that the car would have an unobstructed passage. The car, from its weight, size, and the character of the track on which it runs, cannot turn out; and so reasonable care requires the traveler, who can readily turn out, to do so, and that the car, which cannot turn out, shall be so managed as to afford such traveler a reasonable opportunity for that purpose. An electric car has no paramount right in the street, if "paramount" means that it has a greater right than others who are in the street. "Whenever a wagon or other vehicle is on the track in advance of a car, it is bound to get out of the way, and not obstruct the passage of the car." *Railway Co. v. Whitcomb*, 66 Fed. 915, 920. "The public have the right to use these tracks [the street-railway track] in common with the railway companies, and * * * it is the duty of passenger railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence upon their own part, may not at the moment be able to get out of the way of a passing car." *Gilmore v. Railway Co.*, 153 Pa. St. 31, 33, 25 Atl. 651. "The citizen has the same privilege to use the street for travel that the street-railway com-

pany has for propelling its cars thereon; and the railway company has, apart from its franchise to lay its rails, no right to the use of the street as a highway superior in any degree to that possessed by the humblest individual. The franchise to lay its rails upon the bed of a public street gives to the company no right to the exclusive use of that street, and in no respect exempts it from an imperative obligation to exercise due and proper care to avoid injuring persons who have an equal right to use the same thoroughfare. It is bound to take notice of, recognize, and respect the rights of every pedestrian or other traveler; and if, by adopting a motive power which has increased the speed of its cars, it has thereby increased, as common observation demonstrates, the risks and hazards of accident to others, it must, as a reciprocal duty, enlarge to a commensurate extent the degree of vigilance and care necessary to avoid injuries which its own appliances have made more imminent." *Cooke v. Traction Co.*, 80 Md. 551, 554, 31 Atl. 327. "The right of the railway in the street is only an easement to use the highway in common with the public. It has no exclusive right of travel upon its track, and it is bound to use the same care in preventing a collision as is the driver of a wagon or other vehicle." *Rascher v. Railway Co.*, 90 Mich. 413, 51 N. W. 483. "Although, as has been seen, the public have a right to use the whole of the street for travel, and the fact that a portion of it is occupied by the tracks of a street-railway company does not deprive them of this right, and they can exercise it in common with the street railways, yet there is this exception: that, as the street-railway car cannot leave its track to turn out, it has a paramount right to use that portion of the streets covered by its tracks, but only in so far as that it is the duty of the other teams or travelers to turn out in reasonable time to allow the electric car to pass and avoid accident. The motor-man of a car, however, if he sees that the traveler is not turning out, must, on his part, do what he can in the way of stopping the car to avoid collision." *Crow. Electricity*, § 741; *McGee v. Railway Co.*, 102 Mich. 107, 112, 60 N. W. 293; *Montgomery v. Railway Co.*, 103 Mich. 46, 61 N. W. 543; *Beach, Contrib. Neg.* § 89; *Adolph v. Railroad Co.*, 65 N. Y. 554; *Barker v. Savage*, 45 N. Y. 191; *Belton v. Baxter*, 54 N. Y. 245; *Quinn v. Railroad Co.*, 134 N. Y. 611, 31 N. E. 629; *Carr v. Railway Co.*, 163 Mass. 360, 40 N. E. 185; *Railroad Co. v. Hanlon*, 53 Ala. 70, 81; *Shea v. Railroad Co.*, 44 Cal. 414, 428.

We think the word "superior" or "paramount," when used in the cases cited by the defendant as descriptive of the rights which an electric car has in a street, means no more than is said in the quotation from *Crowwell on Electricity*; that is, that the right which such a car has in a street is only that other travelers shall turn off from its track

in reasonable time to allow it to pass, but that the car itself must be so managed as not to do any unreasonable injury to other travelers, and must be stopped if it appears that the other traveler is not turning out. And then the difference between those cases and the cases cited by the plaintiff is in the form of expression, and not of real meaning. All the cases then mean the same thing; that is, that the right which an electric car has in a highway is not in its nature higher than the right of other travelers, but is a common right with the others, in the exercise of which the electric car and the other traveler shall so conduct themselves as not to interfere unreasonably with the just rights of each. *Butler, C. J.*, in the passage above quoted, said that, in the exercise of their common right in a highway, "the loaded team and the light wagon must each pay a due regard to the rights of the other." So the electric car and the other traveler must each pay a due regard to the rights of the other in the exercise of their common right to use the highway. We are very clear that the defendant's argument in this behalf cannot be sustained, and that the court committed no error in holding that the right of the defendant in Congress street at the time of the accident was, in contemplation of the law, no greater than the right of the plaintiff.

The trial judge, in his memorandum of decision, which is also made a part of the finding, sets forth his conclusions in this way: "Since we are to apply to the circumstances existing when *Laufer* began to turn in upon the east-bound track the test of whether his conduct was that of a reasonably prudent man, we ask first whether the apparent danger, which *Laufer* believed to be imminent and present, and the belief in which caused him to turn upon the east-bound track, ought to be taken into consideration. Unquestionably, the standard of conduct by which he is to be governed is met by placing a reasonably prudent man in *Laufer's* place, confronted with the same situation he was, and then determining whether his conduct would coincide with that of *Laufer*. In the case of *Connelly v. Railway Co.*, 56 N. J. Law, 701, 704, 29 Atl. 438, the court, speaking of the conduct of a traveler in crossing an electric railway track, said: 'If other vehicles threaten his safety, or if his attention is engrossed or distracted by the apparent imminence of danger from other sources, he must act with ordinary prudence with reference * * * to the group of circumstances that makes up the situation by which he is confronted. How a prudent man would act in the face of concurrent and distracting dangers must, in the nature of things, be a question of fact to be passed upon by the jury, and not a question of law, upon which the court may order a nonsuit or direct a verdict.' In the case before us the prudent man is confronted by the fact that he is on

the wrong side of the street, on the track of the west-bound car, which was approaching him, and about 200 or 250 feet away. He knows that the east-bound car is approaching behind him, and that it is so far away that, if it goes at its ordinary rate of speed, he can safely cross to the right side of the street. He had a right to expect that the car would not be run at a dangerous rate of speed over the draw. *Creamer v. Railway Co.*, 156 Mass. 320, 31 N. E. 391. He hears no gong rung by the east-bound car. He does not know that the west-bound car will stop at the draw, but believes that it is going to cross the draw. Under such circumstances, would not the average man of prudence be reasonably apprehensive of danger from the west-bound car, and yield to his first impulse to get out of the way of that approaching car, and would he not be justified, upon these facts, in concluding that his only place of safety was on the east-bound track? We think that a reasonably prudent man would, in the hurry and fright of the moment, have done the very thing that Laufer did; and we cannot hold him guilty of contributory negligence, when we think he acted, under the circumstances, as a reasonably prudent man might have acted." In every case where the inquiry is whether or not a party has acted with due care, the trier must apply the standard of the ordinarily prudent man. *Farrell v. Railroad Co.*, 60 Conn. 239, 21 Atl. 675, and 22 Atl. 544. What would a man of ordinary prudence have done, situated as this party was? And, in answering that question, it is the duty of the trier to take into consideration every known circumstance which might rightfully or reasonably have influenced his conduct in that situation. The defendant insists that, in applying the standard of the prudent man to the conduct of the plaintiff at the time and as set forth in the above citation, the trial court required of him a less degree of care than the law requires. One specification claimed to show this calls for notice. The court says that "Laufer was on the wrong side of the road." The defendant argues that there could be no wrong side of the road, as respects an electric car, and that the court, in taking that idea into consideration, gave the plaintiff the benefit of an exculpatory circumstance to which he was not entitled; that the "law of the road" has no application to the meeting or passing of vehicles and street cars. Whether or not this last claim is correct, we do not now consider. There is, however, a law of the road—a right side and a wrong side of the road—as to all private vehicles, established by universal usage. It is altogether likely that Laufer knew nothing of the law of the road as found in the statutes or in the decisions of the courts. He did know of the universal usage of all wagons to turn to the right. He was in a wagon. There was a wrong side and a right side of the road, as to him. And, in search-

ing for the influences which might reasonably have affected his conduct at that time, this usage seems a very probable one. He did not know that the west-bound car was going to stop. As affecting his conduct, that car was not going to stop at all. He had no time for deliberation. He was compelled to act at once, or abide the consequences of a serious and perhaps fatal collision. It would seem unreasonable to hold that Laufer should, under such circumstances, remember and act upon any distinction in this respect between an ordinary wagon and a street car. But the whole discussion on this part is made unnecessary by the further fact stated in another part of the finding, that the draw-bridge was so narrow that Laufer could not possibly have turned to the left. His only way to escape the collision was to turn to the right, as he did. There is no error. The other judges concur, except BALDWIN, J., who dissents.

STATE ex rel. SULLIVAN v. LONGDON.
(Supreme Court of Errors of Connecticut. Feb. 23, 1897.)

MUNICIPAL OFFICERS—APPOINTMENT BY COMMON COUNCIL—APPROVAL BY MAYOR.

The appointment of members of the police force by the common council of Putnam, pursuant to the power conferred by the city charter (Sp. Acts 1895, p. 256) § 29, is not a "vote, resolution, order, or ordinance" * * * passed by said common council," within section 18, requiring the same to be transmitted to the mayor for approval or veto.

Appeal from superior court, Windham county; Robinson, Judge.

Information in the nature of quo warranto, on the relation of James Sullivan, against William H. Longdon, to determine the validity of respondent's appointment as captain of police. A motion to quash the information was granted, and relator appeals. Affirmed.

William C. Case and William S. Case, for appellant. Edward D. Robbins and John F. Carpenter, for appellee.

FENN, J. The sole question in this case is whether the superior court erred in holding that, under the charter of the city of Putnam (Sp. Acts 1895, p. 256), an appointment by the common council of a captain of police is not reviewable by, and subject to the veto of, the mayor. The establishment and maintenance of the Putnam police department is provided for by the charter, in section 29, as follows: "There shall be maintained by said city of Putnam a police department for the preservation of public peace and good order within the territorial limits of said city and of the jurisdiction of the city court of said city. The force of said police department shall consist of a captain and such number of patrolmen as the common council shall from time to time deem to be necessary, and by ordinances, by-laws, or orders, shall prescribe and provide

for. The members of said force shall be appointed by the common council, who shall fix the salary, wages, or compensation of whatsoever kind, which they shall receive for services on said force, which shall be in lieu of all other fees and compensation." It is provided in section 18 that "every vote, resolution, order, or ordinance, except such as relate to the organization of the common council, to its own officers or employes or to the declaration of a vacancy in the office of mayor, passed by said common council, shall be transmitted to the mayor, who shall either approve it within six days, in which case it shall become operative and effectual, or disapprove it, in which latter case he shall return it to said body at or before its next regular meeting with a statement of his objection, in writing, and after such statement has been read in said common council said common council shall proceed to reconsider its former vote on said measure. If, after such reconsideration, the common council shall again pass it by a vote of not less than six of all its members, said vote being determined by yeas and nays, it shall become operative and effectual without the approval of the mayor, otherwise it shall be of no effect. If the mayor shall refuse or neglect to signify his approval or disapproval of said measure so transmitted to him within six days after its reception, said measure shall become operative and effectual as though approved by him." Section 21 of the charter prescribes: "All elections and appointments to office, or to any position within the appointing power of the common council, which includes all elections and appointments not conferred by this charter on the electors of said city and on the mayor, shall be made by a majority of ballots cast in the common council, the mayor having a vote only in case of a tie. The officers to be appointed in accordance with this section are the city clerk, the chief engineer of the fire department, two assistant engineers of the fire department, a health officer, and a superintendent of streets, sidewalks, and sewers, all of whom shall receive such compensation for their services as may be fixed and prescribed by the common council."

It is the claim of the appellant that section 21, above quoted, names in detail the officers subject to its provisions, and that of police captain is not mentioned. It is urged, therefore, that this part of the charter should be dismissed from consideration. But it is claimed that, however this may be, the broad language used in section 18, also above quoted, disposes of the matter. It is said, and truly, that if the action in question is outside the operation of this section, it must be for one of two reasons: (1) It either comes within one of the classes of votes, etc., specifically excepted by the language of the section; or (2) it is not a vote, etc. We adopt the appellant's claim in reference to section 21 as correct. But considering section 29 in connection with section 18, we think the appointment by the common council of members of the police

force an "executive act" (*State v. Barbour*, 53 Conn. 76, 85, 22 Atl. 686), not a "vote, resolution, order, or ordinance passed [a seemingly legislative act] by said common council," within the meaning of section 18. The entire language of section 29 appears to us to be in support of this conclusion. The "vote, resolution, order, or ordinance" is called a "measure" which is to be transmitted to the mayor, approved or disapproved. If disapproved, the council may reconsider, what? Not its vote, but its "vote on said measure." They may "again pass it" by "yeas and nays," and so throughout. Although, as stated, we adopt the appellant's claim in reference to section 21, yet it seems probable that the draftsman intended in that section to provide for all appointments to any position within the appointing power of the common council, and believed, but erroneously, that he had done so. There are difficulties in the way of construction, such as suggest those sometimes encountered in efforts to discover the meaning of testators who use peculiar, inapt, and inconsistent expressions in their wills. Fortunately in this case, as in such cases, precedents do not largely fetter, nor will the present decision be likely to form a precedent to affect the interpretation of identical provisions in any future charter. There is no error. The other judges concurred.

In re HINE et al.

(Supreme Court of Errors of Connecticut. Feb. 23, 1897.)

CONTEST OF WILL—UNDUE INFLUENCE—EVIDENCE.

1. On a contest of a will on the ground of undue influence, it appeared that proponent had for some years taken charge of testatrix's affairs; that he had compromised a note due her by an estate of which he was administrator for 25 per cent. of its face. *Held*, that evidence was admissible to show that he acted in the matter pursuant to the advice of counsel, and to explain what was done in consequence of such advice.

2. Where the mental capacity of testatrix was in issue, evidence that the boys on the street used to make fun of her was inadmissible.

3. Where a witness is asked whether he remembers certain facts as occurring on a preliminary examination, and testifies that he does not remember them, a further question, asking him to explain how they occurred, was inadmissible.

4. It is error for an attorney in his argument to express regrets that the court should have excluded certain evidence from the jury.

Appeal from superior court, New Haven county; Shumway, Judge.

From an order approving a certain instrument as the last will and testament of Sarah R. Hine, contestants appeal to the superior court, and, from a verdict for the appealing heirs, Treat R. Hine appeals. Error.

The case is sufficiently stated in the opinion.

Charles S. Hamilton and James H. Webb, for appellant. William H. Williams, for appellees.

FENN, J. This case comes before us upon a motion for a new trial for a verdict against evidence, and also by an appeal from the judgment of the superior court, based upon the verdict of a jury in favor of the contestants of the will of the late Sarah R. Hine, of Milford, in this state. So far as the motion for a new trial is concerned, for substantially the same reasons stated by us in the very recent case of *Brooks' Appeal*, 68 Conn. 294, 296, 36 Atl. 47, and in *Johnson v. Norton*, 64 Conn. 184, 29 Atl. 242, it should, we think, be denied. The appeal assigns 36 reasons,—23 relating to rulings upon evidence, and 13 regarding the charge to the jury. There is but a single portion of such charge to which we deem it necessary to allude specifically. The court said: "An intelligent person in making a will in anticipation of death, and thereby attempting to make a proper distribution of her estate among her relatives and friends, will presumptively, if free and under no constraint or undue influence, act fairly, justly, and impartially, and will not make gross inequalities of disposition without cause or reason, and will probably use reasonable care and attention to see that her intended will expresses and carries out her real intention, so as to provide for and protect the natural objects of her bounty; and if the writing executed as a will be unfair, unjust, and partial in a large degree, or there be gross inequalities of gifts to those standing in the same relation to the deceased, without reason, such facts should be weighed and considered by you in determining whether the paper writing in its several parts is the real and true will of the deceased, or whether such paper writing is really the expression, in its several parts, of the will and mind of some other person or persons acting through the deceased and controlling her mind and will." Standing alone, the above expressions might, perhaps, have a tendency to convey an erroneous impression to the jury, and so do injustice to the proponent, as indicating the existence of a presumption favorable to the contestants' claims, which we are not prepared to approve as correct. But when the language above quoted is taken, as it should be, in connection with what precedes and what follows in the statements made in the charge, we have concluded that there is no just and sufficient cause of exception on this ground; and that the charge, taken as a whole, presented the law and the facts to the consideration of the jury, fully, fairly, and properly.

There are also many of the assignments of error relating to evidence which may be passed without comment, as they concern matters of little importance, or are peculiar phases in the presentation of the case which will be in nowise likely to repeat themselves upon another trial, which must be granted. We will therefore confine our attention mainly to those matters upon which our present decision depends. Upon the trial the con-

tants claimed to have proved that the testatrix, who died in April, 1894, unmarried, and at about the age of 56 years, had from her childhood been of exceedingly weak mind, wholly incompetent to transact business, and very largely dependent upon others for aid, advice, and direction in regard to the conduct of her affairs; that for many years prior to April, 1887, her mother had had the entire charge and direction of her affairs; that upon the decease of the mother in April, 1887, George F. Platt, of Milford, was appointed her (the mother's) executor, and then took charge, not only of the mother's estate, but also took charge of the bank books, effects, and affairs of the testatrix, Sarah R. Hine, and from that time forward to her decease had the entire charge and conduct of her affairs, attending to the drawing of money from the savings banks, and paying for supplies furnished the testatrix, and from time to time dealing out to her sums of money, so that soon after he had so taken charge of her affairs she became wholly dependent upon him in regard to the expenditure of her money, and in regard to the purchase of any articles desired by her, and also depended and relied upon him implicitly for advice and direction in regard to the conduct and the management of her affairs; that in January, 1891, at the instance of Frank E. Hine, a nephew and one of the contestants, and of the other relatives, two of the three selectmen of the town of Milford made application to the court of probate for the district of Milford, for the appointment of a conservator over the testatrix, Sarah R. Hine, to take charge of her affairs under the statute; that said George F. Platt and his wife, Elizabeth, who were cousins of the testatrix, were very much displeased and angered because of the application for such conservator, and regarded the contemplated project as a serious reflection upon his integrity, and upon his conduct and management of the affairs of the testatrix; that the contestants, together with Treat R. Hine, Abel R. Hine, Frank E. Hine, and his sister, Cornelia H. Buddington, children of a deceased brother, Elijah R. Hine, were the heirs at law of the testatrix, and soon after the institution of the proceedings for the appointment of a conservator both Mr. and Mrs. George F. Platt began to importune the testatrix to make her will, and to exclude from her will the nephew, Frank E. Hine, and his sister, Cornelia; that, in consequence of the undue influence of the said Platts and others, a will dated July 25, 1891, was prepared and executed; that subsequently the said George F. Platt and his wife, as well as others interested therein, unduly persuaded her to execute the will in question, dated July 7, 1892; that at the time of the execution of this will the testatrix was wholly incompetent to make a will, and was unduly influenced to make and execute said will. These claims were opposed by the proponent, but the counterclaims made do not

require to be stated for the purposes of this opinion.

Upon the cross-examination of the said George F. Platt, who was called as a witness for the proponent, it appeared that subsequent to the death of the mother of the testatrix, and after the witness had taken charge of the affairs of the testatrix, as aforesaid, he became the administrator of the estate of a Mrs. Hubbell, an aunt of the testatrix; that the estate was solvent, and that the testatrix held a note for \$2,000 against her aunt's estate; that he compromised and settled the note with her for \$500; and that so far as he knew she was relying on him in this transaction. In the course of said cross-examination counsel for the contestants inquired: "Sarah claimed that it was a note given to her for her services, didn't she?" This question was objected to, but the objection was overruled, and exception taken. Upon the redirect examination of the witness, he testified that in regard to said note he consulted Elix-Gov. Morris, whereupon counsel for the proponent asked the witness: "Q. And what did Judge Morris advise you in respect to that claim?" To which question counsel for the contestants objected, and the court sustained the objection, the proponent duly excepting; whereupon counsel for the proponent asked: "Q. And did you in fact act in that matter pursuant to the advice Judge Morris gave you?" This question was admitted against the objection of counsel for the contestants, and the witness said: "Partially; yes, sir, I—" And this further question was asked: "Q. Can you explain that answer?"—to which question counsel for the contestants objected, the court sustained the objection, the proponent duly excepting; whereupon counsel for the proponent inquired of the witness as follows: "Q. And from the advice which you received from your counsel, Judge Morris, I will ask you whether or not you regarded that claim as of any legal validity,"—to which question counsel for the contestants objected, and the court excluded the question, the proponent duly excepting; whereupon counsel for the proponent inquired of the witness: "Q. What advice did Judge Morris give you concerning the validity of that note as a claim against the estate of Mrs. Hubbell?"—to which question counsel for the contestants objected, and the court excluded the same, the proponent duly excepting.

It is said by counsel for the contestants in their brief, in support of the above rulings of the court, that the question, "Sarah claimed it was a note given for her services, didn't she?"—was proper, because "what she claimed, and her conduct in reference to the matter, as observed by the witness, was important as a test of her understanding and ability to grasp the real situation, as well as furnishing a very clear light upon the value of his opinion of her brightness, and as showing how completely he had her in his power." It is further

said that it was of no consequence whether the witness regarded that claim as of any legal validity. "The question was not as to how he regarded the claim, but as to what took place in this transaction between him and her, and what he actually did, and the effect upon the testatrix of his conduct, for the purpose of disclosing the light of her intellect, and how readily she yielded to him in the conduct of her important affairs." We cannot look at the occurrence in this way. It is very evident, from the whole record, that the claim upon which, above all others, the contestants relied in the trial, was that of the domination of the witness Platt over the testatrix, and the completeness with which "he had her in his power." Conceding that it was admissible to ask the question concerning her claim as to the note, for the purpose of showing this, how did it so indicate? Was it not by the inference that the claim made was correct; that here was a valid obligation for the valuable consideration of services performed, against a solvent estate, which should have been honored, and paid in full, but which, because the testatrix relied on the witness and he "had her in his power," he compromised and settled for one-fourth only of its value? Unexplained, this would indeed be most effective evidence for the contestants to the jury, and doubtless it was. It not only presented the testatrix to them as an incompetent person, capable of being dominated and imposed upon to the utmost degree, but—what was probably of even more importance to the contestants, and the main purpose of the line of inquiry—it exhibited the witness to them in the form of one destitute of principle, and of the character to exercise the undue influence which the contestants charged against him. It needs no argument to show that the answers to the questions propounded by proponent's counsel as to the advice of Judge Morris, and what was done in consequence of such advice, might, if allowed, have presented the conduct both of the testatrix and of the witness in a far different aspect; the former as acting prudently, with due intelligence and for her best interests, and the latter so dealing as to demonstrate that the reliance which the testatrix placed upon him was justified. It was because it might have so appeared that such answers were so persistently objected to, and it was for this reason that they should have been allowed.

One David L. Clark, called as a witness by the contestants, having testified to his acquaintance with the testatrix, being accustomed to see her on the street and in church, was asked, "Did you observe anything that attracted your attention in regard to her conduct as she was about the streets?" to which the witness answered, "I know the boys used to make fun of her." Counsel for proponent moved that the answer be stricken out, but the court denied the motion, and allowed the question and answer to stand, the proponent duly excepting. We think the court erred in

this. The fact stated was wholly irrelevant. Why the boys made fun of the testatrix does not and could not appear (and how the witness knew the fact does not). The inference that it was because of eccentricity or oddity, as exhibited by the testatrix, may be unfounded. But, if not, the act of the boys was but the expression in conduct of their opinion that she was eccentric or odd. This, if shown by proper evidence to exist, is not and should not be considered as insanity, delusion, or want of testamentary capacity. *Kinne v. Kinne*, 9 Conn. 102. But further, whether the boys' fun was made by words or by gestures, or both, matters not. The words, if repeated, would be hearsay. What would the conduct be? The contestants say: "Clearly it was a circumstance which reflected materially upon her mental caliber, and should not have been stricken out." It seems to us this is the very reason why it should have been. It did so reflect, but no rule of evidence justifies such reflection. Opinion evidence on mental caliber, from nonexpert witnesses, is admitted under certain conditions in this state. But surely such conditions were not quite complied with in this instance.

Upon the cross-examination of Judge William B. Stoddard, one of the subscribing witnesses to, and the draftsman of, the will in question,—he having testified upon such cross-examination, among other things, that, in the course of his interviews with the testatrix in regard to the preparation of said will, she had told him that she did not want her property to go to her brothers, for fear they would die without wills, and therefore it would ultimately go to the objectionable parties, referring to the niece and nephew aforesaid,—counsel conducting the cross-examination in behalf of the contestants called his attention to the fact, which he admitted, that he had testified in the court of probate when the will was offered for probate, upon the subject of his conversation with the testatrix at the time and in the course of the preparation of the will, and was uncertain upon that occasion whether he testified or was asked as to the testatrix having said anything to him as to what might become of her property in case she should leave it to her brothers; and thereupon the following two questions and answers occurred: "Q. You do remember, do you not, Judge Stoddard, that from first to last, in your examination in the court of probate, there was no hint of her having said anything about what might become of her property, if she had left it to her brothers, after they died? A. I do not remember that. Q. Can you explain how it could occur that that should be left out?" To this question counsel for the proponent objected, on the ground that the question was incompetent, and called for the mere opinion of the witness, and assumed as a fact that which had not been shown in evidence; but the court overruled the objection, and permitted the question, the proponent duly excepting. The question objected to, if proper

under any circumstances, could only be so upon the inference, which the contestants claim should be drawn, that the witness had admitted that he did not testify in the court of probate concerning the important matter stated by him in the superior court. But we can make no such inference. The statement of the witness was exactly contrary. He remembered no such condition of things as the first question suggested. The further question, therefore, violated the rule that questions must not assume facts to have been proved when there has been no evidence on the subject, nor that particular answers have been given when none such have been made. 1 Greenl. Ev. § 434; *State v. Duffy*, 57 Conn. 525, 18 Atl. 791. But it is said the questions could do no harm. Perhaps, but we are not so sure.

George F. Platt, the witness hereinbefore referred to, having testified that he had kept an account of his transactions with the testatrix, and that he had with him his books of account, they were offered in evidence by the contestants, but excluded upon objection made in behalf of the proponent. Subsequently, upon cross-examination, he was required to state in detail his transactions with the testatrix; and, the witness saying he was obliged to refer to his books in order to be accurate as to dates, character, and amounts of his transactions, counsel for proponent again objected to the introduction of the books of account; whereupon the witness was allowed to refer to said books and the entries thereon made at the time of the transactions therein recorded, for the purpose of refreshing his recollection, and proceeded to testify, giving, in effect, a transcript of his said books of account. In the course of the argument to the jury, counsel for the contestants alluded to the objection to the admission of the books, and expressed his regret that the jury could not have them in the jury room in order to examine carefully the details and character of the transactions between the witness Platt and the testatrix, instead of being obliged to rely wholly upon their memory of the testimony to the same effect, given by Mr. Platt. Counsel for the proponent objected to such expressions in the argument, but the court ruled that the comments of counsel did not transcend the proper limits of argument, to which counsel for proponent excepted. Although we might not be disposed to grant a new trial solely on account of the ruling of the court just referred to, it appears proper to say that, when evidence is excluded by the court, no very laudable end can be justly promoted by the regrets of counsel against whom the rulings were made, expressed to the jury, in argument, that such evidence was kept from them; and if it be true, as the superior court held, that such comments of counsel do not transcend the proper limits of argument (concerning which there may be more doubt than such court entertained),—but if it be true, it may be also correct that some suggestion by the court to the jury of

their duty to act solely upon the evidence which the court permitted them to receive, and not in anywise upon inferences based upon that withheld, or upon the action of those who by their objections caused it to be withheld by the court, might subserve the interests of justice, and promote impartiality and fairness. Some expressions used by this court in *Hoxie v. Insurance Co.*, 33 Conn. 471, 475, would be equally applicable here. There is error, and a new trial is granted. The other judges concurred.

SHERWOOD v. NEW ENGLAND KNITTING CO. et al.

(Supreme Court of Errors of Connecticut. Feb. 23, 1897.)

WRIT OF PROHIBITION.

Where the court of common pleas, in a suit against the receiver of a railroad corporation without leave of the appointing court, issued a temporary injunction restraining defendant from interfering with certain property, an application to a superior court judge for a writ of prohibition was properly denied, it appearing that plaintiff in said suit claimed that the property affected thereby had never belonged to the corporation, and that the court of common pleas acted under an erroneous belief that the receiver had been appointed by a federal court, in which case leave to sue would not be necessary. Acts U. S. 1887, c. 373, § 3.

Appeal from superior court, Hartford county; John M. Thayer, Judge.

Application by James K. O. Sherwood, receiver of the Philadelphia, Reading & New England Railroad Company, for a writ of prohibition against Arthur D. Warren, judge of the court of common pleas, and another. From a judgment dismissing the application, said receiver appeals. Affirmed.

The New England Knitting Company brought suit against James K. O. Sherwood, as receiver of the Philadelphia, Reading & New England Railroad Company, alleging that defendant threatened to cut certain telephone connections belonging to plaintiff, to its irreparable injury, and asked for damages and an injunction. An interlocutory order of injunction was issued, whereupon defendant receiver made the present application to a judge of the superior court, who found the following facts: "This cause originated in a complaint brought by James K. O. Sherwood, receiver of the Philadelphia, Reading & New England R. Co., dated August 6, 1896, to me, a judge of the superior court of the state of Connecticut, the superior court for the county of Hartford being in vacation, on which an order was granted requiring Arthur D. Warner, judge of the court of common pleas for Litchfield county, to show cause before me at Hartford, on August 31, 1896, why a writ of prohibition should not be granted as prayed for in said complaint. To said complaint and order plea was filed by said New England Knitting Company, which said plea, in

the first paragraph thereof, alleged that the allegations of the complaint were untrue, and in subsequent paragraphs alleged the insufficiency of the facts set up in the complaint as ground for a writ of prohibition. Arthur D. Warner, respondent, made no appearance and filed no plea to said complaint and order. On the return of said order to show cause, the facts as alleged in the complaint were admitted by counsel for said New England Knitting Company, and I find the same to be in all respects true. Counsel for the appellant claimed, as matter of law, that on said facts said writ of prohibition ought to be granted, but for the reasons set forth in the memorandum of decision the application was dismissed."

The memorandum of decision states: "It seems clear to me that application could have been made to the court of common pleas to dismiss the complaint and dissolve the injunction in the suit brought against the receiver for want of jurisdiction, without acknowledging that the court had jurisdiction of the proceedings. This was not done. I think it should have been done, because the judge who granted the injunction may have signed it in the belief that the receiver was an officer of the United States court, and not of the superior court, in which case he would have jurisdiction. If, after such application, the judge should refuse to dissolve the injunction, or the plaintiff refuse to discontinue the action, contempt proceedings would seem to be the proper mode of action against them. I think that the writ prayed for ought not to issue, and the application is dismissed, with costs, if any, to respondents."

Arthur L. Shipman, for appellant. William C. Case, for appellees.

ANDREWS, C. J. Bacon's Abridgment (volume 5, at page 646) says: "As all external jurisdiction * * * is derived from the crown, and the administration of justice is committed to a great variety of courts, hence it hath been the care of the crown that these courts keep within the limits and bounds of their several jurisdictions prescribed them by the laws and statutes of the realm. And for this purpose the writ of prohibition was framed. * * * The object of prohibition, in general, is the preservation of the right of the king's crown and courts, and the ease and quiet of the subject. For it is the wisdom and policy of the law to suppose both best preserved when everything runs in its right channel, according to the original jurisdiction of every court; for by the same reason that one court might be allowed to encroach, another might, which would produce nothing but confusion and disorder in the administration of justice." And the book cites, for the correctness of the rules stated, authorities as ancient as the time of Edward I., and others coming down to re-

cent times. The necessity for some means by which each court might be required to confine itself within its own jurisdiction was early presented to the people of the colony of Connecticut. In 1740 the legislature of the colony provided for the issuing of writs of prohibition by the superior court, or by any two of the assisting judges thereof, to any other court held within the colony that "do exceed their jurisdiction, or do hold plea of any matter, cause or thing, whereof by law such court hath no jurisdiction"; and provided that the superior court might in such cases "proceed and give judgment . . . according to the course of the common or statute law, . . . as fully, absolutely, and entirely as the court of king's bench, in that part of Great Britain called England, by law may do." 8 Col. Rec. 360, 361. This act was modified in 1750, by inserting in the clause respecting the exceeding of jurisdiction the words, "whereby the person or persons suggesting are grieved." In 1776, the colony having achieved independence, the reference to the court of king's bench in England was omitted. In 1821 the statute concerning the writ of prohibition was revised (Revision 1821, p. 314), and as thus revised it has, in substance, continued to this time, and is now section 1299 of the General Statutes. Whatever authority the superior court or a judge of that court now has to issue a writ of prohibition comes from the last-named section. But the full scope and meaning of that statute is only to be known by considering the history of legislation concerning the writ. This history teaches that the Connecticut writ of prohibition is only a slight modification of the common-law writ. 1 Swift, Syst. Laws, 97, 98; 1 Swift, Dig. p. 565.

Notwithstanding the full authority so given to the superior court to grant writs of prohibition, an application for that remedy seems never to have been made until within a very few years. Our Reports show only one case—and that in the year 1891—in which such a writ was actually granted. *Fayerweather v. Monson*, 61 Conn. 431, 23 Atl. 878. In a prior case in 1882 the writ had been denied. *La Croix v. County Com'rs*, 50 Conn. 321. Nonaction may be as significant in determining the law as is action, and after this long period of time it must be held to be the established law in this state that, while the power of the superior court is ample to issue the writ of prohibition upon proper and necessary occasions, yet it will never do so except in a clear case of excess of jurisdiction. It is a prerogative writ, to be used with great caution and forbearance, for the furtherance of justice, and for securing order and regularity in all the tribunals where there is no other regular and ordinary remedy. 1 Swift, Dig. 563, 565; *Washburn v. Phillips*, 2 Metc. (Mass.) 296; *People v. Seward*, 7 Wend. 518; *State v. Wakely*, 2 Nott. & McC. 410. The

case decided in our own reports shows that in a clear instance of excess of jurisdiction, by which the party complaining is aggrieved, if there is no other adequate remedy in the ordinary course of procedure, it is the duty of the court to issue the writ. And in this respect we think the decision is in accordance with the law elsewhere. *Mayor, etc., of London v. Cox*, L. R. 2 H. L. 239, 278; *Burder v. Veley*, 12 Adol. & E. 233, 263; *Shortt*, Proh. 458; *High, Extr. Rem.* § 767. It is obvious from the nature and purpose of the writ, as shown by the common law as well as by our own statutes and usage, that it is only to be interposed in a clear case of excess of jurisdiction on the part of some judicial tribunal.

The only reason on which it is claimed that the court of common pleas did not have jurisdiction of the suit brought by the New England Knitting Company is that the defendant is described as a receiver, and that the suit was brought without having obtained permission of the court by which he was appointed. The court of common pleas did have jurisdiction of the subject-matter of the action and of the parties, apart from the question of the defendant being a receiver. But a receiver is not exempt from being sued in all cases and under all circumstances. "The decree of a court of chancery appointing a receiver entitles him to its protection only in the possession of property which he is authorized or directed by the decree to take possession of. When he assumes to take or hold possession of property not embraced in the decree appointing him, and to which the debtor never had any title, he is not acting as the officer or representative of the court of chancery, but is a mere trespasser, and the rightful owner of the property may sue him in any appropriate form of action for damages, or to recover possession of the property illegally taken or detained." *Hills v. Parker*, 111 Mass. 508, 511. In the suit brought by the knitting company it is evident that the plaintiff therein claimed that the property concerning which the suit was brought had never belonged to the corporation for which the defendant was receiver. Moreover, if the receiver had been appointed by any court of the United States, the suit—and the injunction is only an incident of the suit—might properly have been brought against him without any such consent. U. S. Acts 1887, c. 373, § 3. The judge of the superior court was of opinion that the court of common pleas acted in the belief that the receiver was appointed by a United States court. These grounds were sufficient to warrant the judge in refusing to issue the writ prayed for. *Walton v. Greenwood*, 60 Me. 356, 385. It does not appear that the court of common pleas had done anything which was clearly in excess of its jurisdiction. In the arrangement of courts in this state the reasons given apply with added force in the present case. The court of com-

mon pleas, the superior court, and the judges of both, derive their power and jurisdiction from the same sovereignty. They are component parts in one judicial scheme, the whole being designed for the welfare and happiness of the people of the state. Such courts ought at all times to act with mutual respect for and forbearance towards each other. Each should act on the presumption that the other is desirous to exercise only its own proper jurisdiction. Between such courts jealousies would be unseemly, and any hasty or arbitrary exercise of authority would be inexcusable. The judge of the superior court seems to have acted on this theory. There is no error. The other judges concurred.

ALLING v. FORBES.

(Supreme Court of Errors of Connecticut. Feb. 23, 1897.)

PLEADING—VARIANCE—RECEPTION OF EVIDENCE—HARMLESS ERROR.

1. Where plaintiff sets out a written contract, whereby defendant and other subscribers agreed to pay their proportional parts of a specified sum to be used in erecting tide gates for the protection of salt meadows, a further allegation of an additional "understanding and agreement" as to the meaning of the term "proportional part," and of the amount due on the basis of such understanding, was surplusage, and failure to prove same an immaterial variance.

2. Defendant cannot complain that he was not prepared to meet certain evidence, on which the judgment for plaintiff was based, where a part of such evidence was given by defendant himself, and the rest elicited by him on cross-examination of plaintiff's witness on rebuttal.

3. Evidence elicited from plaintiff's witness on rebuttal, if not objected to, may properly be considered in support of his claim.

4. Where the court adopts defendant's construction of the written contract sued on, as to the amount due thereunder, defendant cannot complain of error in admitting parol evidence to control the meaning of the contract in that respect.

Appeal from court of common pleas, New Haven county; Hotchkiss, Judge.

Action commenced before a justice of the peace by William E. Alling against David Forbes to recover on a contract. On appeal to the common pleas, judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Talcott H. Russell, for appellant. Charles K. Bush, for appellee.

FENN, J. The complaint contains the common counts, with a bill of particulars and three special counts. The bill of particulars is for the defendant's "proportional part of the agreed cost of erection of tide gates on Beach street, West Haven, in accordance with the terms of an agreement, a copy of which, marked 'Exhibit A,' is hereto annexed, \$44.19." Exhibit A is as follows: "We, the undersigned owners of salt meadows situated in West Haven, known as the 'Curtis Meadows,' do jointly and severally

agree to pay our proportional part of a sum of two hundred and fifty dollars. Said sum to be used for the erection of good and suitable tide gates, to be placed at the bridge at Beach street, in said West Haven." This was signed by 13 persons, including the defendant. The special counts allege, in substance, the signing of the above agreement, made part thereof by reference; its delivery to the plaintiff; his acceptance; and that he erected and placed good and suitable tide gates, in accordance with its terms. They also contained the following averments: "(6) It was understood and agreed by the defendant, at the time when he signed said agreement, that the proportional part of the sum of \$250 therein mentioned, to be paid by each of the subscribers to said agreement, was such proportional part of said sum as the quantity of salt meadow owned by each of said subscribers bore to the whole quantity of salt meadow owned by all of said subscribers. (7) The defendant's proportional part of the sum of \$250, based upon the understanding and agreement aforesaid, amounts to the sum of \$44.19, and is due from the defendant to the plaintiff." Several defenses, denials, special matters, and counterclaims were interposed, but they present no questions calling for present consideration.

Upon the trial, the defendant testified that he had refused to pay, because the work was "no good"; that he was ready to pay if the work was good. The court found it good. The plaintiff, upon said trial, introduced one William C. Russell, a signer of Exhibit A, who presented it to the defendant for his signature, and, in connection with the proffer of said agreement, offered the testimony of said witness as to the conversation between him and the defendant at the time the defendant signed the agreement, that the proportion which each subscriber should pay would be according to the quantity of the land which such subscriber owned which would be protected by the gates. Counsel for the defendant objected to said testimony, and claimed that the contract showed what the proportional part was; that the paper was signed by 13 parties; and that the paper showed that each subscriber thereto was to pay an equal sum. The court admitted the evidence, which was that the defendant spoke of having a good deal of meadow, and having a good deal to pay. It appeared that the amount which the defendant should pay, according to the claim of the plaintiff, would be \$41.30, being based upon an estimate of a total of 60½ acres (of which the defendant owned 10 acres) belonging to the subscribers to the agreement, including therein a number of acres owned by those who had paid, but who were not subscribers. No evidence was offered by the plaintiff on the subject of the amount of acreage contained in the whole tract protected by said gates. The only evidence on that point was the statement of one Smith, on cross-examination.

This witness was offered by plaintiff on the rebuttal, and, upon cross-examination, was asked by defendant's counsel what the amount of the whole meadows designed to be protected by said gates was, to which he answered, "From sixty to seventy-five acres." Upon the argument, the defendant claimed that the proper construction of the contract was that each should pay in the proportion which the land he owned bore to the whole acreage to be benefited by the gates. This claim the court accepted as correct, and so construed the instrument, and taking the largest number testified to as being so benefited, namely, 75 acres, found that the proportion that the defendant should pay would be \$33.33, with \$9 interest, making the whole amount \$42.33, for which amount judgment was rendered. The defendant here claims that the court erred in such judgment, for two reasons: First, because no claim for such proportion of the sum of \$250 was made in the complaint, or by the plaintiff upon the trial of the case, and because no testimony was offered in support of said claim, or as to the amount of acreage in said tract, except the remark of said Smith on his cross-examination on the rebuttal, which remark was never offered or claimed for the purpose of proving or supporting any claim to recover for the proportion which the ownership of the defendant bore to the whole amount of said acreage; second, in ruling in the testimony of William C. Russell as to what was said at the time of the signature of the agreement, the same being an attempt to control the meaning of said agreement by parol.

Upon the first of the above reasons the defendant presents three claims. The principal one is upon the ground of variance from the complaint. He says: "The plaintiff cannot recover except on the contract set up, and on the claim made in his counts." This is true. But leaving, as the defendant insists we should, the common counts and the bill of particulars out of consideration, and confining ourselves to the special counts alone, we think such recovery has sufficient basis thereon. The written agreement is set forth in full. The allegations of the hereinbefore recited paragraphs 6 and 7 are simply as to an additional "understanding and agreement" concerning the meaning or construction of a term, "proportional part," therein used, with a statement of the sum due upon such basis. It was unnecessary to make these allegations; and if, being made, it was necessary to prove them, of course the plaintiff should not recover, for he failed, in the judgment of the court below, to do so. But it was not. This court said in *Davis v. Town of Guilford*, 55 Conn. 351, 354, 11 Atl. 350: "The law forgives variances which, although they may magnify the injury and misstate attendant circumstances, neither raise any doubt in the mind of the defendant as to the charge which he is required to meet, nor induce him to omit any matter of preparation

for defense." In this case the "charge" which the defendant "was required to meet" was his "proportional part of a sum of two hundred and fifty dollars." The plaintiff alleged, and claimed to prove by extrinsic evidence, what this proportional part was. The defendant, on the other hand, claimed that the sum was to be determined by the construction of the contract itself. The court adopted this view, and rendered judgment for the lesser amount only, due upon the construction claimed as proper by the defendant. Surely, he was not induced, to his injury, "to omit any matter of preparation for defense," upon a point outside the main issue, concerning the measure of damages merely, and upon which he was entirely successful in his claim before the court.

But the defendant further says that he had no knowledge that it was intended to prove the amount of acreage in the whole tract protected by the gates, or the proportion which the defendant owned of such tract; that, therefore, he could not be required to meet such issue; and that he never did meet it. Since it appears that the evidence as to the amount of land the defendant owned came from his own lips as a witness, and the statement as to the entire amount benefited by the gates was in answer to his own direct question on cross-examination, it seems hardly likely that any injustice has been done to the defendant on this account.

Nor do we think there is force in the remaining claim under the first reason: That the evidence of Smith as to the entire acreage, being upon rebuttal, should not be considered. Whenever received, it was, unless objected to, properly before the court.

The second ground of appeal cannot avail the plaintiff, for the reasons already indicated. It is unnecessary to determine whether the evidence of Russell was properly admitted; for, should the conclusion be reached that it was not, the adoption by the court of the defendant's construction of the agreement rendered it harmless.

It may be added that the repeated decisions of this court, to the effect that a new trial should not be granted when it is evident that substantial justice has been done, would appear to be in point in reference to the present case. There is no error. The other judges concurred.

BALL ELECTRIC LIGHT CO. v. CHILD.
(Supreme Court of Errors of Connecticut. Feb. 23, 1897.)

CORPORATIONS — STOCKHOLDERS' LIABILITY — ENFORCEMENT — SET-OFF.

1. Pub. Acts 1893, c. 140, amending Gen. St. § 3951, making every stockholder in telegraph, telephone, and electric light or power companies liable to a specified extent for debts "contracted or due" during the time of his holding stock, if judgment shall have been obtained against the company, and execution returned unsatisfied, and suit is brought against such stockholder while

he continues such, or within two years thereafter, makes each stockholder of record at the time the debt is due a guarantor thereof to the extent named, though he holds his stock as collateral.

2. A stockholder, when sued on such liability by corporate creditors, cannot set off a debt due him from the corporation.

Appeal from superior court, Windham county; Robinson, Judge.

Action by the Ball Electric Light Company against Linus M. Child to enforce defendant's liability as stockholder in the Killingly Electric Light Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Lewis E. Stanton, for appellant. Charles E. Searis, for appellee.

ANDREWS, C. J. This action is brought on section 3951 of the General Statutes, as amended by chapter 140 of the Public Acts of 1893,¹ against the defendant, who is a stockholder in the Killingly Electric Light Company. That corporation was organized under the laws of this state for the purpose, among other things, of manufacturing and selling electricity for light and power in the town of Killingly. The complaint alleges that the Killingly Company was indebted to the plaintiff; that a suit had been brought by the plaintiff against the said company, a judgment recovered, and execution issued thereon, which had been returned unsatisfied. The section of the statute referred to above makes the stockholders in the classes of corporations therein named, of which the said Killingly Company is one, liable to the creditors of the corporation as guarantors. They are to be liable for the debts of the corporation to the extent of 25 per cent. of the amount of stock held by them, but only after every effort to collect the debt from the corporation has proved unavailing. "A guaranty is a collateral undertaking to pay a debt

or perform a duty in case of the failure of another person, who is in the first instance liable to such payment or performance." 9 Am. & Eng. Enc. Law, 67; De Col. Guar. & Prin. & Sur. 1; And. Law Dict.; Redfield v. Haight, 27 Conn. 31, 37. "The creditor does not give credit to the stockholders as such. They may be *hourly* changing. They, in no sense of the word, are debtors. Like the inhabitants of towns, they may be compelled to pay, while they remain members; not as debtors, but as guarantors. The corporation is the real debtor; and the members, while such, its surety." Bank v. Magill, 5 Conn. 23, 70; Deming v. Bull, 10 Conn. 409; Paine v. Stewart, 33 Conn. 516. A general law declaring that the stockholders of a corporation shall be individually liable to its creditors is a legislative enactment that any person who shall become a stockholder in the corporation, or, in other words, enter into the contract of membership, shall at the same time assume an individual liability to the creditors of the company. The function of the legislature in creating this liability is to declare the legal effect of the voluntary acts of the parties, and to enable them to carry out their purposes in a manner which would not have been authorized at common law. When a person becomes a shareholder in a corporation, he agrees with all the other shareholders to enter with them, upon the terms provided by the general law or the company's charter. He also undertakes to become liable to any person who shall give credit to the corporation, to the extent of the shares which he owns. 2 Mor. Corp. § 870.

The defendant urges three grounds why judgment against him is erroneous: (1) That he was not a shareholder in the Killingly Electric Light Company; (2) that the debt which the Killingly Company owed the plaintiff was incurred before he became a stockholder; and (3) that he was denied a set-off of a debt which he says the Killingly Company owed him. The statute evidently intends to make the obligation of guaranty attend the shares of stock at all times until the debts are paid, into whosoever hands the shares may come. The owner of the stock is made at all times a guarantor, to the extent named in the statute, of all the debts of the corporation contracted by or due from it, so long as he remains a stockholder, and until the corporation is dissolved, or, as the statute has been since 1893, for two years after he ceases to be a stockholder. And of course it must be the stockholder of record. The defendant was the stockholder of record; and the fact that he held the stock as collateral would not, as between himself and the person of whom he took it, remove the statutory liability. A guarantor, when sued on his contract, cannot set off a debt owed to him by his principal. To allow that might deprive the party guarantied of the whole value of the guaranty. There is no error. The other judges concurred.

¹ Section 3951 of the General Statutes reads as follows: "The stockholders of every telegraph, telephone, or electric light or power company, organized under the laws of this state, shall be jointly and severally liable for the payment of all its debts contracted or due during the time of their holding stock therein, to the extent of twenty-five per cent. of the amount of stock held by them respectively, if a judgment thereon shall have been obtained by the claimant against the company, and an execution thereon shall have been returned unsatisfied, or if such company shall be dissolved."

Chapter 140 of the Public Acts of 1893, provides: "Section 3951 of the General Statutes is hereby amended to read as follows: The stockholders of every telegraph, telephone, or electric light or power company, organized under the laws of this state, shall be jointly and severally liable for the payment of all debts contracted or due during the time of their holding stock therein, to the extent of twenty-five per centum of the amount of stock held by them respectively, if a judgment thereon shall have been obtained by the claimant against the company, and an execution thereon shall have been returned unsatisfied, and suit shall have been brought against any such stockholder or stockholders, while they respectively continue to hold any of said stock, or within two years thereafter."

ULLRICH v. ULLRICH.

(Supreme Court of Errors of Connecticut. Feb. 23, 1897.)

FRAUDULENT CONVEYANCE BY HUSBAND—WIFE AS CREDITOR.

1. If a husband's duty to support his wife is a debt within the protection of the law against fraudulent conveyances, a complaint which, in effect, seeks to declare fraudulent a conveyance by plaintiff's husband, on the ground that it will affect her right to such support, states no cause of action, in the absence of any averment that the conveyance was made with intent to deprive her of such right, or that it lessened the husband's ability to furnish support, or that he had neglected to furnish the same.

2. A husband's conveyance will not be declared fraudulent at the instance of his wife, on the ground that it was made to defeat her right to attach the property to secure a contingent claim for alimony in a suit for divorce which she had threatened to bring, in the absence of any showing that she had cause for divorce and alimony, or ever brought, or attempted to bring, such action.

Appeal from court of common pleas, New Haven county; Hotchkiss, Judge.

Suit by Catherine J. Ullrich against Herman L. Ullrich to restrain defendant from proceeding with an action of summary process against plaintiff's husband. Judgment for plaintiff, and defendant appeals. Reversed.

William H. Ely and Howard C. Webb, for appellant. John A. Matthewman, for appellee.

TORRANCE, J. This is an appeal from the judgment of the court below in overruling the demurrer to the complaint and in rendering judgment in favor of the plaintiff. The material allegations of the complaint may be stated as follows: The plaintiff is the wife of Conrad F. Ullrich, a brother of the defendant, and in March, 1894, she and her husband, with their three children, resided upon the premises described in the complaint, in New Haven, and then owned by the husband. In March, 1894, the husband, "without just cause or reason, brought a petition against the plaintiff for a divorce, in the superior court for New Haven county, alleging therein adultery as the cause of his complaint." While this action for divorce was pending, the plaintiff "threatened to bring a cross bill against her husband for a divorce, and also threatened her husband with attaching his property to secure her claim for alimony in case she was successful." Thereupon the husband, "believing that his said property was to be attached for the purpose alleged, on the 3d day of March, 1894, deeded said property collusively and without consideration, and with intent to defraud the plaintiff * * * of her rights as his wife, to one Mary U. Tiffany, his sister, of the town of Hartford, by quitclaim deed dated on said 3d day of March, 1894, and it was understood between the parties to the conveyance that if the said Conrad F. Ullrich was successful with his divorce petition, and

should obtain a favorable decree, then the said Mary U. Tiffany was to redeed the property back to him; and the said Mary U. Tiffany did, in fact, on the said 3d day of March, 1894, execute a quitclaim deed of said property back to said Conrad F. Ullrich, with the understanding with him that the same should not be filed for record until such time as he should obtain his decree." On the same day the husband "left said premises in possession of his wife and three children, and since said time has not resided there or made it his home," but the premises since then have been, and are now, occupied by the plaintiff and her children. Subsequent to this time the husband's petition for divorce was heard, "and was denied and dismissed" by the court in December, 1894. In March, 1895, the husband "brought another petition for divorce against his said wife, the plaintiff, alleging therein the same cause of action as was fully heard by said superior court under his said petition dismissed and denied in the former divorce proceedings. Again believing that his wife would bring a cross bill, and attach his property as aforesaid, to protect her rights and alimony, said Conrad F. Ullrich caused the said Mary U. Tiffany to convey, without consideration, and with intent to defraud and deprive his said wife from obtaining her rights to the premises, the said property aforesaid to the defendant herein, Herman L. Ullrich." Said conveyance was made on the 2d day of April, 1895. "On or about the 1st day of April, 1894, she, the said Mary U. Tiffany, claimed to have leased said property to her brother, the said Conrad F. Ullrich, and to his wife," the plaintiff. In July, 1895, the defendant "commenced summary proceedings against the said Conrad F. Ullrich, to quit possession of said premises, and made the same returnable before Charles Kleiner, justice of the peace for said New Haven county." Said proceedings were instituted by the defendant against the husband, at the suggestion of the husband, and with the understanding between them that the husband "would permit judgment to be taken against him by default." The complaint further alleged that said summary proceedings were pending before said justice of the peace, and that a hearing was to be had thereon on the 21st of July, 1896; and that, if the husband "permits judgment to be taken against him in said suit, and execution issues, it will deprive the plaintiff of her habitation and her home, and will place her and her three infant children upon the public streets of New Haven." The relief prayed for was (1) damages; (2) an injunction restraining the defendant and his agents from proceeding with said summary process "for the purpose of ousting the plaintiff from such premises;" (3) a temporary injunction to that effect. The substance of the demurrer may be thus stated: It does not appear (1) that the defendant knew of the husband's acts or pur-

poses in his dealings with the sister; (2) that the husband has ever refused or neglected to suitably provide for his wife and children; (3) that plaintiff ever began any divorce proceedings against her husband, or that she had in fact any cause for divorce; (4) that the husband had not other property sufficient to secure any contingent claim for alimony; (5) that the defendant is not the owner in fee simple of the premises in question; (6) that the plaintiff has any title to said property. The court overruled the demurrer and, no other plea or answer having been filed, granted a permanent injunction as prayed for.

It is, perhaps, not quite clear whether the complaint fairly charges the defendant with knowledge of the husband's purpose in making the conveyance to the sister or to the defendant; or with any intent to aid the husband in carrying out that purpose. Assuming, however, that it does so, as the plaintiff claims, then the gist of the complaint may be stated thus: (1) The plaintiff threatened to bring a cross bill for divorce against her husband, and to attach the real estate described in the complaint to secure her contingent claim for alimony. (2) The husband made the conveyance to the defendant for the purpose of defeating the threatened attachment. (3) The defendant accepted the conveyance with knowledge of the husband's purpose in making it, and with intent to aid him in carrying out that purpose. (4) The defendant, in collusion with the husband, is prosecuting the summary process proceedings to obtain possession of the premises conveyed to him.

The important question in the case is whether the complaint shows that any legal right of the plaintiff was injuriously affected by the conveyance in question; for, since it is not alleged that it was made to avoid or prejudice the rights of persons other than the plaintiff, it must follow that it was a valid conveyance as to her, unless the complaint shows that it was made to avoid some debt or duty which the husband owed to her, and with respect to which she was within the protection of our rules of common or statute law against fraudulent conveyances. Under the allegations of this complaint the husband had a perfect right, as owner, to make a gift of the property to his brother or to any one else, if in so doing no legal right of his wife was injuriously affected in any way. In the plaintiff's brief it is claimed that the complaint fairly shows that two such rights of the wife were thus affected by the conveyance in question, namely: (1) Her right of support from her husband; (2) her right to attach the land in a proceeding for divorce and alimony.

In regard to the first claim, two questions arise: (1) Whether the duty to support, which is a continuing one, is a debt or duty within the protection of our statute (Gen. St. § 2528), or our rules of common law,

against fraudulent conveyances; (2) whether the complaint alleges that the conveyance in question was made with intent to avoid this duty. With reference to the first question, we are not aware of any case anywhere which holds that a duty of this kind is within the protection of any statute, or of the rules of the common law against fraudulent conveyances. The duty protected by such rules or statutes is generally some particular specific duty to pay money or money's worth, and not a general continuing duty, like this of support, to pursue a certain course of conduct. But it is not necessary to decide this question in this case, because we are of opinion that the complaint fails to allege that the conveyance was made with intent to avoid this duty to support. It is nowhere alleged specifically that the conveyance was made with any such intent, and the allegations in the sixth and eleventh paragraphs, that it was made "for the purpose of depriving the plaintiff of her rights as his wife," and "from obtaining her rights in the premises," have reference, we think, to the right to attach, and not to the right of support. It is not alleged that the husband failed, neglected, or refused to furnish suitable and proper support; nor that the conveyance lessened or diminished in any way his present or future ability or capacity to furnish such support; and, for aught that appears, he has hitherto furnished such support, and is abundantly able to continue to do so. The first claim, then, may be laid out of the case.

The gist of the entire complaint is contained in the second claim,—that the conveyance was made to defeat the threatened attachment under the circumstances alleged, and was, therefore, void as against the plaintiff, under the statute aforesaid.

Upon the facts alleged, the plaintiff's claim is that she stands, with reference to this conveyance, in the position of a creditor of her husband. This claim is not tenable. She does not allege that her husband owed her any debt, nor any duty to pay her money or money's worth. She does not allege that she had any cause for divorce, nor any claim against him for alimony, at the time this conveyance was made, nor since, nor now. She does not allege that she ever brought proceedings for divorce or alimony against her husband in which she attached this property, nor that she was hindered or prevented by this conveyance from so doing, nor that she ever attempted or intended to attach this property. The only allegation is that she threatened to bring such a cross bill and make such attachment. For aught that appears in the complaint, she had no cause for divorce, and no shadow of right to alimony, at the time of this conveyance, and has none now. If she had in fact no kind of pecuniary right or claim against her husband, and never had, then he was under no duty to retain his property to await her attachment; but the complaint does not show that she had

any such right or claim, and that, for the purposes of this case, is the same as if she had none. If this be so, then the husband had a perfect right to make the conveyance in question, and it was not a fraudulent conveyance as to the plaintiff, no matter with what intent or purpose, on the part of husband and brother, it was made. *Patten v. Smith*, 4 Conn. 450, 456; *Ketchum v. Allen*, 46 Conn. 414. The plaintiff likens her case to such cases as *Livermore v. Boutelle*, 11 Gray, 217, *Chase v. Chase*, 105 Mass. 385, and others of a similar character; but her case, as she alleges it, differs widely from the two cases above cited, and, so far as we have observed, from all the cases cited on the plaintiff's brief. In *Livermore v. Boutelle*, the wife, having obtained a divorce a vinculo and a decree for alimony, took out execution for the alimony, and levied the execution upon land which her husband had conveyed to prevent her from collecting alimony; and in an action to recover possession of the land levied upon, it was held that she became a creditor—a subsequent creditor—when she obtained her decree for alimony, and that “a conveyance, fraudulent under St. 13 Eliz. c. 5, is void and of no effect against subsequent as well as against existing creditors.” In *Chase v. Chase* the plaintiff had obtained a divorce a mensa et thoro, and a decree for alimony. She had the execution for the alimony levied upon land which her husband had conveyed to defeat her recovery of alimony; and in the action to recover possession of the land levied upon it was held that she became a creditor of her husband when she obtained her decree for alimony, although the divorce was not a vinculo. We know of no case where the facts were at all like those alleged here, in which it was held that the wife was within the protection of the statute, or the rules of common law against fraudulent conveyances. Besides, it should be noted that the plaintiff is not here seeking to appropriate the property in any manner in satisfaction of any claim of hers against her husband; and as a creditor merely, not seeking to appropriate, in a lawful way, that property to the payment of her debt, she had no right to the injunction. *Owen v. Dixon*, 17 Conn. 492, 498; *Birdsey v. Insurance Co.*, 26 Conn. 165, 171. Under the allegations of this complaint, then, the conveyance in question was good as against the plaintiff; and as between the parties themselves it “stands on the same ground as if a full and adequate consideration had been paid.” *Chapin v. Pease*, 10 Conn. 69, 73; *Owen v. Dixon*, supra; *Ybarra v. Lorenzana*, 53 Cal. 197, 199. This being so, the defendant has the right to obtain possession of the property thus conveyed to him by any lawful means, irrespective of his motives for so doing, and without regard to the plaintiff. There is error in the judgment complained of, and it is reversed. The other judges concurred.

In re STRONG'S APPEAL.

(Supreme Court of Errors of Connecticut. Feb. 23, 1897.)

BEQUEST—CHARITABLE USE—DESIGNATION OF BENEFICIARIES—SELECTION.

1. A bequest in trust, the income to be applied to the relief of the worthy poor of a town, is not invalidated by the fact that it adds nothing to what the poor are entitled to receive from the town, and, in effect, becomes a perpetual fund for the temporary relief only of the taxpaying class.

2. A bequest in trust for “the worthy poor people of said town of P., as may be in needy and necessitous circumstances, and in any misfortune; always, however, excluding from assistance or aid the criminal class, or the habitually intemperate, indolent, and lazy,” sufficiently designates the class to be benefited.

3. A bequest in trust for the worthy poor of the town, which directs that the net income of the fund is to be paid over to certain persons definitely pointed out, who shall make appropriations to render “such assistance in providing food and clothing as in their best judgment and discretion * * * they may determine,” authorizes the distributors of the fund to select such beneficiaries as their discretion may suggest.

Case reserved from superior court, Hartford county; G. W. Wheeler, Judge.

Appeal by Frank M. Strong from an order and decree of the court of probate in the matter of an executor's account. Reserved from the superior court. Judgment of affirmance advised.

Frank L. Hungerford and John H. Kirkham, for appellant. George G. Sill and Marcus H. Holcomb, for appellee.

FENN, J. The thirteenth clause or item of the will of the late Theodore P. Strong, of Plainville, in this state, disposing, as it appears, of about \$75,000, is as follows: “All the rest, residue, and remainder of all my estate of every kind and description, and wheresoever situated, I give, devise, and bequeath unto the Security Company, a corporation under the laws of Connecticut, and located and doing business in Hartford, Conn., in trust, however, and for the following uses and purposes, viz.: To hold, manage, invest, and reinvest the principal thereof, and collect and receive the interest and income thereof, and to pay over the net income of said trust fund to the pastors for the time being of the Congregational, Methodist, and Baptist churches located in said town of Plainville, and to two men to be annually appointed for that purpose by the selectmen of said town of Plainville, and selected by them from the principal and opposing political parties of said town, whose duty it shall be to receive said interest and income of said fund semi-annually, and to use and appropriate so much thereof as may be necessary to keep and maintain in good and complete order and repair my monument and the grounds about the same; and the remainder of said income to pay out and appropriate from time to time for the benefit of the worthy poor people of

said town of Plainville as may be in needy and necessitous circumstances, and in any misfortune; always, however, excluding from assistance or aid the criminal class, or the habitually intemperate, indolent, and lazy; but to all the worthy poor people of said town to render aid and such assistance in providing food and clothing, as in their best judgment and discretion said committee and trustees, pastors, and appointees of said selectmen, they may determine. It shall be the duty of said committees, trustees, or those who shall receive and disburse said income of said trust fund, to render annually to the judge of probate in whose district the said town of Plainville may be an account of the receipts and disbursements of the income from said fund. In the event that said selectmen of said town shall for any reason fail or neglect or refuse to appoint two men, residents of said town, to serve as aforesaid on said committee, the judge of probate for the district of Farmington shall appoint two men, residents of the town of Plainville, selected from the two principal and opposing political parties of said town, to act with the pastors of said churches; and, in the event that said pastors shall refuse to serve, and if for any reason said committee cannot be formed, it shall be the duty of said Security Company to carry out the provisions of this trust in the best way and method they can in order to execute my intentions as hereinbefore expressed." It is the claim of the appellant that the trust attempted to be created by the above language, except so far as relates to the monument and grounds referred to therein, is null and void. The correctness of this claim is the question presented to us by the reservation. The grounds advanced in behalf of the appellant's contention are: First, that the attempted trust is not for a charitable use, and is, therefore, contrary to the statute against perpetuities, which was in force at the time of the death of the testator; second, that it is void for lack of certainty in the beneficiaries.

In support of the claim that the use is not charitable, it is urged that the bequest adds nothing to what the poor are entitled to receive from the town, and which the town of Plainville is bound by law to supply to its poor; that it is thus merely the creation of "a perpetual fund for the temporary relief only of the taxpaying class." But, if this be conceded, the conclusion that such a gift is not charitable is unsupported by any authority in this state or elsewhere. The decisions are to the contrary. So are the best and most thoroughly recognized definitions, such as that in *Perin v. Carey*, 24 How. 465, 506: "A gift to a general public use, which extends to the rich as well as the poor;" or in *Jackson v. Phillips*, 14 Allen, 539, 556, which includes what is given for the purpose of in any wise "lessening the burdens of government." See, also, *Hamden v. Rice*, 24 Conn. 350. "The relief of the poor" is expressly named as a

charitable use in our statute. Gen. St. § 2951. But it is true, as was said in *Attorney General v. Wilkinson*, 1 Beav. 370, 373: "You can in no way benefit the poor without at the same time * * * relieving the rich, either as to their legal duty or their moral obligations." Such relief would seem pretty direct, in many cases which might be cited in our jurisdiction, where charities have been sustained; as, for example, *Hamden v. Rice*, supra; *Proprietors v. Post*, 31 Conn. 240; *Birchard v. Scott*, 39 Conn. 63, 68; *Beardsley v. Selectmen*, 53 Conn. 489, 3 Atl. 557; *Camp v. Crocker*, 54 Conn. 21, 5 Atl. 604. What is said in *Dailey v. City of New Haven*, 60 Conn. 314, 22 Atl. 945, is most instructive, also, upon this subject.

But the appellant further insists that the trust attempted to be created is void for lack of certainty in the beneficiaries. We cannot assent to this claim. Adopting the language quoted by the appellant from *Adye v. Smith*, 44 Conn. 60, 70, that to constitute a valid charitable trust our law "requires certainty in the persons to be benefited, or at least a certain and definite class of persons, with an ascertained mode of selecting them," we think such a class of persons and such a mode of selection is sufficiently pointed out. First, as to the class: It is "the worthy poor people of said town of Plainville, as may be in needy and necessitous circumstances, and in any misfortune; always, however, excluding from assistance or aid the criminal class, or the habitually intemperate, indolent, and lazy; but to all the worthy poor people of said town." There can be no doubt but what the language quoted is quite as definite in its creation and description of a class as is the language used by testators in several other instances where trust provisions have been brought before this court and sustained, and the considerations stated in such cases may be referred to and adopted as applicable, but do not require to be repeated here. *Treat's Appeal*, 30 Conn. 113; *Beardsley v. Selectmen*, supra; *Camp v. Crocker*, supra. See, also, *Coit v. Comstock*, 51 Conn. 352.

Finally, as to the mode of selection, that also appears plain and specific. The net income of the trust fund is to be paid over to certain persons definitely pointed out, who are from said funds to pay out and appropriate, from time to time, for the benefit of said "worthy poor people," in order to "render aid and such assistance in providing food and clothing as in their best judgment and discretion * * * they may determine." The appellant's claim here is that the trustees of the income are given no power or discretion as to selection, but only as to the amount of aid they can disburse. A construction of the language used, so strict and narrow as this, would be alike contrary to principle and to the decisions in our own state. The same claim, upon very similar grounds, was made and disposed of in *Woodruff v. Marsh*, 63 Conn. 125, 128, 26 Atl. 846. We there held, referring to cer-

tain authority conferred upon trustees to maintain and support a home, that such trustees were thereby invested with ample powers to select for its inmates from time to time such individuals of the class created as they might think proper, and we then added: "This power to admit includes power to exclude, and to remove after admission. All such acts are naturally incident." Surely, the provisions of the testator will (to quote again from *Woodruff v. Marsh*, 63 Conn. 136, 26 Atl. 850) "need only that favorable construction to which all charitable trusts are entitled in a court of equity, to ascertain their meaning and establish their validity." Such construction has been too often given by this court in such cases to admit of further doubt as to the settled policy and doctrines of our jurisprudence in dealing with public and charitable trusts. *Birchard v. Scott*, supra; *Colt v. Comstock*, supra; *Tappan's Appeal*, 52 Conn. 412; *School v. Whitney*, 54 Conn. 342, 8 Atl. 141; *Goodrich's Appeal*, 57 Conn. 275, 18 Atl. 49; *Bronson v. Strouse*, 57 Conn. 147, 17 Atl. 699; *New Haven Young Men's Inst. v. City of New Haven*, 60 Conn. 32, 40, 22 Atl. 447; *Conklin v. Davis*, 63 Conn. 377, 23 Atl. 537; *Hayden v. Connecticut Hospital*, 64 Conn. 320, 324, 30 Atl. 50. The superior court is advised that paragraph 13 is valid, and that the decree of the court of probate appealed from should be affirmed. The other judges concurred.

TOWN OF NEW HAVEN v. CITY OF BRIDGEPORT.

(Supreme Court of Errors of Connecticut. Feb. 23, 1897.)

PAUPERS—WHO ARE INHABITANTS.

A minor coming from another state to a Connecticut town, and remaining there nine months, is an "inhabitant" thereof, within Gen. St. § 3288, prescribing the conditions on which an "inhabitant of any town" removing to another town shall acquire a legal settlement therein.

Reserved from court of common pleas, New Haven county.

Action by the town of New Haven against the city of Bridgeport. Heard on agreed statement of facts reserved. Judgment for plaintiff advised.

The statement of facts agreed upon by the parties is as follows: "One John L. Chapman, a person over the age of fourteen years, came from the state of Massachusetts to North Canaan, Conn., about July 1, 1890, where he remained nine months. He then moved to Bridgeport, which was about April 1, 1891. He was admitted as a voter in the city of Bridgeport, October 27, 1892. He remained in Bridgeport until September 11, 1895, when he and his family left Bridgeport, and moved to New Haven. On November 15, 1895, he resided in New Haven, and was poor and unable to support himself, and in immediate need of support. On said day, and until the 5th day

of December next following, the selectmen of New Haven furnished him with necessary support, at an expense of \$20, and further laid out and expended for his necessary support and maintenance on said — day of December, 1895, the sum of \$27.60. On the — day of December, 1895, the selectmen of New Haven gave due notice in writing to the board of public charities of the city of Bridgeport of the condition of the said Chapman, and that he was chargeable in New Haven. On the — day of December, 1895, and on subsequent dates, the selectmen of New Haven presented to the board of public charities of said city of Bridgeport a bill of said expense, and demanded payment thereof. Said expense has never been repaid to the plaintiff."

Jacob P. Goodhart and Robert C. Stoddard, for plaintiff. J. D. Toomey, Jr., for defendant.

ANDREWS, C. J. If Chapman was an inhabitant of North Canaan before he removed to Bridgeport, then the plaintiff is entitled to recover the amount expended; otherwise, not. He had resided long enough in Bridgeport to gain a settlement there, if he had the legal capacity to acquire one; and this depends on the answer to be given to the question above stated, was he an inhabitant of North Canaan? In its general and popular sense, the word "inhabitant" "is the same as 'resident,' or one who lives in a place. An inhabitant necessarily implies an inhabitation, an abode, a place of dwelling." *Hartford Fire Ins. Co. v. Town of Hartford*, 3 Conn. 15, 24. The words of a statute are to be read in their ordinary and popular sense, unless there is something in the context to show that they are used in a different sense. *Hallenbeck v. Getz*, 63 Conn. 885, 28 Atl. 519. This, then, is the sense in which the word "inhabitant," in section 3288 of the General Statutes, is to be read. It is stated in the defendant's brief that Chapman came to North Canaan as an inhabitant of Massachusetts. He was therefore not an alien. He was, while in North Canaan, a resident citizen. As such, he was an inhabitant there. It was so held in *New Hartford v. Town of Canaan*, 54 Conn. 39, 5 Atl. 360, and in *Town of Canton v. Town of Simsbury*, 54 Conn. 86, 6 Atl. 183. The court of common pleas is advised to render judgment for the plaintiff. The other judges concurred.

VILLAGE OF CHESTER v. LEONARD et al.

(Supreme Court of Errors of Connecticut. Jan. 14, 1897.)

APPEAL—REVIEW—HARMLESS ERROR—MUNICIPAL CORPORATIONS—OFFICERS DE FACTO—CONSTRUCTION CONTRACTS—ESTIMATES—BOND—ESTOPPEL—PLEADING—SURETIES—RELEASE.

1. Error in sustaining a demurrer to a complaint for want of certain amendments is harmless where the defense made out on the trial

would have been a bar to a recovery under the complaint as it was originally.

2. Where a de facto municipal board, acting in behalf of the municipality, entered into a contract which it might have made if de jure, it might afterwards, on performing acts which rendered it de jure, ratify the contract so as to bind the parties thereto.

3. Where a contractor's bond recited that the principal had entered into the contract with the obligee through its board of commissioners, the sureties were estopped, in an action on the bond, to deny the authority of the board to represent the obligee, both as to the contract and as to what was done in execution of it.

4. Such estoppel was sufficiently pleaded where the bond was made an exhibit of the complaint.

5. A bond having been given for the performance of a contract with a village board of commissioners, it did not affect the liability of the sureties that the board never formally accepted the bond, where the board took the bond into their possession to "hold subject to further action," and afterwards sued thereon.

6. A contract for the construction of village waterworks provided that "the quantities of the work to be done," as specified, were approximate only, and could be increased or diminished by the village board, and that the village engineer could make such changes in the "forms, dimensions, and alignment of the work" as might, in his opinion and that of the board, be necessary for its proper fulfillment. *Held*, that sureties on the contractor's bond were not released by the making of material changes in the line, site, level, or dimensions of the water pipes.

7. In the absence of a stipulation giving the sureties a right to participate in determining whether such changes should be made, they were not entitled to notice of the changes.

8. Where such contract provided for monthly payments during the progress of the work of 85 per cent. of the amount due for the preceding month, as might be estimated approximately by the village engineer, the sureties were released by payment without their consent of amounts largely in excess of the specified percentage, and without estimates having been made.

9. After partly finishing the work, the contractor notified the board that he must abandon the contract, and by agreement with the board he made its treasurer his agent to receive money to become due under the contract, and therefrom to pay his employes and material men. *Held*, such agreement having been made without the sureties' consent, they were released.

10. A waiver by the board of a condition of the contract that the contractor should give bond for keeping the works in repair for a year after their acceptance released the sureties on the bond given at the execution of the contract for its faithful performance.

11. A breach of a provision of the contract by the village board that it should not pay out of funds due the contractor claims for wages or other account arising against him in execution of the contract, except on the written approval of the village engineer, also released the sureties.

12. The fact that material variations in a construction contract, made without the consent of the sureties on the contractor's bond, might operate for the benefit of the sureties, does not preclude them from release.

13. Accompanying conditions in a contract for the construction of village waterworks, as to responsibility of the contractor for the character of the work, and the continuance of such responsibility until he should be released by formal action of the village board, was a provision that any cash payments made before completion of the work should in no way affect the conditions of the contract. *Held*, that such provision did not, as against sureties on the contractor's bond, justify a material variation in the mode of paying the contractor, or in the manner in which moneys, when paid, were to be disbursed.

14. The fact that variations in the contract were made of public record, and might have been seen by the sureties, did not prevent them from being released by the variations.

15. Where a construction contract called for payments on approximate estimates by an engineer, a letter of the engineer, in which, after stating that the contractor had requested an estimate, and was apparently entitled to one, he recommended payment of a certain sum, as in his opinion the work performed was certainly worth that amount, was not a sufficient estimate.

16. It could not be first objected on appeal from a judgment for defendants in an action on a bond that judgment should have been rendered against the principal, even if it should have gone in favor of the sureties.

Appeal from superior court, Fairfield county; George W. Wheeler, Judge.

Action by village of Chester, in the state of New York, against Francis Leonard and another, on a bond given the village for the faithful performance of a contract by Leonard for the construction of waterworks. From a judgment for defendants, plaintiff appeals. Affirmed.

Joseph A. Gray, for appellant. J. Belden Hurlbutt and H. Whitmore Gregory, for appellees.

BALDWIN, J. The complaint was adjudged insufficient on demurrer, for want of certain amendments, whereupon the plaintiff voluntarily amended it by inserting them. There is authority for the position that this waived any exceptions that could otherwise have been taken to the ruling on the demurrer, and that if the plaintiff, in any such case, is unwilling to assume the burden of proving what the amendment would introduce into the complaint, he should stand by his original pleading, and seek a remedy by appealing from the final judgment which would then be rendered on the issues of law. *U. S. v. Boyd*, 5 How. 29, 51; *Birnbaum v. Crowninshield*, 137 Mass. 177; 1 Enc. Pl. & Prac. p. 624; 6 Enc. Pl. & Prac. p. 350; *Brown v. Railroad Co.*, 18 N. Y. 495. It is, however, unnecessary to express an opinion upon this point in the present case, as the defense which was made out upon the trial would have been equally a bar to the plaintiff's recovery under the original allegations in the complaint. Had the demurrer been overruled, as the plaintiff now claims that it should have been, the defendants would have had the right to plead over. Gen. St. § 1014. We think it fair to assume that they would have availed themselves of this privilege, instead of allowing final judgment to go against them on the pleadings as they stood, and are therefore of opinion that, even if there were error in the ruling complained of, the plaintiff was not injuriously affected by it, since, if it had not changed its pleading, the defendants would have changed theirs, and the same result must in either event have been ultimately reached.

The parties to the construction contract of October 17, 1892, were the village of Chester

and Francis Leonard. In behalf of the village, it was executed by certain individuals who had no authority to speak for it. They were, however, de facto public officers. There was a law under which they assumed to act, and the only defect in their authority arose from their omission to file the necessary bonds and take the prescribed oath of office. This defect was remedied during the ensuing month, and they thereby became the de jure board of water commissioners of the village. The answer set up their want of authority to execute the contract, and to this it was replied that the village had "authorized, accepted, and approved" their action in its behalf. One for whom another has assumed to act may accept and approve what has been done in his behalf, though he never authorized it. The averments in the reply as to acceptance and approval, not having been denied, were admitted to be true. Practice Book, p. 16, § 4. They stated a ratification, which was equivalent to a prior authority. It may be true that under the laws of New York the plaintiff could not on October 17, 1892, have authorized the execution of the contract in its behalf by a mere de facto board of water commissioners. But on and after November 28, 1892, it could have authorized the execution of such a contract by what was then a de jure board of water commissioners; and such authority would properly proceed from that board itself, which for that purpose was, in effect, the village. The ratification pleaded would therefore be sufficient, if it was an acceptance and approval by the board of water commissioners, when duly organized, of what they had assumed to do before they were duly organized. That such was the legal effect of their course of action, as set out in the finding of the superior court, is manifest.

The bond in suit, which bears even date with the construction contract, is one of the exhibits described in the complaint, and was made a part of it by express reference. It runs in favor of the village, and recites that Francis Leonard had entered into this contract with it through its board of water commissioners. This estopped the defendants from denying the authority of the board to represent the village, both as to the contract, and as to what was done in execution of it. *Insurance Co. v. Colton*, 26 Conn. 42, 50.

The estoppel was sufficiently pleaded. The bond was, in effect, set out in the complaint; and it appeared upon its face that its legal operation was necessarily such as to preclude the obligors from contesting either the proper execution of the contract, or the right of the board to accept the security which they offered to give the village for its due fulfillment. The fact that the board never formally voted to accept the bond is immaterial. They took it into their possession to "hold subject to further action." That was a sufficient delivery, and this suit supplies the

want of further action. The sureties on the bond were not entitled to express notice of the acceptance of their obligation; for it was absolute in terms, executed contemporaneously with the construction contract, and part of the same transaction. *White v. Reed*, 15 Conn. 457, 463.

This contract provided for monthly payments during the progress of the work of 85 per cent. of the amount due for the preceding month, as that might be estimated approximately by the village engineer; the balance to be retained as security for the faithful performance of the contractor's obligations until the time of the final estimate and settlement. Nor was it then to be paid over until the work had been publicly tested, and accepted in writing, nor unless, within 20 days from such acceptance, Leonard gave a bond with sureties to keep the works in repair, at his own cost, for one year. Payments largely in excess of 85 per cent. of the contract prices for work done were, however, made both before and after April 19, 1893, and in most cases without any estimate of the engineer. On April 19, 1893, Francis Leonard, after stating to the board of water commissioners that he must abandon the contract, made, by agreement with the board, its treasurer his agent to receive any moneys thereafter to become due under the contract, and therefrom to pay his employes and those from whom materials were purchased. After this substantially all moneys due under the contract were paid out by the treasurer of the board in the manner thus provided. The final payment due to the contractor was made without requiring any bond for keeping the works in repair, the giving of any such security being waived by the village. Material changes were also made, by order of the engineer, from time to time, in the details of the plan on which the construction contract was based. A line of pipes to be laid in a highway for a distance of over 2,500 feet was transferred to private property. Another line was changed from one street to another, and considerably lengthened. The position of another line was shifted for a distance of over a mile, so as to be at some points 200 feet from that marked on the original plans. The dimensions and level of some of the pipes were also varied, so as to call for additional expense on the part of the contractor. None of these changes were necessary to the proper fulfillment of the work, and none were made known to the sureties on the bond; nor did they know of or authorize the variations adopted in the manner of making payment under the contract, or of disbursing the moneys paid.

So far as concerns the changes in the line, site, level, or dimensions of water pipes, they were all warranted by the provisions in the contract that "the quantities of the work to be done," as specified, were approximate only, and could be increased or diminished by the board of water commissioners, and

that the engineer could make such changes in the "forms, dimensions, and alignment of the work" as might, in his opinion and that of the board of water commissioners, be necessary for its proper fulfillment. It was for them, and not for the courts, to determine whether the changes ordered were in fact necessary. Sureties for the performance of a contract so framed must be presumed to contemplate the making of such changes, and, as the defendants did not stipulate for any right to participate in determining whether they should be made, there was no occasion to notify any one but the principal contractor of the fact that they had been ordered. It is contended by the defendants that "alignment" means simply an "adjusting to a line," and that a change in alignment cannot be construed to cover a change of line. The word in question carries a wider meaning than that thus assigned to it. It signifies, not only the act of adjusting to a line, but the state of being so adjusted, and, in terms of engineering, is used to denote the ground plan of a road or other work, as distinguished from its profile. *Webst. Dict.*

But the variations in the mode of payment were substantial, and no power to make them had been reserved. The sureties on the bond, as well as the village, had an interest in its keeping control of the monthly balances of 15 per cent. of the engineer's estimates until the job was completed; for they would constitute a fund to meet any claims for damages from breach of contract that might then be made. They had an interest, also, of another kind, in having the monthly payments graded by such monthly estimates. It served to keep the contractor up to his work, while to pay him without any estimates might well lead to mistakes and delay, if not to his drawing money faster than he earned it. The arrangement by which he constituted the treasurer of the board his financial agent was one that could not properly be made without consulting the sureties. The treasurer was less an agent for the contractor than a representative of the village. His authority derived from Leonard was given to him because of his public office, and his first duty continued to be that which he owed to the plaintiff. It might call upon him to act adversely to the interests of his new principal under the contract, and at best put him in the position of one serving two masters. The waiver of the bond for keeping the works in repair for a year after their acceptance withdrew, also, a security on which the sureties had a right to rely; for if the job were so poorly done as to require repairs within the year, and the village should claim that this was due to a failure to observe the conditions of the contract, they might have been held for the resulting damages, and in that event could have claimed to be subrogated to the benefit of the second bond. By these ma-

terial departures from the contract, respecting the mode of determining, making, and applying the payments for which it stipulated, the sureties were released. Their obligations could not be thus extended without their consent, and the attempt to do it destroyed the ground of their liability, by substituting a new contract for that to which their bond referred. *Rowan v. Manufacturing Co.*, 33 Conn. 1, 23. When Francis Leonard stated to the board of water commissioners that he must abandon the contract, and submitted to it the proposition that he should make its treasurer his agent, two courses only were open to it for the preservation of its legal rights. It might reject the proposition, and look to the sureties; or it might accept it, provided their consent were asked and obtained. Neither of these things was done. Instead, the board, without consulting the sureties, agreed with Leonard that, notwithstanding his confessed inability to carry through the job on his own credit, he might proceed in its execution, in consideration of his making its treasurer his financial agent. The contract provided that, should Leonard fail to pay any wages or other account that might become due from him in its execution, the board might pay them out of any funds due to him, but in no case without the written approval of the engineer. After the arrangement of April 19th, the wages of employes were paid by order of the board upon the recommendation of its treasurer, and without any certificate or estimate from the engineer. It may be that all this worked no injury to the sureties, but, whether it did or not, the result is the same. Any variation of the contract to which they did not assent was fatal, notwithstanding it might operate directly for their benefit. *Miller v. Stewart*, 9 Wheat. 680; *Board v. Branham*, 57 Fed. 179. This defense was sufficiently pleaded in the answer, and the facts upon which it arose were substantially admitted by the reply. The plaintiff contends that it is fully met by the provision in the contract that "any cash payments made before the completion of the work shall in no way affect or alter the conditions of this contract." This manifestly referred to the accompanying conditions as to the responsibility of the contractor to the village for the character of the work done, and the continuance of such responsibility until he should be released by the formal action of the board, with the concurrence of the engineer. It did not, as against the sureties, justify a material variation in the mode of payment, or in the manner in which the moneys, when paid, were to be disbursed.

It is also claimed that the sureties had constructive notice from the public records, including those of the board of water commissioners, of all or most of the various departures from the construction contract. Such is not the law. A surety is not bound to be on the watch for variations which may

be made in the obligations of his principal. But, even had actual notice of whatever was done been promptly given to the sureties on this bond, it would have been unavailing to enlarge their liability. That could result only from knowledge and acquiescence both.

The letter of the engineer, written in February, 1898, to the board of water commissioners, in which, after stating that Leonard had requested an estimate, and is apparently entitled to one, he recommends a payment of a lump sum of \$1,000, or \$1,200, as, in his opinion, the work performed was certainly worth that amount, was properly excluded. It was not an estimate such as the contract required, and did not justify, as against the sureties, the payment of \$1,000 made on the strength of it. Even could it be considered an estimate that the work done was worth \$1,000, not more than 85 per cent. of that amount could have been properly paid on it. It is unnecessary to consider the rulings under which certain evidence offered to show that the plaintiff had suffered damage by breach of the construction contract was excluded, as the defense of the sureties is an absolute one, as respects the entire cause of action.

The plaintiff also claimed in the trial court, and claims here, that what took place on April 19th amounted to an abandonment of the contract by Francis Leonard, and the appointment by the board of its treasurer as the agent of the village to complete the job, as being the most economical mode of accomplishing that object; the latter paying out, as Leonard's agent, only what the village owed to him, and making all other disbursements as the treasurer of the board. This state of facts was set up in the plaintiff's pleadings, but denied by the answer, in which it was averred that what was really done was to substitute, between Leonard and the village, a new agreement for the provisions of the original contract. The issues thus raised were found for the defendants, and the facts set out in the special finding fully support that conclusion.

The only remaining ground of appeal which has sufficient merit to call for its discussion is that judgment should have been rendered against Francis Leonard, the principal in the bond, even if it went in favor of the surviving surety, who was the other defendant. This is a point not raised in the trial court, and resting on Gen. St. § 1108, which permits a judgment against a part only of the defendants in such an action, but does not require it. The plaintiff made 13 claims of law on the trial, and the only one which could by any possibility cover or relate to that now presented is the last in order, which reads thus: "That the defendant Francis Leonard was a surety on the bond, and he knew all the facts relative to any change made relative to the arrangement of April 19th, and regarding the extras, and that all of the defendants were bound by the

constructive notice which they had of the matters of record of the board of water commissioners, of the village records, and of the records of Orange county." This language, far from being such as to direct the attention of the superior court to any several liability of Francis Leonard, as principal in bond, was rather calculated to divert attention from it, since it describes him as a surety, and charges all the defendants with constructive notice of the doings of the board. Under these circumstances, there was no error in not rendering a judgment for which the plaintiff did not ask, and which, in view of the manner in which its pleadings were framed, it might well have been assumed that it did not desire. There is no error in the judgment appealed from. The other judges concurred.

RICH v. BLACK et al.

(Supreme Court of Pennsylvania. May 24, 1897.)

APPEAL—DECISION—EFFECT.

Where an interlocutory decree in an equity case, directing an account, is affirmed, and the record remitted for further proceedings, questions as to the liability to account cannot be again considered on appeal from final decree.

Appeal from court of common pleas, Allegheny county.

Bill by Martha K. Rich against Black & Baird, Daniel H. Barr, and others, to have defendant Barr declared trustee for plaintiff as to certain land, and to obtain an accounting by defendants. On appeal by defendants from an interlocutory decree directing an account, the decree was affirmed, and the record remitted, and from a final decree confirming the report of the referee with slight modifications, defendants again appeal. Affirmed.

J. S. & E. G. Ferguson, for appellants. M. A. Woodward, for appellee.

PER CURIAM. This case was before us in November, 1895, on defendants' appeal from the decree of July 6, 1895, adjudging and decreeing "that Daniel H. Barr be, and is hereby, held as trustee of the property described in the bill, and of the portions remaining unsold," and ordering "that Black & Baird, to wit, Milton L. Baird, J. L. Gloninger, and David P. Black, account to the plaintiff for the moneys and property received from the sale of this land that has been conveyed by the plaintiff to Daniel H. Barr as set forth and described in the pleadings," and sending the case to a "referee to take testimony and state an account," etc. Rich v. Black, 173 Pa. St. 92, 33 Atl. 880. It is a mistake to suppose that the questions involved in that appeal were not all definitively settled by our affirmance of said decree and remittance of the record to the court below for further proceedings. If there is any merit whatever in the provision for appeal "in equity cases of account where the lia-

bility to account is in issue," it must be in the fact that all questions relating to such liability will be thus finally settled by the appellate court before further proceedings are had in the trial court. So far, therefore, as the specifications of error relate to questions that were involved in the former appeal, they may be dismissed without further remark. As to those involving questions that have arisen since the affirmance of the former decree, a careful consideration of the record has satisfied us that there is no error in any of them of which the defendants have any just reason to complain. We are constrained to think the defendants were very considerably and leniently dealt with by the learned referee and court below. We find nothing in the assignments of error that requires special notice. They are all dismissed. Decree affirmed, and appeal dismissed, at the defendants' costs.

HEY v. GUARANTORS' LIABILITY INDEMNITY CO. OF PENNSYLVANIA.

(Supreme Court of Pennsylvania. May 17, 1897.)

INSURANCE—"ACCIDENTAL" DAMAGE—FLOOD—CONCEALMENT OF MATERIAL FACTS.

1. A policy insuring against loss arising from "accidental" damage or destruction, except by fire or lightning, covers loss by flood.

2. Failure of the insured to disclose that the property insured against accidental damage is on the river bank, and has previously been damaged by floods, is not a concealment which will bar recovery for loss from such cause, the facts being equally open to the insurer.

Appeal from court of common pleas, Philadelphia county.

Action by Robert H. Hey, trading as Richard Hey & Son, against the Guarantors' Liability Indemnity Company of Pennsylvania. From a judgment for plaintiff, defendant appeals. Affirmed.

J. Howard Gendell, for appellant. Francis S. Cantrell and Francis S. Cantrell, Jr., for appellee.

MCCOLLUM, J. The policy in suit contains two distinct contracts of insurance. In the one on which the claim in this case is made, the company agreed to indemnify the plaintiff against all loss arising from any accidental damage to or destruction of his stone mill, and warehouse, machinery and stock, stable and other outbuildings, located at No. — Ridge avenue, Manayunk, Philadelphia, "excepting only damage or destruction by fire or lightning." The insurance was for one year from the 22d of June, 1895. On the 6th of February, 1896, "by reason of a sudden rise of the water in the Schuylkill river," certain property in the buildings mentioned, consisting of machinery, stock, etc., was damaged, destroyed, or carried away by the water which came in and upon the buildings. The plaintiff, in his statement of claim, specified the items of damage and the amount thereof. The company,

in its affidavit of defense, disclaimed liability for the loss, alleging as grounds for the disclaimer that it did not arise from accidental damage to or destruction of the buildings, machinery, stock, etc., and that the plaintiff did not state in his application for insurance that the property insured was on the bank of the Schuylkill river. The company also averred in its affidavit of defense that the amount claimed in the plaintiff's statement was an overestimate of his loss, and that there should be deducted from it the sum of \$2,176.21. The plaintiff agreed to the deduction claimed, and the court, having made it, entered judgment for the balance. If there was no misrepresentation or concealment which vitiated the contract, and the language of the latter fairly includes and imposes a liability for the loss caused by the flood or freshet, the judgment should be sustained. The defendant company's main contention is that damage to or destruction of property by a flood is not accidental damage or destruction, within the meaning of its contract. This leads us to consider what an accident is. The definitions of an "accident," as given in the Century Dictionary, are, among others, as follows: "(1) In general, anything that happens or begins to be without design, or as an unforeseen event. (2) Specifically, an undesirable or unfortunate happening; an undesigned harm or injury; a casualty or mishap." In Bouvier's Law Dictionary, "accident" is defined as "an event which, under the circumstances, is unusual, and unexpected by the person to whom it happens. The happening of an event without the concurrence of the will of the person by whose agency it was caused; or the happening of an event without any human agency." In Anderson's Law Dictionary the following definitions of "accident" are given, with citation of authorities: "An event or occurrence which happens unexpectedly, from uncontrollable operations of nature alone, and without human agency; or an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both. An event from an unknown cause, or an unusual or unexpected event from a known cause; chance, casualty." A definition corresponding substantially with those quoted above may be derived from our own case of Insurance Co. v. Burroughs, 69 Pa. St. 43. The principle of that decision is that an accident is an unusual or unexpected result attending the operation or performance of a usual or necessary act or event. To the same effect is Burkhard v. Insurance Co., 102 Pa. St. 262. Further reference to the authorities which define an "accident" is unnecessary. It must be and is admitted by the defendant company that accidental damage to or destruction of property is the result of an accident. It may be the consequence of a tornado, a flood, or a thunderbolt. These, as causes of the damage or destruction, may be considered as in the same category. The destruction of a building by flood or freshet is as

clearly accidental as the destruction of it by lightning. If damage to or destruction of the property by lightning was not regarded by the defendant company as accidental damage or destruction within the meaning of its contract, it would not have excepted from the same "damage or destruction by lightning." The exception of one from a number of like causes of damage to or destruction of property was a recognition by the insurer of its liability for loss arising from other causes of the same nature. The fact that there had been floods in the Schuylkill before the occurrence of the one in question cannot affect the construction of the contract, or the liability of the defendant company under it. The company is presumed to know that which is obvious in regard to the property insured, including the natural perils to which it is exposed. *Western & A. Pipe Lines v. Home Ins. Co.*, 145 Pa. St. 346, 22 Atl. 665, and *Louck v. Insurance Co.*, 176 Pa. St. 638, 35 Atl. 247. In the absence of express stipulation, and where no inquiry is made, a failure to state facts known to the insurer or his agent, or which he ought to know, is no concealment. The insurers are presumed to be skilled in their business, and to know those general facts which are open to the public, and may be known to all who are interested to inquire. *May, Ins. § 207, Insurance Co. v. Paul*, 91 Pa. St. 520, and *Insurance Co. v. Hoffmann*, 125 Pa. St. 626, 18 Atl. 397, are to the same effect. In the case in hand there was no concealment or misrepresentation by the assured. The hazards affecting liability to the public related to another branch of the indemnity promised by the insurer, and obviously had no connection with the contract in question. Our conclusion is that there was nothing in the affidavit of defense which constituted a complete or partial defense to the action, and that the judgment appealed from was properly entered. Judgment affirmed.

MARTIN v. RIDER et al.

(Supreme Court of Pennsylvania. May 17, 1897.)

APPEAL FOR DELAY—DAMAGES.

Where an appeal is taken merely for delay, damages at the rate of 6 per cent. per annum on the amount of the decree will be awarded by the supreme court, together with an attorney's fee of \$20 and the cost of printing appellee's paper book. Act May 25, 1874 (P. L. 227).

Rule by John H. Martin against W. D. Rider and another to show cause why the penalty prescribed by Act May 25, 1874 (P. L. 227), should not be imposed on defendants. Rule made absolute.

Pearson Church, for appellee.

PER CURIAM. The act of May 25, 1874, under which this rule for damages, etc., was granted, declares: "That in all cases in which

a writ of error, or an appeal from a decree in equity shall delay the proceedings on the judgment of the inferior court, and in the opinion of the supreme court the same shall have been sued out merely for delay, damages at the rate of six per cent. per annum shall be awarded upon the amount of said judgment or decree by the supreme court, and an attorney fee of twenty dollars and cost of printing paper book of the defendant in error or appellee shall be taxed and collected as part of the costs of suit." Without referring specially to the record, affidavits, answer, etc., it is sufficient to say that the facts, as they appear to us, bring this case within the mischief intended to be remedied by the act above quoted. We are all of opinion that the appeal was taken merely for the purpose of delay. No other inference can be fairly drawn from the facts before us; and according to our ruling in *O'Donnell v. Broad*, 149 Pa. St. 24, 27 Atl. 305, *Bachman v. Gross*, 150 Pa. St. 518, 24 Atl. 712, and *Pennypacker v. Dear*, 166 Pa. St. 284, 31 Atl. 89, and other cases, the plaintiff is entitled to the damages specified in the act. The rule is therefore made absolute, and it is adjudged and decreed that damages, at the rate of 6 per centum per annum on the amount of the decree, be, and the same are hereby, awarded in favor of the plaintiff, and against the defendants, together with an attorney's fee of \$20, and cost of printing appellee's paper book, if any, be taxed and collected as part of the costs.

In re GRIMM'S ESTATE.

Appeal of MONROE.

(Supreme Court of Pennsylvania. May 17, 1897.)

EXECUTORS—ACCOUNTING—INSOLVENT ESTATES—SALES.

The widow and sole legatee of a saloon keeper purchased the stock and fixtures from the executor, leased the premises, obtained a transfer of the license to herself, and, after several months, sold the same; the license, on her petition, being transferred to the purchaser. The estate being insolvent, the widow agreed that the proceeds should be held by the executor as stakeholder till her right was determined. Held, that the executor was improperly surcharged with said sum for the payment of decedent's debts, since the license was a personal privilege which did not pass to him as an asset, and there was no proof that a purchaser might have been found who, on the chance of procuring a transfer of said license, would have paid more for the stock and fixtures than the widow did.

Appeals from orphans' court, Philadelphia county.

Adjudication of the account of Peter Monroe, executor of Victor B. Grimm, deceased. From an order confirming the adjudication, said executor and Caroline H. Grimm separately appeals. Reversed.

Joseph P. McCullen, for appellants. Otto Wolff, John H. Sloan, and Wm. F. Johnson, for appellees.

FELL, J. Victor B. Grimm, at the time of his death, was engaged in the retail liquor business. By his will he left all of his property to his wife, and appointed the appellant executor. The fixtures of the saloon and the stock of liquors were appraised at \$50, and the widow became a purchaser of them from the executor at that price. She leased the property in which the business had been conducted by her husband, and two weeks after his death she petitioned the court of quarter sessions to transfer the license to her. Her petition was granted by the court, and she conducted the business on her own account for three months, when she sold the lease, good will, fixtures, and stock then on hand for \$3,000, and on her petition the license was transferred to the purchaser. The estate proved to be insolvent, and upon objection by a creditor to her right to retain the money she had received from the sale of the property she agreed, after the transfer of the license to the purchaser, that the money should be held by the executor as a stakeholder until the right was determined. Upon the audit of the executor's account the auditing judge was asked to surcharge him with \$3,000. This was done by the court, and the executor was directed to pay out of this fund the allowed claims of the creditors.

The things which the widow sold were the fixtures bought of the executor, the stock of liquors bought of others, the lease obtained of the owner of the building, and the good will of a business which she had conducted for three months. These things were hers, and to all of them she had an undoubted title. As the adjudication takes from her the price received from their sale, and applies it to the payment of the debts of another, we have looked with some interest for the reasons which are supposed to sustain it. As stated by the auditing judge they are these: The executor had in his custody or control a business for which the decedent had procured a license, which had some months to run. This business may have had a probable value beyond the value of the stock and fixtures, depending upon the contingency of the transfer of the license. The executor was, therefore, "bound to make at least such a representation to the court as might have induced the court to order the payment to the estate by the transferee of the license of so much of the license fee as would represent the unexpired term of the license." Because of the executor's failure to make such a representation as might have influenced the court to regard the interests of the creditors as superior to those of the widow, and induced it to countenance the barter of a privilege to be granted only on the ground of the public necessity of the place and the personal fitness of the applicant, he is held liable, not for an amount proportionate to the unexpired term of the license, which would be about \$800, but for the amount for which the widow, who had become a tenant of the real estate, afterwards sold the lease, the good will, the

stock (possibly largely increased), and the fixtures of a going business. The surcharge of the executor being thus justified on the erroneous assumption that he had under his control a business which in fact had ended with the life of the licensee, and upon the supposition, unsupported by a word of proof, that a purchaser might have appeared who might have paid a higher price if assured that the license would have been transferred to him, it remained to justify the confiscation of the widow's money to pay her husband's creditors.

It is conceded that the widow came into possession of the stock and fixtures as a purchaser at a fair value; that the license was a purely personal privilege, which did not pass to the executor as an asset of the estate; that the creditors would have had no standing to object to the transfer to her. Yet we are told that her right to control, possess, and dispose of that which was her own is subject to a qualification by which she is deprived of the right of retaining the money received from its sale. No attempt is made to define or classify this qualification, and it doubtless would be difficult to do so, as it appears to be *sui generis*; but it is said to be due to the fact that by her negligence she contributed to the result. The negligence found is thus stated: "She filed, as we have seen, a petition describing herself as sole legatee, and saying nothing of creditors, which compelled the inference that no debts remained to be provided for. She did not even ask that a proportionate share of the license fee should be retained out of the purchase money. So that the inference that she was the only party in interest, and that the estate was solvent, became irresistible." The learned judge adds: "It is not proper to speculate upon the decree which would probably have been made if all the facts had been divulged,"—and then proceeds to speculate as follows: "But it is very safe to say that the estate and the creditors would have been cared for to the extent of the unused license fee." And on this speculation he founds a decree taking from the widow three times the amount of the fee for the full year. We are wholly unable to follow this argument, or to accept the conclusion reached. Why the inference of the solvency of the estate would follow from the widow's omission to state, in a petition in which she applied for the transfer of a personal privilege, that there were creditors, and what its solvency had to do with the question before the court of quarter sessions, are not more apparent than is the authority thus, in effect, to summarily reconsider and reform a decree of that court.

No attempt is made by the learned counsel for the appellees to sustain the reasons on which the adjudication is based, but they advance others which are equally untenable. They claim (1) that the widow took her legacy subject to the obligation to pay debts; (2) that the transfer of the license was taken by her with the assent of the executor until a sale of the whole business could be effected.

The first part of this contention may be answered by the fact that the widow took nothing as a legatee under the will, and the second is wholly unsupported by proof. The license granted to the decedent was a personal privilege, which ended with his life. It was not assignable by him. It did not go to his personal representatives. It was not an asset of his estate. *Blumenthal's Appeal*, 125 Pa. St. 412, 18 Atl. 395. The executor could not have carried on the business without a license, had he been so disposed; and he could not, as executor, have obtained a license, as he would not then have been, as required by law, "the only person peculiarly interested in the business." It was his duty to obtain the best price he could for the stock and fixtures. If some one willing to take the chance of procuring a lease of the house and a transfer of the license had offered more for the stock and fixtures than the price at which they were sold by him, or if there had been evidence that by diligence on his part such a person could have been found, there would have been reason for surcharging him. It is not pretended that there was any such evidence, and the finding of the auditing judge rests only upon unwarranted conclusions drawn from purely imaginary conditions. The order of the orphans' court confirming the second adjudication is reversed and set aside, and it is ordered that distribution be made in accordance with the adjudication filed February 14, 1896, admitting, however, to the distribution, the claims of creditors subsequently proved against the estate, as appears by the adjudication of July 15, 1896.

COMMONWEALTH v. VALSALKA.

(Supreme Court of Pennsylvania. April 19, 1897.)

MURDER—JURY—SWEARING WITNESS—WAIVER OF OBJECTION.

1. It is no objection to an array of jurors, or to an indictment, that the jury commissioners, though having taken oath of office, had not filed it before the drawing of the jurors; it being merely provided by Const. art. 7, § 1, that officers, before entering on their duties, shall take an oath, and in case of county officers it shall be filed in the prothonotary's office; and any person "refusing to take" said oath shall forfeit his office.

2. One on trial cannot complain that when his jury was drawn there had not been replaced in the wheel the names of those who defaulted, or were excused at the previous term; *Act April 14, 1834 (P. L. 365) § 135*, requiring it, being merely intended to secure equality in performance of jury duty.

3. On motion to quash an array on the ground that the jury wheel had not been sealed with the seal of the jury commissioners, evidence of how it was sealed after the jury in question was drawn is immaterial.

4. It will be presumed, in the absence of evidence to the contrary, that the keys to the jury wheel remained in the custody of the sheriff, as required by *Act April 10, 1867 (P. L. 62)*.

5. A jury wheel remains in the custody of the jury commissioners, within the requirement of *Act April 10, 1867 (P. L. 62)*, where, said com-

missioners having no separate office, it is kept in a corner, used for no other purpose, of the county commissioners' safe, in the custody of one who is clerk for both boards.

6. Counsel will be held not to have been misled by rejection of offers of evidence as to improper sealing of the jury wheel, and improper custody of its key, where the court pointed out that the offers were not properly directed to the period of time which would render them material, and indicated that evidence directed to such period would be receivable; and counsel, acting on like suggestion as to offer in regard to custody of the wheel, renewed his offer on that point, and was heard on the testimony in regard thereto.

7. *Act March 18, 1874 (P. L. 46) § 3*, requiring a list, containing the name, occupation, and residence of every person placed in the jury wheel to be kept, certified by the judge and the jury commissioners present at the selection of such persons, and filed in the prothonotary's office, does not render subject to challenge one whose name has been selected and placed in the jury wheel, but which has not been put on the list, or has been written there inaccurately; but such condition of the list merely raises a prima facie presumption that the person was not selected.

8. The prima facie presumption that a person summoned as a juror was not selected, arising from the fact that his exact name does not appear on the list of those placed in the jury wheel, which *Act March 18, 1874 (P. L. 46) § 3*, requires to be kept, is overcome by the presence thereon of a name the same except in the first letter of the given name, with the same occupation and residence, with proof that there was no person to be selected of the exact name appearing on the list.

9. A juror who was regularly drawn, served with notice, and appeared in response thereto, is not disqualified because of error in writing his name in the sheriff's return of service of jury notices.

10. A juror summoned and returned as a mine boss, and who was such till two months before the filling of the jury wheel, and who thereafter continued in the mining business as superintendent of a plane, is sufficiently identified as the person of the same name, who appears on the list of jurors put in the wheel as a mine boss, though there was another person of the same name and residence, but who had for two or three years been a merchant and insurance agent only.

11. It is proper to sustain a challenge for cause by the commonwealth to a juror who states on his voir dire that he has such conscientious scruples on the subject of capital punishment as would prevent his rendering a verdict of guilty of murder in the first degree, if the evidence clearly warranted it.

12. Defendant waives objection to the swearing of witnesses in English without an interpreter by waiting till after the state has closed its case, and then moving to strike out their testimony, claiming that they did not understand the oath, and that the matter was brought up as soon as it was discovered, though two to three days were consumed in examination and cross-examination of such witnesses.

Appeal from court of oyer and terminer, Luzerne county.

Peter Valsalka, alias Peter Wassel, was convicted of murder in the first degree. Motions for new trial and in arrest of judgment were denied, and he appeals. Affirmed.

The opinion of the lower court in overruling motions for new trial and in arrest of judgment is as follows:

"We will consider in their order the several reasons filed in support of this motion,—the

first four being directed to the alleged illegality of the indictment.

"1. It is claimed that there was no legal indictment, because the persons who found it were selected by jury commissioners who had not taken and filed in the office of the prothonotary the oath of office prescribed by article 7, § 1, of the constitution, and therefore such commissioners were not legally qualified to act. The record shows that this reason comes up under the following circumstances: Before pleading, defendant's counsel moved to quash the arrays of grand and petit jurors, as also the indictment, because, as alleged, the jury commissioners S. W. Taylor and J. F. Dohl had never taken the oath in question, nor filed the same. At the request of the counsel for this motion, who had not sufficient evidence at hand to support the facts involved in it, the court was adjourned to enable the defendant to produce the jury commissioners to establish such fact. At the meeting of the court these persons were produced and sworn, and from their evidence it appeared that they had taken, reduced to writing, and signed the oath of office before the deputy recorder, in the office of that officer, and had there left it; this being before the beginning of their official terms. That they supposed, from information received upon inquiry, that this was all that the law required of them in that behalf. We thereupon found as matter of fact that these officers took the oath prescribed by the constitution, and we overruled the motion; adding, in our ruling, that, even though the oath was not filed in the prothonotary's office, that would not be a sufficient reason for allowing the motion, in that the portion of the constitution relating to the filing of the oath is directory rather than mandatory. The first clause of section 1, art. 7, Const., requires county officers, before entering upon the duties of their respective offices, to take and subscribe the form of oath there given; the next clause requires such oath to be administered by some person authorized to administer oaths, and, in case of county officers, that it shall be filed in the office of the prothonotary of the proper county; and the next provides: 'And any person refusing to take said oath or affirmation shall forfeit his office.' Our meaning at the time of overruling this motion would have been more clearly expressed had we said that the clause prescribing a forfeiture of office has reference merely to the refusal to take the oath, and the failure to file it is neither a cause of forfeiture, nor is the filing a prerequisite to the right and qualification of the officer to enter upon the duties; but such filing is directed merely for the purpose of preserving the oath as evidence that it has been taken, and the act of filing may be performed at any time. In support of the first reason filed, and now under consideration, it has been argued at length that in construing express constitutional provisions courts have no authority to hold that any of them is merely directory, or anything less than mandatory,

and therefore, as the oath was not filed when the jury commissioners filled the jury wheel, or afterwards when they drew the panels of jurors, the motion to quash the arrays and the indictment ought to have prevailed. Whatever may be said of this first proposition, it does not meet the facts of the case and the real question before and in the mind of the court when the ruling was made. As already indicated, the constitution does not expressly say that the oath shall be filed before the officer enters upon his official duties, nor that he shall forfeit his office if he fails to file said oath; and if such was the meaning intended, it arises from implication only. At the time of the ruling these features were in mind, as also what was said by Gibson, C. J., in *Com. v. Clark*, 7 Watts & S. 133, as to the commands of the constitution, namely, that 'its commands as to the time or manner of performing an act are to be construed as merely directory whenever it is not said that the act shall be performed at the time and in the manner prescribed and no other.' Without further commenting upon the reasons given or intended to be applied by the court in overruling the motion in question, we are satisfied that the ruling was correct upon other grounds, namely: The constitutional provisions in question do not relate to the mode of the exercise of the official functions of the officers there named after they shall have entered upon the duties of their offices, but only to what they shall do after their election or appointment, and before beginning the performance of official duty, in order to entitle them to the right and power to act. To be more specific, these provisions do not pertain to the mode of procedure of the jury commissioners of this county, Messrs. Taylor and Dohl, either in their filling the jury wheel with the names from which the grand and petit jurors here involved were drawn or in the drawing of those juries. Nor is there any allegation that said commissioners were not duly and regularly sworn, first before the filling of the wheel, and next before drawing the panels, in accordance with the act of assembly in such case provided. The constitutional provisions, however, relate to the duties of Messrs. Taylor and Dohl before assuming to act as jury commissioners for any purpose, in order to entitle them to the right and power to thus act. And, even though their oaths of office were not actually filed in the office of the prothonotary, the most that can be said of their delinquencies is that they neglected a prescribed constitutional duty before asserting their powers as commissioners; not, however, that they neglected a duty the nonperformance of which constituted a cause of forfeiture of office, for that cause is the refusal to take the oath. These persons have acted as jury commissioners, and this is admitted both in the motions made at the trial and in the reasons now before us. They are, therefore, at least officers de facto in any and every event, and their legal right and power to act as such cannot be gainsaid by the defendant in this case,

as this question could only be raised by parties other than the defendant, and in another proceeding instituted directly against these officers. See *Keyser v. McKisson*, 2 Rawle, 139; *Clark v. Com.*, 29 Pa. St. 129; *Campbell v. Com.*, 96 Pa. St. 344; *Shartzler v. School Dist.*, 90 Pa. St. 192; *Gregg Tp. v. Jamison*, 55 Pa. St. 468; *Com. v. Slifer*, 25 Pa. St. 23-31.

"2, 3. The second reason is that the petit jury that appeared to try this cause were illegally impeached because they were drawn from a jury wheel not in the custody of the jury commissioners; and the third is that the key of the jury wheel was not at all times inaccessible to any other person than the sheriff. These reasons, like the one already considered, embody complaints without specifying how or wherein the court erred with respect to the matters therein embraced. These complaints are of a serious nature, and, in order that our disposition of them may be intelligible, it is necessary to refer to the record facts. After the testimony had been heard upon the motion already considered, counsel for the defendant filed four additional reasons—unsupported, however, by any affidavit or evidence—for quashing the arrays and the indictment. The facts asserted in each of these four several reasons are, upon the face of the latter, either directed to such a period of time as shows their irrelevancy to the matter then before the court, to wit, that of quashing the arrays and the indictment, or to an entirely indefinite period, and therefore having no direct bearing upon the case at hand. We will here reproduce these reasons, numbering them, for convenience sake (a), (b), (c), (d), as follows: (a) Because the jury wheel is not in the custody of the jury commissioners. (b) Because the key of the jury wheel has not at all times been inaccessible to any other person than the sheriff. (c) Because the prothonotary of the court of common pleas and the clerk of the court of quarter sessions and oyer and terminer did not, nor did either of them, certify to the sheriff and jury commissioners of the said county, at the end of the preceding term of their respective courts, the names of the jurors who appeared and served at the said terms; also the names of those who made default, or were excused from serving as jurors at that time, and also the names of those who were privileged or exempted from serving as jurors. (d) Because the jury wheel has not been sealed as prescribed by the act of assembly. After filing these several reasons, counsel for defendant made an offer to show the facts asserted therein, this offer being in the exact language of the reasons, and therefore equally as indefinite as they in their bearing upon the question of the validity of the arrays and indictment sought to be quashed. These reasons and the offers were severally overruled, and in overruling them the court, in order that the counsel should not be misled as to the

causes for such action, but might remold his reasons so as to render them pertinent to the particular indictment and juries involved, said, as to reason and offer (a), that it was too general, in not specifying that the wheel was not in the custody of the jury commissioners prior to the time when the grand jury which found this indictment was selected, and prior to the time when the petit jury was drawn; as to reason and offer (b), that they were also too general, in not fixing the period of time during which the key was not inaccessible to persons other than the sheriff; as to reason and offer (c), that these were insufficient for quashing the arrays or the indictment, unless it were also shown that the names of those who made default or were excused were not replaced in the jury wheel, and also that the time fixed in the offer was too general to affect the question before us (the fact being that the end of the preceding terms of the respective courts specified in the offer was March 9 and March 26, 1896, respectively,—a time long after the juries involved had been drawn); and as to the reason and offer (d), that it was also too general. The subject-matters of the reasons (c) and (d) are not now assigned among the reasons in support of the motions presented before us, but they have been argued as if thus assigned, and we will so consider them.

"Our ruling as to the lack of pertinency of reason (c) by reason of the time referred to therein requires no further comment. The other branch of the ruling on the same reason was predicated of the theory that section 128 of Act April 14, 1834 (P. L. 364), requiring the certificates referred to in that reason, and section 135 of the same act, requiring the sheriff and commissioners to replace in the wheel, at the time of the next drawing, the names of jurors thus defaulting or excused, were intended for the benefit of the suitor, and for the purpose of giving him as large a number of names as possible from which juries to try his cause should be selected; and therefore, if these names were in fact replaced in the wheel (which would be presumed unless it were directly shown to the contrary), the defendant had not been injured by the alleged neglect of the clerk and prothonotary to certify the names, as this did not prove failure of the jury commissioners and sheriff to replace the names in the wheel. Upon further investigation, however, we find it directly decided in *Rolland v. Com.*, 82 Pa. St. 321, that even the omission to replace these names in the wheel is a matter of which the defendant on trial cannot complain, and that the legislation in question was only intended to secure equality in the performance of jury duty. This necessarily disposes of the defendant's contention as to this subject-matter.

"Upon the overruling of reason (d), *supra*,

counsel for defendant, without filing any more specific data in that regard, thereupon offered to prove that the jury wheel had not been sealed with the seal of the jury commissioners, as prescribed by the act of assembly, by the presentation in evidence of the wheel itself, which was then produced in court for that purpose, and showed the manner in which it was then sealed; it thus being long after the juries involved in the case had been drawn, and after the wheel, subsequent to such drawing, had been sealed. The ruling upon this offer was as follows: "The question is not how the jury wheel as exhibited here in court to-day is sealed, or has been sealed. The question, if of any importance at all, is as to how it was sealed, or kept sealed, prior to the time when these juries were drawn. Any evidence going to show that it was not sealed prior to that time is allowable. Evidence of its condition since the juries have been drawn is entirely immaterial." We discover no error in this ruling. Moreover, it clearly indicated the time to which evidence relating to the subject should be directed, and could not, therefore, have been misleading to the counsel. No evidence with relation to such period was offered or asserted to be in existence, and we must conclusively presume there was none affecting the proper sealing of the wheel in the manner prescribed by the act of assembly.

"Upon the overruling of reason (a), supra, defendant's counsel, without filing further reasons in that behalf, offered to prove that the jury wheel was not in the custody of the jury commissioners for one week prior to the drawing of the grand and petit juries for the term at which the indictment was found. This offer was allowed, and thereupon Mr. James M. Norris was sworn, and testified substantially as follows: That he was the clerk for both the jury commissioners and the county commissioners, and was paid by each board for services rendered for them, respectively; that the jury commissioners had had no separate office in the courthouse or elsewhere; that the jury wheel had been kept in the upper right-hand corner of the safe in the commissioners' office,—the place especially set aside for it,—and that the jury commissioners themselves took it out each time before the drawing of a jury, and put it back again; that this corner of the safe was devoted to no other purpose than that of keeping the wheel and the envelopes containing the names of jurors drawn, after a drawing took place; that the wheel was in the custody of the witness, as the clerk of the jury commissioners, in the corner of the safe in question; that the safe was not accessible to others; and that there were two sets of doors to it, which were kept closed, except while putting in or taking out papers, but not locked during the daytime. After considering this evidence, we found that the wheel was in the custody of the jury commissioners during the period in question, within the meaning of the act of assembly in that regard, and thereupon the motion was over-

ruled. Complaint in this respect is continued under the second reason now before us on the present motions, and under the third of these reasons there is again presented the complaint made on the trial by motion (b), supra, to quash the indictment, because the key to the jury wheel was not at all times inaccessible to persons other than the sheriff. The second section of Act April 10, 1867 (P. L. 62), enacts that 'the said jury wheel, locked as now required by law, shall remain in the custody of the jury commissioners, and the keys thereof in the custody of the sheriff of the said county.' It has been held that, in the absence of evidence to the contrary, the presumption is that the sheriff and jury commissioners have legally performed their duties. *Rolland v. Com.*, 82 Pa. St. 306. It has been seen (and as to this reference will be further hereinafter made) that there is no evidence that the key of the wheel was not in the custody of the sheriff as required by law, and as to the custody of the wheel by the jury commissioners we have the evidence already set forth. We think this evidence justified the finding that the law had been complied with. The legislature have definitely prescribed the locking and sealing of the wheel, as also the manner of such sealing; but as to the additional precautions to prevent tampering with the names placed therein from which juries are to be drawn, the enactment is less specific. It does not attempt to define the precise meaning intended by the use of the word 'custody,' either as respects the wheel or the key; and of this portion of the enactment it was said in the case last cited: 'We must give this section a reasonable interpretation. It does not designate where the wheel shall be kept, and provides no place in which the jury commissioners may deposit it.' It was, therefore, held in that case that the depositing of the wheel in the vault in the county commissioners' office, in a locked chest, in the custody of the county commissioners' clerk, who was also the sworn clerk of the jury commissioners, was a sufficient compliance with the statute relating to the custody of the wheel. In the later case of *Curley v. Com.*, 84 Pa. St. 152, there being no office provided for the jury commissioners, nor place of safety for the custody of the wheel, they arranged for its custody in the vault of the county treasurer, upon condition that no one but a jury commissioner should enter the vault for the wheel. The sheriff kept the key, and it was held that the custody of the wheel was sufficient. In this last case the key to the vault was in the possession of the county treasurer, and, of course, he had access thereto. His only restraint by the jury commissioners against taking the wheel from the vault or allowing persons other than these commissioners to enter it for that purpose was his agreement with the jury commissioners not to do so, and the legal penalties attaching to his interference with the wheel. So, in the present case, the jury commissioners were without an office or place of their own, under

the control of no one else, in which to keep the wheel; and it was kept in the place designated and set apart for it in the county commissioners' safe. So far as shown, no one but the jury commissioners ever took it out of that place, or put it back there, or were authorized by them to interfere with it in any way; and, while the clerk of the county commissioners had access to the safe, he was, at the same time, the clerk of the jury commissioners, and his access to the safe, and use of it for the purposes of the business of the county commissioners, no more interfered with the legal custody of the wheel in the jury commissioners than did the entrance of the treasurer into his own vault on business pertaining to his office, in the case of *Curley v. Com.*, *supra*. That the word 'custody' mentioned in the statute does not necessarily imply a constant keeping under lock and key, is shown in the above case of *Rolland v. Com.*, where the keeping of the key by the sheriff in an unlocked drawer of his desk, to which his son and others going into the room had access, by reason of the desk not being locked all the time, was nevertheless held to be a compliance with the law, although a careless keeping of the key.

"The line of argument adopted in support of the present motions, in view of our conclusions that there is no evidence affecting the proper sealing of the jury wheel, or showing that the key thereof was not in the custody of the sheriff, as required by law, requires further notice at this point. It is conceded by counsel for defendant—in fact the record proves it beyond any question—that there is not, upon such record, any evidence of the character just referred to; but it is claimed: (1) That under the formal reasons (b) and (d), *supra*, and the offers to prove the facts there alleged (being among the several reasons filed for quashing the arrays and the indictment), the court should have admitted evidence to show that the wheel was not properly sealed, and that the key was not properly kept; (2) that it must now be presumed that such evidence existed; and (3) that by overruling the reasons and offers the defendant has been deprived of his legal rights. It is not now argued, nor is such a proposition tenable, that the questions of the proper custody of the key in the sheriff, and of the proper manner of sealing the wheel, were material in this case, as respects any other period than from the last annual filling of the wheel to the drawing of the grand and petit jurors involved in the finding of this indictment and the trial thereof; but it is contended that the reasons and offers in question, although not expressly directed to this period of time, should not have been overruled, because their unlimited scope as to time embraced, among others, the material period; and, as said by the court in *Com. v. Bezek*, 168 Pa. St. 616, 32 Atl. 109, the rule in civil cases, that it is not error to reject as a whole an offer which blends irrelevant and inadmissible matters with

a matter relevant and admissible, ought not to be summoned to sustain a ruling prejudicial to the interests of a defendant on trial for murder. There is no doubt of the correctness of the law or the principle of justice involved in this last proposition, but the mistake of the counsel in invoking it to prove that the court was in error in the ruling referred to lies in an erroneous assumption as to the true character of such ruling, and that it was prejudicial to any legal interest of the defendant. If the court had simply overruled the reasons and offers in question, without further suggestion or comment, and thereby the defendant's counsel had either been fairly misled to assume that the ruling involved the conclusion that evidence even pertinent to the material period of inquiry was not receivable, or he neglected his opportunity to renew the reasons and offers so as to conform to the pertinent period, then such ruling, coupled with its treatment by counsel, would have operated to the prejudice of the defendant's interests, if he, in fact, had pertinent evidence to offer; and in that event the proposition of the case last above cited would now have been applicable, and it would have been wrong to refuse the defendant a hearing on the pertinent evidence in question by the application of the rule in civil cases that it is proper to reject as a whole an offer blending relevant and irrelevant matters. But, as has already been shown, the court, in overruling the reasons and offers referred to, not only distinctly pointed out their lack of pertinency in not being properly directed to the period of time which rendered them material, but also indicated that evidence directed to such period would be receivable. And, as has also been shown, counsel thereupon, in the case of the reason relative to the custody of the wheel, adopted the suggestion of the court, renewed his offer, and was heard upon the testimony. It cannot be said, therefore, either that the counsel was misled by the ruling in question, or that the court refused to receive testimony as to the questions of the proper custody of the key, or the proper sealing of the wheel, at any material point of time. Nor, in view of what we have already said, and in the absence of any specific offer of testimony relative to a material period of time, are we to assume that such evidence existed. The proposition laid down in the case of *Com. v. Bezek*, *supra*, is, therefore, not applicable to the facts of this case, and, as there shown, it was not in fact applied in that case, because, as there appears, after the rejection of the offer of blended relevant and irrelevant matter, that which was relevant was received, and the defendant was therefore not harmed. So here the court indicated what matter was relevant and receivable, and the defendant had a full and fair opportunity to present it. He has, consequently, no cause to complain, and the failure to present any relevant testimony gives rise to the presumption that there was none. These conclu-

sions in no way interfere with the legal rights of a defendant. Even though the offense charged against him be of the most serious character, his defense must have relation to the issue, and must, in its presentation, conform to reasonable and well-established rules. When called upon to plead to an indictment, he has an undoubted right to question the legality of any of the proceedings relating to the filling of the jury wheel from which either the grand jurors who found the indictment or the petit jurors summoned to try him were drawn, or to contest the legality—as applied to the period between the filling and the drawing of jurors affecting his cause—of the custody of the key of the wheel, or of the wheel itself, or of the manner of its sealing. But all these matters are presumed, in the first instance, to have been legally carried on and performed by the officers upon whom the law imposes that duty, and the defendant, who, being called for trial, complains to the contrary, must be prepared to support his complaint by pertinent evidence. A mere offer to produce evidence having relation to these several subjects, but without regard to any designated period of time or circumstance, not based upon any affidavit, or specifying the name of a witness, does not require the court to assume its relevancy, or to delay the regular trial, and proceed with a general investigation of the subjects in question, upon such proofs as may happen to be extracted by the incidental calling of the officers supposed to be cognizant of the facts, of which the person proposing to call them has no definite information or knowledge. The court is entitled to know in advance specifically what is proposed to be proven in such case, and the period of time to which the proposed evidence relates. If the complaining defendant has pertinent evidence to offer, his counsel is presumed to know what it is; and it is his duty to make the offer specific enough to indicate its pertinency. Falling in this, and being informed by the court wherein the offer is defective, neither he nor his client can afterwards justly complain of injury to any legal rights, no matter how serious the character of the offense for which the trial has been had, especially where no affidavit or evidence of any kind is produced to show the existence of evidence that may have been relevant. Were the rules of practice otherwise, trials in court would be without definite purpose or efficacy.

"4, 5. The fourth reason is that the judge and jury commissioners did not, as the statute requires, file in the prothonotary's office a list containing the name, occupation, and residence of every person placed in the jury wheel, to wit, the name of Juror J. M. Burdick; and the fifth reason is the refusal of the court to sustain defendant's challenge for cause of said juror, as it appeared from the certified list of jurors offered in evidence that his name was not filed of record. We assume that by the language of the fourth reason, taken with that of the fifth, it is meant, not that the certified list

of jurors was not regularly filed in the prothonotary's office, for the record here shows that such a list was offered in evidence by the defendant, but that it is intended to be asserted that such list did not contain the name of one of the jurors called, to wit, J. M. or Jasper M. Burdick. One of the jurors drawn and returned by the sheriff on the regular panel was Jasper M. Burdick, who, on being called and sworn on his *voir dire*, proved to be, as stated on the panel, a resident of Wilkesbarre, and a manufacturer. Thereupon defendant's counsel interposed a challenge for cause 'that the juror's name is not contained in the list of jurors' names filed in the prothonotary's office as prescribed by the act of assembly,' and supplemented the challenge by offering the certified list in the file office, showing not the correct name of the juror on the stand, but the name 'Casper M. Burdick, manufacturer, Wilkesbarre city.' It was then shown to our satisfaction by the testimony of the juror on the stand that the only Burdicks in the city of Wilkesbarre were himself and W. H. Burdick, of whom the former only was a manufacturer. We thereupon overruled the challenge, holding, in substance and effect: First, that from the absence from the certified list of the correct name of the juror upon the stand, in view of the presence on that list of a name with an occupation and residence in all respects identical with that of the juror save in the first letter of the first name, we would not assume that the correct name of the juror present was not regularly selected and placed in the jury wheel; second, that we were satisfied from the facts already alluded to that the proper officers, in filling the wheel, intended to select the juror on the stand as one of the number selected, and for that purpose placed in the wheel a name, with an occupation and residence, designing thereby to identify and select the particular juror present, who, by the name placed in the wheel, had been duly drawn and returned. In view of the nonexistence in Wilkesbarre, or elsewhere, so far as the testimony showed, of any person of the name of Casper M. Burdick, whether a manufacturer or otherwise, and of the residence here of the present juror, Jasper M. Burdick, a manufacturer, we regarded the name on the list as corroborative of the actual selection and drawing of the juror present, yet indicative of an error in writing upon the list the name Casper instead of Jasper, consequent upon a similarity of sound in the calling of the name to the person who wrote the list. The third section of Act March 18, 1874 (P. L. 46), referred to in the reason under consideration, requires that thereafter 'a list, containing the name, occupation and residence of every person placed in the jury wheel, shall be kept, certified by the judge and jury commissioners or such of them as shall be present at the selection of such persons, and filed of record in the office of the prothonotary of the court of common pleas of the respective county.' In a case entitled 'In re Challenge to Certain Grand

Jurors,' reported in 23 Pittsb. Leg. J. 73, we find a construction of this act by the present chief justice, then president judge of Allegheny county. In that case he says: 'The act does not declare that the nonappearance of a juror's name on the certified list shall be good cause for challenge, but, inasmuch as it requires that the list shall contain the name, occupation, and residence of every person placed in the jury wheel, a fair construction of it requires us to hold that the list is at least prima facie evidence that all the persons whose names appear on it were duly selected, and that all whose names are not found on the list were not properly selected, placed in the wheel, and drawn therefrom. If the name of any person summoned as a juror does not appear on the certified list, the presumption is that he is not one of those selected; but this presumption may be rebutted by proof that he was duly selected, and his name placed in the wheel as required by law. If this is satisfactorily shown, the fair inference then is that there has been merely an accidental omission to enter the name on the certified list, which may readily occur in making out a list of over three thousand names.' The foregoing construction must be viewed in the light of the fact that in the cases then before the court neither did the names of the jurors there in question who had been drawn from the wheel, nor, so far as shown, did any names in any way similar thereto, appear on the list. We are of the opinion, therefore, that our conclusions in this case are not inharmonious with the spirit of the rule there applied. In other words, we hold, where the name, occupation, and residence of a person summoned as a juror fail to correspond exactly with any name, occupation, and residence appearing on the list, but so nearly correspond as in the present case, any prima facie presumption that the juror summoned is not one of those selected by the proper officers is rebutted by proof that there was no person to be selected of the exact name of that appearing on the list. A list of jurors regularly certified and filed by the proper officers, as in this case, is not only prima facie evidence that all the persons whose names appear on it were duly selected, as held by Judge Sterrett, but also prima facie evidence of the selection of as many jurors as there are names on the list corresponding with the total number which the court has ordered to be selected; and where the variance between the correct name, occupation, and residence of a juror summoned and appearing and a name, occupation, and residence shown on the list is of the character of that in this case, and the facts are as here shown, the presumption that there was an error in writing the first name of the juror upon the list, consequent upon the liability of the clerk keeping it, as the names selected by the judge and jury commissioners are called off and placed in the wheel, to mistake the name Jasper, when called, for that of Casper, is greater than that a name pertaining to no one in existence in the specified territory, and with

the specified occupation, was selected and placed in the wheel.

"Though not among the reasons filed, it has been claimed in the argument that there was error in overruling defendant's challenges for cause in the cases of two other jurors, to which we will make brief reference. When Frank Gemmel, a merchant, of Ashley, was called and sworn on voir dire, the defendant's challenge was: 'On the ground that the panel of jurors certified by the sheriff and jury commissioners contains the name of Frank Gemmel,—the name to which the juror responded when called here in court. The list of names of jurymen attached to the sheriff's return of jurors served contains the name of Frank General, while the notice which the juror says was served upon him contains the name of Frank Gemmel.' The juror swore that he knew of no Frank General, merchant in Ashley. No claim or pretense was made that the name of Frank General was upon the panel of jurors; while the very language of the challenge itself shows that this juror was regularly drawn, served with notice, and appeared in response thereto. How, under such circumstances, an error in the writing of the name Gemmel, in the sheriff's return of service of jury notices, by writing it General, could possibly affect any legal right of the defendant, or in any way disqualify the juror, has not been suggested, and we deem further comment unnecessary.

"John Jacobs, a juror drawn, summoned, and returned as a mine boss in the city of Hazleton, stated, when called and sworn on his voir dire, that he was and has been a resident of that city for eighteen years, and still resided there; that up to the September previous to the time of the trial in April, he had been an outside foreman or boss of mines, but since September had been a superintendent of a plane; that there was another John Jacobs, who for two years past had been a merchant and insurance agent residing in said city, but that prior to that time the latter had lived in Hazle township, and up to two or three years previous had also occupied a position of outside foreman or boss. A challenge for cause was then overruled, the court holding that the juror present was the one drawn and intended for jury service. In our judgment, then and now, the occupation of the juror present, up to within two months of the time of filling the wheel, being the same as that of the person whose name was selected, and the juror thereafter continuing in connection with the same line of business, sufficiently indicated that he was the one whose name was intended to be placed in the wheel, and clearly distinguished him from the other John Jacobs, who for two or three years had been a merchant and insurance agent only.

"Finally, upon the subject of challenges, it is suggested that the court ought not to have sustained the commonwealth's challenge for cause of a juror (Peter Mackin) on the

'ground of conscientious scruples against capital punishment.' This juror clearly stated on his voir dire that he had such conscientious scruples on the subject of capital punishment as would prevent him from rendering a verdict of guilty of murder of the first degree; the penalty being death, if the evidence clearly warranted it. There was no error in sustaining this challenge.

"6, 7. Another reason assigned for a new trial is the refusal of the court to allow a motion of the defendant's counsel to strike out the evidence of twelve of the witnesses for the commonwealth, namely, Joseph Krugle, Michael Dombrowski, Anthony Lackasavitch, Frank Gelatosky, Simon Koslosky, Anthony Shepenis, Charles Stenovitch, Clements Sheshensky, Joseph Koslukis, Anthony Borak, Joseph Bultofski, and Stanley McClosky; and this on the alleged ground that they did not speak English, but were sworn in that language without the intervention of an interpreter. And still another reason assigned is the refusal of the court to entertain an offer subsequently made to prove that Frank Gelatosky, one of the twelve witnesses above named, was unacquainted with and uninformed as to the oath it was alleged he had taken in the case; that said oath was never repeated to him in his native language; that he could not speak English; and that the matter was brought to the attention of the court, and objection raised, as soon as discovered. It is proper to state more in detail the proceedings prior to this motion and offer, respectively, and the circumstances under which they were made and disallowed. But first it is only fair to the defendant to say that, while the record does not show in what language the oath was administered to the twelve several witnesses in question, it was in fact administered in English, without the intervention of an interpreter. These witnesses were severally called and sworn by the prosecution in its case in chief, and severally signified their appreciation of the position they occupied, by voluntarily holding up their right hand, and indicating their undertaking to tell the whole truth under the sanction of the oath, as do ordinary witnesses under like circumstances. There was no manifestation on their part of ignorance in that particular, otherwise the court, of its own motion, would have directed the administering of the oath through an interpreter. They were of the same nationality as the defendant himself, and their native tongue was likewise his own. Neither he nor his counsel acting for him made any objection whatever to this method of swearing the witnesses. The two former sat at the defendant's table, and heard these witnesses testify at length, either directly in English, as was the case with some in whole or in part, or indirectly, in their native language, duly interpreted into English, as was the case with others; and

then each was subjected to cross-examination—some at great length—by the defendant's counsel, after the same manner. Most of the two and one-half days spent in hearing the case of the commonwealth was occupied in the examination and cross-examination of this particular class of witnesses. After waiting until the commonwealth's case was closed, defendant's counsel moved to strike out the testimony of these witnesses, because they had been sworn in English without an interpreter, and, as counsel averred, because they did not speak English, although he was clearly in error in the latter respect as to some of the witnesses. This motion was overruled, we regarding it sufficient to say at that time that it did not appear that the witnesses did not understand the oath, and that no objection had been previously made on that account. Then came an adjournment of the morning session of the court, and upon its opening in the afternoon defendant's counsel, by way of a supplement to the overruled motion, and to meet the reasons assigned for overruling it, made a so-called 'offer,' to show that one of the twelve witnesses, viz. Frank Gelatosky, did not understand the oath administered to him, that he could not speak English, and that this matter was brought up as soon as it had been discovered. How, or in what manner, this showing was to have been made, was not stated. No witness was called for that purpose, nor was any medium of such proof even referred to. We rejected the proposition of the counsel, announcing that he would not be permitted to thus claim surprise, after sitting by and participating in the examination and cross-examination of witnesses during the period of several days, and after the commonwealth had closed its case in chief. Let us consider the situation at the time the rulings in question took place, and the probable effect of such a motion and offer if allowed to prevail. It is to be borne in mind that new trials are not granted to the commonwealth in cases of this character, and that both the motion and the offer took place after the prosecution had closed its case in chief, and before the defense was opened. Had these prevailed, the consequence would have been the elimination from the record, upon technical grounds, entirely disregarded by the defense at the time they properly arose, of the vital evidence for the commonwealth directly relating to the issue joined, and the permanent relief of the defendant from the burden of criminal responsibility thus cast upon him, unless, perchance the prosecution, by the license of judicial discretion, could have reached, recalled, resworn, and re-examined the witnesses, who may have already departed the court, and separated in different directions. We are not convinced that there was error either in the refusal to allow the motion or to entertain the offer in ques-

tion; nor, in the absence, as is the case here, of any affirmative showing at this time that this witness or these witnesses testified falsely, whether by reason of the failure to interpret the oath to them or otherwise, do the rulings in question entitle the defendant to a new trial upon the principle that, the crime charged against him being a serious one, he ought not to be denied that consideration where he has suffered in the first trial of the cause on grounds other than technical errors of law. We have no hesitation in concluding that the failure of the defendant and his counsel to interpose any objection to the administering of the oath to the several witnesses referred to without the interposition of an interpreter, and the delay in raising that objection until after the case of the commonwealth was closed, constituted a waiver of any right the defendant might have had to have the oath interpreted had the objection been taken when the witnesses were called,—at least to the extent of precluding him from having the evidence stricken from the record in the manner attempted in this case; that the motion to strike out the testimony was properly overruled; and that neither the defendant nor his counsel should be allowed to wait without objection, and take the benefit of the chances of evidence from these witnesses favorable to the defendant, and then, finding it to be otherwise, plead ignorance of the matter sought to be proven by the offer; and thereby seek to eliminate the testimony from the record. Counsel must be held to have knowledge of matters of this character occurring and coming before them during the course of a trial in which they participate, whether in fact ignorant of them or not. If the rule were otherwise, motions and offers of the character we have been considering would operate as instruments by which the orderly conduct of the trial of causes would be trifled with, and whereby the administration of the law would be brought into deserved disrepute. We do not assent to the proposition of the counsel that no legal right of a defendant charged with murder can be waived by himself, or by those who represent him in his presence. Thus in *Com. v. Ware*, 137 Pa. St. 465, 20 Atl. 806,—which was a case of the conviction of murder of the first degree,—the jurors, in being impaneled, were examined as to their qualifications without being first sworn to make true answers. No objection was made to this mode of procedure, and the prisoner's counsel participated in such examination without asking that the jurors be sworn. The supreme court held that, had the prisoner requested at the time that the jurors be first sworn, and had that request been refused, it would have been error. But that,

when the prisoner voluntarily examined the jurors without their being sworn, and without objection or exception, he could not take advantage of it after a trial upon the merits. In that case the court also says: 'It is said that in a capital case the prisoner can waive nothing; that is to say, he is not bound by such waiver. This is a mistake in the broad sense in which the proposition is usually stated. There are many things to which his waiver would not bind him. There are, on the other hand, many matters connected with the trial which he may waive.' One of the cases put by the court is the defendant's right to waive the challenge of a juror. 'But,' say the court, 'if he challenges the juror for cause, he has a right to examine him as to his qualifications, after which, if he has not shown cause, he may challenge peremptorily, or he may waive either form of challenge, and allow the juror to take his seat in the box. If this were not so, we might have the anomaly of a challenge for cause being abundantly sustained by the juror's answer; a waiver of the challenge by the prisoner, followed by a motion for a new trial, in case of conviction, upon the ground that an incompetent juror had been permitted to serve. A plea, in such case, that he was not bound by his waiver, would not receive much consideration.'

"We are not called upon to discuss what the defendant might have shown or been permitted to show, in the course of the presentation of his own case, after opening it to the jury, concerning the subjects we have hitherto considered. This is in no way before us. After a careful consideration of the various reasons assigned, we are of the opinion that the defendant has had a fair trial, and that he was fairly convicted, under the abundant and convincing evidence against him. The motions for new trial and in arrest of judgment are overruled."

Eugene Ward, for appellant. D. A. Fell, Jr., Dist. Atty., and Ralph Wadhams, Asst. Dist. Atty., for the Commonwealth.

PER CURIAM. We are clearly of opinion that all the assignments of error are entirely without merit. They were all considered by the learned judge of the court below in his opinion on the motions for new trial and in arrest of judgment. That opinion is a most exhaustive and elaborate treatment of all the subjects involved in the present contention, and we are well satisfied with its reasoning and conclusions. We do not think it necessary to repeat them, and we therefore affirm the judgment for the reasons stated in the opinion. The judgment of the court below is affirmed, and it is ordered that the record be remitted for the purpose of execution.

LUMIS et al. v. PHILADELPHIA TRACTION CO.¹

(Supreme Court of Pennsylvania. April 26, 1897.)

STREET RAILROADS — CROSSING ACCIDENTS — CONTRIBUTORY NEGLIGENCE.

A trench 18 inches wide, which had been dug 21 inches from a street-car track, stopped 3 feet from the crossing. In attempting to cross the street, and after crossing the track, plaintiff stepped away from the cross walk, and, finding her course obstructed by dirt thrown from the trench, started back. As she was on the track, an approaching car, a half square away, rang its gong, and, instead either of continuing to cross back, or of turning and taking an unobstructed part of the crossing forward, she took several steps backward to one side, and fell into the trench. The accident occurred in daylight. *Held*, that she was guilty of contributory negligence.

Appeal from court of common pleas, Philadelphia county.

Separate actions by Mary E. Lumis and Lewis H. Lumis against the Philadelphia Traction Company were consolidated, and, from a judgment for plaintiffs, defendant appeals. Reversed.

J. Howard Gendell, for appellant. Henry M. Du Bois, for appellees.

GREEN, J. The plaintiff Mrs. Lumis, at the time of the happening of the accident in question, was pushing a baby carriage, with a little child in it, in an effort to cross Market street from north to south on the west crossing of Thirty-Fourth street. There were two tracks of the defendant's road,—one on the north, carrying west-bound passengers; and the other on the south, carrying east-bound travelers. She started from the northwest corner of the two streets, and this was her account of her movement: "Then I intended to cross Market street, but stopped for a moment, to see if there were any cars coming. Another lady with a baby coach passed me, and I went on across the street,—across the car tracks; and before I was aware of anything I had the wheels of the coach right on a bank of dirt,—the front wheels of the coach. I could not roll it over it, and I went back on the other side, to get up on the other side. As I started forward, I heard the gong of the cable car ringing, and I did not have time to cross the track again. There I turned to the east. I could not go back for the car, nor forward for the pile of dirt. I stepped to the left side for about two steps, and found I was falling." She added that she fell to the bottom of the hole. This is a very imperfect and confused account of what happened. It would not be possible to define the precise circumstances without resorting to her cross-examination and to the other testimony in the case. She seems to say that she went all the way across the street and across the car tracks, and then attempted to go back again, but had

not time to do so, and then she stepped to the left side, and found herself falling. On her cross-examination she was asked: "Q. What did you do? A. Started to the south side of Market. Q. Did you go straight across? A. I stopped at the pile of dirt. Q. Where was it? A. Half way between the car track and flagging. Q. Where was it in relation to the track,—before you got to the west-bound track, or between the two tracks? A. Between the south track and the pavement. Q. What did you do after that? Did you go right across? A. No, sir. I could not roll the carriage over the pile of dirt. I intended to go back. Q. Did you go back? A. I could not, because the car was coming. I was standing with my whole person on the south track, and the car was coming on that track, going east towards the Delaware on the same track I was going on. A part of the coach was right over the track. * * * Q. How far away from you was the car when the gripman rung the bell? A. Not half a square." As the plaintiff was on the track, and the front wheels of the carriage also, and the car nearly half a square away, there was nothing to prevent her from drawing the carriage back over the track. It would require but an instant of time, and there was no peril in immediate prospect that would justify an irresponsible movement because of sudden apprehension of imminent danger. She chose to divert the course of the carriage in another direction, moving backward as she did so. As a matter of fact, the car stopped about 10 or 15 feet away from the crossing, but she had already fallen before the car stopped. She was asked: "Q. Did it stop before it got to you? A. I do not know where he stopped. I fell before he stopped the car." It is, therefore, a fact, established by her own testimony, and not contradicted by any one, that she got off the track herself, pushed the carriage off also, changed its course, and herself moved backward without looking where she was moving, and fell into the manhole, while the car was still moving, and before it stopped at a distance of 10 or 15 feet away from the crossing. This was proved by another of the plaintiff's witnesses (Fibble), who was asked: "Q. The car stopped before it got to the crossing? A. Yes, sir. Q. Far away? A. About ten or fifteen feet away. Q. Entirely stopped before was at the crossing? A. Yes, sir. I gave him great credit for that." Now, it is too plain for argument that the movement she did make necessarily took more time than would have been required to complete her act of recrossing the track, as she was already almost across, and part of the carriage was also on the track. There was not the least obstruction in her way; there was no actual peril; and there was no reason to apprehend an immediate danger, because the car was so far away when she first saw it. Nearly half a square is quite a considerable distance, in which there was opportunity for crossing and recrossing the track several times before the arrival of the car at the

¹ Rehearing denied.

crossing. All of the foregoing is said in contemplation only of the plaintiff's personal testimony as to the occurrence. Her other testimony by other witnesses proves a far more damaging state of facts as to her right to recover. All the witnesses who describe the crossing concur in saying that it consisted of three courses of flagstone in width, of which one was taken up and the other two remained in place. The plaintiff's witness Fibble was asked: "Q. Did you measure the width of the flagstone? How large a passage was there for a pedestrian? A. No, sir. I did not measure that. There were two flagstones. Q. The two flagstones were bare? A. Yes, sir. Q. A good foot passage for most people to walk across? A. Yes, sir. The third one was taken up, and she was on the third one. The two wheels was on the third one from the north corner crossing. Q. Is that where the pile of dirt was? A. Yes, sir; after she crossed. Q. She was not crossing the flagstone, but on the dirt? A. Yes, sir. She was crossing on the flagstone,—the third one. Q. It was bare except at that one place? A. Yes, sir. Q. The baby coach struck the pile of dirt? A. Yes, sir. * * * Q. The flagstones were clear until she got to the western flagstone, and that was taken up? A. Yes, sir." This was the only witness, other than the plaintiff, who saw the whole of the accident, and described it. George Young, another witness for the plaintiff, testified as to the crossing. After saying he saw the lady pulled out of the hole, he was asked: "Q. Do you know where that hole was? A. About nearly four feet of the west crossing, and about eighteen or twenty inches from the railroad track on the south side. Q. Was there any dirt piled up? A. There was no dirt on the crossing, and there was two cross stones not up. Q. What were those two stones? A. The cross stones, three rows, and two of them down, and one taken up." Charles E. Taylor, another witness for the plaintiff, testified: "Q. The dirt was piled how high? A. There was no dirt around the manhole. Q. Not immediately around the manhole? A. No, sir. Q. Between the manhole and the crossing there was dirt? A. No, sir. We tunneled the crossing, and the dirt was thrown out back of the crossing. Q. The dirt was between what? A. Between the crossing and the pole. Q. What pole? The feed pole,—the trolley pole? A. The pole the wires are strung on. Q. The dirt was between that? A. Between that and the manhole, and not between the manhole and the crossing. Q. What was between the manhole and the crossing? A. The crossing was perfectly clear. Q. No dirt on the crossing? A. Not to my knowledge." Mr. Fibble, who seems to be the only witness who took any measurements, said the distance from the manhole to the flagstone was 35 to 40 inches, and from the manhole to the track about 21 inches. So there seems to have been a clear space of about 3 feet to the flagstone which was entirely unobstructed. There is a

little doubt as to whether the two rows of flagstones were obstructed at that point, growing out of the rather confused testimony of Young on cross-examination. On his examination in chief he conveyed the idea that the two rows of flagstones were in place, and were clear. On his cross-examination he says two cross stones were lying on the other crossing stones. Whether he meant on other crossing stones of the third row from which two were taken up, or on the two rows of crossing stones which had not been disturbed, is uncertain. But it is of no consequence, since, while in the latter event they might have constituted a slight obstruction, of the thickness of the flagstone, it is entirely uncontradicted that there was no bank of earth there, and that there was a space of at least three feet of the pavement between the flagstones and the manhole that was entirely clear; and, as this was of itself more than sufficient for the baby carriage to pass through, it was a clear act of negligence on the part of the plaintiff not to pass through over that space. When it is considered that the trench was only 18 inches wide and 3 feet deep, and that when the crossing was reached the trench was tunneled underneath the flagstones, leaving the two rows of stones intact, and only two stones of the third row taken up, and that the trench stopped on the west side of the crossing, and that there was no dirt around the manhole, or between that and the flagstones, it will be perceived at once that there was ample space in which to move the baby carriage in safety if the slightest care had been taken by the plaintiff. It is singular that no one asked her whether she moved backward towards the manhole, or with her face towards it. Her testimony is so very meager as to what she did and how she moved when she turned the carriage that almost no information on this subject can be derived from it. She simply says: "I stepped to the left side about two steps, and found I was falling. I did not know where I was going, but I let loose the handle of the coach, and found I was going down. I did not know where." It would seem from this that the coach was behind her, but whether her face or her back was towards the coach she did not say, and no one seemed to think it necessary to ask her. But, so far as her legal duty was concerned, it would matter but little which way her face was turned. If it was towards the manhole, it was her clear duty to see it, and avoid it. If it was towards the coach, it was grave negligence to walk in that position on any street or sidewalk of the city.

We think the case comes clearly within the line of a very considerable class of cases in which the legal duty of persons walking on the streets and sidewalks of cities and towns is clearly defined. The rule is thus expressed in *Dickson v. Hollister*, 123 Pa. St. 421, 16 Atl. 484: "It is the duty of every pedestrian upon a public highway to use reasonable care for his own safety, and to

avoid an open or apparent danger." In *Barnes v. Sowden*, 119 Pa. St. 53, 12 Atl. 804, the facts were quite similar to those of the present case. A trench had been dug about eight feet in length across the sidewalk, leaving a passage of about four feet in width between the end of the excavation and the house line. The earth was thrown up along the trench, making a bank of loose dirt about three feet high extending the whole length of the trench. The plaintiff and her sister were coming along on the footwalk, and when they reached the trench they passed along the unbroken space between the trench and the building. When the plaintiff left the store window into which she had been looking, she took two or three steps backward, and fell into the trench, and was injured. The court below left the case to the jury, who returned a verdict for the plaintiff. On the single assignment of error for submitting the case to the jury, and for not taking it from them with a binding instruction for the defendant, we reversed the judgment without a venire. Our Brother Williams, delivering the opinion, said: "The exercise of the slightest care would have prevented the fall of which she complains. * * * This case is one in which a binding instruction should have been given. The plaintiff came in open daylight down the walk in full view of an obstruction three or four feet high, stretching across the pavement almost to the house line. She could not fail to see it. She went around it safely, became interested in some goods displayed in a window, and backed into the trench. A clearer case of contributory negligence it would be hard to find." In *Buzby v. Traction Co.*, 126 Pa. St. 559, 17 Atl. 895, the plaintiff had safely alighted from a car, and was about to cross the street. He stepped upon another track, and was struck by an approaching car and injured. Our Brother Mitchell, delivering the opinion of this court, said: "But the case was tried below, and must be tested here, upon the universal rule which requires due and ordinary care in crossing public streets, as in all other transactions of life. Even on the sidewalk, especially devoted to the use of foot passengers, a man is bound to look where he is going; and this duty is still more imperative when he is about to cross the middle of a street, where horses, wagons, and cars have equal rights with himself, and where each is bound to take notice of such other's rights, and to use his own with due regard thereto." In *King v. Thompson*, 87 Pa. St. 365, the plaintiff, passing along on the sidewalk in the evening, stepped into an opening which projected 16 inches from the building, and was injured. The court below having refused to affirm a point which asked for a binding instruction if the

jury believed the facts stated in the point, we reversed the judgment on the ground that, if the facts had been found as stated in the point, the binding instruction should have been given. Mr. Justice Paxson, in the course of the opinion, said: "What are the facts here? A sidewalk ten feet wide; a paved space from seven to eight feet wide between the curb and trees on the one side and the opening at the cellar window on the other; the street lighted by a lamp in the window, and gas lamps in the street sufficient to have enabled the plaintiff to avoid the accident. It is really difficult to see how the plaintiff succeeded in getting into the hole. * * * It is proper enough to hold owners of property to a reasonable care over it, yet at the same time persons using public streets ought also to exercise some little caution." Another of our late utterances will suffice. In *Robb v. Connellsville Borough*, 137 Pa. St. 42, 20 Atl. 564, the plaintiff sued for an injury received by falling over the footway of a street crossing raised six inches above the level of the footway upon which she was walking. She was nonsuited in the court below for contributory negligence, when it appeared from her own testimony that she could have seen the obstruction had she looked where she was going, and that her fall resulted from a failure to look. This court sustained the nonsuit. Mr. Justice Mitchell, delivering the opinion, said: "That the reasonable care which the law exacts of all persons in whatever they do involving risk of injury requires travelers, even on the footways of public streets, to look where they are going, is a proposition so plain that it has not often called for formal adjudication. But it has been expressed, or manifestly implied, in enough of our own cases to constitute authority for those who need it." After reciting the facts as testified to by the plaintiff, we said: "The general result of her own testimony clearly is that she was not paying such attention as the situation required. This is concisely and forcibly summed up by the learned judge in sustaining the nonsuit, and his action must be sustained." This was precisely the case here. The plaintiff paid no attention to where she was going, and failed to see the open manhole. She could easily have seen it, if she had paid any attention to her steps. She was on a public street, and was bound to take reasonable care of her steps. She took no care at all, and fell into an opening in the street, in broad daylight, which she could not have failed to see if she had simply looked where she was going. We think the case is ruled by those above cited. The foregoing considerations convict the plaintiff of contributory negligence which precludes any recovery. Judgment reversed.

BELDEN v. SEDGWICK et al.

(Supreme Court of Errors of Connecticut. Feb. 23, 1897.)

MARRIED WOMEN—ASSIGNMENTS IN INSOLVENCY—
TRUSTEE—LIEN FOR SERVICES—
APPEAL—JURISDICTION.

1. Goods assigned to plaintiff in insolvency belonged to the wife of the assignor, and had been bought by him, as her agent and statutory trustee, for use in a mercantile business of which she was the proprietor and he the manager. The wife had joined in requesting plaintiff to act as trustee in insolvency, and both she and her husband had agreed with him on the terms on which he should act. The assignee took possession, and rendered valuable services till the goods were attached by creditors. *Held*, that plaintiff had an equitable lien for his services, subject to the attachments, the wife having subjected the property to the lien for acts done at her request and for her benefit.

2. An appeal will not be erased on the ground that the matter in demand in the superior court was below the jurisdictional amount.

Appeal from superior court, New Haven county; George W. Wheeler, Judge.

Suit by Charles G. Belden against Sarah J. Sedgwick and others to establish his title to goods as trustee in insolvency, and to subject them to a lien for his services. Sarah J. Sedgwick filed an answer by way of interpleader. From a judgment establishing plaintiff's lien, subject to certain attachments, defendant Sarah J. Sedgwick and husband appeal. Affirmed.

John O'Neill, for appellants. Charles G. Root and T. F. Carmody, for appellee Belden. George B. Terry and Nathaniel R. Bronson, for appellees the attaching creditors.

BALDWIN, J. An assignment in insolvency was made to the plaintiff as trustee for the benefit of the creditors of Benjamin Sedgwick, the assigning debtor, and duly filed in the proper court of probate. The goods assigned belonged to the wife of the assignor, and had been bought by him, as her agent and statutory trustee, for use in a mercantile business of which she was the proprietor and he the manager, and which had proved to be a losing one. She had joined in requesting the plaintiff to act as trustee in insolvency, and both she and her husband had agreed with him on the terms on which he should act, and, after the assignment was made, acquiesced in and consented to his possession. Under these circumstances, he was properly held to have an equitable lien on the goods assigned, for his reasonable fees and disbursements as the trustee under the assignment, which neither Mr. nor Mrs. Sedgwick could dispute. Our laws permit suits against a married woman, jointly with her husband, upon any contract entered into jointly with him for the benefit of her estate or of their joint estate, or made by her, upon her personal credit, for the benefit of herself, her family, or her separate or joint estate; and, in such actions, executions may be levied upon her property as if she were unmarried.

Gen. St. §§ 984, 985, 987. By Gen. St. § 986, it is also provided that when a married woman shall carry on any business, and any right of action shall accrue to her therefrom, she may sue thereon as if she were unmarried. The effect of these statutes, taken together, is to put her substantially in the position of a feme sole as to all rights and obligations growing out of her interest in such a business conducted with his consent, or out of what she does or agrees to do in consequence of her connection with it. So far forth, the title of her husband—if she were married prior to 1877—as statutory trustee is curtailed or taken away.

The provisions of Gen. St. §§ 2792, 2793, must be read in connection with those concerning civil actions, to which reference has been made, and as part of one entire plan for regulating the property rights of husband and wife. Section 2793, which forbids the sale or transfer by the husband of any interest in his wife's estate unless she joins in a written conveyance of it, is manifestly inapplicable to the management of a store for the sale of goods in the ordinary course of mercantile business, when conducted by him in her behalf. *Rockwell v. Clark*, 44 Conn. 534, 536. Section 2792, which vests the wife's property in the husband, as trustee, in such a manner as to give him the beneficial use of the income during his life, is, if read by itself, equally inconsistent with the right given to her creditors by section 984 to levy on it in his lifetime for her debts of a certain description. We gave a somewhat narrower construction to certain of the statutory provisions now embodied in section 984 when first enacted. Pub. Acts 1872, p. 93, c. 94. Notwithstanding they originally authorized in terms the levy of execution upon the wife's "interest in any real or personal property," we held that this referred only to her separate property, and simply gave a remedy at law in cases where there had always been a remedy in equity. *Buckingham v. Moss*, 40 Conn. 461. Soon afterwards, however, it was determined that under the equity of the act of 1869 (Pub. Acts 1869, p. 340, c. 124), now also incorporated in substance in section 984, whatever was legally liable for the debts of a married woman, incurred in carrying on business, or evidenced by note given for the benefit of her sole estate, or the joint estate of herself and her husband, might also be subjected to an equitable charge for debts incurred for the benefit of her sole estate, or of the joint estate of herself and her husband, although no note were given, and that, when the act of 1869 gave a remedy by levy of execution upon "her property * * * as if she were unmarried," it authorized such a levy upon property owned by her which was not secured to her sole and separate use. *Donovan's Appeal*, 41 Conn. 551, 557. Such property may be bound by her contracts, even when she could not be held personally liable, and if the contracts were made on the credit

of her real estate, not held to her separate use, and she then dies, leaving a surviving husband with the rights of a tenant by the curtesy, the interest of her estate in such land can be sold to satisfy them. *Shelton v. Hadlock*, 62 Conn. 143, 154, 25 Atl. 483; *Corr's Appeal*, 62 Conn. 403, 409, 26 Atl. 478. The personal property of a married woman, who was married after 1849 and before 1877, is always hers, in equity, subject only to the husband's legal title, and to his life use of the accruing income. *Connecticut Trust & Safe-Deposit Co. v. Security Co.*, 67 Conn. 438, 442, 35 Atl. 342. It is unnecessary to inquire, in the present case, whether the effect of any of these laws passed since the appellant's marriage, in 1865, upon Mr. Sedgwick's rights, could be questioned, under the provisions either of our own constitution or of that of the United States, as going beyond the legitimate power of the legislature to make reasonable modifications from time to time in the legal incidents and consequences of the marriage relation. He assented to whatever his wife has done under her enlarged authority to contract, and to everything out of which the plaintiff's claim arises. Mrs. Sedgwick asked the plaintiff to take possession of the goods on which he now claims a lien, under an assignment in insolvency. He assented, and such an assignment was made by her husband in his own name, under which possession was taken and held, at his request and hers, for over two months, during which time the plaintiff rendered valuable services as trustee, and made proper expenditures as such. She must be treated as if she were a feme sole in regard to this transaction, and, so regarded, it is manifest that the plaintiff is entitled to the lien he claims. He takes it, not because he has the title, but because she has it, and has subjected it to a charge in his favor for acts done at her request and for her benefit.

The appellants ask to have this appeal erased from the docket on the ground that the superior court had no jurisdiction of the action. No motion to erase, or objection to the jurisdiction, was made in the court below; but the claim now put forward is that it nowhere appears on the record that the matter in demand in that court exceeded \$500 in value, and, therefore, that, notwithstanding the superior court is one of general jurisdiction, all the proceedings, from the institution of the original action to the entry of this appeal, have been coram non iudice. This court has jurisdiction to review any judgment of the superior court from which an appeal is taken on the ground that it was void for want of jurisdiction. If a judgment is not simply erroneous, but void, there is so much the more reason for the authoritative declaration of its invalidity by the court of last resort. Whether the original cause was or was not within the jurisdiction of the superior court, this appeal is within the jurisdiction of this court, and the motion to erase is there-

fore denied. *Canter v. Insurance Co.*, 2 Pet. 554. There is no error in the judgment appealed from. The other judges concur.

BALDWIN et ux. v. FAIR HAVEN & W. R. CO.

(Supreme Court of Errors of Connecticut. Feb. 23, 1897.)

CARRIERS OF PASSENGERS—NEGLIGENCE—ALIGHTING FROM STREET CAR.

A cause of action is stated by a complaint by a passenger for injuries received in alighting from a street car at a transfer point, alleging that by reason of the traffic at such point, the short time the car stops there, and the large number of passengers who get on and off the car, it is necessary to have a conductor there to prevent injuries to passengers, all of which was well known to defendant; that plaintiff signified to the conductor her intention of getting off at such point, as did also other passengers, carrying bundles; that on the stopping of the car the conductor abandoned it, and that plaintiff, in endeavoring to alight without assistance, was kicked in the back and pushed down by a passenger hurriedly alighting from the car,—as defendant should have anticipated such an injury from the facts alleged.

Appeal from superior court, New Haven county; Shumway, Judge.

Action by Clifford Baldwin and wife against the Fair Haven & Westville Railroad Company. A demurrer to the complaint was sustained, and plaintiffs appeal. Reversed.

The amended complaint was as follows: "(1) On the 4th day of February, A. D. 1895, the defendant was managing and operating a street railroad in the town of New Haven, and in particular along and at a point in Chapel street, in said city of New Haven, where said street is intersected by State street; and was running cars thereon, propelled by the power of electricity. (2) On said February 4, 1895, the plaintiff Elizabeth Baldwin was a married woman, residing in said town of New Haven, and was pregnant with child, to wit, was in the fifth month of her pregnancy. (3) On the evening of said last-mentioned day the plaintiff entered a passenger car of the defendant in said town of New Haven, for the purpose of being carried from the corner of Chapel and Chestnut streets to Front street, Fair Haven, and paid her fare, and then became and was accepted as a passenger in one of the cars of the defendant's railroad, for the purpose aforesaid. (4) At the time the plaintiff boarded said car it was in the care, custody, and control of a conductor, to whom the plaintiff stated her desire to be carried from said corner of Chapel and Chestnut streets to said Fair Haven, whereupon the conductor gave her a transfer ticket entitling her to the passage aforesaid, and gave transfer tickets to other passengers. (5) At said intersection of State and Chapel streets the defendant's cars met, coming from four different directions, and transfer tickets are

given to passengers who are compelled to change cars at this point to be carried in any of four directions, to wit, Fair Haven, Westville, East Haven, or to the depot of the New York, New Haven & Hartford Railroad Company; and at said point most of the passengers in the cars of the defendant do change cars, and after the arrival of the cars said cars remain but a moment or two. (6) Said point is in the center of the city, and a large number of teams for passengers and trucking are continually passing said point, which said passengers have to avoid in passing from car to car; and by reason of the short time said cars stop, and the hurried action of said passengers in so changing from car to car, and by reason of the crowded condition of said street, the act of changing cars is exceedingly dangerous, both from the liability to injury from passing teams and from passengers in said cars in their hurry to change from car to car; and the passengers are in great danger of being pushed and jostled and injured by other passengers, and in particular by passengers who carry packages, parcels, and bundles; and said point in the defendant railroad is an exceedingly dangerous one, and the presence of a conductor on each car is absolutely necessary for the safety and security of its passengers to protect them from being pushed, jostled, assaulted, and injured by passengers who are in the act of alighting and changing cars at said point,—all of which is well known to the defendant. (7) The particular car in which the defendant was riding contained passengers who had just arrived from New York by steamboat at Belle Dock, one of whom carried large bundles and parcels, and others satchels and parcels, all of which was known to and open to the full view of the defendant, and who notified the defendant of their intention to change cars at said intersection of State and Chapel streets, and received transfer tickets therefor. (8) When the car upon which the plaintiff was riding arrived at the intersection of the streets mentioned in the preceding paragraph, it was stopped for the purpose of enabling passengers to be transferred from said car to other cars of the defendant company going in the other directions. (9) Contemporaneous with the arrival of said car at said intersection of State and Chapel streets, and before said car had come to a complete standstill, and before any of the passengers thereof did alight, or had a chance to alight, the conductor in charge of said car jumped from the rear platform thereof, abandoned said car, ran in the direction of State street, and was lost to view. (10) As a result thereof, the car upon which the plaintiff was a passenger was thus carelessly and negligently abandoned, and was left and exposed wholly and entirely without any conductor or other proper official to care for, protect, and provide for the safety and security of the passen-

gers thereof; and the passengers on said car were thus carelessly and negligently abandoned and left without any conductor or other person in authority to aid and assist them in alighting and changing cars with reasonable safety, security, and protection, and with reasonable freedom from danger from within and without. (11) Then and there, and as a consequence of the careless and negligent conduct of the defendant in abandoning said car and in failing to provide a conductor or other suitable person to take charge of said car, the plaintiff, while in the act of alighting from the steps of said car, and in the exercise of due care, was violently kicked in the back, and forcibly pushed forward from behind by the passenger carrying said bundles and parcels by reason of the carrying thereof by said passenger, and hurled down in and upon the street by the passenger carrying said bundles and parcels, who was in great haste to alight from said car; whereby the plaintiff was cast down and fell upon her left side, hips, body, and arm."

The defendant demurred to the foregoing complaint for the reasons following: "(1) It does not appear that the plaintiff's condition was known to the defendant, or that she was exposed to dangers other than such as are ordinarily incident to leaving one car and taking another, with other passengers, at a transfer point. (2) It does not appear that at the time and place of the injury the defendant had any reason to anticipate any assault upon or injury to the plaintiff. (3) It does not appear that the company had reason to anticipate that either the traffic in the street or the carrying of bundles by passengers would cause the injury complained of. (4) It does not appear that the conductor was not justified in leaving the car."

Jacob P. Goodhart and Robert C. Stoddard, for appellants. George D. Watrous and Harry G. Day, for appellee.

ANDREWS, O. J. In the case of *Flint v. Transportation Co.*, 34 Conn. 554, it is laid down that "carriers of passengers for hire are bound to exercise the utmost vigilance and care in maintaining order, and guarding those they transport against violence from whatever source arising, which might be reasonably anticipated, or naturally expected, to occur, in view of all the circumstances, and of the number and character of the persons on board." See, also, *Murray v. Railroad*, 66 Conn. 512, 34 Atl. 506. In *Pendleton v. Kinsley*, 3 Cliff. 416, 417, Fed. Cas. No. 10,922, the court said: "Passengers do not only contract for room and transportation, but for good treatment, and it is the duty of the owners to use due care and exertion to protect them from any degree of violence, or any kind of abuse or ill treatment from other passengers, or the owners' servants, or other persons coming on board during the trip. The principal in this class of

cases is liable for the misconduct of the employe, when it occasions injury to the passenger, whether arising from malice or neglect." These authorities furnish the rule of duty which the defendant in this case was by law bound to observe towards the plaintiff. If, then, the complaint states a case coming fairly within such rule, the demurrer should have been overruled. Let us examine it. The defendant is a carrier of passengers for hire. It is stated in the complaint that in the evening of the day named, Mrs. Baldwin, the plaintiff, was accepted by the defendant as a passenger to be carried a continuous trip from the corner of Chapel and Chestnut streets, in New Haven, to Front street, in Fair Haven, and that she paid her fare therefor. A part of this trip was in Chapel street and a part in State street. At the intersection of these streets passengers who desired to make such a continuous trip are transferred; that is, they are required to alight from one car, walk a little distance, and enter another car. The continuous trip over which the defendant had so contracted to convey the plaintiff included this transfer; and it is stated that the place of this transfer is dangerous by reason of the great number of vehicles constantly passing and repassing there, and that, by reason of the short time allowed for the transfer, passengers are hurried in changing from one car to the other, and are in great danger of being injured by other passengers, especially by those who carry bundles or packages; and that the presence of a conductor or other suitable person at that place is absolutely necessary to protect passengers from being injured,—all of which was well known to the defendant. The complaint avers further that on the car in which she had so taken passage in Chapel street there were divers other passengers, who carried bundles, packages, etc., who notified the conductor of the car that they were to be transferred at said intersection; that just before the said car reached said point of transfer the conductor left it, and there was no person left in charge of it to guard passengers from injury while being so transferred, and that in consequence of the said abandoning of the car by the conductor the plaintiff, while alighting from the car, and in the exercise of due diligence, was injured by another passenger carrying bundles, etc.; that she was kicked in the back, and forcibly pushed forward from behind, by a passenger carrying bundles, who was in great haste to alight from said car to make the transfer, and was thrown down in the street, etc. In testing the legal sufficiency of these averments, it must be remembered that Mrs. Baldwin, while stepping down from the car in which she had been riding, was still a passenger of the defendant. That transfer was a part of her trip, for the whole of which the defendant had agreed to convey her in safety; and because she was so a passenger the duty of the defendant to protect her from danger continued. The averments seem to us to bring

the case very clearly within the rules as laid down in the cases we have cited. The delicate condition of the plaintiff at the time is stated, but we do not understand the pleader intended to claim that the defendant owed her any higher degree of care than it owed any other passenger.

One specification of the demurrer is that the defendant had no reason to anticipate an assault on the plaintiff by any other passengers. Counsel argue that the word "kicked" means a wanton and sudden blow with the foot by another passenger, which they had no reason to anticipate, and against which they were not required to provide. The word "kicked" may mean what the defendant claims. We have no occasion to discuss this point, because we think there is enough alleged in the other part of the paragraph to entitle the plaintiff to maintain the action.

Another specification is that the defendant had no reason to anticipate that the carrying of bundles, etc., would cause injury. This specification cannot be sustained. The exact contrary is alleged. The complaint sets out with considerable fullness the reasons why the carrying of bundles, etc., by some passengers, would be likely to cause injury to other passengers; and then it is averred that all these things were well known to the defendant. If it knew this, it was bound to provide against the danger, the existence of which is admitted by the demurrer. It is also alleged that there were passengers on this car who had bundles, and who had notified the conductor of their intention to be transferred, so that the conditions of danger existed on that car, and were known to the conductor. He was, therefore, called on to exercise special care that no injury should be done to the plaintiff. There is error, and the judgment is reversed. The other judges concurred.

Appeal of FREEMAN.

(Supreme Court of Errors of Connecticut. Feb. 23, 1897.)

MARRIED WOMEN—CONTRACTS OF SURETY—DELIVERY—BY WHAT LAW GOVERNED.

1. An Illinois firm, one of whose members resided in Connecticut with D., his wife, whom he married there prior to 1877, being indebted to an Illinois bank, said bank agreed to forbear suit in consideration of the execution of a written guaranty of the debt by D. Such guaranty was given by the bank to D.'s husband, who took it to Connecticut, procured D.'s signature thereto, and then mailed the paper to one of his partners in Illinois, by whom it was delivered to the bank. A statute of Connecticut enacted in 1877, permitting married women to become sureties for their husbands, did not apply to a woman previously married, unless she and her husband agreed, in writing, to accept the provision of said act, and no such writing was executed by D. Held, that as D. had no authority to constitute her husband her agent for the delivery of a contract which she could not legally make in Connecticut, and as the agency by which the delivery of the guaranty was made was attempted to be created in that state, the

instrument was never delivered as to D., and hence did not bind her.

2. After the insolvency of an Illinois firm, a creditor in that state prepared an order on the executor of an estate then in course of settlement in Connecticut, for the payment to said creditor of whatever might be coming to D., the wife of a member of said firm residing in Connecticut, and sent the same to him, as agent, to procure D.'s signature, which he did; and, after procuring the acceptance of the executor, said agent mailed the order to the creditor in Illinois. *Held*, that the validity of the order was governed by the laws of Connecticut, and being dependant on the contractual act of a married woman, not for the benefit of herself, her family, or her estate, it was void.

Case reserved from superior court, Hartford county; George W. Wheeler, Judge.

Appeal to the superior court by Edward A. Freeman, trustee of the estate of H. Drusilla Mitchell, insolvent, from an adjudication of commissioners allowing a claim against said estate by the First National Bank of Chicago, Ill. Reserved, on a finding of facts, for the advice of the supreme court. Disallowance of claim advised.

William C. Case and Percy S. Bryant, for claimant. Frank L. Hungerford and Theodore M. Maltbie, for the estate.

BALDWIN, J. Mrs. Mitchell, being a citizen of Connecticut, married a citizen of Connecticut in 1857, and they continued to reside in this state until his death. Her marriage gave her, under the laws of the state then in force, substantially the status which belonged to a married woman at common law. Her personal identity, from a juridical point of view, was merged in that of her husband. Thereafter, during coverture, she could make no contract that would be binding upon her, even by his express authority. 1 Swift's Dig. 30. If she assumed to make such a contract, it was absolutely void. These personal disabilities the common law imposed partly for the protection of the husband, and partly for that of the wife. To preserve what property rights remained to her, as far as might be, against his creditors, various statutes were from time to time enacted, until this long ago became recognised as the established policy of the state. *Jackson v. Hubbard*, 38 Conn. 10, 15. These statutes were mainly designed to protect her against others. The common law was sufficient to protect her against herself, and prior to 1877 it precluded her from making any contract as surety for her husband. *Kilbourn v. Brown*, 56 Conn. 149, 14 Atl. 784. A statute of that year establishes a different rule for women married after its enactment, but does not enlarge the rights of those previously married. Gen. St. § 2798.

Whenever a peculiar status is assigned by law to the members of any particular class of persons, affecting their general position in or with regard to the rest of the community, no one belonging to such class can vary by any contract the rights and liabilities incident to this status. *Anson*, Cont. 328. If he could, his

private agreements would outweigh the law of the land. "Jus publicum privatorum pactis mutari non potest." Coverture constitutes such a status, and one of its incidents in this state, at the time of Mrs. Mitchell's marriage, was a total disability to contract. So far as contracts of suretyship for their husbands are concerned, the disability of women married before 1877 remains absolute, unless both husband and wife have executed for public record a written contract, by which both accede to the provisions of the statute of that year, and accept the rights which it offers to them. Gen. St. § 2798. No such contract was ever executed by Mrs. Mitchell.

The claim in favor of the First National Bank of Chicago, which has been allowed by the commissioners on her estate, was founded on a debt due from a mercantile firm in Illinois, of which her husband was a member, for which she had assumed to make herself responsible, as guarantor, by a writing dated in Illinois, but signed in this state. The creditor had agreed, in Illinois, with the firm, to forbear suit if she and they (as a firm and individually) would become parties to such a paper, and, after they had signed it there, had given it to her husband, in Illinois, to take to her, in this state, for execution. He procured her signature, and then mailed the instrument to one of his partners at Chicago, by whom it was there delivered to the bank. The agreement of forbearance had been conditioned on the execution of the guaranty by the firm, its individual members, and Mrs. Mitchell. It was her credit only that was to give it value. Its execution by the others gave the bank nothing which it did not have as fully before. It did not become complete until it received her signature. It did not then become operative as a security until it had been delivered to the creditor. Her husband cannot be deemed to have acted, in procuring Mrs. Mitchell's signature, as the agent of the bank. No finding to that effect was made by the trial court, and no such agency is implied from the circumstances of the transaction. He had a direct interest in obtaining the desired extension of credit. He was a principal in the obligation. He sent the paper, as soon as it was completed, not to the bank, but to another of the principals. If he represented any one but himself, it was his co-partners. The delivery of the paper by his wife to him, therefore, after her signature had been attached, was not a delivery to the bank, but simply purported to give him authority, as her agent, to make or procure such a delivery at some subsequent time. If, therefore, the guaranty, so far as concerns her obligation upon it, was ever delivered, it was delivered, and so first took effect, in Chicago. But its delivery there could not affect her, unless it was made by her or by her authorized agent. Morse, the partner who actually handed it to the bank, stood in no better position than her husband, whether regarded as the servant of the latter, or as a

partner with him. In either case, the agency by virtue of which the delivery was made was created, if at all, in Connecticut. But to create an agency is to enter into a contractual relation. Mrs. Mitchell had no capacity to make any contract whereby her legal position in respect to all or any of the other members of the community would be varied. It would have varied it in respect to her husband could she have constituted him her agent to put her, by the delivery of an instrument of guaranty, in the situation of a surety for his debt to a third party. He therefore derived no authority from her to make the delivery to the bank, and, as to her, the instrument never was delivered. It is true that the guaranty, if a binding contract, was a contract made in Illinois. It might also be assumed, so far as concerns the law of this case (although this is a point as to which we express no opinion), that it was one to be performed in Illinois, and that, as to the principals in the transaction, it was fully an Illinois contract, and to be governed by the law of Illinois, as respects any question as to its validity. By that law, a married woman was free to enter into such an engagement, and to constitute an agent for that purpose. But the *lex loci contractus* is a rule of decision only when there is a contract, so made as to be subject to that law. It is a *petitio principii* to say that, because the guaranty was delivered in Chicago, it is therefore to be held effectual or ineffectual, as against Mrs. Mitchell, by the law of that place. The underlying question is, was it, as to her, ever delivered at all? It was not so delivered unless delivered by her authority; and by the laws of Connecticut, where she assumed to give such authority, she could not give it. *Cooper v. Cooper*, 13 App. Cas. 88, 90, 100; *Story*, Conf. Laws, §§ 64, 65, 66a, 136; *Dacey*, Conf. Laws, c. 18, rule 123.

Had Mrs. Mitchell been within the state of Illinois when she signed the guaranty, it may be that her personal presence would have so far made her a resident of that state as to subject her to its laws in respect to acts done within its jurisdiction. But, as whatever was done in Illinois to bind her to the bank was done under an agency constituted in Connecticut, it is the law of Connecticut which must determine as to the authority of the agent, and so as to the validity of the obligation which he, as such, undertook to impose upon her by the delivery in Chicago of the paper signed by her in Bristol. The order drawn by Mrs. Mitchell on the executor of her father's will, directing him to pay over to the bank whatever might otherwise be coming to her as part of the estate in his hands, though dated at Chicago, was brought to her in behalf of the bank in Connecticut, signed and given back to the agent of the bank in Connecticut, accepted by the executor in Connecticut, and then mailed in Connecticut by its agent to the bank at Chicago. The whole transaction, therefore, was completed here.

The order became operative, if at all, to transfer her interest in her father's estate, when the executor had notice of it, and agreed to comply with it by handing his written acceptance to the agent of the bank. That Mr. Mitchell was acting in that capacity seems clear from the finding that the bank, after the firm had become insolvent, and made an assignment for the benefit of its creditors, prepared the paper, and sent it to him, to procure her signature to it. No assignment which she could make would benefit the firm. If its result was to satisfy the claim of the bank, she would be subrogated to its place, and their creditors would receive no greater dividend. The order, also, was for the payment of a share in the estate of a deceased citizen of Connecticut, in course of settlement in its courts. Under these circumstances, its validity must be determined by the laws of Connecticut, and being dependent on the contractual act of a married woman, not for the benefit of herself, her family, or her estate, it was void. There have been cases not differing essentially in principle from that at bar, in which courts, to whose opinions great consideration is due, have come to conclusions varying from those which we have reached. The leading one is *Milliken v. Pratt*, 125 Mass. 374. There a guaranty by a married woman of such debts as her husband might thereafter contract was signed in Massachusetts, delivered there by her to him, and by him there mailed to the other party, in Maine. The court held that the contract became complete when the guaranty was received and acted upon by the latter, and not before, and enforced it as one made and to be performed in Maine, where married women then had power to enter into such agreements. No reference was made to the fact (which may, perhaps, have been immaterial under the laws of Massachusetts) that the delivery was made by the husband, acting as the agent of the wife,—a fact which, in our view, under the common law of Connecticut, is of controlling importance. Engagements which coverture prevents a woman from making herself she cannot make through the interposition of an agent, whom she assumes to constitute as such in the state of her domicile. If this were not so, the law could always be evaded by her appointment of an attorney to act for her in the execution of contracts. No principle of comity can require a state to lend the aid of its courts to enforce a security which rests on a transgression of its own law by one of its own citizens, committed within its own territory. Such was, in effect, the act by which Mrs. Mitchell undertook to do what she had no legal capacity to do, by making her husband her agent to deliver the guaranty to the bank. He had no more power to make it operative by delivery in Chicago to one of his creditors in Illinois than he would have had to make it operative by delivery here, had it been drawn in favor of one of his creditors in Connecticut. It is not the place of delivery that controls, but the power

of delivery. The superior court is advised to disallow all and every part of the claim of the First National Bank. The other judges concurred.

GILBERT v. KOLB.

(Court of Appeals of Maryland. April 30, 1897.)

TRUSTEES—INVESTMENTS—DISCRETION—NEGLECT.

1. A testamentary trustee empowered to invest the trust funds in some safe security, with power to reinvest, is not liable for loss if he acts in good faith and with diligence, and in a way that a court of equity would have approved under the circumstances as the trustee honestly believed them to be.

2. A testamentary trustee, who was also executor and a residuary legatee, sold property as executor for \$3,500, on credit, taking, as trustee, a mortgage on the property sold and a second mortgage on other property, and held such mortgages as an investment for the trust fund. He had previously tried to sell the property at that price, but failed. The trustee had no knowledge of the value of the property on which the second mortgage was taken except what the mortgagor told him. He consulted his solicitor as to the investment, but did not know whether the solicitor had ever seen the property. The entire mortgaged property was not worth more than \$400 above the incumbrances, and on foreclosure there was a loss of about \$1,400. *Held*, that the trustee was liable for the loss.

Appeal from circuit court, Frederick county, in equity.

Petition by Alice Virginia Gilbert, by her husband and next friend, J. Milton Gilbert, for an accounting by David Kolb, trustee. There was a decree dismissing the petition, and petitioner appeals. *Reversed*.

Argued before BRYAN, FOWLER, BOYD, ROBERTS, PAGE, BRISCOE, and RUS-SUM, JJ.

Milton G. Urner, C. O. Keedy, and Ham. Urner, for appellant. Charles W. Ross, Benjamin F. Reich, and John S. Newman, for appellee.

RUS-SUM, J. William Kolb, of Frederick county, died in 1889, leaving a will, by which, *inter alia*, he bequeathed to his son, David Kolb, who was also one of the executors named in the will, \$15,000, "in trust to invest the same in some safe security or securities, either public or private, with full power in said trustee to reinvest the same from time to time as the exigencies of the trust may require," the income to be paid to his daughter, Alice Virginia Gilbert, the appellant, during her life, and after her death the corpus of the estate to be paid to her children then living, and to the descendants of any child or children who may be living at her death, to be equally divided between them per stirpes. There was a mill property known as the "New London Mills," which belonged to the testator's estate, which the executors, in September, 1889, sold to one Keller for \$3,500. No part of the purchase money was paid, but the executors conveyed

the property to Keller, and took from him a mortgage thereon for the entire purchase money, at 5 per cent. interest, and also a mortgage on a farm of 52 acres, subject to a prior mortgage of \$1,200, bearing 6 per cent. interest. Keller, the mortgagor, died in 1894, and the trustee, on March 16, 1895, filed his petition *ex parte*, asking the circuit court for Frederick county, in equity, to take jurisdiction of the trust, and approve his investments, which was done. Afterwards the trustee and mortgagee foreclosed the mortgage, and sold both properties, buying them in as trustee,—the mill for \$2,000, and the farm for \$260, subject to the prior mortgage of \$1,200. After the foreclosure proceedings were completed, the trustee filed his petition asking to be relieved of the trust, and filed therewith a statement showing a loss of \$1,392 to the trust estate. On this petition the court passed an order releasing the trustee from the further execution of the trust, and Hammond Urner was substituted as trustee upon the petition of the appellant, and the trust estate transferred to him, except the investment in the Keller mortgage, in relation to which testimony was ordered to be taken; so that the sole question before us is in relation to the Keller investment. The learned and distinguished judge who decided this case in the court below, after referring to the difference which may exist between the discretion possessed by a testamentary and a conventional trustee,—that is, a trustee appointed under a decree,—clearly and correctly lays down the legal principles which control it, as follows: "Generally speaking, where there are no restrictions imposed" by the testator, a trustee named by him is vested with a discretion which a conventional trustee does not ordinarily possess; and where a discretion is expressly conferred by will, "its exercise in good faith and with proper diligence, though resulting in a pecuniary loss, presents quite a different situation from that which would arise were the loss to follow from an unauthorized act, or from the exercise of an assumed discretion" not intrusted to a conventional trustee. And this is so because the power of the one is broader than the power of the other, and the accountability of each is measured by a totally different standard. Loss resulting from an act of a conventional trustee, though the act were done in the utmost good faith, if it were not an act permitted by the instrument creating or defining the trust, or were done without proper judicial sanction, would fall on the trustee, who, having no discretion at all, or a very limited one, is justly held to a rigid accountability, without the slightest regard to the motives that may have influenced his action, or the prudence he displayed in performing it. *Zimmerman v. Fraley*, 70 Md. 561, 17 Atl. 560. But where the testator has selected a particular person as trustee, and has clothed him with a discretion in regard to making investments, and confided in this

behalf to his judgment and integrity, and such trustee in good faith and with diligence makes an investment of trust funds, strictly in accordance with the power conferred upon him, or in a way that a court of equity would have sanctioned at the time if advised of the circumstances as the trustee then knew or honestly believed them to be, will be exonerated should a loss ensue, though he failed to invoke the guidance of the court, or to procure its subsequent ratification of the step he took. *Tyson v. Mickle*, 2 Gill, 878; *Cunningham v. Schley*, 6 Gill, 208; *Gray v. Lynch*, 8 Gill, 408.

In applying these legal principles to the facts contained in the record we are compelled to differ with the learned judge below. We are of the opinion that the investment made by David Kolb, trustee, was not a judicious investment, made in the exercise of a fair discretion,—such a one as a prudent man would have made dealing with his own affairs, nor such as a court of equity would have sanctioned at the time if advised of the circumstances as the trustee knew them, or had reason to believe them to be,—especially as the facts in the record show that the trustee would be benefited, as residuary legatee, by getting a large price for the property sold. This view of the case is, we think, fully sustained by the testimony of the trustee. In making the investment he was under the duty to use due diligence (1) to see that the title was valid, and (2) that the value of the property at the time of the loan is such as would in all probability be adequate security for the repayment of the loan whenever the mortgage should be called in. The criterion by which the value is to be ascertained is the estimate of men of ordinary prudence, who would deem it safe to make a loan of the same amount of their own money on the same property. This is what a court of equity would have required of the appellee had it been applied to at the time to sanction the investment. By his own confession the appellee had failed to sell this mill property to Kinna for \$3,500, because he could not raise the money on it, and yet he sold it to Keller for that sum, taking as security a mortgage on the property for the full amount, and the additional security of a second mortgage on a farm of 52 acres subject to a prior lien of \$1,200 at 6 per cent. interest, and of the value of which he had no knowledge except what Keller, the mortgagor, told him. If the testimony of the appellee's witnesses who knew the property, and are capable of correctly estimating its value, be referred to, it clearly appears that, taking a fair average of their estimates, there was, after deducting the first mortgage on the farm, no such margin as would justify a prudent man in making the investment. At the average valuation of appellee's witnesses, there was a margin of not exceeding \$400, when, if common skill, caution, and prudence had been exercised, there should have been at least three

times that amount. This is the most favorable view that can be taken of the appellee's conduct. The plea that he consulted his solicitor, Mr. Ross, does not aid him, because, by his own admission, he does not know whether Mr. Ross had ever seen either the mill or the farm. It was proper that the appellee should consult Mr. Ross as to the title, and he was justified in relying on his opinion on that subject, but Mr. Ross' opinion as to the value of the property should not have been relied on any more than the opinion of any other person who knew nothing of the property. No court of equity would have approved an investment where the value of the property was estimated by persons who had confessedly no knowledge of the property, even with the superadded estimate of the party to whom the loan was to be made. Such is this case. The appellee has not acted in this matter as a prudent man would act in the management of his own affairs. Being the acting executor, he used the trust funds to facilitate the sale of the real estate left by the testator, and, by taking a mortgage for the entire purchase money, obtained a larger price than he could otherwise have received. His interest as executor was to swell the estate by large sales, and in taking care of that interest he failed in his duty as trustee by subordinating that duty to his interest as executor. Instead of making the investment required by the will in good faith and as a prudent man would have done had he been lending his own money, he risked the trust fund upon an insufficient security, hoping that the good character, steady habits, and capacity of Keller, the mortgagor, would furnish additional security upon which he could rely for the repayment of the loan. The death of Mr. Keller made it necessary to sell the mortgaged property, which has resulted in a loss to the trust estate; and having, by his own admissions, failed in his duty to the cestui que trust, he ought, in equity and good conscience, to be required to assume the loss that has been sustained. It follows that the decree appealed from must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

HOOPER, Mayor, v. NEW.

(Court of Appeals of Maryland. April 8, 1897.)

SCHOOL COMMISSIONERS—MODE OF APPOINTMENT—STATUTES—VACANCY—MANDAMUS.

1. In 1828 an ordinance of Baltimore provided for the appointment of school commissioners by the two branches of the council in convention. Const. 1864, art. 8, § 8, provided that the school commissioners of Baltimore "shall be appointed as at present," subject to such amendments as the council or general assembly might make. In 1866 an ordinance was adopted re-enacting such method of appointment. Const. 1867 did not re-enact the provision of Const. 1864 as to the Baltimore commissioners, but contained nothing inconsistent therewith, and (article 11, § 8) con-

tinued in force all ordinances relating to Baltimore city not inconsistent with that article, until they were changed in due course of law. It also provided (article 8, § 2) that the public school system then existing should expire, except so far as it was continued by the general assembly of 1868. Acts 1868, c. 407, tit. 2, subc. 7, § 1, creating a general school system, provided that the mayor and council of Baltimore should have "full power" to establish a school system in that city under such regulations as they might prescribe, and to give supervisory power to a board of school commissioners. The act prescribed the mode of appointing school commissioners in counties, but contained no provision as to their appointment in Baltimore. The ordinance of 1866 was repealed and re-enacted several times, but no change made in the mode of appointing commissioners. *Held*, that the power of the council to appoint commissioners continues in force, having been recognized by Const. 1864, and continued by Const. 1867, and the grant of "full power" in the act of 1868; and hence Code Loc. Laws, art. 4, § 80 (enacted before 1860), providing that the mayor shall, with the consent of the council, appoint all city officers, does not apply to the appointment of school commissioners.

2. The ordinances of Baltimore city providing that the council shall be officially notified of vacancies in offices within its appointment, which it shall thereupon fill, does not apply to appointments on the expiration of a term, which the council may make without receiving such notice.

3. On demurrer sustained to the answer to a petition for mandamus, the writ may issue without proof; the statute requiring proof where there is no answer not being applicable.

Appeal from Baltimore city court.

Petition for mandamus by Henry F. New against Alcaeus Hooper, mayor of Baltimore city. There was an order that the writ issue, on demurrer sustained to the answer, and defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Thos. I. Elliott and Thos. G. Hayes, for appellant. Chas. Marshall and John P. Poe, for appellee.

McSHERRY, C. J. The appellee was appointed, by a joint convention of the two branches of the city council, one of the school commissioners of Baltimore city, pursuant to the provisions of article 44 of the City Code of 1863. The ordinance therein contained makes provision for the appointment of school commissioners of the city by a joint convention of the two branches of the council. When the appellee presented himself to the mayor to have the oath of office administered by the mayor, the latter refused to administer the oath, and placed his refusal on the ground that the appellee had not been legally appointed. The mayor maintained that the appointment was illegal because the ordinance under which it had been made was *ultra vires* and void. And it was insisted that the ordinance was *ultra vires* and void because it is in conflict with section 30 of article 4 of the Code of Local Laws. That section is in these words: "They [the mayor and city council] may pass ordinances regulating the manner of appointing persons to office under the corporation,

which they are or may be authorized by law to appoint, but unless such ordinances be passed, the mayor shall nominate, and by and with the advice and consent of a convention of the two branches of the city council, shall appoint all officers under the corporation, except the register of the city and the clerks employed by the city or under its authority," etc. Upon the refusal of the mayor to administer the oath of office to the appellee, he made application by petition to the city court for a writ of mandamus to compel the mayor to administer the oath. To this petition the mayor filed an answer relying upon the alleged illegality of the appellee's appointment, by reason of the asserted invalidity of the ordinance. To this answer the appellee demurred. The court sustained the demurrer, and ordered the writ to issue. From that order this appeal was taken by the mayor.

The paramount question involved is whether the ordinance under which the appellee was appointed a school commissioner of Baltimore city is valid, or *ultra vires* and void, and this question is presented and brought up directly on the face of the record. The question at issue arises, it is claimed, under the same section of the Code of Local Laws that was before us in the Hooper-Creager Case (recently decided by this court) 35 Atl. 967, and 36 Atl. 859. There is, however, a clearly-defined line of distinction between that case and many other cases that might arise under the same section, and which, if they did arise, it has been supposed, would be covered and controlled by that decision; but, in spite of this distinction, there appears to be some misunderstanding as to the scope and effect of the court's opinion in that case, and there also exists an impression that it is conclusive of the issue here involved. In Hooper v. Creager we were dealing with the case of a municipal officer, distinctively and confessedly such, the method of whose appointment was prescribed by a designated section of the Local Code, and with that section the ordinance under which Mr. Creager had been appointed was asserted to be in conflict. We did not have before us, and therefore did not pass upon, the case of a subordinate employé or laborer, or other like inferior servant, whose selection, in the very nature of things, was never designed or intended to be, and in fact is not, embraced within the terms of the statutes embodied in section 30 of article 4 of the Local Code. And, as we had no such question to decide, we deemed it wholly unnecessary to step aside a single pace from the straight path before us, and declare what particular appointments were not included within the scope of our decision. The duty of a court is done, as we apprehend, when it decides the case before it; and it is obviously no part of that duty to declare that the court has not decided something wholly different, or to enumerate, in anticipation of possible future contests, the instances in which, by reason of a difference of facts, the opinion would not be applicable. The language which a court em-

plays, the reasoning which it resorts to, for the purpose of disposing of a particular question, ought not to be wrested from the context and the occasion, and strained so as to be made pertinent, or seemingly pertinent, to some other distinct and dissimilar question. But this is frequently done incautiously, and some persons are by that erroneous process led to suppose that results are established by a judicial opinion, though those results do not logically follow from it at all. There may be sometimes an apparent similarity between cases, but it ought not to be forgotten that mere similarity is not identity. It is a common fallacy, this inference that a conclusion is universally, and under all conditions, sound, because it is sound in a particular instance and under peculiar circumstances. It does not follow that a conclusion which is true secundum quid, or in a certain respect, is also true simpliciter, or simply and absolutely. In the Creager Case we were dealing with an ordinance regulating, or attempting to regulate, the manner of appointing persons "to office,"—to a municipal office,—and not with an ordinance regulating the method of employing or appointing servants or laborers, and kindred subordinates, who are in no sense officers of the municipality at all, but are merely and essentially employés. Consequently the language used in the opinion in that case must be understood as applicable to municipal officers,—the class of persons designated in section 30 of article 4,—as contradistinguished from mere employés. Nor does the Creager Case touch upon or involve the specific point now presented. If the school commissioners are municipal officers, and if there had not been any legally prescribed mode provided for their appointment other than that contained in section 30 of article 4, which applied to Mr. Creager's appointment, then undoubtedly the mode of selecting school commissioners would be within the reason, and therefore within the effect and operation, of the decision in the Creager Case. But it is right here that the Creager Case and this case diverge. It is precisely because section 30 of article 4 does not apply to school commissioners any more—though for a different reason—than it applies to a bailiff in the tax collector's office, an employé under the city commissioner, or hundreds of other subordinates in the service of the city, that what was said in *Creager v. Hooper* can have no influence upon the decision of this case. If it be assumed, though it is by no means conceded (and certainly it is not now decided), that the school commissioners are municipal officers, as contradistinguished from agents of the state selected by the municipality, under power delegated by the state, to carry on within the limits of the city the beneficent purpose of the general school system of the commonwealth,—just as a state tax collector in a county is an officer of the state, though selected by the county commissioners,—still the predominant proposition that their appointment does not fall within the terms of section

30 of article 4 of the Local Code remains to be demonstrated. If their appointment does not fall within that section, we have no further need or occasion to allude to the Creager Case hereafter, in this opinion.

Now, what is the method provided for the appointment of the school commissioners of Baltimore city, and under what authority was the method adopted? The Local Acts of 1825, c. 130, declare "that the mayor and city council of Baltimore shall have power to establish public schools within the city of Baltimore"; and section 21 of chapter 162 of the General Laws passed at the same session of the legislature vested in the mayor and city council the authority to establish and regulate the public or primary schools of the city. Under these statutes, and pursuant to their design, an ordinance was passed by the municipality in 1828 by which it was, among other things, provided that the commissioners of public schools should be chosen by the two branches of the city council in convention; and this prescribed method thus specifically fixed by that and by subsequent amendatory ordinances, apart from being recognized by the Acts of 1845, c. 120, was fully and completely ratified, sanctioned, and validated afterwards, even if antecedently invalid, by the organic law of the state; for by section 3 of article 8 of the constitution of 1864 it was expressly ordained that "the school commissioners of Baltimore city shall remain as at present constituted, and shall be appointed as at present, by the mayor and city council, subject to such alterations and amendments as may be made from time to time by the general assembly or the said mayor and city council." It should be noted that this constitutional provision prescribed two things: First, it declared that the school commissioners of the city should remain as then constituted; and, secondly, looking to the future, it ordained that they should afterwards "be appointed as at present,"—that is, in the mode then existing. The constitution of 1864, therefore, not only ratified the then subsisting method of appointment, but provided that the same method, viz. by a joint convention of the two branches, should thereafter be pursued, unless changed or altered by the general assembly or by the municipality. It seems too clear for serious controversy that when the constitution of 1864 (the supreme law of the state) provided that the school commissioners should be appointed in the method then pursued (that is, pursued under the ordinance of 1828, as repeatedly re-enacted), it distinctly sanctioned the appointment by a convention of the two branches of the city council, for that was the sole method then in force and then followed; and, however other officers of the municipality might have been required to be selected under the acts of 1817 and 1828, which formed section 25 of article 4 of the Local Code of 1860, and which now form section 30 of article 4 of the Local Code of 1888, these appointees (the school commissioners of the

city) were not within the terms or the scope of the Local Code, and their appointment was provided for by a totally different and wholly distinct method. While under the Acts of 1865, c. 160, which established, pursuant to the mandate of the constitution of 1864, a general public school system throughout the state, the primary schools of the city were brought under, and in a measure molded into, that system itself, still that statute did not strike down the entire autonomy of the local schools, but left the mode of selecting the school commissioners for the city, as fixed by the ordinance of 1828, precisely where the constitution of 1864 had unequivocally placed it,—in a joint convention of the two branches of the city council. This, in substance and effect, our predecessors determined in *School Com'rs of Baltimore City v. State Board of Education*, 26 Md. 505. In 1866 another ordinance was adopted by the mayor and city council, whereby the number of school commissioners was increased to 20, and whereby numerous details of the local system were prescribed, but no change whatever was made in the mode of appointing the commissioners. So far from a change being made, the identical method prescribed by the old ordinance of 1828, viz. a selection by a joint convention of the two branches of the city council, was in terms specifically re-enacted. This ordinance of 1866, passed at the very time that section 25 of article 4 of the Local Code of 1860 (which is practically identical with section 30 of article 4 of the present Local Code, as transcribed in the beginning of this opinion), was in force, was clearly such an ordinance as the municipality had the power, under the broad terms of section 3 of article 8 of the constitution of 1864, to enact; for it was, in so far as it related to the mode of making the appointments of the city school commissioners, simply a reiteration of the provisions of the ordinance of 1828, as frequently amended and re-enacted. It cannot be doubted that the mayor and city council had the unquestionable power, under the constitution of 1864, to pass the ordinance of 1866, inasmuch as the act of 1865 made no provision whatever for the appointment of city school commissioners, and inasmuch as there was no other law that did. At the very time this ordinance of 1866 was adopted, and validly adopted, under the plenary power conferred by the constitution of 1864 upon the municipality, the identical law (section 25, art. 4, Loc. Code 1860) under which, as contained in section 30, art. 4, Loc. Code 1888, it is now claimed the school commissioners must be nominated by the mayor, and, by and with the advice and consent of a joint convention, appointed, was in full force and vigor. Still, assuming as we have throughout that a school commissioner is a municipal officer, it can scarcely be contended that the method of selecting school commissioners first resorted to in 1828 (but whether rightfully then or not is wholly immaterial, because it was afterwards unequivocally sanc-

tioned by the organic law in 1864)—It can scarcely be contended, we repeat, that this method was not an exception to the general mode provided by the Local Code for the appointment of other municipal officers. It was an exception created by an ordinance in 1828, and that ordinance was given the force of law by the constitution itself; and the ordinance not having been changed in this particular,—respecting the mode of appointment by the ordinance of 1866,—but being re-enacted by the latter, it obviously continued to have the same force and efficacy which the constitution imparted to it, unless the mere abrogation of the constitution of 1864, and its being superseded by a later one, have deprived the ordinance of its vitality. When the ordinance became obligatory by force of the constitutional provision alluded to, how could the adoption of a new constitution, without more, take away the character antecedently given to the ordinance? But it is needless to speculate upon this subject, because there is a most conclusive reason for holding that the adoption of the constitution of 1867 did not destroy or impair the efficacy of the ordinance of 1866.

The constitution of 1867 contained a separate article pertaining to Baltimore city, and among the provisions therein set forth is section 8, whereby it is declared that "all laws and ordinances now in force and applicable to Baltimore city, not inconsistent with this article, shall be and they are hereby continued until changed in due course of law." Here, then, in the most formal and explicit terms, is a declaration that "all ordinances now in force * * * shall be and they are * * * continued until changed in due course of law." The ordinance of 1866, providing for the appointment of school commissioners by a joint convention of the two branches of the city council, was undeniably, then, in force. It was applicable to the city of Baltimore, and to that city alone, and it was not inconsistent with article 11 of the constitution, which related to Baltimore city. Was not that ordinance, then, and the power conferred by it, necessarily continued in force "until changed in due course of law"? There can be, it seems to us, but one answer to that question; and it is that the ordinance was incontestably continued in force, and the power it gave was unmolested, by the constitution of 1867. If continued in force, as it certainly was, it provided, and lawfully provided, after the abrogation of the constitution of 1864, a separate method for the appointment of school commissioners, essentially and materially different from the method prescribed in and by the Local Code for the appointment of city officers; and it remained, as it had originally been, an exception to the other or general mode. The same section of the constitution of 1867 which continued the ordinance of 1866—not by name or number, it is true, but because it was an ordinance then in force—also continued the laws applicable to appointments generally, and consequently the constitution left both systems of appointment as it found

them, side by side,—the one pertaining to a particular class; the other and different one affecting distinct classes. The constitution of 1867 not only continued this ordinance in force, but it continued it, and the power that it gave, "until changed in due course of law"; and this phrase obviously means that the ordinance in question was to remain effective by virtue of the constitutional mandate, and the power that it conferred was to subsist, until repealed by the municipality, or until overridden or superseded by subsequent legislative enactment. By no right reasoning can it be held that the very section of the constitution which expressly continued the ordinance of 1866 at the same time repealed it, by also continuing in force the law providing a different method for the appointment of other officers. If the ordinance relating to the appointment of school commissioners, and the statute relating to appointments generally, were flatly contradictory, the continuation of both of them in force by the very same clause of the constitution of 1867 could cause neither to be a repeal of the other, but would constitute the one (the particular method) an exception to the other (the general method). The change by due course of law which was contemplated by the constitution was a change not made by the constitution itself, or as a result of its adoption, but was to be some subsequent action taken either by the mayor and city council or by the general assembly. Has, then, the ordinance of 1866, prescribing the method of appointing school commissioners, been "changed in due course of law"? The ordinance has been repeatedly repealed and re-enacted, but there has been no change made in the method of selecting the commissioners. The thing, the substance, which the constitution of 1867 continued in force, was, not merely the formal ordinance, couched in particular words, but the power which that ordinance contained, authorizing the municipality to follow this special method of making these selections; and until some other method is adopted, if that one has not been repealed, the same power necessarily continues, notwithstanding changes by the repealing and re-enacting ordinances in other particulars. So long as the power has not been surrendered by the adoption of some valid inconsistent ordinance, or taken away by the passage of some act of assembly, it remains; and its exercise by the enactment of subsequent ordinances, later in date than that of 1866, but all reasserting the same power, is conclusive, as indicating that the power itself has not been stripped from the municipality by any act of the mayor and city council. There is nothing in the legislation by the city authorities that has abridged this power in the least, and it remains to be seen whether there is any constitutional provision or any act of assembly that impairs it.

The constitution of 1867, by article 8, provides for the establishment of a thorough and efficient system of free public schools throughout the state, and in obedience to that require-

ment the general assembly of 1868 enacted an elaborate statute on that subject. Among other things, it was prescribed by the statute that: "The mayor and city council of Baltimore shall have full power and authority to establish in said city a system of free public schools under such ordinances, rules and regulations as they may deem fit and proper to enact and prescribe; they may delegate supervisory powers and control to a board of school commissioners; may prescribe rules," etc. Acts 1868, c. 407, tit. 2, subc. 7, § 1. Other sections follow defining the power of the school commissioners and authorizing the municipality to levy taxes for the support of the schools. By section 6 (title 1. subc. 3) of the same act, and the amendment of it by the Act of 1892 (chapter 341), the method by which the school commissioners of the several counties are to be appointed is specifically prescribed; but nowhere in the act of 1868 (chapter 407), as originally passed, or as codified in article 77 of the Code, or as since amended, is there a single word designating the mode to be pursued in the appointment of the school commissioners of Baltimore city. Is, then, the delegation to the municipality of the power to establish in the city of Baltimore a system of free schools—which system was to be a part and parcel of the general system—to be taken as a repeal of the power to select the commissioners in the manner that was manifestly lawful at the time the act of 1868 was passed? A valid mode of making appointments of school commissioners in the city existed when the act of 1868 was adopted. That act made provision for no other method, as respects Baltimore city, though it did establish a mode for the several counties, and by its second and ninth sections it repealed only such general and local laws as were inconsistent with its provisions. Now, obviously, the act of 1868 having made no provision, in direct and unequivocal terms, for the mode of appointment of school commissioners in Baltimore, there is nothing in that act inconsistent with the antecedent ordinance of 1866, and the power contained in that ordinance; and it irresistibly follows that the act in no way impaired the validity of the ordinance, or took away the right to exert the power it conferred, unless it be assumed that a failure to provide, specifically and in direct terms, a mode of appointment for the city, while distinctly prescribing a method for the counties, was tantamount to an abrogation of all prior legislation on the subject. But the second section of article 8 of the constitution of 1867 declared that the system of public schools as then existing under the constitution of 1864, and under the act of 1865, should remain in force until the end of the session of the general assembly of 1898, "and shall then expire, except so far as adopted or continued by the general assembly." Now, the system in force when the constitution of 1867 went into effect contained no provision for the appointment of school commissioners in Baltimore, apart from those of the

ordinance of 1866, which had been continued in force, as already pointed out. If this feature of the school system relating to the appointment of school commissioners in the city was not adopted or continued by the provisions in the Acts of 1868, c. 407, which gave to the mayor and city council full power and authority, precisely as they had possessed it before, to establish schools in the city, or was not retained by the continuance in force under the constitution of 1867 of the ordinance of 1866, then there is not—and since 1868 there has not been—in existence any clause or section of the school law, or of the city ordinances relating to schools, making provision for the method of selecting school commissioners in Baltimore city. The delegation of the whole subject to the city, without restriction, was a delegation to the city of exactly the authority it had had before, as that authority had been defined and interpreted by the previously existing organic law. The effect of the act of 1868 was to place the city, in respect to the public schools, just where it had been, and to clothe it with identically the powers it had possessed antecedently; and therefore the act, coupled with the continuance in force of the ordinance of 1866, clearly carried the provisions of that ordinance, and the power that it gave, into the new system established under the constitution of 1867, as a component part of that system, and consequently the ordinance did not expire. Let us state this another way: Under the school system created by the constitution of 1864 and the act of 1865, the power of a joint convention of the two branches of the city council to appoint school commissioners, was indisputable; but that power had not been conferred by the act of 1865, for it existed independently of that statute altogether. The source of the power is to be found anterior to the adoption of the ordinance of 1866,—but we need go no further back; and that ordinance, aside entirely from its relation to the public schools of the city, was continued in force by the constitution of 1867, because it was an ordinance actually in force when the constitution was adopted, and was not inconsistent with any constitutional provision relating to the city. When the new school system of 1868 was enacted, and the same general and broad powers were given by it to the city that the city had had under its own old system,—for that was undoubtedly the effect of section 1, c. 407, subc. 7, Acts 1868, heretofore quoted,—the antecedent power to make appointments of the school commissioners, and to make those appointments in the manner they had previously been made, was not taken away or disturbed; and, if not taken away or disturbed, it was, under the comprehensive terms of the act of 1868, necessarily continued. The legislature did not mean, in giving full and plenary power to the city, to strip the city at the very same instant of a part of the power which the city already had. Such a proceeding would have been flatly contradictory. In giving full power the legisla-

ture neither gave less power than then existed, nor curtailed the methods by which the power actually given could have been, or may still be, exerted. It is difficult to perceive how the delegation to the city by the legislature of full power to establish schools could possibly have operated to deprive the city of some portion of the power it confessedly possessed on the same subject at the very moment the act so delegating such plenary power became effective. To rescue the city school system from the conditional repeal which section 2 of article 8 of the constitution of 1867 contemplated (for that section declared, as already stated, that the system established by the constitution of 1864, and under the act of 1865, should expire at the end of the next session of the general assembly unless adopted or continued by the legislature), the legislature did, by the Acts of 1868, c. 407, what was clearly equivalent to a literal re-enactment of every provision of the then operative statutes and ordinances relating to public schools in the city, because it gave to the city, in the most liberal and unqualified terms, full power over the whole subject (that is, precisely the same power which the state herself possessed); and in the face of this it can scarcely be asserted that full power was intended, or can be interpreted, to imply a power far more restricted, narrowed, and limited than the antecedent power admittedly possessed by the city. It cannot be denied that it was entirely competent to the legislature to provide that school commissioners should be appointed by a joint convention of the city council. But the act of 1868 gave to the city, for the purpose of enabling it to successfully carry on the public schools, the whole of the state's power on that subject, coupled, of course, with an inalienable right on the part of the state to modify or repeal, and hence any mode of appointment which the legislature might lawfully have prescribed was of necessity given by the act of 1868 to the city; and, if this be so, then that act incontestably continued in the city all the powers which the city formerly had respecting the method of appointments of school commissioners, as well as in regard to prescribing the length of the commissioners' term of holding. As, then, the ordinance of 1866 remained in full force after the adoption of the Acts of 1868, c. 407, the appointment of school commissioners in Baltimore continued to be made under the provisions of that ordinance. We find nothing in either the municipal legislation, or in any enactment of the legislature, or in any constitutional provision, which took away or interfered with the power that the two branches of the city council in joint convention possessed, to select the school commissioners of Baltimore city. If conditions have arisen, and now exist, which indicate that this method of appointment, followed, as it has been, for the past 69 years uninterruptedly and unchallenged, no longer promotes the efficiency of the public schools in the city of Baltimore, the mayor and city council, or the general assem-

bly, may by ordinance or by statute sweep it away, and substitute some other in its stead; but courts of justice, whose sole province it is to declare what the law is, have no jurisdiction or authority to disturb it.

It has, however, been objected that the appointment of the appellee was irregular, because "no vacancy existed in the ward for which he claims to have been elected," and "that the ordinances requiring the city council to be officially informed of any such vacancy were not observed." This defense set up by the eleventh paragraph of the answer cannot be of any avail. Mr. New was not selected to fill a vacancy. His predecessor, the school commissioner from the Twenty-First ward, had been selected in February, 1893, for the full term of four years, and when that term expired it became the duty of the city council to elect a successor. The ordinances did not impose upon the city council an obligation to wait until informed by the mayor that the term of the then incumbent had expired, or was about to expire, before they could lawfully proceed to elect another commissioner from the same ward. Their own records advised them of the dates when the terms of the school commissioners would end; and as the ordinances upon which reliance is placed in this particular relate only to cases where vacancies occur, and as, by the eleventh clause of the answer, it is admitted that no vacancy did exist, these ordinances thus relied on obviously have no application, and certainly furnish no reason or cause which impugns the regularity of the appellee's appointment.

There was no issue of fact raised that should have gone to a jury, and hence no error can be predicated of the order appealed from because it was passed without sending the case to a jury for trial.

We do not perceive anything tenable in the objection that the writ was ordered to be issued after the demurrer to the answer was sustained, and without proof to support the allegations of the petition. In *Legg v. Mayor*, etc., 42 Md. 203, the answer was quashed, and there was then and thereafter no answer whatever in the case; and this court held that, "in the absence of an answer, the judge is required to hear the case *ex parte*,"—that is, to allow the applicant to produce his proof, to satisfy the mind of the judge that the allegations of the petition are founded in truth." In *Miles v. Lankford*, 82 Md. 142, 33 Atl. 455, the petition for the writ was demurred to, and upon the demurrer being overruled the writ was issued. This we held to be error, for the reason given in *Legg's Case*. There was no answer filed at all, and the statute does not authorize the averments of the petition to be taken *pro confesso*, nor an entry of judgment by default for the want of an answer. But there is no such condition presented by this record. Here, in this case, an answer was filed, and to that answer a demurrer was interposed by the relator. The demurrer admitted all the facts set up in the answer, and rais-

ed purely and simply a question of law; and that question was whether, conceding every fact averred in the answer to be true, a valid legal ground was shown against the issuance of the writ. The answer is still in the case. The sustaining of the demurrer did not strike out the answer, as a successful motion to quash it would have done. The facts upon which the question of law arose were admitted, and the order directing the writ to be issued was not passed by default for the want of an answer, nor because the allegations of the petition were taken *pro confesso*, but because the naked legal question presented by the petition and the answer was determined adversely to the respondent. This is precisely the mode of procedure followed in *Com'rs v. Banks*, 80 Md. 321, 30 Atl. 919, and has been expressly determined by this court to be proper and permissible. The exact point has been ruled in *Hardcastle v. Railroad Co.*, 32 Md. 32; *Barney v. State*, 42 Md. 480.

The views we have expressed are conclusive of every question that affects the merits of the controversy, and, as we agree entirely with the results reached by the learned and accomplished judge who decided this case below, his judgment upholding the validity of the ordinance under which the appellee was appointed, and declaring that appointment valid, must be affirmed. Order affirmed, with costs.

HOOPER, Mayor, et al. v. FARNEN et al.
(Court of Appeals of Maryland. April 8, 1897.)
SCHOOL COMMISSIONERS—REMOVAL—POWER OF
MAYOR—MANDAMUS—PARTIES.

1. The summary removal of Baltimore school commissioners by the mayor is not authorized by Code Pub. Loc. Laws, art. 4, § 31, providing that all city offices are held at the mayor's pleasure, "unless otherwise provided by law or ordinance," and that any officer holding "by appointment of the mayor" may be removed for cause; since the terms of school commissioners are fixed by ordinance, and they are not appointed by the mayor.

2. The school commissioners are not brought within such power of removal by Baltimore City Code 1893, art. 1, § 46, providing that a term of office shall not be deemed to be fixed within Code Pub. Loc. Laws, art. 4, § 31, by the fact that the ordinance prescribes that the officer shall be appointed biennially, or as other city officers, or by other like expression; since such provision merely prescribes what words shall not create a fixed term, and does not affect a term which may be in fact fixed.

3. It is no defense to mandamus by one board of school commissioners against a rival board to obtain possession of the apartments and papers of the board that the same are in possession of a subordinate of defendant board.

4. The members of a board of school commissioners may maintain mandamus in their collective capacity to obtain possession of the apartment and papers of the board.

Appeal from Baltimore city court.

Petition for mandamus by Joseph L. Farnen and others, as the board of school commissioners of Baltimore city, against Alcaeus Hooper, mayor of Baltimore city, and Lucius P. Bunnell and others, claiming to be the board of

school commissioners of said city. There was an order that the writ issue on demurrer sustained to the answer, and defendants appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Thos. I. Elliott and Thos. G. Hayes, for appellants. Chas. Marshall and John P. Poe, for appellees.

McSHERRY, C. J. The mayor of Baltimore, in January last, acting on the assumption that the old school board had not been legally constituted, appointed a new board during the recess of the city council. The new board at once took possession of the apartments in the city hall usually occupied by the school commissioners, seized upon the books, records, documents, and furniture belonging to the school commissioners of Baltimore city, forcibly ejected the old board from their official quarters, and proceeded, it is alleged, unlawfully and wrongfully to exercise the functions, powers, and authority which rightfully belonged to the relators. Thereupon the gentlemen composing the old board collectively filed a petition in the city court praying that a writ of mandamus might be issued against the mayor and the gentlemen appointed by him as the new school board, requiring them and each of them, individually and collectively, "as said pretended board of commissioners of public schools of Baltimore city," to restore to the relators, "as the legal board of public school commissioners of Baltimore city, the free and unobstructed use of the official quarters and rooms in the city hall set apart for the use of the board of commissioners of public schools, * * * and to surrender and deliver" to the relators, "as such board, all the books, records, documents, papers, and archives of every description belonging to" the relators "as such rightful board." The mayor and the other respondents, claiming to be the lawfully constituted commissioners of public schools, filed an elaborate answer, in which they averred that the mayor had, under the city charter, the power to remove the old board; and that, the positions of school commissioners being vacant in January by reason of the old board not having been legally selected, or in consequence of the removal of the commissioners by the mayor, the latter official had, by express provision of law, the authority to fill those vacancies by appointment, which it is claimed he lawfully did do during the recess of the city council. The answer then proceeds to insist that the writ should not issue, because the custody of the room and the possession of the books, papers, and records alluded to in the petition are, under the ordinances of the city, not under the control of the respondents, but in charge of the secretary whom they appointed. It is further contended by way of defense that the relators ought not to have been joined as petitioners, and that the respondents ought not to

have been united as defendants in one proceeding. To the answer the relators demurred, and the court below sustained the demurrer. From the order subsequently passed directing the writ to issue as prayed, this appeal was taken by the mayor and the new board.

Having decided in the case of Hooper v. New, 37 Atl. 424, that the members of the old board had been duly and lawfully selected, and were, consequently, entitled to be sworn in or qualified, the inquiry now is whether the mayor had the power to remove the old board, or to declare the places held by its members vacant, and to appoint their successors. This is the controlling question raised by the demurrer to the respondents' answer. The removal, or attempted removal, was made by the mayor on January 11, 1897, and the method by which it was effected is thus stated by the mayor himself in a letter addressed by him to Mr. John T. Morris: "I would say that, in conformity with my expressed intention contained in my communication to you of the 8th inst., I have removed the gentlemen who have heretofore acted as the school board by the appointment and qualification of the gentlemen who have met and organized, and who are now in charge, and whom I solely recognize as the legally constituted school board of Baltimore city." In a subsequent letter the mayor notified Mr. Morris that he would not permit the old board to occupy any of the apartments of the city hall. The removal was summarily made, without charges of any kind having been preferred, or a hearing of any sort having been accorded. The power to remove a municipal officer from an office having a definite term, before that term has expired, is quite distinct and different from a power to displace an officer whose tenure is dependent solely on the will or pleasure of the appointing authority. *Townsend v. Kurtz*, 83 Md. 331, 34 Atl. 1123; *Miles v. Stevenson*, 80 Md. 358, 30 Atl. 646. The distinction is plainly recognized in section 31, art. 4, Code Pub. Loc. Laws,—the very section under which the mayor acted in attempting to remove the old board. Confessedly, if he did not act under that section, there is no other provision of law which furnishes the slightest color of authority or justification for his proceeding. By that section two conditions are provided for: First, it is declared that "all persons holding office under the corporation of the city of Baltimore shall, unless otherwise provided by law or ordinance, hold their respective offices during the pleasure of the mayor"; and, secondly, it is enacted that "no person holding office by appointment of the said mayor" shall, if a defaulter to the city, or if not a citizen of the United States and the state of Maryland, or (unless a female) if not a registered voter of the city, "hold any office of emolument, trust, or profit" under the municipality; and it is made the duty of the mayor, upon written complaint being filed with him "involving any

one of the above-enumerated causes, * * * to immediately revoke * * * any commission issued by him, and vacate * * * any appointment made by him," if the charges are sustained by competent proof, adduced upon a full and fair investigation of the accusation. Now, it is perfectly obvious that the first contingency provided for by the statute has exclusive relation to those officers whose tenure of office is not fixed by some law or some ordinance. In those instances—that is, where the duration of the term of the office is not fixed—the statute limits the tenure to the pleasure of the mayor; or, in other words, provides that all officers for whom a definite term is not prescribed shall hold merely at will, and the power to remove in such cases is essentially included in the power to terminate the tenure. As the term of office of the school commissioners of Baltimore—a term of four years—is defined and regulated by ordinance passed pursuant to law, they are not within the first category, and do not hold their offices "during the pleasure of the mayor"; and, as they do not hold office during the pleasure of the mayor, he cannot, at his mere will, terminate their tenure. The second contingency provides for a removal of officers appointed by the mayor, and the causes are prescribed for which such a removal may be made. Before the power thus given can be exerted, it must appear—First, that the officer sought to be removed is one who had been appointed by the mayor; and, secondly, that at least one of the three causes named in the statute not only has been alleged, but has been sustained by competent proof upon a full and fair investigation. The school commissioners whom the mayor undertook to remove were not officers appointed by him at all. He had no part in their selection. They had been chosen by a joint convention of the two branches of the city council under and pursuant to the requirements of a valid ordinance. No complaint in writing was made against them alleging that they were defaulters to the city, that they were not citizens, or that they were not registered voters in the city. Their removal was not, and could not, therefore, have been legally made under the second of the contingencies mentioned in section 31, art. 4, Local Code; and, as there is no other legislation conferring upon the mayor a power to make removals, it is clear that his attempted removal of the members of the old board was wholly unwarranted, and, being unwarranted, was necessarily ineffectual, and, consequently, created no vacancies. Nor can section 46 of article 1 of the Baltimore City Code of 1893 enlarge the power given to the mayor by section 31, art. 4, of the Public Local Code, in respect of making removals. Section 46 provides as follows: "A term of holding shall not be deemed to be created by any resolution or ordinance so as to effect the power of removal given to the mayor by article 4, section 31, of the Public Local Laws, because

such resolution or ordinance may prescribe that such officer or officers may or shall be appointed biannually or in the month of February, or as other city officers are appointed, or by any like expression indicating a periodical duty of appointment, and such words shall not be deemed and taken as otherwise providing by law or ordinance, so as to annul the power of removal intended to be given by said section." It is perfectly obvious that this section was designed primarily to define what words in the various city ordinances and resolutions relating to the selection of municipal officers should not be construed as creating, or intended to create, a fixed and definite term of office; but it did not, nor could it, make a definite term a mere holding at the pleasure of the mayor, nor give to him the power to remove as an incident of the power to terminate the tenure in instances where the power to remove did not antecedently exist. Section 46 of the ordinance is simply declaratory of the meaning of prior ordinances. Its import is that, when the phrase "biennial appointment" or other equivalent expression is used in ordinances relating to municipal officers, it shall not be treated as establishing a fixed and definite term; but section 46 could not override the other provisions of section 31 declaring, in effect, that when the term is a fixed one the tenure shall not be at the pleasure of the mayor, and providing that a removal from an office having a definite term, and filled by appointment by the mayor, must be made for the causes, or one of the causes, specifically assigned in the statute, and in the mode and by the method therein prescribed. Section 46 had, and necessarily could have had, no such effect as to give to the mayor the absolute, arbitrary, and unrestricted power to remove from an office, at his mere pleasure, any officer holding for a definite term under a city ordinance; and, if it had undertaken to do so, it would have been palpably in conflict with the provisions which carefully confine that power to instances where the mayor has made the appointment, and where no term is fixed for the office, and to cases where the causes set forth in the statute are applicable; and which provisions also sedulously guard against both a hasty and a despotic use of the power when these enumerated causes are relied on. The ordinance embodied in section 46 neither broadened nor narrowed the effect or the scope of the statute, and it certainly gave no power to remove where none previously existed under the statute, and conferred no authority to exercise such a power in any way different from the way pointed out in the statute,—summarily, when the tenure is at will; after proof and investigation, when the term is definite. It follows, then, that as the power of the mayor to summarily remove or to remove for cause is confined to classes of incumbents within which classes the school commissioners do not come, his attempted removal of those officers was unlawful, and that they are still rightfully in office, and are, therefore, entitled

to the possession of the apartments in the city hall formerly occupied by them, and to the books, papers, and archives described in the petition, unless the other grounds of defense are sufficient to defeat their demand. Entertaining the views we have expressed on the merits, the technical defenses become comparatively unimportant. We take it for granted the case was not brought here to be disposed of on a purely technical ground. The importance of speedily determining finally and fully this litigation, involving, as it does, the stability of the public school system as it has existed for years in the city of Baltimore, is obvious. The issues raised in these cases are momentous and far-reaching in their consequences; and the public interests at stake require that the agitation, the jarring and the excitement, which a prolongation of these unfortunate controversies will surely provoke, should be promptly and effectually set at rest by a decision on the merits, rather than kept alive by fruitless contentions over mere technical forms of procedure. As to the first of these technical grounds, viz. that the respondents are not in possession of the apartments of the books and archives, but that their secretary is, little need be said. The secretary is not a bold usurper, holding by force against both the relators and the respondents. Whatever the nature of his possession is, it is such only as the respondents have conferred or attempted to confer. He is their agent. His possession is their possession, simply because he is their appointee. It is the plain duty of the respondents to surrender up to the relators, who are the rightful school commissioners, what has been demanded of them; and they cannot be permitted to evade the performance of that obligation by sheltering themselves behind their own subordinate. *Commissioners v. Banks*, 80 Md. 325, 80 Atl. 919. What the relators seek is not relief purely personal or pertaining to each individually, but they demand, as the lawfully constituted board of school commissioners, the possession of premises to which, as members of the school board, and solely as such members, they are entitled. It is very questionable whether each one individually would have had a right to a mandamus to obtain possession of the rooms set apart for the school board, but it is perfectly certain that collectively and in their official capacity they may make the demand and enforce the right, which is a right not held by them separately, but pertaining to them collectively as an official body.

We have not deemed it necessary to go into a consideration of the question as to the power of the mayor to fill vacancies during a recess of the city council, for the reason that no vacancies exist. Nor do we feel called on to enter into an extended refutation of the mayor's asserted right to create a vacancy by appointing some one else than the incumbent to the same office in such a case

like this, because we held in *Hooper v. New*, 37 Atl. 424, that the old commissioners had been legally appointed, and we hold now that they were not subject to be removed by the mayor, under section 81, art. 4, Code Pub. Loc. Laws, or under any other law or ordinance; and that, therefore, there were no vacancies to be filled. It results, from what has been said in this opinion, that the order appealed from must be affirmed. Order affirmed, with costs above and below.

GOLDSBORO v. CENTRAL R. CO. OF NEW JERSEY.

(Supreme Court of New Jersey. May 26, 1897.)

RAILROADS — CONTRIBUTORY NEGLIGENCE — EVIDENCE — PHOTOGRAPHS.

1. Whenever, in an action for personal injuries received at a railroad crossing by a collision with a train, there exists a fair controversy upon the question of contributory negligence, upon the proof, either of a direct or circumstantial character, whether the plaintiff could see or hear an approaching train, a situation has arisen which requires the submission of the question to the jury.

2. Photographs, in order to be admissible in evidence, must be verified by proof that they are correct resemblances or true representations of the subject. Whether they are so verified is a question to be decided by the judge presiding at the trial.

3. Quere, can the decision of the trial judge as to such verification be reviewed?

(Syllabus by the Court.)

Action by Edward Goldsboro against the Central Railroad Company of New Jersey, in which there was a judgment for plaintiff. On rule to show cause why a new trial should not be granted. Rule discharged.

Argued November term, 1896, before BEASLEY, C. J., and VAN SYCKEL, GARRISON, and LIPPINCOTT, JJ.

John W. Westcott and Thomas W. Trenchard, for plaintiff. John L. Conover and William A. Barkalow, for defendant.

LIPPINCOTT, J. This action was brought to recover damages for injuries claimed to have been sustained by the plaintiff in a collision with a locomotive on the New Jersey Southern Railroad, at a crossing near Shepherd's Mills, in the county of Cumberland, on the 28th day of December, 1892. The plaintiff was driving in an open wagon on a public road which approached this railroad crossing at about an angle of 20°, and as his horses reached the track they were struck by the locomotive and killed, his wagon was thrown to one side, and the plaintiff injured. The wagon road approached and entered upon the tracks on a down grade, with banks on either side. The railroad tracks were also on a down grade, between banks on either side to a considerable height. Upon the apex thus formed there were growing some pine trees or bushes which to some extent obscured the vision. The train came from the plaintiff's right, somewhat towards his back. The plaintiff claims that he looked in both directions from which a train might be expected, and

listened at a reasonable distance from the track. On his left-hand side there was a wood, which was an obstacle to some extent to a clear vision. The plaintiff swears that he heard no signals of the approaching train, and in this he is corroborated by several witnesses. The contention of the defendant upon the point of contributory negligence was that the plaintiff had such an opportunity to see and hear the train approaching that his not seeing or hearing it could only arise from culpable default on his part in this respect, and that, therefore, on this ground there should have been a nonsuit or a direction of a verdict for the defendant. Whenever there exists a fair doubt upon the question of the contributory negligence of the plaintiff, the question must be submitted to the jury, and the answer to this contention of the defendant is to be found in the evidence in the case. The question whether the plaintiff could see or hear the approaching train in time to avoid the danger of collision was much controverted both by the direct as well as the circumstantial proof in the case, and it is only necessary to say this proof was in such a conflicting condition as required its submission to the jury. The question whether the statutory signals were given by the engineer of the train, by sounding the whistle or ringing the bell, in approaching the crossing, was a disputed one. The plaintiff swears they were not given, and he was listening as he approached the crossing. Three other witnesses in carriages or wagons immediately behind the plaintiff, approaching the crossing, and looking and listening, heard no signals. Two other witnesses in the immediate neighborhood say that they heard no signals of the approaching train. On the part of the defendant, the engineer and fireman testified that the statutory signals were given. This situation required a submission of these questions of fact to the jury for solution. *Railroad Co. v. Shelton*, 55 N. J. Law, 342-345, 28 Atl. 937. No error has been discovered in the charge of the trial justice in submitting these questions to the jury.

It is further contended by the defendant that the trial justice erred in excluding certain photographs of the place of the accident. The accident occurred in December, 1892, and the photographs were taken in April, 1894, and others in May, 1896. There is some evidence that the character of the surroundings between these times had been changed. There is also evidence that no changes were made between these periods. A photographer was called, who testified to the making of small photographs from certain points of view. These were enlarged, and were offered in evidence, but not preceded or connected with any other proof that they were correct representations of the place at any time. This ancillary proof was not only not offered, but counsel for the defendant stated that the offer was to prove the situation of affairs at this crossing, so far as the offer was concerned, by the photographs alone. It is not necessary to discuss the ques-

tion whether photographs taken so long after the accident would be admissible in evidence, even if supported by proof of their correctness as a representation at the time they were taken. These photographs were not supported by any proof that they correctly represented the crossing at any time. As evidence, photographs have been held as admissible upon the question of identity and comparison of handwriting, and as secondary evidence when the primary and better evidence could be obtained. It may be generally regarded as a rule that they are never admitted but as secondary evidence. They have been admitted to show the condition and identity of premises. *People v. Buddensleck*, 103 N. Y. 487, 9 N. E. 44; *Archer v. Railroad Co.*, 106 N. Y. 589, 13 N. E. 318. There are many illustrations in the cases of the admissibility of such evidence. But they are not admissible unless authenticated by other evidence that they are correct resemblances or truthful representations. *Cowley v. People*, 83 N. Y. 464. In *Blair v. Pelham*, 118 Mass. 420, Gray, C. J., it was held that the photograph must be verified by proof that it was a true representation of the subject, and that whether it was sufficiently verified was a preliminary question of fact to be decided by the judge presiding at the trial. These photographs were properly rejected by the trial justice. The verdict was for \$2,500. The plaintiff was a workman of good character and industrious habits. His knee was permanently disabled, and it was shown in the evidence as the result of the accident that he suffers from severe injuries to the back and spine, and that his limbs are gradually withering and losing power, and it is questionable whether he can ever recover from his injuries. Under the circumstances of this case, the damages were not excessive. The rule to show cause is discharged.

STATE (TOMLINSON et al., Prosecutors) v. GANO.

(Supreme Court of New Jersey. Feb. 18, 1897.)

TAXATION—MORTGAGES.

A mortgagee is taxable for the amount of the mortgage debt where deduction has been claimed by and allowed to the mortgagor on account thereof, though the deduction was not claimed in writing under oath, and the value of the land does not equal the amount of the debt.

Certiorari by the state (Caroline Tomlinson, executrix, and others, prosecutors) against Conwood W. Gano, collector of Union township, to review an assessment for taxes. Tax affirmed.

Argued November term, 1896, before LUDLOW and DIXON, JJ.

H. A. Fluck, for prosecutors. Paul A. Queen, for defendant.

PER CURIAM. We are satisfied that a deduction for the amount of the mortgage debt was claimed by the owner of the land and allowed by the assessor. That being so, the mortgage debt was subject to taxation in the

hands of the creditor, although the deduction had not been claimed in writing under oath (*Vail's Ex'rs v. Runyon*, 41 N. J. Law, 98), and even if the value of the land did not equal the amount of the debt (*Appleby's Ex'rs v. Inhabitants of East Brunswick*, 44 N. J. Law, 153). The tax is affirmed, with costs.

KELLY v. HAUGH.

(Supreme Court of New Jersey. March 24, 1897.)

VENUE—PERSONAL ACTIONS.

Where both parties to an action for slander reside in the county where the cause of action arose, the action should be brought in that county, under Gen. St. p. 2571, providing that transitory actions shall, in the discretion of the court, be brought in the county where the cause of action arose or where the plaintiff or defendant resides.

Action by Michael J. Kelly against John A. Haugh. Defendant moves for a change of venue. Granted.

Argued February term, 1897, before GUMMERE, J.

E. C. Cole, for the motion. Jonas S. Miller, opposed.

GUMMERE, J. This is an action for slander. Suit was instituted in August, 1896, and the summons was served on the defendant in the county of Camden. It appears, from the testimony which was used upon the argument of this motion, that during the summer of 1896 both the plaintiff and defendant resided at Sea Isle City in the county of Cape May; and it is admitted that the cause of action arose at that place. By the 230th section of our practice act (Gen. St. p. 2571) it is provided that "an action merely transitory shall, at the discretion of the court, be tried in the county in which the cause of action arose, or the plaintiff or defendant reside, at the time of instituting such action, or, if the defendant be not an inhabitant of this state, in the county in which process shall be served upon him." This statute gave to the defendant the right to have his case tried in the county of Cape May, that being not only the county in which the cause of action arose but also that in which the plaintiff and himself lived. The laying of the venue in the county of Camden, where the summons was served, was in disregard of this right, and the defendant is entitled to a rule altering the venue from the county of Camden to that of Cape May, and directing that the suit be tried in the latter county. He is also entitled to the costs of this motion.

SHERLOCK v. STATE.

(Supreme Court of New Jersey. Feb. 18, 1897.)

CRIMINAL LAW—PROOF OF ALIBI.

Upon the trial of an indictment, a charge to the jury that "the defendant must prove the fact of the alibi set up by him by a preponderance of

evidence," is erroneous. Such an instruction deprives the defendant of any reasonable doubt his proofs may have created in the mind of the jury as to an essential ingredient of the state's case.

(Syllabus by the Court.)

Error to court of quarter sessions, Hudson county; Hedspeth, Judge.

James Sherlock was convicted of a crime, and brings error. Reversed.

Argued November term, 1896, before BEASLEY, C. J., and VAN SYCKEL, LIPPINCOTT, and GARRISON, JJ.

W. D. Daly, for plaintiff in error. C. H. Winfield, for the State.

GARRISON, J. This writ of error brings up the record of a judgment in a criminal cause. A general exception to the charge of the court to the jury appears in a bill of exception (1 Gen. St. p. 1151, § 157), and the charge itself is certified by the court below under 1 Gen. St. p. 1154, § 170.

By force of this procedure, this court must reverse the judgment below for any affirmative error in the charge that may have prejudiced the defendant in maintaining his defense upon the merits. 1 Gen. St. p. 1138, § 89. The official history of the trial shows that the defendant sought to break the state's case by testimony tending to show that he was elsewhere at the time of the commission of the offense charged in the indictment,—in common expression, "he set up an alibi." Upon this branch of the case, the judicial instruction to the jury took this form:

"In considering the proof offered to sustain the alibi interposed, gentlemen, it is essential that it should cover the whole time of the transaction in question, so as to render it impossible that the defendant should have committed the act. It is not enough that it renders his guilt improbable, merely." In another part of the charge it is said: "He [defendant] must prove the fact of the alibi set up by him by a preponderance of evidence." These instructions are erroneous, and rest upon a misconception of the nature and effect of the line of evidence offered. In a case where the presence of the defendant at the commission of the crime is essential to his conviction, the state must establish that fact beyond a reasonable doubt.

Testimony tending to break the force of the state's *prima facie* case, by testimony that the defendant was "alibi," is not the offer of an affirmative issue advanced by the defense; it is merely showing a state of facts inconsistent with an essential element of the indictment. The jury may, notwithstanding such testimony, believe that the defendant was present as charged, or they may believe that he was absent, in which event he is said to have "proved his alibi." A third result may be that the defendant's testimony may create such a degree of uncertainty as to his whereabouts that the jury are not satisfied beyond reasonable doubt of his guilt of the crime

for which he was indicted. The charge in the case before us deprived the defendant absolutely of the benefit of such reasonable doubt, and hence was prejudicial in the extreme.

I do not know that the question has been passed upon in any reported case in this state. In the case of insanity as a defense, the burden is shifted to the defendant upon the express ground that a presumption of sanity exists throughout the trial until overcome by proof from which the jury are satisfied to the contrary. The presence of the accused at the time and place of the criminal act are surely not to be presumed until he shall succeed in shaking off such suspicion. Even when drunkenness is set up to affect the degree of homicide, the defendant is entitled to the benefit of any reasonable doubt the jury may have as to his willful premeditation of murder. *Warner v. State*, 56 N. J. Law, 686, 29 Atl. 505.

There are, it is true, decisions to the contrary to be found in some of the states, but none that overthrow or control the principles upon which our courts administer the criminal law. 1 Am. & Eng. Enc. Law (2d Ed., 1896), under the title "Alibi," contains a clear and correct statement of the doctrines upon this subject, with notes that bring the decided cases down to the present year.

Judgment is reversed.

VON DER LEITH v. STATE.

(Supreme Court of New Jersey. Feb. 18, 1897.)

INTOXICATING LIQUORS—CRIMINAL PROSECUTION—EXEMPTION—ORDINANCES—REPEAL.

1. In order that a person be exempt from conviction upon an indictment for the sale of intoxicating liquor in the cities of this state on Sunday, under the provisions of the sixty-first section of the act entitled "An act concerning crimes," the municipality must not only have the power by its charter to enact ordinances providing a penalty for such offense, but the ordinance must by its terms provide such penalty, and it must embrace within its provisions the class of persons who claim the benefit of its protection.

2. When a subsequent ordinance, upon the subject of the sale of intoxicating liquors in a city, covers the same ground as a former ordinance, and revises it, the former ordinance is repealed by implication, and upon such repeal the general law immediately prevails, unless the subsequent ordinance provides a penalty for such sale.

(Syllabus by the Court.)

Error to court of quarter sessions, Hudson county; Hedspeith, Judge.

Henry Von Der Leith was convicted of an illegal sale of intoxicating liquors, and brings error. Affirmed.

Argued November term, 1896, before BEASLEY, C. J., and GARRISON and LIPPINCOTT, JJ.

W. D. Daly, for plaintiff in error. C. H. Winfield, for the State.

LIPPINCOTT, J. The plaintiff in error, at the December term, 1895, of the Hudson quarter sessions, upon indictment for that offense,

was convicted of the sale of liquor at his liquor saloon in the city of Hoboken on Sunday, under the sixty-first section of the "Act for the punishment of crimes" (1 Gen. St. 1061). He was not the keeper of an inn or tavern. At the trial of the indictment the sale of liquor on Sunday was admitted, the defense being that he was punishable, not by conviction under indictment, but only upon conviction under the ordinance of the city of Hoboken. The trial judge, upon this defense being presented, held that the ordinance as proved did not cover the offense of a sale of liquor on Sunday in a licensed liquor saloon, but only affected such sales when made by the keeper of an inn and tavern, and, it being admitted that the defendant was not such keeper, directed the jury to find the defendant guilty. By the charter of the city of Hoboken (P. L. 1859, p. 654, § 40), the council of the city was empowered to pass ordinances, inter alia, "to license and regulate inns and taverns and other houses of public entertainment for the sale or traffic in spirituous, vinous, fermented or other intoxicating liquors or drinks." The first ordinance upon this subject was approved June 8, 1855. This ordinance provided that the council might license any person to keep an inn or tavern upon the terms provided in the ordinance. The sixth section of this ordinance imposed a penalty of \$12 upon the holder of any such license, as well as upon "any other person" who should sell intoxicating liquor on Sunday. It is evident that this ordinance could have no effect except upon two classes of persons,—first, the licensed keeper of an inn and tavern, and upon the unlicensed seller of intoxicating liquors,—for the reason that the ordinance only provided for licensing inns and taverns. On June 8, 1859, the mayor and council passed and approved another ordinance. This ordinance provides for the licensing of "any person within the corporation to open and keep a house of public entertainment." It fully covers the same ground as the former ordinance, and also provides for the licensing of places of public entertainment other than inns and taverns. It is clear to my mind that this latter ordinance revised the whole subject-matter, and the intention is manifest to make it a substitute for the earlier ordinance, and thus operating as a repeal of it. *Roche v. Jersey City*, 40 N. J. Law, 257. An examination of this ordinance reveals the fact that by the sixth section the sale of intoxicating liquor on Sunday by a person licensed to keep an inn and tavern is forbidden, and a penalty imposed for such sale; but in no part of the ordinance, nor by any section of it, is the sale of intoxicating liquor on Sunday forbidden by any person licensed to keep any other place of public entertainment, nor any penalty whatever imposed by the ordinance for such sale. Section 11 of the ordinance does provide a penalty against one selling any intoxicating drink without having obtained a license to sell, but is entirely silent as to the imposition of any penalty for the sale on Sunday. The ordi-

nance of 1855, having been repealed by that of 1858, leaves the city of Hoboken without any ordinance forbidding the sale of intoxicating liquor on Sunday, or providing any penalty for such sale, except as to persons licensed to keep inns and taverns. The consequence is that the fiftieth section of the "Act concerning inns and taverns" (2 Gen. St. 1786), which exempts persons from indictment and conviction for the sale of intoxicating liquors on Sunday, in cities which provide for the punishment of that offense by ordinance, can have no effect whatever in protecting the defendant; for no ordinance existed at the time of his conviction, in the city of Hoboken, providing for the punishment of a person for selling intoxicating liquor on Sunday, except in an inn and tavern. In order to be such a protection, the ordinance must be general, or, in any event, it must embrace the person who claims the benefit of it. It is only those who can be punished under the ordinance that can claim exemption from the punitive operation of the act of the legislature declaring it an indictable offense and as such punishable. *State v. Zeigler*, 46 N. J. Law, 307. The judgment of the Hudson quarter sessions must be affirmed.

CITY OF HOBOKEN v. LAVERTY.

(Supreme Court of New Jersey. Feb. 18, 1897.)

APPEAL—REVIEW.

Assignments of errors which are directed to supposed erroneous rulings of a referee, to whom the circuit court had referred the cause with the consent of the parties, point to no errors that are reviewable by writ of error. They tend to embarrassment and delay, and should be struck out as frivolous.

(Syllabus by the Court.)

Error to circuit court, Hudson county; Nevins, Judge.

Action by Francis L. Laverty against the city of Hoboken. There was a judgment for plaintiff, and defendant brought error. On motion to strike out assignment of errors as frivolous. Granted.

Argued November term, 1896, before DEPUE, GUMMERE, and MAGIE, JJ.

James F. Minturn, for plaintiff in error. William S. Stuhr, for defendant in error.

MAGIE, J. The record returned with this writ of error shows that the issue made by the pleadings was referred, with the consent of the parties, to a referee, that his report was in favor of the plaintiff below, and that his report was duly confirmed, and judgment entered thereon. Two assignments of error were filed, both of which are special, and point to supposed errors of law committed by the referee. There is no general assignment. Motion is made to strike out the assignment of errors as frivolous. It was held in this court that the report of a referee to whom a cause was referred by consent of parties would be controlled by the court in which the cause was pending as the verdict of a jury would be.

Carpet-Lining Co. v. Potts, 36 N. J. Law, 301. Thereafter the rule (now rule 84) was adopted which required an order of reference, either in this court or in the circuit, to state whether the award is to have the effect of a finding of arbitrators, or merely the force of a verdict, and declared that in the absence of such a statement the award is to be treated as a verdict. There was no such statement in the order of reference in this case. It is entirely settled that a report made upon such an order of reference can only be objected to by opposition to its confirmation, or by motion to set it aside, and that the rulings of the court thereon are not open to exception, nor subject to be reviewed by writ of error. *Beattie v. David*, 40 N. J. Law, 102; *Ranney v. Hodges*, 48 N. J. Law, 359; *Association v. Hall*, 47 N. J. Law, 152; *Clayton v. Levy*, 49 N. J. Law, 577, 9 Atl. 755. A fortiori there can be no review by writ of error of the referee's rulings. It is proper to add that the referee's report and the evidence taken before him are no part of the record. Even if they could be brought here by certiorari as out branches of the record, it would not avail plaintiff in error, because not open to review on the doctrine settled in the cases above cited. It therefore appears that the assignments point to no error which can be considered by this court, and their presence tends only to embarrassment and delay. The motion to strike out will be granted, with costs.

**STATE (PHILADELPHIA & B. R. CO.,
Prosecutor) v. MAYOR, ETC., OF BOR-
OUGH OF BRIGANTINE.**

(Supreme Court of New Jersey. Feb. 18, 1897.)

STREET RAILROADS—LICENSING CARS.

If boroughs possess the power to license "cars," the power exists under the act of March 28, 1892 (1 Gen. St. p. 274), and can be enforced only by a precise pecuniary penalty, fixed by the governing board of the borough.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of the Philadelphia & Brigantine Railroad Company, against the mayor and council of the borough of Brigantine, to review an ordinance. Ordinance set aside.

Argued November term, 1896, before LUDLOW and DIXON, JJ.

William B. Williams, for prosecutor. Allen B. Endicott, for defendant.

DIXON, J. This certiorari brings up an ordinance, passed August 5, 1896, by the mayor and council of the borough of Brigantine, on the subject of licenses. Among the matters for which it requires licenses are "street, trolley, or electric cars," and the prosecutor, being engaged in running electric cars through the borough, contends that the ordinance is in that particular illegal. Of the reasons assigned for this contention it is necessary to notice only those relating to the penalty prescribed for violation. This penalty is "a fine

not exceeding twenty dollars, or imprisonment in the lockup not exceeding ten days, or both, at the discretion of the mayor or magistrate trying and having jurisdiction of the offense." The prosecutor insists that the penalty must be pecuniary only, and must be fixed precisely by the common council. This position is well taken. The counsel for the borough rests the ordinance on a statute approved May 2, 1885 (2 Gen. St. p. 2234, § 517), and urges that that law, in conjunction with section 8 of the act for the formation of borough governments (1 Gen. St. p. 179), sanctions the present penalty. But we think that this law of 1885, so far as it related to the licensing of cars in boroughs, was superseded by the later act of March 28, 1892 (1 Gen. St. p. 274, § 509). According to this act the penalty is to be recovered by a suit in the court for trial of small causes (*White v. Borough of Neptune City*, 56 N. J. Law, 222, 28 Atl. 378), in which a summons is to be issued for the penalty, and, if the defendant be found guilty, the magistrate is to "give judgment for the penalty sued for and costs," and execution is to issue against the goods and chattels and body of the defendant "for the amount of said penalty and costs." This plainly indicates that the penalty must be a sum of money exactly ascertainable before the suit is brought, and not left to the discretion of the magistrate. *State v. Zelgler*, 32 N. J. Law, 262; *Melick v. Borough of Washington*, 47 N. J. Law, 254; *Smith v. Town of Clinton*, 53 N. J. Law, 329, 21 Atl. 304. Whether the still later act of May 1, 1894, respecting licenses in the boroughs of this state (1 Gen. St. p. 279, §§ 528-532), is to be regarded as superseding all prior laws on that subject, and so abrogating all licensing powers not there specified, we need not now decide; for, if it should have that effect, the power to license "cars" is wholly withdrawn from boroughs. The ordinance is illegal so far as it prescribes penalties for the running of cars, and to that extent is set aside, but without costs, since it does not appear that the borough had made any attempt to enforce it against the prosecutor.

MAYOR, ETC., OF BOROUGH OF BRIGANTINE v. HOLLAND TRUST CO.

(Court of Chancery of New Jersey. May 24, 1897.)

MUNICIPAL CORPORATIONS—CONTROL OF STREETS—NUISANCE—EQUITABLE RELIEF.

Water pipes laid under the street are not such an obstruction of the public easement therein as authorizes the municipality, under its general control of the streets, to compel their removal by mandatory injunction.

Bill by the mayor and common council of the borough of Brigantine against the Holland Trust Company for an injunction. Defendant demurs to the bill. Sustained.

Allen B. Endicott, for complainant. W. B. Williams, for defendant.

EMERY, V. C. The demurrer for want of equity is sustained. The complainant is a municipal corporation, and the bill is filed to compel the removal of water pipes already laid by defendant under the soil of the streets claimed to be under the control of complainant under the borough acts. Complainant's right, therefore, is not a right of property as owner in the soil itself, but a right of possession for the protection of the public easement in the streets. For all the ordinary obstructions of the public easement the remedies given by the courts of law are sufficient, and the settled rule in equity is that, where the public easement or right of travel in the streets or highways is the right to be protected, a court of equity will not interfere unless the continuance of the obstruction will seriously impede public travel. *Raritan Tp. v. Port Reading R. Co.* (Ch. McGill, 1891) 49 N. J. Eq. 11, 23 Atl. 127, and cases cited on page 16, 49 N. J. Eq., and page 128, 23 Atl. In *Inhabitants of Woodbridge v. Inslee*, 37 N. J. Eq. 397, a demurrer was sustained. The main object of this bill is to compel by mandatory injunction the removal of the pipes already laid down under the soil, and the restoration of the street after this removal. How the pipes already laid under the soil create any such public nuisance as to require the aid of a court of equity by mandatory injunction does not appear by the bill, and the bill, therefore, cannot be sustained for the purpose of protecting the public easement. The cases cited by complainant's counsel, protecting rights of property, or of previous consent granted by express constitutional or statutory provisions against a threatened violation, stand upon different grounds, and are not authorities for holding the present bill. The complainant's bill is not based upon any such express constitutional or statutory provisions, but only on its general control of streets within the borough dedicated to public use. Without examining the other points raised on the demurrer, we conclude that the bill must be dismissed for want of equity in this respect.

MAYOR, ETC., OF BOROUGH OF BRIGANTINE v. HOLLAND TRUST CO.

(Court of Chancery of New Jersey. May 24, 1897.)

MUNICIPAL CORPORATIONS—CONTROL OF STREETS—NUISANCE—EQUITABLE RELIEF.

1. The stringing, without the consent of the municipality, of wires 20 feet above the ground, on poles already erected, cannot be enjoined by the municipality by right of its general control of the streets.

2. An abutting owner has a right, as against the municipality, to run electric wires into his building, from poles lawfully erected in the street, for the purpose of supplying light.

Bill by the mayor and common council of the borough of Brigantine against the Holland Trust Company for an injunction. Hear!

on bill, answer, and replication. Bill dismissed.

Allen B. Endicott, for complainant. W. B. Williams, for defendant.

EMERY, V. C. This case, as set down for hearing on the bill, answer, and replication, involves the single question of the right of complainant, the borough of Brigantine, to the remedy by injunction to restrain the stringing of wires by defendant over a street within the borough, dedicated to public use. The wires are to be strung 20 feet above the ground, and from poles already erected in the street, across the street, at this height of 20 feet, to the property of defendant abutting on the street. The complainant's right is based solely on its right to the general supervision and control of the streets, and on the fact that the stringing of the wires across the street is without its authority. For the reason stated in the case brought by complainant against the same defendant (37 Atl. 438), to compel the removal of water pipes laid under the soil of a street in the borough, we are of opinion that the injury is not one which requires the extraordinary remedy by injunction. There is an additional reason for refusing relief in this case, based on the fact that the defendant, as an abutting owner, would seem to have the right to run electric wires above the street for the purpose of connecting buildings on its property with the wires already on poles in the public streets erected for the purpose of supplying lights. The present bill does not question the right to erect the poles already on the street, or the use of them, and they must, therefore, so far as the record goes, be taken as legally erected, and the only question is as to enjoining the defendant from stringing wires above the street to connect its buildings with the electric wires on the poles. We think such injunction should be refused, and the bill dismissed.

STATE (NOE, Prosecutor) v. TOWN COUNCIL OF WEST HOBOKEN.

(Supreme Court of New Jersey. March 1, 1897.)

CERTIORARI—LACHES.

Certiorari to review a resolution of a town council dismissing prosecutor from the police force, brought 18 months after the passage thereof, is barred by laches where there is no excuse for the delay and the vacation of the resolution would affect subsequent municipal action and rights dependent thereon.

Certiorari by the state (John Noe, prosecutor) against the town council of West Hoboken to test the legality of a resolution of said town council. Writ dismissed.

Argued November term, 1896, before DEPUE, MAGIE, and GUMMERE, JJ.

Charles C. Kelly, for prosecutor. Augustus A. Rich, for defendant.

PER CURIAM. The prosecutor, by this proceeding, seeks to test the legality of a reso-

lution of the town council of West Hoboken dismissing him from the police force of that town. The resolution in question was adopted on the 24th day of August, 1894, but the prosecutor took no steps to review the action of the town council until the 16th day of March, 1896, when this writ was sued out. Nothing appears in the case by way of explanation or excuse of the long delay of the prosecutor in challenging the action of council, and we do not think that, after having slept upon his rights for over a year and a half, he should now be permitted to attack such action. The setting aside of this resolution, so long a time after its adoption, would undoubtedly result in nullifying subsequent municipal action, and in disturbing other rights dependent thereon. The writ will therefore be dismissed on account of the laches of the prosecutor. The defendant is entitled to costs.

HARRIS v. KRAUSE.

(Supreme Court of New Jersey. March 3, 1897.)

EXECUTION—LEVY—REMEDIES OF CLAIMANT.

Under Gen. St. p. 1420, § 33, providing that, if plaintiff in execution shall indemnify the sheriff against the demand of a claimant, the sheriff shall suspend proceedings for the trial of the right of property, the remedy for a person whose property is wrongfully taken is by replevin, trespass, or trover, and mandamus will not lie to compel the court to try such right before a jury.

Application by Charles Krause, Jr., for a rule to show cause why mandamus should not issue in an action to try title to property between him and Joseph Harris. Rule discharged.

Argued November term, 1896, before DEPUE, MAGIE, and GUMMERE, JJ.

Warren Dixon, for the application. Samuel J. MacDonald, opposed.

DEPUE, J. Harris, the respondent in this application, recovered a judgment in this court July 28, 1896, against Charles F. Krause, for the sum of \$259.83, in an action upon contract. Execution was issued upon the judgment, directed to the sheriff of the county of Hudson, in virtue of which the sheriff levied upon certain personal property as the property of the defendant in execution. Thereupon Charles Krause, Jr., served on the sheriff a notice in writing claiming that the goods levied on were his property, and not the property of the defendant in execution. Upon receiving this claim of property the sheriff notified the plaintiff in execution of this claim, and received from him a satisfactory bond to indemnify him against the claim of the claimant. The sheriff then advertised the property for sale under the plaintiff's execution. Before this sale could be effected the claimant applied to a judge of the court of common pleas of Hudson county to summon a jury to try the right of the claimant to the said property, pursuant to section 32 of the act concerning executions (2 Gen. St. p. 1420). The plain-

tiff having indemnified the sheriff, the judge refused to order a venire under the statute. The claimant, upon such refusal, obtained out of the court a rule to show cause why a mandamus should not issue, directed to the said judge, commanding him to try with a jury the title to said goods and chattels in the manner provided by the said statute. The statute provides that the sheriff, immediately upon a claim of property by any other person than the defendant in execution, shall delay sale for 10 days, and that the claimant may within that time apply to a judge of the court of common pleas for a venire to summon a jury to try the right of the claimant to the property. But the thirty-third section provides that, if the plaintiff in execution shall indemnify the sheriff against the demand of the claimant, the sheriff shall suspend any further proceedings for the trial of the right of property, and proceed to sell. At common law the remedy for a person whose property was wrongly taken in execution as the property of the defendant in execution was by action of replevin or trespass or trover. This remedy still remains unimpaired by the statute, the object of which was to provide a summary method for the trial of property, to be adopted by the consent of the parties. Chief Justice Beasley, speaking of the kindred provisions contained in the justices' court act, says: "What this statute does is this: It offers for their acceptance a mode of trial at once inexpensive and facile, but neither the one nor the other is compelled to resort to it. The plaintiff has the option of presenting his claim or of vindicating his rights of property by an action of replevin, or in trespass de bonis asportatis. The plaintiff in execution may give bond and compel a sale under his execution, and thus refer the question of title to the ordinary tribunals. But the parties can waive such rights, and, at their option, accept the other method of litigation proffered by the legislature." *Berry v. Chamberlain*, 53 N. J. Law, 463-468, 23 Atl. 116. The common-law mode of redress by action being unimpaired, the contention that the proviso in section 83 was unconstitutional, in that it deprived a party of his property without due process of law, is without foundation. The rule to show cause should be discharged, with costs.

TATE v. FIELD et al.

(Court of Chancery of New Jersey. May 8, 1897.)

EQUITY—PLEADING—RETAINING JURISDICTION FOR LEGAL RELIEF.

1. An allegation in the bill that defendants removed a building from complainant's property is admitted by an answer admitting that the building was removed, failing to deny that defendants removed it, and averring on behalf of one defendant separately that he was present at such removal, and supposed that he had a right to remove the building.

2. Equity, having jurisdiction of a bill for fore-

closure, may award damages for waste committed by purchasers from the mortgagor, whereby the security was rendered inadequate, such purchasers being nonresidents, who could only be sued at law in a foreign state.

Bill by Joseph Tate against Frank S. Field and others to foreclose a mortgage. Heard on bill, answer, and proofs. Decree for complainant.

The bill is in the ordinary form to foreclose a purchase-money mortgage given by the Powerville Felt-Roofing Company, Limited, to the complainant, Tate, as part consideration of lands conveyed by Tate to the company. It is dated the 25th of April, 1891, and covers five lots of land lying in a body, situate near Chatham, in the county of Morris, conditioned for the payment of \$800 in three years, with interest, with a special proviso that the mortgagor should erect upon the lands within 90 days a building of the value of at least \$500. The bill shows that the corporation mortgagor erected a building upon the premises worth at least \$500, and afterwards went into the hands of a receiver, and that the premises were sold by the receiver in the month of July, 1894, subject to the mortgage to one Garret Smith, who purchased and held them in trust for the three defendants Field, Haynes, and White, composing the firm of F. S. Field & Co. The bill further charges that between the time of the purchase by Smith for Field & Co. and the last day of the year 1894 the defendants Smith, Field, Haynes, and White, combining to defraud the complainant, "took or tore down and removed from the said mortgaged premises the said building so as aforesaid erected thereupon in accordance with the terms and conditions of the said bond and mortgage, and carried or removed the same to the premises of the said Field, Haynes, and White, in or near Boonton, in the county of Morris, and re-erected the said building thereupon." The bill then charges that the lands without the building are not worth the amount of the mortgage, and, besides the ordinary prayer for foreclosure and sale, prays that Smith, Field, Haynes, and White may be ordered and decreed to return and restore the building to the mortgaged premises, or to pay to the complainant the value of the said building at the time of its removal, or to pay to complainant any and all deficiency that may arise upon the sale of the mortgaged premises in the principal, interest, and costs due upon the mortgage. The defendants last named are, apparently, nonresidents, having been brought in by publication, and have joined in an answer, in which it is admitted that Smith purchased the premises on behalf of Field, Haynes, and White. With regard to the charge that they removed the building from the premises they answer in this wise: "These defendants, further answering, say that there was subsequently removed from the mortgaged premises a building which had been erected thereon by the Powerville Felt-Roofing Co., which building stood upon posts driven in the

ground, and was otherwise unattached to the mortgaged premises, and so built that it could be removed without injury to the mortgaged premises. And these defendants deny that Garret Smith removed the said building, or had any knowledge of the removal thereof until he was informed thereof by the complainant; and this defendant Frank S. Field, for himself answering, says that he was present at the removal of the said building, and supposed at the time he had a perfect right to remove the same, and still insists that the building was rightly removed." They further deny, by their answer, that the building was part and parcel of the mortgaged premises, and deny that the removal of the same injured the security of the complainant's mortgage; deny the insufficiency of the premises, and that the removal of the building was a fraud. They then, by their answer, set up that the remedy of the complainant is by an action at law, and that no decree can be made in this court against defendants, or either of them, in that behalf.

S. J. MacDonald, for complainant. F. J. Swayze, for defendants.

PITNEY, V. C. (after stating the facts). No proof was offered by complainant at the hearing of the actual removal of the building by either of the defendants. He relied in that behalf entirely upon the allegation of the bill, and the failure to deny by Field, Haynes, and White that they removed it. Defendants contend that the failure to deny and the partial admission by Field is not sufficient to sustain the issue in this respect. But I think there is no issue. There is a distinct charge in the bill of a matter within the personal knowledge of the defendants, and they are asked to answer; and in such case a failure to answer a distinct charge within the knowledge of defendants is an admission of the truth of the allegation. Besides, the peculiar language in which Mr. Field's statement is couched, namely, "that he was present at the removal of the said building, and supposed at the time he had a perfect right to remove the same," amounts to an implied admission on his part of its removal. The point that the removal of the building was justifiable, as against complainant, was not seriously pressed. The principal question litigated was the right of the complainant to relief in this court for the waste committed by the defendants. Complainant contends that the court, having acquired jurisdiction of the cause for the purpose of the foreclosure of a mortgage in which the question whether the premises without the building are sufficient to secure the amount due the complainant will be necessarily determined in the orderly course of the suit by a sale of the premises, should proceed, and give complete relief by holding the defendants who have committed the waste liable in this suit to make up the loss to the complainant to an extent not exceeding the deficiency to arise

from the sale of the premises, and so not exceeding the value of the building removed. The defendants deny the jurisdiction of the court in this behalf, and contend that under the cases of *Jackson v. Turrell*, 39 N. J. Law, 829, and *Schalk v. Kingsley*, 42 N. J. Law, 82, the complainant has complete remedy at law, and this court should not entertain jurisdiction.

The general rule undoubtedly is that this court will not, under ordinary circumstances, entertain a pure bill for an account of waste in behalf of a person who would be entitled to an action at law for damages on that account. But it is equally true that where this court has acquired jurisdiction of a cause for any purpose in which a matter of waste is incidentally involved, it will, in general, proceed to ascertain the amount of the waste, if necessary in order to do complete justice. The usual mode of acquiring jurisdiction in suits involving waste is by an application for an injunction to stay waste, and in such case, when the injunction has been granted, and the waste stayed, the court will, as an incident to the relief, and for the purpose of preventing multiplicity of suits, take an account of the waste in that suit. And such are the authorities cited by the defendants, the leading one being *Jesus College v. Bloom*, 3 Atk. 262. The cases are collected in the note to the famous case of *Garth v. Cotton*, imperfectly reported in 1 Ves. Sr. 524, 1 Dickens, 183, and 3 Atk. 751, but reported fully in 1 White & T. Lead. Cas. Eq. *697. Lord Hardwicke, who refused jurisdiction in *Jesus College v. Bloom*, assumed it in *Garth v. Cotton*. The latter was a case where the complainant could not maintain an action at law; but he therein discussed *Jesus College v. Bloom*, and stated the ground upon which it was decided. In *Whitfield v. Bewit*, 2 P. Wms. 240, an account was allowed of timber cut as a mere incident to a bill for discovery. There was, however, an injunction against opening mines. And see 2 Wat. Eden, Inj. *244-*249, and *Lee v. Alston*, 1 Brown, Ch. *194. I have said that the usual mode of acquiring jurisdiction in such a case is the filing of a bill for an injunction, but I am unable to perceive that there is any peculiarity in a bill for an injunction by which an account of the waste committed is justified, rather than by any other ground of jurisdiction. The question is, has the court jurisdiction, independent of the mere act of waste? and, if so, then arises the question whether it is necessary or convenient for finally and completely disposing of the subject-matter of the suit that the question of the amount of the waste should be dealt with. This is the view of the learned author of the American notes to the *Leading Cases in Equity*. At page 1024 (4th Am. Ed.) 1 White & T. Lead. Cas. Eq., after quoting Chancellor Walworth in *Winship v. Pitts*, 3 Paige, 259, at page 261, where he says: "This court only interferes to prevent future waste, except in cases where the complainant has no remedy at law, or a

discovery is necessary, or where there is some other ground for equitable interference. In ordinary cases, the account for waste already committed is merely incidental to the relief by injunction against future waste, and is directed upon the principle of preventing a needless multiplication of suits,"—the author proceeds: "The rule, however, is general that, although the recovery of damages for waste is not a substantive ground for a bill in equity, yet, if the court has jurisdiction of the subject upon another ground, it will decree an account of the waste committed." And here he instances the case of waste by one tenant in common where an account is taken of the waste in partition between the parties, and cites *Backler v. Farrow*, 2 Hill, Eq. 111. Vice Chancellor Bird, in *Jackson v. Beach*, 3 Atl. 375, holds that the power of the court of chancery to take notice of waste by one cotenant against the other, and to give a remedy on a bill for partition, is not derived from section 15 of the act respecting partition, but inheres in the court independent of that act. That was a case of partition, and he says: "This court, having jurisdiction of the principal question, would not send a party entitled to relief to the law courts. Its purpose is to avoid a multiplicity of suits." In the case in hand the right of the complainant to come into this court for equitable relief upon his mortgage is undoubted, and his right to recover against the defendants for waste in an action at law is limited to the amount which his security will be diminished by the waste. That amount can only be ascertained satisfactorily by a sale of the premises under foreclosure. The difficulty of ascertaining it in an action at law was clearly manifested in the opinion of Justice Van Syckel in *Schalk v. Kingsley*, supra. So that one of the material matters to be determined in an action at law will necessarily be determined here in this suit. Now, it seems to me it would be an unjustifiable limitation upon the duty of this court to do complete justice to say that it should not proceed to ascertain the extent of the waste in this case if practicable. In this connection it must be remembered that the case is not precisely within *Jackson v. Turrell* and *Schalk v. Kingsley*, supra. In those cases the actions were brought against persons not in possession, or claiming to be the owners of the premises. Here the persons committing the waste were the owners of the premises, and were either in possession or entitled to be in possession; so that it cannot be said that it has been decided by those cases that an action would lie against them by the mortgagee. Then, again, apparently they are nonresidents of this state, and the complainant would be obliged to sue them in a foreign state, and prove his case by witnesses in this state. I will advise a decree for the foreclosure and immediate sale of the premises, reserving the ascertainment of the amount of the injury due to the waste until after the premises have been sold, and the deficiency, if any, ascertained.

ENSLIN v. ENSLIN.

(Court of Chancery of New Jersey. May 24, 1897.)

HUSBAND AND WIFE—SEPARATE MAINTENANCE.

Where a husband, after a long separation from his wife, puts his property out of his hands, and has no home for his wife, a decree for her support while living in the state of separation will issue.

Bill by Louisa Enslin against Charles Enslin for support. Decree for plaintiff.

Crossley & Montgomery, for complainant. Nevin J. Loos, for defendant.

REED, V. C. This is a second bill filed by this complainant, a wife, against the same defendant, her husband, for support, while she is living in a state of separation from him. In the former suit, as in this, a cross bill was filed by the defendant for a divorce on the ground of desertion. In that suit both bills were dismissed, but without prejudice, so that the same facts could be again used in another suit in case the husband should refuse to receive his wife, and provide for her a home, after the decision therein made. In this suit it is alleged that he has so refused to provide a home for her, or to receive her at his present home, and the application is now renewed for support, while she lives apart from him. So far as the case stands upon the testimony in the former suit, which testimony, by consent of counsel, is to be regarded as standing in this cause, without a reproduction of the witnesses then sworn, I do not see any reason to change the views I then expressed, so far as these views were essential in the discussion of the facts, for the purpose of that decision. I did not then think that her separation from her husband was so obstinate and causeless as to entitle him to a divorce, nor did I think that either of them were faultless, but I concluded that their errors arose rather from ignorance than from an intentional violation of their marital duties. Unfortunately, the difficulties in the way of their resumption of their cohabitation have increased by reason of their long separation. The defendant, by the transfer of his title to the five houses which he owned to Miss Schilling, and by his residence with her, as he now says, as a boarder, has made it little short of impossible for his wife to live under the same roof with him at his present home; nor has he a desire to live with her elsewhere. He may have, in good faith, offered to support her while living with her in the room or rooms which she presently occupies; but the whole transaction looks to me as if she had insisted upon living with him in the house where he was boarding, and nowhere else, and that he made the offer to live with her for the mere purpose of technically complying with the views of the court expressed in the former case. He, by putting his property under the control of Miss Schilling, is very likely without much means to furnish a new home; but, if there was a real

desire on the part of both to live together, these difficulties could be surmounted. The facts are, as I have already observed, that she does not wish to live with him elsewhere than in the house where he now lives, and he does not wish to live with her anywhere. Taking into consideration the conduct of both parties through so many years,—for neither is without fault,—and the pecuniary position of the defendant, I have concluded to make a decree that the defendant pay to complainant, while living in a state of separation, the sum of two dollars per week. In case the defendant can subsequently show that he has in good faith prepared a home for the complainant, I will, upon his petition, hear an application to modify or discharge this order.

THOMSON-HOUSTON ELECTRIC CO. v. MURRAY.

(Supreme Court of New Jersey. Feb. 18, 1897.)

CORPORATIONS—LIABILITY OF STOCKHOLDER—FALSE CERTIFICATE.

1. This is an action of contract, in which the plaintiff seeks to make the defendant, as a stockholder, liable for a debt of the company. Such liability can exist only by force of a statute. Section 56 of the corporation act (1 Gen. St. p. 918) applies only to a false certificate given by "an officer of the company."

2. The certificate relied on to support this action is that which was filed in order to organize the company. Such certificate is not the act of the defendant as "an officer" of the company, and will not support the action.

(Syllabus by the Court.)

Action by the Thomson-Houston Electric Company against Thomas Murray. Demurrer to petition sustained.

Argued November term, 1896, before the CHIEF JUSTICE, and VAN SYCKEL, GARRISON, and LIPPINCOTT, JJ.

Freeman Woodbridge, for plaintiff. Willard P. Voorhees, for defendant.

VAN SYCKEL, J. The first count of the plaintiff's declaration seeks to charge the defendant personally for a debt against the Thomas Murray Company, on the ground that the certificate of incorporation made and filed by the defendant and other corporators was false, in the following respects: That the company never had \$100,000 worth of capital stock, that it did not commence business with \$1,100 of capital, and that neither the defendant nor any of the alleged stockholders ever paid any legal consideration for the stock alleged to have been held by them, but that the whole scheme was fraudulent, and an attempt to defraud creditors. The plaintiff's remedy as a creditor is in equity, to charge the defendant for unpaid subscriptions to the capital stock. The proceeding is under the fifth section of the act concerning corporators (Revision, p. 178), which requires the creditor to exhaust his remedy against the corporation by judgment, execution, and a return of *nul-la bona*, before he can maintain his bill in

equity. *Wetherbee v. Baker*, 35 N. J. Eq. 501. The case of *Hood v. McNaughton*, 54 N. J. Law, 425, 24 Atl. 497, was an action by the receiver of an insolvent corporation against a stockholder who had not paid his stock subscription, to recover the unpaid subscription, after the court of chancery had directed the receiver to collect the same by suit at law. At common law the stockholder was liable to pay his subscription when it was necessary to discharge the debts of the company, but it was a liability to the company or its legal representative. No right of action existed at common law in the creditor to maintain such action at law for his own benefit. The capital stock paid in and that which remained unpaid is regarded as a trust fund pledged for the payment of the debts of the corporation, and it is to be administered by the corporation itself, or by its receiver in its behalf. It is obvious that in any proceeding to enforce the liability of delinquent stockholders, under the fifth section of the corporation act, for their unpaid subscriptions, all the assets of the corporation, as well as its indebtedness, must be taken into account, for, until they are ascertained, neither the amount of money requisite to discharge the claims of creditors, nor the percentage to be paid by each stockholder, can be known; and to such suit the corporation must be a party. All creditors are entitled to participate ratably in the common fund, which is a trust fund for the benefit of the creditors as a class, and the suit must be prosecuted in behalf of all creditors. A judgment creditor cannot proceed by force of the statute to require stockholders to pay in their unpaid installments for stock, by a bill filed for himself alone. The proceeding must be by a general creditors' bill. The attempt of a creditor to obtain relief by a bill filed on his own behalf proved to be abortive in *Bickley v. Schlag*, 46 N. J. Eq. 533, 20 Atl. 250. The court of errors and appeals in that case declared that it would violate the fundamental principles of equity to permit a few creditors to absorb the assets of the company, when such assets are a trust fund belonging equally to all persons to whom the body corporate is indebted. At common law there is no known method by which a creditor, by superior diligence, can succeed in appropriating to his own use a fund in which all creditors have a common interest. In *Bank v. Hendrickson*, decided in this court, and reported in 40 N. J. Law, 52, it was held that the personal liability of the officers and stockholders of a corporation for a debt contracted by the corporation is inconsistent with the idea of a body corporate at common law, and can arise only out of some statutory provision. The right of action set forth in the first count of the plaintiff's declaration can have no stable foundation to support it unless it can be shown that it is authorized by some provision of positive law. The only statute that has any apparent relation to the situation of affairs here presented is the fifty-sixth section of the corporation

act (1 Gen. St. p. 918), which is as follows: "If any certificate made, or any public notice given by the officers of any company, in pursuance of the provisions of this act, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the company contracted while they were stockholders or officers thereof." This section makes officers of the company who give a false certificate chargeable with the debts of the company. There is no allegation in the count demurred to which brings the defendant within the description of "an officer" who has made a false certificate. The certificate relied on is that which was filed in order to organize the corporation. That was not an official act. It brought the corporation into being, with power to elect officers to conduct its business. No official act could be done until there was an officer to perform it. The fifty-sixth section applies only to officers who make a false certificate, and imposes no liability upon the defendant, in the situation disclosed by the declaration. The case of *Waters v. Quimby*, 27 N. J. Law, 296, is not pertinent. That case rested upon the allegation in the declaration that the defendants who were officers of the company made an untrue statement of matters required to be set forth by them under sections 19 and 20 of the act concerning "manufactures" (Nixon's Dig. p. 458), and that they were thereby brought within the provisions of the twenty-first and thirtieth sections of the same act. Sections 19, 20, and 21 of the act concerning manufactures, in Nixon's Digest, are new sections (sections 272, 273, and 32 of the corporation act; 1 Gen. St.), and section 30 in Nixon's Digest is section 56 in the corporation act in the General Statutes. There is no allegation that the defendant has incurred any liability under the statutory provisions on which the case of *Waters v. Quimby* was based. The demurrant should have judgment.

STATE (YOUNG & MCSHEA AMUSEMENT CO., Prosecutor) v. MAYOR, ETC., OF ATLANTIC CITY.

(Supreme Court of New Jersey. Feb. 18, 1897.)

CITY ORDINANCES—PENALTIES FOR VIOLATION.

Under a statute which authorizes the governing bodies of municipalities to enforce their ordinances "by reasonable penalties which may be imposed for revenue," the governing body must itself fix the precise penalty to be imposed, and cannot leave it to the discretion of the trial court.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of the Young & McShea Amusement Company, against the mayor and common council of Atlantic City, to review an ordinance. Judgment reversed.

Argued November term, 1896, before LUDLOW and DIXON, JJ.

Clarence L. Cole, for prosecutor. Allen B. Endicott, for defendant.

DIXON, J. The Young & McShea Amusement Company, having been convicted by the recorder of Atlantic City for violating "An ordinance [passed March 31, 1890] to regulate the use of the sixty feet wide street along the ocean front," and fined therefor \$50, now contends that the section of said ordinance prescribing the penalty is illegal. That section declares that violators may be punished by fine not exceeding \$200 or imprisonment not exceeding 30 days, as the mayor, recorder, or aldermen may direct. The statute under which the ordinance was passed (1 Gen. St. p. 529) in section 11, enacts that the council "may enforce such regulations and rules as may be adopted, by reasonable penalties which may be imposed for revenue." The prosecutor insists that under this law the council must designate the precise penalty to be imposed. The principle laid down in this state is that, under statutory authority to exact penalties for violation of municipal ordinances, the governing body of the municipality may confer upon the court trying the offender the power of adjusting the penalty, within statutory limits, to the circumstances of each case (*McConvill v. Jersey City*, 39 N. J. Law, 38; *Leland v. Commissioners*, 42 N. J. Law, 375), unless the statute evinces an intention that the governing body should itself fix a precise sum (*State v. Zelgler*, 32 N. J. Law, 262; *Melick v. Borough of Washington*, 47 N. J. Law, 254; *Smith v. Town of Clinton*, 53 N. J. Law, 329, 21 Atl. 304). In the statute now under consideration we think such an intention is disclosed. The penalty is to be "imposed for revenue." This singular provision seems to invoke the exercise of the taxing power (*North Hudson Co. Ry. Co. v. City of Hoboken*, 41 N. J. Law, 71), in conjunction with the police power, and to require that the impost should be graduated, not so much by the circumstances of the particular case, as by the needs of the municipality within reasonable bounds. The ascertainment of the sum to be charged for this latter object is not a judicial function. *Munday v. City of Rahway*, 43 N. J. Law, 338. Our conclusion is that the council should have prescribed an exact penalty, and therefore the present judgment should be reversed, with costs.

STATE (BRADSHAW et al., Prosecutors) v. PARKER et al.

(Supreme Court of New Jersey. Feb. 18, 1897.)

OPENING TOWN ROAD—LIABILITY OF TOWNS.

A person who voluntarily and at his own expense constructs and opens a public road, which has previously been laid out under the provisions of "an act concerning roads," is not entitled to be reimbursed therefor by the township in which such road is located, and a resolution of town meeting voting such reimbursement is illegal and void.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of Alfred A. Bradshaw and others, against Samuel M. Parker and others, to review a resolution of the annual town meeting of the township of Woolwich. Resolution set aside.

Argued November term, 1896, before DEPUE, MAGIE, and GUMMERE, JJ.

D. J. Pancoast, for prosecutors. T. E. French, for defendants.

GUMMERE, J. This writ brings up for review a resolution passed by the inhabitants of the township of Woolwich, in the county of Gloucester, at their annual town meeting, held March 10, 1896, ordering "that \$1,400 be raised to pay Samuel M. Parker and his associates for work and expense on new road." The evidence taken on the return of the writ discloses that the "new road" referred to in the resolution was laid out in 1888, but that, owing to extended litigation concerning it, and to the refusal of many of the inhabitants to obey the call of the overseer of highways to work on the road, there was a long delay in the making and opening thereof. In this condition of affairs the defendants Samuel M. Parker and his associates, who lived along the line of the proposed road, entered into the following agreement in relation to its opening: "This agreement, made this 12th day of May, 1896, between Samuel M. Parker, B. Frank Rulon, J. S. and W. Gleason, and Benjamin Shoemaker, for defraying the expenses of having a road opened from the Gloucester and Salem turnpike to the Kay's Mill road: Samuel M. Parker to be to one-third of the expense so incurred; J. S. and W. Gleason, one-fourth; B. Frank Rulon and Benjamin Shoemaker to pay five-twelfths, to be equally divided between them." Pursuant to their agreement the defendants made and opened the road in question, and since its opening it has been in use by the public. The money sought to be raised by the resolution under review is for the purpose of paying the defendants for the labor performed, materials furnished, and moneys expended by them upon that work. The power conferred upon townships to raise moneys at their annual town meetings for road purposes is limited. Such moneys can only be raised for the opening, making, working, repairing, and keeping in good order the highways within their boundaries. Road Act, § 39 (3 Gen. St. p. 2814); Township Act, § 11 (3 Gen. St. p. 3583). The purpose for which the moneys were voted by this resolution is not embraced within the statutory provisions. The defendants, in making and opening the "new road," were volunteers, and the fact that what they did has resulted in a benefit to the public does not entitle them to be reimbursed out of the township funds. They stand in the same position, so far as any valid claim against the township is concerned, as if they had opened a highway through their own lands and dedicated it to the public use. The resolution should be set aside, with costs.

STATE (WALKER, Prosecutor) v. WINKLER et al.

(Supreme Court of New Jersey. Feb. 18, 1897.)

CERTIORARI—LAYING OUT HIGHWAY.

A certiorari sued out to review the proceedings taken in the laying out of a public road will not be dismissed because the prosecutor, before suing out the writ, applied to the court of common pleas for the appointment of freeholders, under the statute, to review the action of the surveyors in laying out the road.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of Charles H. Walker, against Emil Winkler and others, to review proceedings for the laying out of a public road. Proceedings set aside.

Argued November term, 1896, before DEPUE, MAGIE, and GUMMERE, JJ.

Carroll Robbins, for prosecutor. Edwin Robert Walker, for defendants.

GUMMERE, J. The initial proceeding in the laying out of a public road is the written application to the court of common pleas, signed by at least 10 freeholders, for the appointment of surveyors of the highways to lay out such road. Road Act, § 119 (3 Gen. St. p. 2828). Until such application is made, the court is without jurisdiction to proceed in the matter. In the case now before us written application was made to the common pleas for the appointment of surveyors, signed by 10 persons purporting to be freeholders, and on that application the order of appointment was made. It now appears that one of the signers of the application was not a freeholder, and that the number of applicants was not up to the statutory requirement. It is clear, therefore, that the action of the court in appointing the surveyors, and the subsequent proceedings of the surveyors in laying out the road and making their return thereof, were coram non judice. This is not denied by the defendants, but their insistence is that the prosecutor is barred from disputing the legality of those proceedings because, after the return of the surveyors was made, he filed a caveat against it, and applied to the court, under the statute, for, and obtained the appointment of, chosen freeholders to review the action of the surveyors. But this action on his part does not prevent him from thereafter contesting the legality of the proceedings by certiorari. This was so decided in the case of Powell v. Hitchner, 32 N. J. Law, 211, 215, where an application was made to quash the certiorari, on the ground that no motion had been made in the common pleas to set aside the return of the surveyors (because of failure to comply with the requirements of the statute) before the appointment of freeholders to review their action. This court refused the application to quash the writ, and set aside the proceedings and return. It is further urged on behalf of the defendants that the prosecutor was guilty of laches in not suing out this writ until after the road had been

laid out and returned by the surveyors, and their action had been reviewed by the freeholders. It is sufficient on this point to say that there is nothing in the case, as it has been presented to us, to suggest the idea that the prosecutor had any knowledge of the fact that one of the applicants for the proposed road was not a freeholder, while the proceedings referred to were pending, or that he did not promptly sue out his writ upon that fact being made known to him. The proceedings should be set aside.

CITY OF PERTH AMBOY v. RAMSAY.
(Supreme Court of New Jersey. Feb. 27, 1897.)

ESTOPPEL BY DEED.

If a trustee having the legal estate diverts it by deed in due form, he cannot, in a court of law, deny the title so created.

(Syllabus by the Court.)

Action by the city of Perth Amboy against Hugh Ramsay. Judgment of nonsuit. Rule to show cause why nonsuit should be set aside. Judgment sustained.

Argued June term, 1896, before BEASLEY, C. J., and MAGIE, LIPPINCOTT, and GARRISON, JJ.

Edward Q. Keasbey, for plaintiff. Cortlandt & Wayne Parker, for defendant.

BEASLEY, C. J. This is an action of ejectment, brought by the city of Perth Amboy against the defendant, Ramsay. At the trial before me in the Middlesex circuit the undisputed facts were as follows, to wit: The premises in question came directly from the board of proprietors, which, on May 21, 1802, directed that a warrant be issued to the surveyor general directing him to lay out and survey to three members of the board, in trust to be conveyed to the mayor, recorder, aldermen, and commonalty of the city of Perth Amboy, "the Market Square, Cove or Wet Dock, and all and every the streets in the said city, to be held in trust for the use of the inhabitants of the said city forever, upon condition that said streets and square be kept open in full size and breadth, and that the Cove or Wet Dock be made use of for the benefit of the inhabitants of said city as they shall think fit, provided that they do not alienate the same or any part thereof." This survey having been duly made and returned, the realty thus described became vested in fee in the three designated proprietors, who afterwards, on October 4, 1825, conveyed it in fee to the city of Perth Amboy, its successors and assigns, "in trust, nevertheless, for the use of the inhabitants of said city forever, on condition," etc.; such condition belag set out in the terms of the order for the survey, and which are above recited. The effect of this course of conveyancing was to transfer to this municipal corporation the fee in the lands in question, to be appropriated to the use of the public in the modes prescribed. In this situation of the title, the city, in its corporate capacity, made a

lease under seal for 99 years of the cove above designated for certain considerations, and to a certain person, therein mentioned; and it is under this instrument that the defendant, as assignee, now holds. These facts being developed at the trial, it seemed to me expedient that I should nonsuit the plaintiff *pro forma*, in order to deliberately examine the legal effect of the facts with reference to the right of the plaintiff to maintain his action. This course being consented to by counsel, by the method thus pursued the question referred to is now before this court for decision.

The inquiry thus arising is obvious, and it is this: Can this corporation, being the holder of the title in fee simple, repudiate in a court of law the title to the leasehold which itself created by its own deed? On the part of the plaintiff it is claimed that the corporate body held these premises in trust, and for it to demise them was a plain breach of trust, and therefore the transfer in question cannot stand. Many authorities are referred to in the brief of the counsel of the plaintiff in order to show that this lease was in violation of the duty of this corporate trustee, and that, therefore, it could not be sustained. But all this learned line of argument has no place whatever in our present inquiry, for our present problem is not whether this trust has been violated by the trustee, but to determine whether this court has the power to decide what the trust is, which is a prerequisite to the consideration whether there has been a breach of it. But, assuming that the transfer of this property by the demise above mentioned was a plain breach of trust, it seems to be entirely clear that, as the title was thus divested in a legal form, such title cannot be impeached in a court of law. This rule is settled by the decisions, and is stated as settled by all the text writers. At law the equitable title passes for nothing. So completely is this the case, that the trustee, having the legal title, can maintain ejectment against his own *cestui que trust*, who has the equitable right of possession; and the latter, if he would protect his right, must have recourse to an injunction in equity. *Lewin, Trusts*, p. 277; *1 Perry, Trusts*, §§ 17, 321, 328, 428. The plain reason for this is that it is the province of a court of equity, and not of a purely legal tribunal, to construe the instrument creating the limitations in trust. In the present case the fee simple is vested in this corporate plaintiff, and the conveyance devoted the premises to certain charitable uses, and the proposition is that this court shall decide what such uses are, and how they are to be enjoyed. On the side of the defendant it is insisted that the premises in suit, being the cove in dispute, could not be put out under a lease without infringing the regulations established by the donor, while for the defense it is contended that, if this land is "to be made use of for the benefit of the public" according to the limitations of the instrument, to demise it is the best mode of carrying into effect the purposes of the grant.

And this disagreement a court of law is called upon to arbitrate, ascertaining the interest of the settler, and preventing the trustee from infringing such interest. Plainly, this is the well-known function of chancery, and there is not, in our legal annals, the slightest intimation that it can be performed by any other tribunal. If this court can entertain judicial cognizance over the present deed devoting these lands to charitable uses, so it can in every case, no matter how complicated and intricate the trusts may be; and certainly by such a course the boundaries that have heretofore separated in a very distinct manner our system of law from that of equity would be thrown into confusion. Nor would such a transformation of our legal institutions be an advantage in the administration of our laws. It has always been the settled conviction of the jurists of this state that the subjects of trusts should be confided to a court of equity, and there seems to be less reason for the transference to a common-law court of a jurisdiction over charitable uses than any other class of equitable interests. I think it not only the settled rule of our law, but that it should be the settled rule, that it is only the legal estate, either in the trustee or in his grantee, that this court will take notice of and enforce.

With respect to the argument that was so much pressed on, that in case of these public interests the practice in this state has been for the courts of law to recognize and protect such rights, in my opinion the argument is unfounded. In all the cases cited it was the legal right, and not the equitable right, that was dealt with. Thus, in all the numerous decisions referred to in which it was held that when lands came to the use of the public by dedication the effect was to vest the legal right of possession in the public body, and consequently such right would support an action of ejectment by the corporate body representing the public. There has never been any pretense in such proceedings to adjust or enforce any equitable interest. It follows that, the legal title to these premises having been in the trustee, the plaintiff in the action, no suit will lie in a court of law against its alienee. The judgment of nonsuit must be sustained.

STATE ex rel. HOOS v. O'DONNELL, City Clerk.

(Supreme Court of New Jersey. April 1, 1897.)
CITY ELECTIONS—CONSTITUTIONAL LAW—SPECIAL ACT.

An act entitled "An act relating to cities of the first class in this state, and providing for the holding of municipal or charter elections therein, and regulating the terms of elective and appointive officers therein," approved March 18, 1897, is a local and special law regulating the internal affairs of towns, and for that reason is unconstitutional.

(Syllabus by the Court.)

Application by the state, on the relation of Edward Hoos, for a writ of mandamus against

Michael J. O'Donnell, city clerk of Jersey City. Writ granted.

Argued February term, 1897, before GUMMERE and GARRISON, JJ.

Allen L. McDermott and W. D. Daly, for relator. John Griffin, for respondent. Spencer Weart and Chandler Riker (C. L. Corbin, of counsel), for Jersey City.

GARRISON, J. The question to be decided is whether "An act relating to cities of the first class in this state, and providing for the holding of municipal or charter elections therein, and regulating the terms of elective and appointive officers therein," approved March 18, 1897, is a constitutional enactment, in view of section 7, art. 4, of the constitutional amendments, which forbids the passage by the legislature of any local or special law regulating the internal affairs of towns and counties. Inasmuch as the statute cited is admittedly a regulation of the internal affairs of the cities affected by it, the inquiry takes this shape: May cities having a population of 100,000 and upwards be selected from among the cities of this state for the special regulation imposed by this act? A uniform line of decisions expounding the constitutional provision referred to narrows the question to its ultimate form, viz.: Is the subject-matter of this act one that is naturally incident to mere excess of population?

The act deals with a single subject, which is contained in the first six lines of its first section. All that follows is merely ancillary. The substantial provision referred to is in these words: "(1) Hereafter in all cities of the first class in this state, all municipal officers required to be elected therein shall be voted for and elected on the first Tuesday after the first Monday of November in each year, and upon the same official ballots required by law for the election of state and county officers and not otherwise."

From this language we must learn the conditions that called forth the regulation, in it discover the mischief of the old law, and from it gather the principle of remedial legislation applied by the lawmaker. The matter is within a small compass. The condition that existed was that elections to fill municipal offices were held at a different time from those at which county, state, and federal elections were held. The mischief, therefore, whatever it may have been, was something that inhered in the practice of voting separately for these purposes. The remedy consists in the requirement that municipal officers shall be voted for at the same time that the others are elected, and upon the same ballot. In fine, the mischief was that local affairs were kept separate from state and national politics, and the remedy is to bring them together.

This remedy, it will be seen, operates solely upon the individual voter. Its efficacy depends wholly upon the success with which it brings to bear upon him the influences set at work by the commingling of what had pre-

vously been kept separate. Else it is no remedy, and such is its avowed purpose. Beyond this it makes no claim. It does not operate upon the municipality itself. It adds no feature to city government, creates no new office, and enlarges no public power. To the voter alone it is addressed. Finding him hampered as an elector by the condition referred to, it proposes, for the public good, to expose him henceforth to the influences that will arise from the new order that it institutes.

Furthermore, the act is not limited to its effect upon municipal affairs; and as the mischief is not a mere incident of population, but the result of a system in no wise conditioned upon numbers, so the remedy is broader than these, affecting the voter in all of his relations to the expression of the popular will.

This being, beyond question, both the purpose and effect of the law, it is, in its essence, a declaration of public policy; and I believe I shall not err in saying that a legislative policy with respect to the influences to which the voters of a state shall be subjected, or from which they shall be guarded, in the act of suffrage, cannot, under the organic law construed by our courts, be limited to a special class selected upon a purely numerical basis. The distinction between such a provision and those that are passed upon in *Mortland v. Christian*, 52 N. J. Law, 521, 20 Atl. 673, and the other cases cited, is entirely clear.

Administrative details may be varied to meet the exigencies of population. The number of officers, their duties and emoluments, the machinery of voting, the apparatus for canvassing votes may be changed to suit conditions that exist only in the places affected. But whatever is to influence the mind of the voter, to determine his conduct as an elector, and to find expression in his ballot, is necessarily a matter of public policy, and not a question of local administration.

The beneficent results expected from the statute now before us are all based upon the claim that the popular will can be better expressed under the new law than under the old. The statement is of itself a definition of public policy, and an apt illustration of such a rule.

"All regulations of the elective franchise," says Judge Cooley (Const. Lim. 758), "must be reasonable, uniform, and impartial;" thereby placing the instrument of popular representation in the same category with the right of taxation, with which it has, in this country at least, always had an historical association. If this be not a correct view, then the changes introduced by the adoption of secret voting could have been inaugurated in certain places upon the mere ground of population; or the provision of the election law that prohibits the solicitation of a voter within a hundred feet of a polling place can to-day be altered so as to exempt cities of a certain class from its operation; or the voter in cities of the first class may be permitted to place a distinguishing mark upon his ballot, or, in a city of the

third class, he may reveal its contents within the polling room. The sole reason why these may not be done is because of the distinction to which I have referred, viz. that regulations of the conditions that shall surround a voter with the object of influencing his conduct as an elector are, in their nature, matters of public policy, and must find expression in the general laws of the state.

If I am right in regard to this, the statute under review is fatally invalid, in that the legislature therein has provided that a voter in Newark or in Jersey City, or other city of 100,000 population, shall cast his vote for municipal officers under the current influence of state or national politics, and shall vote upon these wider interests under conditions wherein purely local issues may dominate, whereas elsewhere throughout the state no such influences are permitted or experienced. The point is not that this policy is unwise, and hence is unlawful, but that, however wise it may be, it must be accomplished in a lawful manner. It is not the duty of the courts to question the policy of this law. It is their duty to say that the policy declared by the law is a public one, and that it does not arise from conditions that are expressed in the terms of mere population, and that it can lawfully be limited only by the extent of the mischief that it undertakes to remedy.

Holding these views, I am of opinion that the statute referred to is void, and that in the proceeding before us a peremptory mandamus should issue, commanding the city clerk to print the ballots as required by the general election law of the state.

GUMMERE, J. (concurring). This controversy presents but a single question which requires consideration, and that is whether the act of March 18, 1897, entitled "An act relating to cities of the first class in this state, and providing for the holding of municipal or charter elections therein and regulating the terms of election and appointing officers therein," is constitutional or not. The prime object sought to be accomplished by the act is the election of municipal officers, in cities having a population exceeding 100,000, on the same day and by the same ballot that county and state officers are elected. This is provided by the first section of the act. It is not necessary for the purposes of this case to set out the further provisions of the statute, as they do not in any way aid in the solution of the question presented. The validity of the act is challenged on the ground, among others, that it is in contravention of that provision of our constitution which forbids the passage of any local or special law regulating the internal affairs of towns or counties. That the act does regulate the internal affairs of certain of the cities of the state is apparent. The determination of the question before us, therefore, must depend upon whether it is a general law, or whether it is local or special, within the constitutional meaning of these terms.

The effect of this constitutional mandate, upon legislation affecting only such cities as have a population within prescribed limits has frequently received consideration both in this court and in the court of errors; and it is now settled, beyond controversy, that population may be made the basis of classification, in statutes relating to municipal affairs, in all cases in which it bears a reasonable relation to the subject-matter of the legislation. Butas was said by Mr. Justice Depue in *Warner v. Hoagland*, 51 N. J. Law, 68, 16 Atl. 166: "It must not be inferred from these decisions that classification may be resorted to as a means of evading the constitutional interdict against local and special laws, where the classification is illusory. A law is to be regarded as general only when its provisions apply to all objects of legislation distinguished alike by qualities and attributes which necessitate the legislation, or to which the enactment has manifest relation. Such law must embrace all, and exclude none, whose conditions and wants render such legislation equally necessary or appropriate to them as a class." To the same effect are *Randolph v. Wood*, 49 N. J. Law, 85, 7 Atl. 286, on error 50 N. J. Law, 175, 15 Atl. 271; *Helper v. Simon*, 53 N. J. Law, 550, 22 Atl. 120; *Dexheimer v. City of Orange*, (N. J. Sup.) 36 Atl. 707. As I have already stated, the object of this statute is to unite municipal or charter elections in cities of the first class (that is, in cities having a population in excess of 100,000) with elections for county and state officers; and unless the union of such elections bears a reasonable relation to the number of inhabitants of the cities in which they are united,—if the statute does not embrace every city, and exclude none, whose condition and wants render such legislation equally necessary or appropriate to them,—it comes within the constitutional interdict. Being keenly aware of the great confusion which must result from the judicial declaration that this act is special in its character, and therefore unconstitutional, I have striven to find some ground upon which it could be brought within the rule laid down by the cases to which I have referred; but I have been unable to perceive how this legislation, if it be a public necessity for cities having a population of over 100,000, is not equally a necessity for those having a smaller number of inhabitants. We are, indeed, told by counsel that this legislation is needed in cities of the first class because, in those cities, voters are sometimes intimidated, votes are purchased and fraudulent votes cast, and that fraudulent returns are made of the votes in the ballot box; but unfortunately these evils, as is well known, exist also in cities having a population of less than 100,000, although perhaps not to the same extent, and, if the consolidation of municipal and state elections will tend to do away with these evils, surely the conditions and wants of these smaller cities render the legislation in question equally appropriate to them. We are also told that in the cities of

the first class the places of business of many of the voters are located at a long distance from the places where they cast their votes, and that, because of the fact that the day for holding municipal elections is not a legal holiday, they remain away from the polls, with the result that the total vote cast in those cities at such elections is much smaller than that cast at the fall elections; and it is urged that for this reason it is important that in such cities the elections should be consolidated, in order that the charter elections should be held on a legal holiday, and thus bring out a larger vote than can now be obtained. But it is equally true that in cities which are not of the first class the vote cast at charter elections is usually much smaller than that cast at the state and county elections, and for the reasons stated; and if the union of the two elections, and the holding of the joint election on a legal holiday, will benefit cities of the first class, by bringing out a larger vote for municipal officers, it will for the same reason be equally beneficial to many of the other cities of this state. Again, it is said that in cities of the first class the expense of holding their municipal elections has grown to be so great as to have become an intolerable burden, and we are told that for this reason these cities are properly classified for the purposes of this legislation. But it is unquestionable that the expense of holding an election is, to a large degree, proportionable to the population of the municipality in which it is held, and that the larger cities, by reason of their richer treasuries, are not less able to bear the burden cast upon them than their weaker and smaller sisters. And, even if it be true that the election expenses of a city of the first class are proportionately larger than those of cities having fewer inhabitants, still it is only a matter of degree; and, if it is to the interest of these larger cities to be relieved from the expense of holding two elections in each year, clearly it is to the interest of the smaller cities also to be relieved from this burden. The only other reason suggested by counsel for constituting cities having a population of over 100,000 into a class, for the purposes of this legislation, is based upon the statement that in those cities property is generally rented for terms which begin upon the 1st of May, while in the smaller cities leases generally run from April 1st. There is no evidence before us, however, of any such condition of affairs, and the statement is not justified by the fact. The beginning day of the term for which property is rented in our various cities depends much more upon their geographical locality than upon the number of their inhabitants. In those cities lying in the neighborhood of New York, the commencement of the term is generally the 1st day of May, while in the more southerly and westerly part of the state April 1st marks the beginning of the renting year. Nothing else is suggested by counsel as differentiating cities having more than 100,000 inhabitants from

those having a less number, with relation to the consolidation of municipal with state elections, except that in those cities the fiscal year commences in the month of December; and it is argued that on this account legislation which changes the date of the municipal elections in those cities from the spring to a time shortly prior to the commencement of such fiscal year is not special in its character. But this argument assumes what is not true, viz. that it is only in cities having more than 100,000 inhabitants that the fiscal year begins at or about the time mentioned, and consequently does not require consideration here. There being nothing in the grounds suggested by counsel which will justify the conclusion that the statute before us applies to all cities which are distinguished by qualities and attributes which necessitate this legislation, or to which it has manifest relation, and none being perceived, I am reluctantly compelled to declare this law unconstitutional.

I have not overlooked the cases referred to in the briefs of counsel with the respondent, such as *Mortland v. Christian*, 52 N. J. Law, 521, 20 Atl. 673; *In re Haynes*, 54 N. J. Law, 7, 22 Atl. 923; *Matheson v. Caminade*, 55 N. J. Law, 4, 25 Atl. 933; and *McLaughlin v. City of Newark*, 57 N. J. Law, 298, 30 Atl. 543,—and which, it is claimed, support the contention that the act under consideration is not illusory in its classification, and is a general, not a special, law. An examination of those cases, however, will show that the statutes there dealt with related to the structural forms of government and administration of the cities of this state on the basis of their population; and it is entirely settled that for this purpose the municipalities of the state may be distributed for legislative action into classes constructed upon this basis, and that in making such distribution it is the function of the legislature to determine where the line of demarkation between the larger and smaller aggregations of people shall be placed. The distinction between such cases and the present one is plain. The relator is entitled to a peremptory mandamus.

MINGIN v. ALVA GLASS MANUF'G CO. et al.

(Court of Chancery of New Jersey. May 15, 1897.)

INSOLVENT CORPORATION—PREFERENCE TO WORKMEN—WHEN ATTACHES—APPRENTICES.

1. The right to a preference in payment of their wages given to workmen of an insolvent corporation is wholly statutory, and does not vest until the happening of the statutory requirements.

2. It is created only when insolvency proceedings are begun, and then arises in favor of those persons, and for such amounts, and under such conditions as the legislation on the subject, then in force, may prescribe.

3. Apprentice workmen, who have allowed their wages to accumulate upon an agreement that they should be paid at the end of their apprenticeship, have no more extensive right to a preference

than have any other unpaid workmen in the regular employ of the insolvent corporation. (Syllabus by the Court.)

Bill by Whitall E. Mingin against the Alva Glass Manufacturing Company and others. Petition for distribution of assets. Distribution ordered.

The bill of complaint was filed on the 27th day of November, 1895, and has resulted in a decree that the defendant corporation is insolvent. A receiver has been appointed. He has realized upon all the assets of the corporation, and reports that he now has on hand the sum of \$4,423.09 from proceeds of sales, etc. Claims have been filed with the receiver as follows:

By workmen for wages.....	\$10,146 89
By apprentices for wages held back.....	358 20
By C. W. Shoemaker for salary....	2,068 39
By R. Elmer Shoemaker for salary.....	2,234 06
By Cumberland Mfg. Co., for services of C. W. Shoemaker and R. Elmer Shoemaker	629 76
By other creditors	17,326 83

Total of all claims filed with receiver \$32,764 15

The receiver is now ready to state his final account, and to distribute to those claimants who are entitled to it the surplus which may be found to be in his hands. The balance which will remain for distribution is already indicated to be insufficient to meet the claims of those who assert preferences under the statute for wages as employés in the service of the corporation, if these claims are admitted as entitled to payment to the full amount named therein as preferences. Under this situation the counsel representing the different classes of claims appear before the court, and enter into a stipulation declaring the facts in the case applicable for the ascertainment of the rightfulness of their several claims; and to this stipulation they append a schedule showing the names of the several workmen and apprentices, the amount of their schedule claims for wages, when their work began and ended. The apprentices claim that their wages were retained in trust for them by the insolvent company, upon an understanding that they should be returned to them on the completion of their full term of apprenticeship; that the intervention of the insolvency proceedings before the completion of their term of apprenticeship was occasioned by no fault or action of theirs; that this alone prevented the full service of their term of apprenticeship; and that their money, retained as above stated, ought properly to be payable to them in full out of the assets in the hands of the receiver. They also assert a right to a preference for wages under the corporation acts. The other workmen claim that the amounts respectively due them for wages are preferred claims under the provision of section 63 of the general corporation act of 1875 (Revision 1877, p. 188), as enlarged by the act of March 31, 1887 (Laws 1887, p. 99), and that they hold this preference as a vested interest, and should be first paid in

full, or, if the total of their claims exceeds the balance in hand, that they alone should participate in the division of it. They insist that the act of 1892 (Laws 1892, p. 426), substantially re-enacted in the general corporation act of 1896 (Laws 1896, p. 303, § 83), which limits the preference of employes to wages earned during the last two months preceding the assumption of jurisdiction in insolvency, cannot be used to affect their vested right to their preference, and they declare they are controlled by the above-cited preceding acts of 1875 and 1887, and have an unlimited preference for all wages due them. On the part of the general creditors it is claimed that no preference should be allowed to any of the workmen to whom wages are due from the corporation by reason of the statutory provisions above referred to, or because of the retention of a portion of the wages of the apprentices until the completion of their term, but that an equal dividend should be declared to all claimants. The general creditors insist, however, that if any preference is given to the laborers, the act of April 8, 1892, has superseded all previous legislation giving wages preference in case of the insolvency of a corporation, and that the provisions of the corporation act of 1896 (P. L. 1896, p. 303) are identical with those of the act of 1892. All parties join with the receiver in the application to the court for direction as to the mode in which the surplus remaining in the hands of the receiver shall be distributed.

A. H. Swackhamer, for complainant and workmen claimants. W. T. Hillard, for defendant, and for C. W. Shoemaker, R. Elmer Shoemaker, and Cumberland Glass Manuf'g Co. J. W. Acton, for apprentice claimants.

GREY, V. C. (after stating the facts). As to the claims of the apprentices. The portion of their wages earned, but held back, has no greater equity than the unpaid portion of any other class of workmen's wages. There is no assertion that the amount so held back exists in any specific and separate form held in custody for them. No trust fund has been created or held for these unpaid wages. They stand merely as a credit in favor of the apprentices, for which they have a right of action on breach of the contract by the company, as any other workman may have under like circumstances. I am referred to the case of Bedford v. Machine Co., 16 N. J. Eq. 121, as declaring that the apprentices have some equity superior to that of other workmen in the employ of an insolvent company. That case arose, like this, on an application for direction to a receiver as to disposition of funds in his hands. The right of the workmen to a lien on the assets of the company in the hands of the receiver was asserted under section 42 of the act of 1840, authorizing the establishment of manufacturing companies. That act gave a lien for their wages, in case of insolvency of the company, to laborers in its employ. There were wages due to laborers who had left the

employ of the company previous to the act of insolvency, and also to others who were at that time still in its employ. The question in dispute was whether both these classes of laborers were entitled, under the statute, to a preference; and only those laborers were held to have a preference who were actually in the employ of the company at the time of the suspension of its business operations, which was, under the statute, the act of insolvency. There were also apprentices in the employ of the company, and these were held to be entitled to their wages without regard to the time they were last actually laboring for the company, because there was no evidence that they had been discharged from their indentures prior to the act of insolvency; and the refusal or inability of the company to furnish them with employment did not affect the continuance of their employment. For this reason they were declared to be within the class of laborers who were in the employ of the company at the time of the suspension of its business, whether actually engaged in the doing of labor or not. The apprentices were not given any different or more favorable position than other laborers in the employ of the company, but because of the continuity of their contract under their indentures they were deemed to be within the class of laborers who were in the employ of the company at the time of the act of insolvency, within the meaning of the statute. The act of 1887 (Laws 1887, p. 99) changed the law as defined by the case of Bedford v. Machine Co., and provided that the lien upon the assets of the insolvent company for wages should extend to all the laborers for services rendered in behalf of the corporation before the date which the court adjudged to be the time when the insolvency occurred, "whether such laborers were in the actual employ of the corporation at that time or not." Whatever rights the apprentices have to a preference are secured to them, not because they are apprentices, but because they are employes; and those rights are in no way superior to those of any other employes of the insolvent company.

It being ascertained that the apprentices and all other laborers are alike in their rights of preferential payment, it remains to be ascertained what those rights are under the facts of this case. It may be premised that the privilege of preferential payment is wholly statutory, and is always dealt with in statutes which direct the disposition of the assets of insolvent corporations. These acts prescribe the conditions and characteristics which will entitle a certain class of claimants to preferential payment over other creditors whose claims may be equally meritorious. The privilege conferred is in derogation of the general equity of all creditors to share equally in the distribution of the assets of an insolvent debtor. The laborers who in this case claim a preference began working for the insolvent company in the year 1890, and while section 63 of the corporation act of April 7, 1875 (Revision 1877, p. 188, § 63), as modified by the act of March 31,

1887 (Laws 1887, p. 99), was in force. The provisions of these statutes gave to the laborers who had been in the employ of an insolvent corporation a lien upon the assets of the company for the whole of the amount of wages which might be due them, respectively, for all services rendered before the date which the court adjudged to be the time when the insolvency occurred. The act of 1892 (Laws 1892, p. 426) directed that the workmen should have a first lien upon the assets of the insolvent company, but prescribed that this lien should be limited to the amount of wages owing for services rendered within two months next preceding the date when the proceedings in insolvency were actually instituted. This statute has been, in all its material elements, re-enacted in the corporation act of 1896. Laws 1896, p. 303, § 83. These workmen, in this case, who earned wages as above stated, prior to 1892, insist that they should be given a preferential payment under the acts of 1875 and 1887 for the full amount of those wages, and that the limitation of their preference under the act of 1892 to wages earned two months next before the assumption of jurisdiction in insolvency ought not to be applied to them, because they say they took their employment before the passage of that act, at a time when the acts of 1875 and 1887 were in operation, and they insist that they acquired a vested right to this preference, which cannot be taken from them by subsequent legislation. This argument is based upon the assumption that the preference given by the statute of 1875 became a part of this workman's contract as soon as he accepted employment, and that during its continuance he has always been entitled to the same preference, which could not be taken away by subsequent legislation.

An examination of the several statutes will show that the employe's lien has its origin in the taking of jurisdiction by a court to administer the assets of the insolvent company. The lien which the laborer has upon the assets of the employing company does not attach coincidentally with, nor as attendant upon, the making of the contract of employment, but only when all the prescribed statutory conditions which create that lien have come into being. By section 63 of the act of 1875 it was only in case of the insolvency of the corporation that the workmen were given a lien on the assets of the corporation. The time when the lien attached was defined in the *Bedford v. Machine Co.* case, *ubi supra*, to have been the period when the insolvency occurred. The act of 1887 enlarged the class of workmen who might have the lien, and extended its benefits to include all claims for services rendered before the date which the court adjudged to be the time when insolvency occurred. The workmen had no lien, under these acts, against the assets of a solvent corporation engaged in the conduct of its ordinary business. They acquired none by their contract. It came as a pure gift, and only when insolvency occurred. There is nothing

submitted to me which in any way indicates that this company had become insolvent or suspended its ordinary business, whereby the workmen acquired a lien on its assets, before the act of April 8, 1892 (Laws 1892, p. 426), was passed, which limited the workmen's lien to the amount of wages for services rendered within two months next before the insolvency proceedings were begun. The bill in this case was filed on the 25th day of November, 1895. The earliest act of insolvency set out in the bill was the permanent closing of the works, which is stated to have been "about two years ago"; that is, about November 25, 1893,—more than 18 months after the act of 1892 had, on its passage, gone into effect. As the workmen had acquired no lien under the acts of 1875 and 1887, they had no vested interest which the act of 1892 either could or did impair. The mere chance that they might continue to work for the corporation until at some indefinite time in the future, when it might become insolvent, and might be indebted to them, and they might, if insolvency proceedings were taken against it, claim a lien on its assets, is quite too remote a possibility to be recognized as a vested right protected against legislative action by the modification of the statute giving them a preference. There is no basis for the application of the principle that vested rights cannot be impaired by subsequent legislation, because there were no rights vested at the time when the subsequent legislation was enacted. The insolvency proceedings in this case are controlled by the legislation in force at the time they were begun. This was the act of 1892, re-enacted in its substance in 1896. Laws 1896, p. 277. It is under this legislation that the receiver holds these assets, and it is under it that the lien of the workmen became fixed on the assets of the insolvent company. Their right to a preference was, therefore, given them by the same act which must guide and control the distribution, and no question arises as to the taking away of vested rights by subsequent legislation. Under this act of 1892 the workman acquires no lien on the assets of an insolvent company until the court has assumed jurisdiction to administer those assets. And, even if the company be insolvent, and the court has assumed control of its assets, the workman under that act has no lien upon them, unless it has become indebted to him for wages earned during the two months next preceding the beginning of the insolvency proceedings. His preferential privilege is therefore created by the statute which authorizes the insolvent suit, and is wholly dependent upon the institution of the insolvency proceedings. He can reach the assets only through the receiver who is appointed by the court to administer them. *Hinkle v. Trust Co.*, 47 N. J. Eq. 334, 21 Atl. 861. The statutory provision for laborer's preference in the act of 1892 differs so radically from the previous legislation on the same subject as to the extent of the lien and the conditions under which the

preference will be given that it must be construed to stand as a substitute for the earlier statutes on the subject. It is true that there are no words in the statute of 1892 in terms repealing the previous acts of 1875 and 1887, but no repealer is needed where the preceding statute, treating of subjects in *pari materia*, cannot stand and be enforced with the succeeding statute on the same subject. The act of 1892 is clearly repugnant to the former one in its limitation of the time within which the wages must have been earned for which a preference is given, and, being the later statute, the act of 1892 must stand as a repealer by construction of the previous acts of 1875 and 1887 as to the extent of the preference. This question was raised on somewhat different lines in *Mersereau v. Mersereau Co.*, 51 N. J. Eq. 382, 26 Atl. 682, and the act of 1892 was in that case held to have superseded section 63 of the act of 1875, and that no words of repealer were necessary where the repugnancy between the several statutes was so manifest.

I will advise an order instructing the receiver to distribute the balance of the assets shown by his account in satisfaction of a prior and first lien for all wages of workmen due for labor done within two months next preceding the date when this insolvency suit was begun, if there are any claims for wages earned during that period. The residue of the balance of assets must be divided *pro rata* among the general creditors. If wages were not earned during the period named, they are not entitled to a preference, and come in with the claims of the general creditors.

O'KEEFE v. MOORE.

(Supreme Court of New Jersey. May 19, 1897.)

SPECIAL SESSIONS—JURISDICTION—WAIVER OF INDICTMENT—TRIAL BY COURT.

1. Under existing laws in this state, a court of special sessions is not a sitting of the court of general quarter sessions of the peace, but is a special tribunal, dependent for its jurisdiction upon statutory prerequisites.

2. If, on waiver of indictment and of trial by jury, the accused consents only to a trial before three judges, he cannot be tried by one judge.

(Syllabus by the Court.)

Action by Robert O'Keefe, who sues by Julia O'Keefe, his next friend, for a writ of habeas corpus to Samuel S. Moore, head keeper of the New Jersey State Prison. Petitioner discharged.

Argued February term, 1897, before DIXON, LUDLOW, and COLLINS, JJ.

John A. Montgomery, for petitioner. John P. Stockton, Atty. Gen., for defendant.

COLLINS, J. The petitioner, being detained in the state prison, sued out a writ of habeas corpus. The commitment returned being palpably defective, the state brought up, by certiorari, the original proceedings, and the justice who allowed the writs referred the

matter to this court. The return to the certiorari discloses what purports to be a conviction and sentence of the petitioner in a court of special sessions, following a waiver of indictment and of trial by jury. Under a constitution like that of this state, the better opinion is that such a waiver, to be effectual, must be authorized by statute (*Edwards v. State*, 45 N. J. Law, 419); and the reason would seem to be that in criminal cases the state as well as the accused should consent to such a change in constitutional methods. A variety of special acts applicable to particular counties have given the necessary authority, and have established procedure in case of such waiver, and certain general acts on the subject are now extant. None of these acts provide for a trial by a court of general jurisdiction. Each of them provides for a special tribunal, whose jurisdiction depends upon statutory prerequisites. A court of special sessions is not a mere sitting of a court of general quarter sessions of the peace, although composed of the same individuals who *ex officio* constitute that court. Each case is tried by a court created *pro hac vice*, with a record and clerk of its own. Among the prerequisites to jurisdiction are the essential ones that the accused shall, in writing, waive indictment and trial by jury, and request an immediate trial, and that the presiding judge of the court of common pleas of the proper county shall "call" a court of special sessions for such trial. Under the special acts above referred to, such court consisted of the presiding judge and at least two other judges of the court of common pleas; under the general acts passed before 1896, it might consist of the presiding judge and one other judge of that court. By a statute approved March 26, 1896 (P. L. p. 149), it was enacted that after March 31, 1896, there should be no more than one judge of the court of common pleas in each county, exclusive of the justice of the supreme court authorized to hold the circuit court therein, and that either said judge or justice, or both, might hold the court of common pleas, orphans' court, and court of general quarter sessions of the peace and special sessions in the county, and that such judge should have and might exercise all the jurisdiction and powers theretofore vested in or exercised by any judge or the judges of the court of common pleas. Such being the state of the law, the petitioner, on June 25, 1896, signed a writing reciting a special act that authorized a trial by at least three judges, and requesting a trial "in the manner and form provided for by said act." Thereupon the judge of the court of common pleas of the county signed an order calling a court of special sessions, to be composed of himself "and at least one other judge of said court of common pleas." Such a court could lawfully be convened under proper conditions, the justice of the supreme court authorized to hold the circuit court of the county sitting as the other judge, within the terms of the call; but in fact the judge alone tried, convicted, and sen-

tenced the accused. He was plainly without jurisdiction to do so. After the issue of the writ of habeas corpus, an order was signed by the judge reciting that the words "or at least one other judge of said court of common pleas" were, by reason of the inadvertent use of an obsolete printed blank, erroneously contained in the order convening the court of special sessions, and amending such order by striking out those words. This attempted amendment was nugatory, for no court of special sessions had ever come into existence up to that time. The most that can be argued is that the prisoner may now be arraigned and tried before a court of special sessions composed of one judge. But even this cannot be. He never consented to any such trial, nor, indeed, to a trial before two judges. His request was for a trial before three judges, and to nothing else can he be subjected. This being impossible, the whole proceeding falls. Vice Chancellor Pitney so decided on habeas corpus in a similar case (*Kampf v. State* [N. J. Ch.] 30 Atl. 318), and there seems to be no escape from such a conclusion now. The petitioner must be discharged from custody.

GOAT & SHEEP SKIN IMPORT CO., Limited, v. PASCHALL.

(Supreme Court of New Jersey. May 22, 1897.)

RIGHT OF PLAINTIFF TO COSTS.

The practice act (2 Gen. St. p. 2586, pl. 319) denies costs to a plaintiff who does not recover above \$200, exclusive of costs, except where title to land comes in question, or "where the parties to a suit, in which the amount recovered, exclusive of costs, exceeds \$100, do not reside in the same county." *Held*, that the language quoted is not limited to cases where both parties reside in this state, and will apply to a recovery by a foreign corporation.

(Syllabus by the Court.)

Action by the Goat & Sheep Skin Import Company, Limited, against Fannie M. Paschall. Judgment for plaintiff. Motion to set aside so much of the judgment on a verdict for \$132.08 as awards costs.

Argued February term, 1897, before DIXON, LUDLOW, and COLLINS, JJ.

C. V. D. Joline, for the motion. Thomas E. French, opposed.

COLLINS, J. The practice act (2 Gen. St. p. 2586, pl. 319) denies costs to a plaintiff where he does not recover above \$200, exclusive of costs, except where title to land comes in question, or "where the parties to a suit, in which the amount recovered, exclusive of costs, exceeds one hundred dollars, do not reside in the same county." In this case the plaintiff is a corporation of another state, and it is argued that the exception quoted should be construed to apply only where the parties reside in different counties in this state. The language of the statute is too plain to admit of construction. The parties to the suit certainly do not reside in the same county. Costs

were properly awarded under the general law. 2 Gen. St. p. 2577, pl. 265. The motion is denied, with costs.

TERHUNE et al. v. SIBBALD.

(Court of Chancery of New Jersey. May 7, 1897.)

INSOLVENCY—ACTION BY CREDITORS—FRAUDULENT CONVEYANCES—JURISDICTION IN EQUITY.

1. Creditors who have proven their claims against an assigned estate may maintain a bill to set aside fraudulent sales made by the assignor, and for the removal of the assignee, who was a participant in these fraudulent sales, though their claims are not in judgment.

2. Creditors may maintain an action to set aside fraudulent sales of an assignor, without any demand on the assignee to bring such suit, when he is a party to the fraud.

3. In a suit to set aside a conveyance alleged to be fraudulent, the grantee is a necessary party.

4. Where the orphans' court could grant only a portion of the relief prayed for in a bill in equity against an assignee in insolvency, the court of chancery will retain the bill for all purposes.

Bill by Charles E. Terhune and others against Robert A. Sibbald. Demurrer to bill as to complainant Terhune sustained.

Clarence Kelsey, for complainants. R. E. Hart, for defendant.

PITNEY, V. C. The bill is filed by eight creditors of William Havens against Robert Sibbald, to whom Havens has assigned all his property for the equal benefit of his creditors. All of the complainants but the first (Terhune) have proven their claims against the estate. Three are admitted to be creditors by the schedule annexed to the deed of assignment. Under the rule enunciated by the chancellor in *Lee v. Cole*, 44 N. J. Eq. 319, 15 Atl. 531, and which the court of appeals did not disapprove in reversing the decree in that cause on appeal, and which was finally expressly adopted by that court in *Kalmus v. Ballin*, 52 N. J. Eq. 290, 28 Atl. 791, all of the complainants except Terhune have a standing in this court for the purpose of this bill, although none have obtained judgments on their claims. The scope and gravamen of the bill is that the assignment in question was part of a scheme gotten up between the debtor and his assignee to so dispose of his property as to defraud his creditors, resembling, in this respect, the case of *White v. Davis*, 48 N. J. Eq. 22, 21 Atl. 187, and on appeal, 49 N. J. Eq. 567, 25 Atl. 936.

The bill contains specific charges of fraud with regard to three pieces of real estate. The first charges a conveyance of real estate by one Reddick, at the request of and for a consideration paid by the debtor, to a Mrs. Groll, the sister of the debtor. That conveyance was made on the 20th of April, 1896, one month before the assignment by the debtor to the defendant Sibbald. The charge is that Mrs. Groll holds that property in trust for her brother. The next charge is that on the 11th of March, 1896, the debtor, Havens, without

consideration, conveyed to his sister, Mrs. Groll, two other lots of land, and that on the 28th of April, 1896, three weeks before the assignment, Mrs. Groll conveyed the premises to Sibbald, the defendant, and that such conveyance was made without consideration, and that on the 9th of May Sibbald entered into an agreement to sell to one Beers a part of the premises so conveyed to him, and that on the 29th of August, 1896, he conveyed that part of the premises to Beers, and received therefor \$650 in cash, which he claims the right to retain as his own, as well as the part of the land still retained by him. The third charge is that, among the assets which passed to the assignee by the conveyance, was a house and lot, which was appraised at \$750, and which was worth \$2,000, and that Sibbald applied by petition to the orphans' court for an order to sell the same to one Bernard at private sale for a consideration of \$225 in cash and the assumption by Bernard of a mortgage on the property of \$500, and stated under oath in his petition that the price offered by Bernard was the full value of the land and premises, and the best price that could be obtained for the same, and that upon that application the orphans' court made an order to sell and convey to Bernard at that price; and Sibbald did, on the 2d of July, convey the premises to Bernard, but that the representations as to value in the petition were false, to the knowledge of Sibbald, and that the conveyance was made for the purpose of defrauding the creditors of Havens, the debtor; that Bernard was not a bona fide purchaser, but knew the land was sold to him for a fraudulent purpose; and that shortly afterwards Sibbald, acting as the agent for the said Bernard, procured one Berry to purchase the said property from the said Bernard by deed dated August 13, 1896, for the consideration of \$1,000 in cash over and above the mortgage, being an advance of \$750 over the price paid by Bernard. No person is made defendant besides Sibbald, and the prayer is that he may be removed, and a fit and proper person appointed in his place to execute the trust, and that the land conveyed to Mrs. Groll and still held by her, the money received from Beers from a sale of part of the premises conveyed to Sibbald by Mrs. Groll, and the land so conveyed still retained by Sibbald, may be decreed to be held in trust by Sibbald for use of the creditors, and that Sibbald may be decreed and compelled to transfer and deliver and pay to a new trustee all the real and personal property held by him in trust. It further prays an accounting against Sibbald, and for other relief.

The bill does not allege that the complainants have asked Sibbald to sue and recover the real estate standing in the name of Mrs. Groll, but I think the circumstances and other allegations of the bill excuse him for not so doing. Taking the allegations of the bill to be true, as we must for present purposes, it would, manifestly, be idle to ask defendant to

bring suit to reach those assets. With regard to the land alleged to be held in trust by Mrs. Groll, it is sufficient to say that she has not been made a party, and in her absence no decree could be made as to that land. The demurrer for want of parties is well taken as to this part of the bill. With regard to the land charged to be held by Sibbald himself, I think the bill will lie; and as to that part of the bill the demurrer falls. With regard to the money received by Sibbald from part of the land sold by him to Beers: If that feature stood by itself, the proper remedy would be in the orphans' court. The same may be said of the allegation as to the advance in price on the sale from Bernard to Berry. The orphans' court would have jurisdiction to compel the assignee to account for that, and this court would not, in an ordinary case, assume jurisdiction which could be as well administered in the orphans' court. Such a case was *Hoagland v. See*, 40 N. J. Eq. 469, 3 Atl. 513.

But the bill in hand more nearly resembles that in *White v. Davis*, above cited, and the case disclosed by the bill will justify the court in removing the assignee and appointing a new trustee in his place. This aspect of the affair, together with the charge of fraud as to real estate, justifies this court in retaining the bill for all purposes. The power and duty of the court to entertain a bill of this kind, in order to assist the present or future trustee in reaching the assets of the estate, was fully established by the cases, just cited, of *White v. Davis* and *Kalmus v. Ballin*. The demurrer will be sustained as to the complainant Terhune, and overruled as to the other complainants, without costs, and defendant to have liberty to answer. Liberty is also given to the complainants to amend their bill by making Mrs. Groll and the judgment debtor, Havens, and such other parties as they may be advised, parties defendant.

THIEFES v. MASON.

(Court of Chancery of New Jersey. May 15, 1897.)

POWERS OF EXECUTORS—DISPOSAL OF PERSONALTY —BILL FOR DISCOVERY.

1. An executor derives his power from the will, and not from its probate. He may dispose of the property of the testator before probate.

2. An executor who does not prove the will of his testator, but disposes of his personal property otherwise than as directed by the will, is responsible to the legatees of the testator for this conversion, and his executor or administrator is likewise responsible to such legatees, but not to the administrator cum testamento annexo of the first testator.

3. A bill filed for the recovery of definitely ascertained sums of money, and showing no occasion for an accounting, no breach of trust, fraud, or other element of equity jurisdiction, will be dismissed on the ground that adequate remedy exists at law, where the answer of the defendant prays, on this ground, the same relief as if he had demurred.

4. And on such a prayer in the answer, if it appears by the proofs that the sum recoverable

is less than \$50, the bill will be dismissed at final hearing.

(Syllabus by the Court.)

Bill by Emil R. Thlefes, administrator cum testamento annexo of Gertrude Loewendahl, against Joseph Mason, executor of Israel Loewendahl. Dismissed.

Joseph Loewendahl and Gertrude Loewendahl were man and wife. Gertrude died in 1885, leaving Israel her surviving, but without any issue. Her heirs at law and next of kin were her brothers and sister, none of whom are parties in this suit. Gertrude left a will dated December 19, 1884, whereof she appointed her husband and her brother Charles executors. On her death her husband took possession of whatever property, real and personal, she left, and, among other things, of her will and other papers. He survived his wife, and died in 1894. Gertrude's personal property consisted in great part of a share in her parent's estate, which by her will she gave to her husband during his life, and on his death one-half to her brother Charles, the other to be divided among her other brothers and sister. She also left some jewelry, books, a piano, and some household furniture. These also she gave to her husband for life, and on his death to her brother Charles. Israel Loewendahl did not prove Gertrude's will, nor did the other executor. He took possession of the property, and received several hundred dollars (reichsmark) in 1889, through a firm of bankers, from the representatives of the estate of Gertrude's parents. Israel died in 1895, testate, the defendant, Joseph Mason, being the executor of his will. After Israel's death, Gertrude's will was probated by the complainant, who took out letters of administration with the will annexed. The complainant files this bill as administrator with the will annexed of Gertrude Loewendahl, sole complainant, against Joseph Mason, executor of the will of Israel Loewendahl, sole defendant, setting out the will of Gertrude, and alleging that Israel had used and disposed of part of Gertrude's personal property, and that some of it was sold and converted by the defendant as executor of Israel's will since his death. The complainant also alleges a demand made upon the defendant for \$500, the money paid to Israel in 1889, and for \$150, the value of Gertrude's other personal property. He states that the demand for payment of the \$500, with interest, was agreed to by the defendant under authorization by letters from the parties interested in Israel's estate, but that the defendant now insists that he cannot pay without the protection of a decree. The complainant prays discovery, and that the defendant may be decreed to pay him the \$500 and interest from the death of Israel, and the \$150 with interest from the same date. The defendant answers, praying the same benefit as if he had demurred, because the complainant is entitled to any relief which he might have received at law. He admits that he has dis-

posed of Israel's property; that the proceeds are in his hands for distribution. He also admits that demand was made upon him for the moneys referred to in the complainant's bill, and says he gave the complainant notice that his claim was disputed and to sue according to the statute. He admits that he advised the payment of the 2,000 reichsmarks (the \$500), provided that the payment should be in full discharge of all matters in dispute between parties interested in the two estates of Israel and Gertrude, and that the parties interested in the estate consented to the proposed settlement, but before any money was paid they revoked the authority to settle, and since that time he has been without authority of the parties to make any payments. He admits that he sold what personal property he found at the residence of the testator, but he denies that the complainant is entitled to be paid the moneys he claims.

Wheaton Berault, for complainant. W. W. Benthall, for defendant.

GREY, V. C. (after stating the facts). This cause came on for hearing at the same time as another between the same parties regarding the real estate of Gertrude Loewendahl, and it was in open court agreed that all the testimony taken should be deemed to be testimony in either cause so far as applicable. The correspondence submitted indicates that the defendant made an effort to obtain the consent of the beneficiaries under Israel Loewendahl's will to settle the claim of the complainant for the \$500, which Israel had in his lifetime received and converted to his own use, but the evidence shows that, before the attempted settlement was finally agreed upon, the interested parties differed in their views, and the defendant gave notice that the claim was disputed. The complainant sues as administrator cum testamento annexo for discovery and to recover a definite sum of money paid to the defendant's testator in his lifetime as either executor of the complainant's testator or as life tenant entitled to the enjoyment of it under her will; and also to recover the value of certain goods of the complainant's testator, which it is shown the defendant's testator had received in his lifetime either as executor or as legatee for life. The sum of money and the goods were portions of the estate of the complainant's testator, and were proven to have been so converted by the defendant's testator in his lifetime (except the piano, etc., hereinafter referred to); that they no longer existed in specie at the time of the death of the latter. As to the money received by Israel in his lifetime, there is no pretense of proof that it remained in specie, nor, indeed, was the money received by Israel ever the property of Gertrude in the form in which it came to him; for at her death, in 1885, it was a mere right or chose in action, to receive a share of her parent's estate. This was so realized that in 1889, after Gertrude's death, it

was satisfied by the remittance of the \$472.29 to Israel. He used it as his own in his lifetime, and at his death it was either consumed, or so mingled with his own estate as to be indistinguishable, and the defendant, Israel's executor, never received this fund in any identifiable shape. The other personal property of Gertrude (except the piano, etc., hereinafter dealt with) was likewise disposed of by Israel in his lifetime; and when his executor, the defendant, assumed charge of his property, none of her personal (except as stated) could be in any way identified.

The complainant is the administrator cum testamento annexo of Gertrude. Israel, in his lifetime, was the executor of her will. He did not prove the will, but he was none the less executor. An executor may receive and dispose of the personal estate of the testator before probate. *Brazier v. Hudson*, 8 Sim. 67; *Wankford v. Wankford*, 1 Salk. 301. He derives his power from the will, and not from the probate. *Comber's Case*, 1 P. Wms. 768. It is only in order to assert his right to sue as executor that he must first have probated the will. *Humphreys v. Ingledon*, Id. 758. When Israel converted the estate of his testatrix to other uses than those directed by the will, he became liable to the legatees for his wrongdoing, and they have a right of action against his executor to recover for the injury. The complainant in this case does not represent these legatees of Gertrude in any way. He is administrator cum testamento annexo of Gertrude. In this capacity he has authority to take the goods of the testatrix, but he has no power to recover for an injury done by his predecessor, the executor of the will, by disposing of or converting the estate of the testatrix. *Brownlee v. Lockwood*, 20 N. J. Eq. 256. For such a conversion of the estate of the testator the representative of the deceased executor must account to the legatees. *Carrick's Adm'r v. Carrick's Ex'r*, 23 N. J. Eq. 367. A very clear exposition of the principle on which this rule is based will be found in the opinion of the late Justice Bradley in the case of *Beall v. New Mexico*, 16 Wall. 540.

The letters on which the complainant sues are apparently those of immediate administration cum testamento annexo, and not those of limited administration de bonis non administratis by the executor. In actual fact, as appears in this case, there had been a partial administration by Israel Loewendahl, the preceding executor, though without proof of the will, and he had by his disposition of the testatrix's estate so converted a great part of it that it no longer existed in specie as it had been at her death. The form of the letters issued by the probate court does not alter the fact that there has been a partial preceding administration, by reason of which the complainant can only administer those goods, etc., of Gertrude which remain not administered, nor can it deprive those legatees interested in Gertrude's estate of their direct right of action against Israel Loewendahl's executor because of the

wrong he did them by his disposition of Gertrude's estate; for it is obvious that the legatees and the new administrator cannot both have a right of action for the conversion by the executor. On the same form of administration with the will annexed the plaintiff sued in *Wankford v. Wankford*, ubi supra, seeking to enforce a claim against the heirs of a deceased executor; but the king's bench sustained the defendant, holding that the executor who had partially disposed of the testator's goods, though without probate of the will, was in fact and in law executor of the will, and entitled to all the rights of an executor. Necessarily, such an executor became charged with all the responsibilities of the place, one of which was the liability to the legatees of his testator for his disposition of the estate. The representatives of the deceased executor are still liable to those legatees for this default, and his successor in the administration of the estate has no right to call on those representatives to account to him for the goods converted, or, technically stating it, administered. *Beall v. New Mexico*, ubi supra.

This leaves the claim for the piano, books, and music the only further question in this case. These articles appear to have been a part of the personal estate of Gertrude Loewendahl which came to the hands of the defendant in specie, as they existed at the time of Gertrude's death. The defendant sold them, the piano for \$15.70, and the books and music and a bookcase for \$2.50, making a total of \$18.20. There is no other proof of the value of any of those articles than the price at which they were sold when disposed of by the defendant, nor is there any indication that these prices were not their full value. The defendant has in his answer objected that the remedy of the complainant, if he had any, is in a court of law, and he now insists that this court should not retain this bill to enforce a payment of so trivial a sum as \$18.20. Lord Bacon's ordinance, declaring that all suits under the value of £10 are regularly to be dismissed, has been determined to be forceful in this state in several cases. *Swedesborough Church v. Shivers*, 16 N. J. Eq. 458; *Allen v. Demarest*, 41 N. J. Eq. 164, 2 Atl. 655. The claim of the complainant is merely for the payment of money. There is no allegation of fraud or other element of equity jurisdiction which should induce the court to retain the further consideration of this case. The rule is based upon grounds of public policy, and is intended to discourage litigations in this court which involve only unimportant and frivolous controversies. *Story*, Eq. Pl. § 500. It was enforced at final hearing when it appeared that the balance due to the plaintiff did not amount to £10, and the bill was dismissed, even where there was no demurrer. *Brace v. Taylor*, 2 Atk. 253. The bill filed is apparently one for discovery and relief. The complainant, though asking for discovery, prays an answer without oath. An answer thus filed without oath may, as to its admissions, be evidence against the

defendant who answers. *Hyer v. Little*, 20 N. J. Eq. 443. But, when a complainant invites an answer without oath, he deprives it of any evidential quality for the defendant, under the operation of our statute. 1 Gen. St. p. 376, § 23; *Sweet v. Parker*, 22 N. J. Eq. 455. So far as his bill invokes the aid of this court to obtain a discovery, this voluntary refusal by the complainant to credit the invited disclosures of the defendant would seem to be an abandonment of this element of jurisdiction. The other relief he asks is a decree for the payment of the sum of money, part of Gertrude's estate, disposed of by Israel in his lifetime, as above described, and also the value of other personal property, part of which Israel disposed of in his lifetime, and the residue of which the defendant converted into money. As to the property converted by Israel, it is to be taken to have been administered by him as above shown, and the right of action is not in the complainant. Irrespective of the view above taken of his claims, there is no ground stated on which the jurisdiction of this court is necessary to give the complainant full relief. The substantial right which the complainant asserts is the obligation of the defendant to pay him a definitely known sum of money, and also for the value of certain known and named goods. No accounting is prayed, nor does any seem to be required, as the sums claimed are already ascertained. The courts of law, in a case of this character, have jurisdiction to give him full and adequate relief. The defendant in his answer alleged that the matters complained of are cognizable at law, and that the complainant is not in respect to them entitled to any relief in this court, and prayed the same advantage as if he had demurred to the bill. *Daniell*, Ch. Pl. & Prac. p. 714, note; *Id.* p. 715. At the hearing he insisted that, as the only matters on which the complainant based his suit were merely claims for ascertained sums alleged to be due to the complainant, without the setting up of any fraud and breach of trust or need of an account or other ground of equity jurisdiction, he had a full, adequate, and complete remedy by suit at law. I think this contention is justified. The complainant, upon the view above expressed, has shown no ground which puts him in a position to invoke the jurisdiction of this court. I will advise that the bill should be dismissed.

WARWICK v. STOCKTON.

(Court of Chancery of New Jersey. May 13, 1897.)

PATENTS—CONTRACTS—CONSTRUCTION—ACCOUNTING—BURDEN OF PROOF.

1. A contract "to divide all profits derived from the bicycle business equally" includes the profits from any branch of the bicycle business which the parties afterwards take up.

2. A defendant cannot avoid liability on a contract to pay royalties for certain bicycle patents on the ground of their invalidity, where the consideration therefor has not wholly failed, and

he derives profits therefrom and has not repudiated his license.

3. Defendant is liable to an accounting on contracts for the use of certain patents, notwithstanding complainant has agreed to assign such patents to a third person, where complainant claims a release from such person, who has never made any claim against defendant.

4. A defendant is liable to an accounting for the use of patents, though complainant refused to complete the formal record title of the patents for a long period of time, where he did do so before suit brought.

5. The burden is on defendant to establish, if he so claims, an agreement qualifying written articles under which complainant seeks an accounting.

Bill by George T. Warwick against Charles S. Stockton for an accounting. An account directed.

George T. McEwan, for complainant. Adrian Riker, for defendant.

EMERY, V. C. This bill is filed to obtain an accounting under a written agreement between complainant and defendant, the complainant claiming that the relation between himself and defendant, created by the agreement, either alone or in connection with the subsequent conduct of business during the term specified in the agreement, created a partnership. The bill asks, also, a receiver for the partnership, based on complainant's exclusion from the partnership business, and a charge of mismanagement. No particulars of mismanagement are, however, alleged in the bill. The general questions in the case are, first, whether the relation of partners exists between the parties, or whether the complainant's rights are simply to a share of the profits by way of royalty or compensation; and, if no partnership exists, then, secondly, whether the complainant has any right to an accounting at all under the agreement, in view of the defenses set up. I will state briefly the conclusions I have reached, leaving a fuller statement and opinion to be filed hereafter if desired. These conclusions are:

First. The agreement between the parties, as shown by the writings executed and delivered by them, was not an agreement of partnership, but was an agreement for a share of the profits by way of royalty to complainant, and an additional agreement for compensation to complainant for personal services. In reference to the construction of the agreement in this respect, I follow the opinion of Vice Chancellor Pitney on the application for receiver in this case (*Warwick v. Stockton* [Jan., 1897] 36 Atl. 488), and in this opinion I concur.

Second. These contracts in writing, creating this relationship between the parties, were not ambiguous or uncertain in their language, and the subsequent conduct of the parties in carrying on their business, during the time provided for by the written agreements, is not to be resorted to simply for the purpose of construing the agreements in this respect. Nor is the evidence relating to such conduct of the parties sufficient, in my judgment, to

show any change of the relations fixed by the agreement to the relation of partnership, nor any intention on the part of the defendant to change the relationship created by the agreements into one of partnership. The relation of partners must be the result of the intention of both parties to create the relation, and the subsequent conduct of the parties, in carrying on the business, which is here relied on by complainant to create a partnership, if it is not created by the agreement, is, in my judgment, fairly referable to, other causes or reasons than the existence of a partnership, and is insufficient, either alone or in connection with the agreement, to establish a relation of partnership.

Third. The complainant's rights, therefore, are not the rights of a partner in the business, but are limited to an accounting and the employment specified under the contract. Complainant is entitled to such accounting, unless deprived of it by the defenses set up, and which are hereafter considered.

Fourth. Under the agreement and its supplement the right to an accounting will extend, not only to the profits in the manufacture and sale of the parts of bicycles covered by the patents owned or controlled by the complainant at the time of the original agreement, but to all profits derived from the bicycle business as carried on by the parties. The original agreement seems to restrict the manufacture to bicycle parts covered by the patents, but the modification, made by the writing of the same date, by which it was agreed "that we are to divide all profits derived from the bicycle business equally," etc., includes, in my judgment, the profits from any branch of the bicycle business which the parties afterwards took up. The subsequent conduct of the parties in carrying on the manufacture, and the manner of keeping and stating the accounts between them, show that this was their construction of the extent of defendant's interest in the profits; and, if the language "bicycle business" is ambiguous or indefinite, the subsequent conduct of the parties is admissible to determine its construction.

The defendant denies any right whatever to an accounting, repudiating any liability to account under the agreement. He has not, as yet, either by answer or otherwise, rescinded or claimed to rescind the agreement, or abandoned in complainant's favor any right to manufacture any of the articles supposed to have been covered by the patents, or articles covered by patents since procured by complainant. The latter manufacture constitutes a considerable part of the business transacted since January, 1896, and these articles were manufactured and sold in large quantities upon the supposition, as between both parties, that the agreement was in force. The defenses set up to resist any accounting whatever are, substantially: First, failure of consideration for the agreement of defendant to account, upon the ground that the patents

claimed to be owned or controlled by complainant, for the articles manufactured, or some of them, were invalid; second, that the equitable title to these patents is in the Warwick Cycle Company, under a contract made by complainant to assign to them; third, that complainant's refusal to complete defendant's record title to the patents, on his demand made before suit, justifies defendant in refusing to account. In reference to these defenses, my conclusions are:

Fifth. As to the invalidity of the patent: So far as relates to the profits derived from the manufacture and sale of the articles, which are apparently covered by the patents, the defendant, as licensee, having acted under the license and received profits from it, is estopped, as against the licensor, to deny the validity of the patent. *Bigelow, Estop.* (5th Ed.) p. 553, and cases cited; 7 Am. & Eng. Enc. Law, p. 25; 13 Am. & Eng. Enc. Law, p. 570; *Kinsman v. Parkhurst*, 18 How. 288. The law to this extent is not disputed by defendant, as I understand, and this will cover the pedals manufactured under the Broadbent patent. The same principle, in my judgment, extends to the manufacture and sale of the hubs, which were manufactured and sold by the parties as covered by patents, and so claimed, by stamping and otherwise. The manufacture of these hubs has not been, so far as appears by the evidence, molested or interfered with on the claim by any person that it was an infringement or not covered by complainant's pedal patent. Defendant's expert, in this case, states that *prima facie*, and on the face of the pedal patent and specifications, the hub would seem to be covered, and so long as the defendant has not repudiated and does not repudiate any right to manufacture under the patents which he derives or may derive from the license, and does not leave complainant in a position where he can sue him as an infringer for all the profits, the right to profits under the agreement should not be dependent on the determination in this suit of the validity of the manufacture of the hub under the pedal patent. As to the hubs manufactured and sold and covered by patents issued to complainant since the date of the agreement, and also the chains and other articles, which were not covered by patents, the right to an accounting for these is based upon the construction of the modification of the original agreement, which, as above stated, extended it to the entire bicycle business. But I am not entirely clear that this patent for hubs granted since the agreement is not included within the original agreement as a patent owned or controlled by complainant "during the continuance of the agreement." So long, however, as the defendant in fact has, and is allowed by complainant to have, the exclusive license under this patent, and does in fact manufacture under it, it will not, in my opinion, be necessary to pass upon this question in order to decide the question of a liability to a present accounting for the profits

hitherto made. So far as relates to manufactures which are not covered by the patents referred to in the agreement, the question of invalidity of the patents does not apply, nor can the invalidity of the patents be set up by the licensee, except it amounts to an entire failure of consideration, and the licensee repudiates the license, leaving the licensor to his full remedies against him as an infringer. This I understand to be the effect of the cases relied on by defendant's counsel. In the absence of any such entire failure of consideration or repudiation of his rights as licensee, under any of the patents, and inasmuch as defendant has derived and continues to derive profits from the license, I hold that he is liable to account for these, as well as the other articles manufactured in the bicycle business under the agreement as modified.

Sixth. As to the contract or alleged contract by complainant with the Warwick Cycle Company: Inasmuch as this company has never to this date insisted upon or set up any such claim against the defendant, or shown any intention to do so, and complainant claims a release from all obligations in this respect, if any contract ever was made, it is manifest, I think, that the defendant's equities, by reason of the continued existence of any such contract, would reach only to protection or indemnity against such claim, if actually made in good faith by the Warwick Company before decree for payment of any balance due on the accounting, and cannot at all be extended to allowing him to withhold the accounting under the articles.

Seventh. As to the rights of the defendant to resist any accounting, because complainant failed to produce the formal record title, my opinion is that the completion of the formal record title before suit satisfied the defendant's rights in this respect, so far as any question of liability to account was concerned, and that the refusal or neglect in the past, if it had any effect whatever on defendant's rights, is not to be punished by the penalty of depriving complainant of all his rights to an accounting. Inasmuch as the manufacture and sale has been actually proceeding for two years and over, the right to an accounting for the profits actually made to this time cannot be denied, because they were made pending the completion of the formal record title to the papers.

Eighth. As to the principles upon which the accounting should proceed, the principal disputes are two: First, whether the accounting is to be restricted to the articles covered by patents owned or controlled by complainant at the date of making the contract, or should extend to all the articles made in carrying on the bicycle business. On this point my view is, as above stated, that the account extends to all articles manufactured in the business. The other question is as to the right of the defendant to an allowance of 6 per cent. interest on all capital invested beyond \$25,000. The original agreement fixes no lim-

it as to the capital to be provided, neither did it make any provision for interest thereon, except that, "as part of the reasonable cost of manufacture, a reasonable rental for the factory room and power should be allowed to Stockton." The supplemental agreement of the same date provided that all commissions and running expenses should be deducted. It was represented to Dr. Stockton, and supposed by him at the time of embarking in the enterprise, that the sum of \$10,000 would be sufficient to equip the necessary plant for the manufacture of hubs and pedals, and that the plant would be self-sustaining in a few months; but a much larger amount was in fact expended, and before August 10, 1893, the amount expended had exceeded \$25,000 for a plant to manufacture hubs, pedals, and also chains, and the business had not yet begun to make profitable returns. The original agreement had been for two years from October 10, 1894, but on August 10, 1893, the agreement was extended to five years from October 10, 1894, and in reference to charges to be allowed to Dr. Stockton it was expressly agreed "that ten (10) per cent. shall be charged off on the cost of the machinery and tools and placed to the expense account." As the articles provided for a yearly statement of the profits, this 10 per cent. would be deducted yearly, and the tools (or some of them) were also supplied at the expense of the firm. The allowance now claimed by defendant for 6 per cent. interest on capital advanced beyond the \$25,000 is in addition to the rental and the 10 per cent. on machinery and tools. These provisions for rental and 10 per cent. are the only written contracts between the parties relating to the allowance, and, unless there was a subsequent agreement, the written contract covering the subject-matter of allowances for payments on account of capital must be the basis of the accounting. Defendant asserts and complainant denies that there was such subsequent agreement. No settlement has ever been actually had between the parties in which any such allowance has been made, and the burden, therefore, is on the defendant to establish satisfactorily an agreement which qualifies the written articles. This, in my judgment, he has failed to do.

During the spring of 1896, Dr. Elliott, the son-in-law of the defendant, endeavored in behalf of the latter to adjust the differences between these parties, which had become so serious that there was no personal intercourse between them. One point of difference was the payment of this interest on capital over \$25,000, and, as a result of these efforts of Dr. Elliott, complainant wrote a letter to defendant on June 19, 1896, stating the concessions he was willing to make, one of them being the payment of this interest; but the concessions included other charges affecting defendant, such as making the factory rental \$2,500, which had been \$3,000, and striking off, from January 1, 1896, the 10 per cent. wear and tear of the tools. He proposed, also,

the joint pushing of the business. Complainant requested a reply to this letter, if the concessions, taken all together, were agreeable. No reply was ever received, and complainant says he never had any conversation with defendant in which the offer was accepted. Defendant says that on the Saturday following the reception of the letter the complainant came to the factory, and they talked over the reception of the letter, and he (defendant) accepted it. But the subsequent conduct of defendant shows that the concessions on his part stipulated for in the letter, such as the omission from January 1, 1896, of the charge of 10 per cent. on tools, and the reduction of the factory rent from \$3,000 to \$2,500, were not carried out on the books, according to defendant's statement. An inventory to be taken July 1st was requested in the letter, and this was taken; but the defendant also says that this would have been taken anyhow, at that time, so that this cannot be of any special importance as indicating an acceptance of the terms of the letter. These facts weaken the force of defendant's evidence that the letter was accepted by him as a settlement on the basis proposed therein. The burden of showing that the written articles have been changed in this respect rests upon the defendant, and he has failed, in my judgment, to establish that there was any change. I must hold, therefore, that the agreement to allow this interest, either on the terms mentioned in the letter of June 19, 1896, or otherwise, has not been made out, and that the account must be taken upon the basis of allowance made by the written agreements. If any further directions are required for the accounting, they may be applied for on settlement of decree.

GRAY v. REYNOLDS.

(Court of Errors and Appeals of New Jersey.
May 19, 1897.)

CREDIT INSURANCE—INSOLVENCY OF INSURER— SUBSEQUENT LOSSES.

A policy holder in a company insuring traders against losses occurring through the insolvency of their customers cannot recover for losses sustained after the company's insolvency, whether on sales made by him before or after that date, but is only entitled to a return of the unearned premium; there being no reserved value to the policy, nor any method of reinsuring.

Dixon, J., dissents as to sales made before the company's insolvency.

Appeal from court of chancery; Reed, Vice Chancellor.

Claim by L. M. Reynolds, trading under the firm name of L. M. Reynolds & Co., against George R. Gray, receiver of the United States Credit-System Company. The receiver disallowed a part of the claim, and from an order of the chancery court setting aside such adjudication in part said receiver appeals. Reversed.

Howard W. Hayes, for appellant. Edward A. Day, for respondents.

DEPUE, J. The respondents are merchants carrying on business in Virginia. The United States Credit-System Company is a corporation of this state, incorporated in 1888. The business for which this corporation was created was the issuing of certificates of guaranty, which may be called contracts of insurance, or indemnity to traders for losses incurred by the failure of their customers who are debtors to the traders and become insolvent. A policy issued by this company runs for one year, and covers losses on goods sold during that year by the insolvency of their customers during that year; in other words, the goods must be sold, and the insolvency of the customer must also occur, during the period of time covered by the policy. Losses incurred after the certificate expires, on sales made during its term, are provided for by other parts of the contract, not material to this case. The vice chancellor very properly describes the kind of insurance undertaken by this company as *sui generis*. Indeed, so peculiar is the system of insurance engaged in by this company that its contracts of insurance appear to be protected, as its exclusive property, by a copyright. In this adventure there is no reserve fund to meet the obligations it incurs, no surrender value, and no opportunity for reinsurance in other companies. The complainants took out a policy, No. L169, dated and issued May 24, 1894. This policy covered the period from June 1, 1894, to May 31, 1895. The company became insolvent August 23, 1894. The order appointing a receiver adjudges that upon that day the company was insolvent. The day on which insolvency occurred, as adjudged by the order appointing a receiver, fixes the time to which the several claims of creditors must be referred for adjustment. *Mayer v. Attorney General*, 32 N. J. Eq. 815. The complainants presented to the receiver a claim for \$517.60, which was the amount of loss actually suffered on goods sold during the continuance of the policy up to the date of insolvency, which was allowed. They also presented claims for losses on goods sold after the policy was issued, where the losses were incurred after the insolvency of the company, to the amount of over \$2,000. The latter the receiver disallowed. On appeal to the court of chancery, the vice chancellor set aside the adjudication of the receiver in the latter respect. The vice chancellor very properly held that under the scheme of insurance there was no reserve value to the policies, and that it did not appear that it was possible to reinsure in any solvent company, so as to put the insured on the same footing he occupied at the time of the insolvency of the company. The vice chancellor also held that where no provable loss had occurred, either at the time of the insolvency, or at the time of exhibiting final proof of loss, the only method of fixing the loss occasioned by the breach of the contract was to assume that the premium paid was a fair price for the risk, and the risk was equally distributed throughout the period covered

by the certificate, and that a rebate of that portion of the premium which represented the unexpired term of the policy would be a practical method of determining the amount of damage to the insured. But the vice chancellor also held that where the loss has actually occurred after the date of the insolvency, but before the exhibition of the final proof of loss, the occurrence of such an event was competent evidence in respect to the value of the policy at the date of the insolvency, and that the method of ascertaining such value was the amount of such losses, with a rebate of interest from the time they were payable back to the date of the insolvency, and that, as to the losses that happened between the time the claim was presented to the receiver and the expiration of the policy, the insured should have a right to prove them on the hearing of his appeal as showing the amount of his loss, and that there was no distinction between losses happening on merchandise shipped after the insolvency of the company and on that shipped before. These conclusions of the vice chancellor, if sustained, must rest upon the assumption that the policy holders were entitled to treat the insurance company as a going concern until all its policies expired. In this view, with respect to companies of this character, we cannot concur. The order in the insolvency proceedings put an end to the business of the company, and terminated its contracts, leaving the holders of policies to be indemnified as indemnity might be awarded. Any other view would compel the creditors of the company to continue the insurance business with the property and funds of the company which the insolvency proceedings contemplate shall be divided among the creditors as of the time when the insolvency occurred. And there being no reserve value to the policies, and no method of obtaining reinsurance, the only practical mode of determining the compensation to be made to the insured, where no provable loss had occurred at the time of the insolvency, would be by a rebate of that portion of the premium which represented the unexpired term of the policy. This view of the nature and effect of policies, where the insolvency of the company has occurred, was adopted by the supreme court of Minnesota in the case of *Smith v. Insurance Co.* (April term, 1896) 68 N. W. 28. The order appealed from should be reversed, and an order entered in conformity with these views.

DIXON, J. I vote to reverse this decree only so far as it allows losses resulting from sales which were made after the insolvency of the insurance company. Against such losses the insured should have guarded himself by reinsuring, for the cost of which a return of the proportionate part of the premium will be compensation. But for losses resulting from sales made before insolvency I find no way to indemnify the insured, except by permitting such losses to be proved, according to the terms of the policy, against the assets held

by the receiver. His right to such indemnity seems indisputable, and no inequity can be done to other creditors by postponing, if necessary, the distribution of the fund until the amount of those losses can be ascertained.

ISHAM v. COOPER et al.

(Court of Chancery of New Jersey. May 19, 1897.)

EQUITY PRACTICE—INJUNCTION—RES JUDICATA.

1. The defense of former adjudication may be raised by answer as well as by a formal plea.

2. The defense of former adjudication should be disposed of as a preliminary question on the motion for preliminary injunction, if the court has before it all the evidence to be submitted on this point, and there is no special reason for reserving the decision until final hearing.

3. Complainant sought to enjoin the enforcement of a judgment which had been sustained in the supreme court, where he had been sued upon a written instrument. He was permitted, without objection, to introduce evidence tending to prove the alteration of the instrument, and the insertion by himself of his initials, by mistake, in such a place as to make the instrument read differently than he had intended; and the court instructed the jury to settle whether to accept the evidence of the plaintiffs or that of defendant, but refused to make the specific charge to the effect that, if the initials were inserted for the purpose of noting an interlineation, the plaintiffs could not recover, and the supreme court found no error in this refusal to charge. *Held*, that the complainant had had in the court at law the benefit of his defense of mistake, and that this court would not grant a retrial on that issue.

Bill by Henry H. Isham against John W. Cooper and another for injunction. On application for preliminary injunction. Denied.

Joseph Cross and C. L. Corbin, for the motion. R. V. Lindabury, opposed.

EMERY, V. C. This is an application for a preliminary injunction to restrain further proceedings in an action at law in which defendants have obtained a verdict against complainant, and a rule to set aside the verdict has been discharged by the supreme court. The action at law was commenced by attachment proceedings against the complainant, in which he appeared and gave bonds, and a preliminary injunction against the prosecution of this bond is also applied for. The principal question involved on this application for injunction is whether the grounds now relied on by complainant to enjoin the collection of the judgment on the verdict were set up as defenses, and decided adversely to the complainant, in the action at law; and, in the view which I take of the case, the granting or refusal of the preliminary injunction depends upon the decision of this question. A statement of the proceedings in the action at law is necessary, in order to determine whether, after the verdict of the jury, the complainant still has a right to apply for equitable relief. The entire record in the suit at law, including the evidence taken at the trial, is made part of the record on this application, by complainant's filing it with the

bill; and so far, therefore, as relates to the decision of the question of the effect of the verdict at law, the entire case of complainant and defendants seems to be presented as fully as it could be on final hearing. The action at law was one of contract, and was founded upon a letter dated February 8, 1894, written by the complainant, Henry H. Isham, to the defendants, Fowler and Cooper, signed by the complainant, proposing the terms upon which complainant would assume the management of the affairs of a corporation (the Fowler Company) of which Fowler and Cooper were officers, and which then needed financial and other assistance. By a letter of the same date written to Isham, and signed by Fowler and Cooper, the latter accepted the terms; and the complainant's letter and its acceptance constituted, or were claimed to constitute, a contract between the parties. At the time of the writing of the letter, certain notes for \$20,000 of the Fowler Company, indorsed personally by Fowler and Cooper, were outstanding in the hands of a bank which had discounted them. The letter or contract, as sued on, contained a clause relating to these notes, and Fowler and Cooper claimed that this clause in the letter signed by Isham read as follows, viz.: "That the Fowler Co. notes now indorsed by you shall be renewed and reindorsed when they mature, and shall be cared for by the company and H. H. I. until the Co. is able to care for them itself." They brought suit on the letter, as containing this clause, and to recover the amount they had been eventually obliged to pay on the Fowler Company notes or their renewals, being over \$13,000. As appears by the pleadings, bill of particulars, and specification of defenses in the cause, the dispute between the parties, so far as relates to the form of the contract, was whether this clause of the letter had been altered after its execution. Isham, in his specification of defenses, as to this point, claimed that this clause had been altered, and was not his contract, but was null and void. The clause in the letter as delivered, according to Isham's claim, was as follows, including the interlineations as actually made:

"That the Fowler Co. notes now indorsed by you to the extent of \$20,000 shall be renewed and reindorsed when they mature and shall be cared for the Company and by (H. H. I.) by you until the company is able to care for A them itself."

—And the alteration claimed consisted in the erasure of the word "you" after the carat. In this specification of defenses, it will be observed that the initials "H. H. I." were included in a parenthesis placed at the side of the sheet, and not immediately following the words "and by"; but there was no claim in the specification of defenses that the initials were intended to indicate an alteration, or that by mistake the initials were so placed in

the letter as to admit of being read into the text as part of the letter or contract. In the letter itself these initials in fact immediately followed the word "by." On the trial of the cause, it appeared by the undisputed evidence on both sides that the disputed clause of the letter, as originally written by Isham to Fowler and Cooper, read, the notes "shall be cared for by you," without any interlineation or erasure. It was also shown by the evidence on both sides that alterations were made in the letter at the interview held immediately after the receipt of it by Fowler and Cooper, at which interview Isham, Fowler, Cooper, and also Judge Gilhooly, the counsel of the company, and no others, were present. The main question of fact at the trial at law was as to the alterations which were then made in the letter in the presence of all these parties. Mr. Isham and Judge Gilhooly testified as to the conversation previous to the alterations, and as to the purpose of making the alterations, which were then declared, and as to the alterations actually made after these conversations for the purpose of carrying out the changes in the letter which were agreed on. Mr. Isham and Judge Gilhooly testified, substantially, that the alteration and the only alteration in the letter itself was the interlineation of the words "the Company and by" after the word "by" and before the word "you," so that the letter, as altered, read, the notes shall be cared for "by the Company and by you" (Fowler and Cooper). They both further stated that this alteration was actually made by Isham himself after the conversation between the four persons in reference to making alterations in the letter, and that the alteration thus testified to was the only alteration to be made in the letter itself. As to the initials "H. H. I.," these two witnesses stated that these were made after the alteration of the letter had been made as agreed on, and that the initials were added by Isham, at the suggestion of Judge Gilhooly, solely for the purpose of noting or identifying the interlineation. This suggestion, they stated, was made in the presence of both Fowler and Cooper, and Isham then, in their presence, added the initials immediately following the words "and by" in the interlineation previously made, and delivered the letter to Fowler and Cooper; the letter at the time of delivery, according to their statement, containing the word "you" after the carat, un-erased. Fowler and Cooper, on the other hand, after having given a different account of the conversation preceding the actual alteration, and of the object of the alteration, said that the entire alteration, in its present form, including the initials, was written by Isham at once, who at the same time erased the word "you," and that the letter was delivered to them in the form in which it now appears. Cooper's statement in his direct evidence, as to the object of the alteration, was that he said to Isham, "I want something specified there to show that you are to take care of that paper when it comes due," and that then,

after a question to Judge Gilhooly, Isham wrote in the interlineation, "to be cared for by the company and H. H. I.," and scratched out the word "you." On cross-examination, being asked as to the language of his objection to the letter, he stated, "I wanted Mr. Isham to take care of that note, and wanted something put in that instrument so that he would take care of it," and that Judge Gilhooly did not, as he remembers, say anything after the alteration had been made by Isham, except that it was all right. Fowler's statement on this point is substantially similar. No objection was made on either side to the admission of the evidence relating to the circumstances under which the initials were written, or to the object of writing them. Nor does the attention of the court or counsel on either side seem to have been specially directed, during the taking of the evidence, to any supposed objection that in a court of law the initials "H. H. I." must be read into the contract, as a part of the contract, independent of the intention of all the parties in their insertion, or to any objection that for the correction of a mistake in so locating the initials that they might be read as part of the contract, instead of a mere notation of an interlineation, the remedy of the defendant was to apply to a court of equity to correct the mistake. On the contrary, the statements of the four witnesses were received as to the entire transaction relating to the alteration of the contract, and the intentions with which all the alterations were made and the initials were placed on the paper.

In charging the jury the learned justice (whose charge is set out in full on the record) stated that the disputed question between the parties was what alteration was made; and after giving a statement from the plaintiff's evidence, substantially as above, he gave Judge Gilhooly's statement of the entire alteration, as follows: "Then Isham took his pen and interlined the words 'the Company and by,' making it read, 'by the Company and by you.' Judge Gilhooly then suggested that Isham should put his initials, 'H. H. I.,' to witness the alteration. Isham substantially testifies in the same way. Fowler and Cooper as positively assert that Isham agreed to be responsible for the note, and that Isham then wrote in the interlined words as they now appear, and also erased the word 'you.' The plaintiffs say Isham did alter it as it now is. Isham says he did not. The question is, which statement will you accept, under the evidence?" The justice, after calling attention to the special facts appearing in the case bearing upon the main issue, then said that all these and the other evidence in the cause must be considered, and that the jury must settle "whether you will accept the evidence on the part of the plaintiffs or that on the part of the defendant." The complainant's counsel do not claim that up to this point the rules of law, as laid down by the justice at the trial, required the jury to read the initials "H. H.

I." into the contract, as part of it, but they insist that this was the effect of a subsequent refusal to make a special charge which they requested him to make. The defendant requested the judge to charge "that if the jury shall be satisfied from the evidence that the initials 'H. H. I.' were inserted in the letter of February 8, 1894, for the purpose of noting an interlineation, then the plaintiffs are not entitled to recover in this action." This charge was refused, not in absolute terms, but refused "except as charged," and to this an exception was taken. On the application for a new trial, it was claimed in reference to this refusal that it was an error of law, for the reason that, whether the word "you" was crossed out by Isham or not, he could not be held unless the initials were written as part of the text. In reference to this, as well as the other legal points raised, no error was found by the supreme court, and the rule was discharged. The complainant claims formally by his bill that this refusal to charge, "in effect, declared that that purpose for which complainant's initials, H. H. I., were inserted, could not be considered in a court of law," and that by reason of this ruling, affirmed on application for new trial, complainant's defense arising out of this alleged mistake in placing his initials where they could be read into the contract was in fact overruled, as an equitable defense not admissible at law. This overruling of an equitable defense not available at law is the special equity upon which complainant applies to a court of equity, notwithstanding the verdict, for relief, and on the general jurisdiction of a court of equity to reform mistakes in written instruments. The affidavits to the bill, and the answer under oath, so far as relates to the circumstances of the alteration, and to the statements made as to the object of the insertion of the initials in the letter, present substantially the same case on each side, as presented at the trial at law, except possibly in the following particular: In the affidavits to the present bill it is stated by Isham that there was no margin to the paper in which to place the initials, and that they were underscored by him, with the object of parenthesizing them. In the evidence at the trial I have not found this statement of the reason of the location of the initials, or of the underscoring, given by either Mr. Isham or Judge Gilhooly. This is, however, a matter of detail, and, so far as relates to the facts at issue, the defendants here place themselves substantially upon the same ground taken by them in the suit at law; and they set up specially, by their answer, that the verdict and proceedings at law are conclusive upon the facts now in issue on this bill, and pray the same benefit thereof as if the verdict and judgment had been pleaded. In relation to obtaining the benefit of a former adjudication, our practice, as I understand it, permits the defense to be raised by answer as well as by a formal plea, following in this respect the general rule of the American courts.

Lyon v. Tailmadge, 14 Johns. 501, 511; *Black*, Judgm. § 783. And the defense of former adjudication being in its very nature a preliminary question in the cause, which should regularly be disposed of before proceeding to examine the evidence anew on the merits, the proper practice would seem to be that where this preliminary question on the record is ripe for decision, on the application for preliminary injunction, and no special reason appears for reserving the decision of the question until final hearing, the question should be disposed of as a preliminary question on the motion for preliminary injunction. This was the course taken by Chancellor Williamson in *Brown v. Railroad Co.* (1860) 13 N. J. Eq. 181. An injunction was here dissolved on motion upon the ground, among others, that the claims and issues involved in the cause had been virtually decided in a prior suit between the parties in another state. The judgment in that case was obtained in another state, and had not been formally pleaded as a bar, but it appeared on the record; and Williamson, Ch., says (page 186): "This court, sitting as a court of equity, ought not to permit a party who has had his rights fully investigated and decided in a court of equity in another state to avoid a final decision in that tribunal, and to raise the same questions upon the same facts, and to ask a reinvestigation at the hands of this court." He therefore considered the question of *res adjudicata* on motion to dissolve the injunction, and dissolved the injunction and dismissed the bill upon this ground. If a preliminary injunction in the present case would, under this practice, be dissolved on motion, and the bill dismissed, it would seem to be clear that no preliminary injunction should go, but that the application should be refused. So far as relates to the effect of the verdict, the case has been fully presented on both sides; and, in view of the fact that the entire proofs which would be relevant to this point on final hearing seem to be presented on this application as fully as they would be presented on final hearing, it is a case where, in the interest of all parties, this preliminary question should be disposed of on this application, instead of deferring decision upon it until final hearing, where it will still remain as the preliminary question after the taking of evidence on the issues. This course will also probably enable the parties, with the least delay, to obtain a decision on appeal on this preliminary question. I will therefore proceed to consider and dispose of this question on this application.

Where the defense is clearly an equitable one, which could not be made available at law, it is entirely settled that a court of equity can relieve against a verdict obtained purely on the legal liability. *Railroad Co. v. Titus*, 27 N. J. Eq. 102, and cases cited page 106, approved on this point on appeal, 28 N. J. Eq. 269, 270; *Holmes v. Steele*, Id. 173, 176; *Smalley v. Line* (Runyon, Ch. 1877) Id. 348, 352. *Borcherling v. Buckelshaus* (1892) 49 N.

J. Eq. 342, 24 Atl. 547, also decides that where the defense offered at law is overruled at the trial as being in fact an equitable and not a legal defense, the verdict and judgment is not an estoppel to a bill, based on the equitable defense, to be relieved against the verdict, and that the ruling of the court of law at the trial may be accepted as final on the question of its admissibility at law, without taking the review of a higher court on exception and error. The ruling of the trial judge which is here relied on as having the effect of overruling the equitable defense offered by complainant was sustained on review by the higher court, and must therefore, undoubtedly, be taken as the law of the case. The crucial question in the case, however, is whether this refusal to charge, so sustained, can, under the circumstances of the trial, shown by the entire evidence and charge, be fairly construed to have been a ruling that in a court of law the initials must be read into the contract, as part of it, or to have overruled the defense set up, that the initials were so placed by mistake. This alleged mistake in the location of the initials is the only equitable defense or claim on which an injunction can now be based. For although a court of equity may have jurisdiction to declare an instrument forged, and to order it to be delivered up (*Peake v. Highfield* [Gifford, M. B., 1828] 1 Russ. 559, and cases cited), yet the issue of forgery is generally sent to a jury in such cases, and in this case the verdict of the jury is plainly final in favor of the plaintiffs on the question of forgery, which can, as it seems to me, no longer be controverted, either alone or in connection with the question of the mistake.

Proceeding, then, to the consideration of the question whether the equitable defense of mistake in locating the initials was overruled by the refusal to charge, it is clear, as a starting point, that it was not, in terms, a ruling to the effect that the initials must, in the court of law, be read into the contract as part of it, and that the question of the intention of placing them could not be admitted. No such claim is made, nor can it be claimed that any such rule of evidence was applied at all in this case, or that the complainant was prevented in the trial at law from giving as fully as he has here given on his affidavits to the bill his entire case as to the identity of the paper signed, and as to his intentions in placing his initials upon the paper, as well as in relation to the erasure; and, in refusing to charge, the justice did not refuse absolutely, but only refused "except as he had charged," thereby against giving to defendant the benefit of his evidence on this point. This refusal, as it seems to me, certainly was not intended by the justice as instructing them that they must read the initials into the contract notwithstanding the defendant's evidence. I do not think it could have been so interpreted by the jury, nor does it seem to have been presented by counsel to the supreme court as having that effect. The objection to

this ruling, as there taken by the briefs of counsel, which have also been submitted to me as part of the record to be considered on this application, was that by the refusal the justice failed to give to defendant the benefit of a ruling to which he was entitled, viz. that he could not be held unless the initials were read into the contract, whether the erasure of the word "you" was afterwards made or not, and that by this refusal the effect of the erasure was thereby magnified, and the jury misled. But it was not at all claimed by defendant's counsel in the briefs that the ruling had the effect now insisted on, of requiring the jury, in a court of law, to read the initials into the contract, without regard to the evidence of their intent and purpose. In reference to this refusal to charge, no error was found by the supreme court, but no opinion was filed, so that there was no express adjudication or ruling by the supreme court that the refusal to charge had the effect now contended for, or that, if so construed, it properly declared the law. There is therefore, on the record of the case at law, nothing to show that the rule of legal evidence now claimed to have been applied was expressly laid down, either at the trial or by the supreme court; and even on the assumption that this court is entitled in this case to infer or deduce such reading, in the absence of an express declaration to that effect by the court of law, it is certain, I think, that such deduction or inference must appear to be fairly warranted on a consideration of the whole case on the point in question as presented at the trial. Upon such consideration, I do not think the ruling in question, or its affirmance, can be considered as having the effect now claimed. Considering the present application in its entire scope appearing from the record, the complainant's situation, stated in its most favorable aspect, seems to be as follows: He was sued at law upon a written instrument in relation to which he had two defenses,—mistake in locating his initials in one portion of the contract, and alteration after execution of another portion. Without applying to a court of equity to take jurisdiction as to the defense of mistake, either alone, or as drawing to it also the jurisdiction to direct a delivery up of the altered instrument, he set up at law, on the record, the single defense of alteration. The case, as presented by both sides at the trial, was one in which the direct evidence on the two points of initials and erasure was necessarily intimately connected and interwoven; and defendant's evidence produced at the trial embraced all of his direct evidence relating to mistake as well as to alteration, which was received without objection, and the jury were clearly directed by the trial justice that, if the evidence for defendant was believed, no action at law was sustainable. The justice refused to direct the jury that defendant's evidence as to mistake, if believed, created a primary and separate cause of defense, independent of the defense of alteration, but did not withdraw the

defense of mistake in connection with the defense of alteration, as one entire defense, from the jury, and, on the contrary, again expressly instructed them to find in favor of the defendant to the action if his statements as to the execution of the instrument (which included both mistake and alteration) were believed. The jury found a verdict against defendant, and, on review of this verdict, complainant claimed that the defense of mistake was a separate and primary defense, to the full benefit of which the defendant was entitled, and that the trial judge, by the refusal to charge, had deprived him of the benefit of this defense to this extent. The court on review found no error at law, or misdirection, in the manner of submission. The complainant now applies for equitable relief against the verdict, on the ground that the defense of mistake was overruled at law. The relief in equity must be granted, if at all, by the trial separately of the defense of mistake; for, as to the defense of alteration, the verdict of the jury is clearly final and conclusive. If this be the correct statement of the case, then, as it seems to me, it is clear that the present application to equity is really based, not on the fact that the defense of mistake was overruled at law, as being an equitable defense only, but that the trial court, after admitting the defense as a defense at law, failed to give it the full separate effect to which the defendant in the action claimed it was entitled in this particular case when once admitted as a defense in the court of law. The court, on review, held that this course was not erroneous at law, but did not declare that the evidence relating to mistake was not admissible at law, and, on the whole case, refused to disturb the verdict. To grant now, in equity, a retrial of the case solely upon the separate defense of mistake, would be, as it seems to me, a review of the correctness of the decision of the supreme court as to the manner in which the defense of mistake, when once admitted in a court of law, should be treated in connection with other defenses, rather than an instance of exercising the undoubted jurisdiction of a court of equity to sustain an equitable defense which is not admissible and has been overruled at law. The defense of mistake in this particular case has been, by the conclusive action of the court of law, substantially held to be a defense concurrent at law and in equity, and it has been admitted as such. The treatment of this defense by the court of law after admitting it as a legal defense may be ground of review upon writ of error, but cannot be ground of retrial of the defense in equity for the purpose of correcting this supposed error of the court of law. I am of opinion, therefore, that the only question of fact which can now be relied on as a basis of equity jurisdiction has been substantially tried in a court of law, and the verdict is final upon this court, so far as this question is concerned. The application for preliminary injunction is therefore refused, and the rule to show cause is discharged.

TARLTON v. GILSEY et al.

(Court of Chancery of New Jersey. May 22, 1897.)

TESTAMENTARY POWERS—JOINT EXECUTION.

Where a will authorizes such of the executors "as shall qualify and survive" to sell testator's lands, all who qualify and survive must join in a contract of sale, and one of them cannot delegate to another the power to act for him, at least unless all have jointly agreed on the terms of sale, so that no discretion remains to be exercised, and even then the contract must purport to be that of all.

Bill by John J. Tarlton against Mariana Gilsey and others for specific performance of a contract to convey land. Dismissed.

Flavel McGee and W. A. Helsley, for complainant. Charles L. Corbin, for defendants.

EMERY, V. C. This is a bill for specific performance filed by the purchaser to compel the executors of Andrew Gilsey to carry out a written contract for sale of lands belonging to decedent's estate. The executors by the will had power to sell the lands, which power was conferred expressly upon "such of them as shall qualify and survive"; but only two of the four executors who proved the will signed the contract of sale. These two executors who had not signed the contract refused to join in a deed, and the complainant refused to accept a deed executed only by the two who signed the contract. The written contract of sale, dated May 20, 1896, is between "the executors of the estate of Andrew Gilsey, parties of the first part, and John J. Tarlton, party of the second part," and is signed "Andrew Francis Gilsey, Exc.," "Frederick C. Gilsey, Exc.," "John J. Tarlton." It purports to be under the hands and seals of the parties, one seal being attached for all parties, opposite to the signatures. It does not appear on the face of the contract itself that there were any other executors of the estate, and from the undisputed evidence in the cause it appears that it was not the intention of the parties that the other two executors should execute the contract of sale. Duplicate contracts in the above form were exchanged at the time of the signing of the agreements by these three persons, and the payment of \$500, portion of the \$6,000 purchase money, was then made. As to compelling all of the executors to join in the conveyance, the bill is based on the allegations that the two executors, in signing the contract and receiving the money, acted not only for themselves, but as the representatives of all the executors, and with their consent and under their instructions. By the terms of the contract \$500 was to be paid on the signing of the agreement, which was paid, \$2,500 additional was to be paid, on passing the title, on or before July 1, 1896, and \$3,000 to be secured by bond and mortgage. The complainant duly tendered the \$2,500, and the bond and mortgage for \$3,000; but the two executors who did not join on the contract refused to convey according to the terms of the

contract, and the complainant declined to accept a deed from the two executors who did sign. Subsequent to this tender and refusal, the defendant executors who had proved the will conveyed the premises to the defendant Baxter, who is by the bill charged with being a purchaser without consideration and with notice of the contract. I find, on the evidence, that although Baxter paid the purchase money, about \$7,000, he did have, through his attorney, sufficient notice of the contract, or of facts to put him on inquiry, so that he is not a bona fide purchaser. The main issues of fact and law relate, therefore, to the contract with the executors and its enforcement against all of the executors.

The defenses set up by the two executors, Andrew and Frederick, who answer separately, are that in making the contract they did not represent the other two executors, and did not make the contract by their consent or under their instructions, and that these two repudiated the contract and refused to execute it. They further, by way of cross bill annexed to the answer, allege that the contract was made by them relying upon representations, made by complainant, that the property was purchased by him for a residence, that these representations were false, and that complainant in fact purchased the property for a steamboat landing, which it is alleged would depreciate the other lands belonging to the estate. They ask, therefore, that the contract may be declared void and be delivered up. Complainant, by replication to the cross bill, denies these charges. The two executors who did not join in the contract, together with the two other executors named in the will, who did not prove the will, and who are also parties to the suit, deny that the executors Andrew and Frederick represented them in signing the agreement or making the contract, or acted with their consent or under their instructions, or that it was the intention of the executors to bind them, and deny that they are bound by the contract. Baxter, the subsequent purchaser, by his answer, denies the power of the two executors to bind the estate by their contract, sets up his purchase from the executors on July 1, 1896, for \$7,620, then paid to them, and their deed to him for the premises, but does not deny notice of complainant's contract at the time of his purchase.

Upon the pleadings and proofs in the cause, I reach the conclusion that specific performance of the contract by all of the executors must be denied. The right of the executors to convey lands of the testator in this case is solely by virtue of the power conferred upon them by the testator's will. This power to sell is given by the will to those who qualify and survive, and all who have qualified must join in the deed in order to pass the title. This principle is not disputed, but it is contended that where there are several executors one of them may delegate to another the power to act for him, and that this dele-

gation may be express or by course of conduct. As to some matters relating to the acts of executors in the settlement of estates this may be true, but where the question relates to the power to sell lands, which is by its very nature a personal trust and confidence in the executors, the exercise of this trust and confidence reposed by the testator cannot be delegated by one executor to another, either by power of attorney or otherwise. As stated by Chancellor Kent in *Berger v. Duff* (1820) 4 Johns. Ch. 369, the principle "*Delegatus non potest delegari*" applies in such cases. "The power given to executors, in such cases," he says, "is a personal trust and confidence, to be exercised by them jointly according to their best judgment. One executor, in this case, cannot commit his judgment and discretion to the other, any more than to a stranger." In this case Chancellor Kent refused to require a purchaser to take a deed under an agreement of sale signed by one executor for himself, and under a written power of attorney from the other executor authorizing the executor who sold to sell on such terms as he deemed expedient. The agreement by one executor under the power of attorney was held not to be a due execution of the power granted by the will. The same principle is stated in 1 Sugd. Powers, *214, and is put upon the same grounds. In *O'Reilly v. Keim* (1896) 54 N. J. Eq. 418, 427, 34 Atl. 1073, it was also held (page 427, 54 N. J. Eq., and page 1077, 34 Atl.) that joint powers of sale must be jointly exercised, and each of the joint donees of the power must exercise his own discretion and will in the sale. These authorities go at least to the extent that where the contract to convey, entered into by one executor for himself and another executor, is in fact an exercise by one executor for the other of the discretion conferred by the will, such contract is not a due execution of the power given by the testator. Whether the same rule would apply if all of the executors, by previous consultation and joint exercise of their discretion, had fixed the terms of sale, so that there remained no longer any discretion to be exercised, may admit of question. In such cases it may perhaps be held that one executor might then be authorized, either by parol or in writing, to make a contract to convey as an attorney for the other and in such other's name, which would be enforceable. This is stated to be the rule with reference to powers of appointment. 1 Sugd. Powers, *214.

But this rule, or qualification of the general rule, is not applicable in the present case, for two reasons. In the first place, the contract was not in fact signed, and does not purport to be signed, by the two executors who did sign, or either of them, as the attorneys of the two who did not sign, but purports to be only their own contract as the executors of the estate, and these two executors who did not sign are therefore not bound by any contract in writing to convey

these lands, signed by them or by their agent lawfully authorized, as is required by the statute of frauds. In the second place, the evidence fails to show that the sale at the price fixed was with the previous consent of the two executors who did not sign. Complainant's evidence does show, as I conclude, that the executors who did sign represented to complainant that they had consulted with the other executors, and that the sale at the price fixed (\$6,000) was by their consent; but this evidence only affects the two who signed. As to the other executors the proof is, by the only witnesses called on the subject, that the price fixed on the consultation of all of the executors previous to the agreement was \$6,500. After the agreement to sell at \$6,000 was reported to them, they refused to approve it; and although the circumstances of the case are such as to show that other reasons than this difference in the price to be paid by complainant may have brought about this refusal, yet if in fact the price had been previously fixed at \$6,500, and no less, as the witnesses all state, I cannot hold that the contract for a sale at \$6,000, as executed by the two executors, was in fact binding on the other executors, as an execution expressly authorized by them, even supposing it could be so authorized. If not authorized by them, then the executors who did not sign, not having exercised the trust confided to them by the will, had the right to refuse to approve it. Nor can I, on complainant's case against these executors, which involves only the question of previous authority to sign the contract, decide upon the sufficiency of their reasons for refusing to approve the contract subsequently. Complainant was obliged to call these executors as his own witnesses upon the question of the price fixed for sale at their consultation before the contract, and three of the executors, Andrew, Frederick, and Mary, swear positively that \$6,500 was the limit fixed, and that, when the sale at \$6,000 was reported, Mary and Victor, the other executor, refused to approve. Victor was not called. This is contrary to Andrew's and Frederick's statement made to complainant at the time of the contract, and, so far as they are concerned, might, perhaps, in view of all the circumstances of this case, be considered less reliable than their statements at the time; but it is the only evidence to affect the executors Mary and Victor, and I am not justified in finding against them that there is any sufficient evidence that this sale for \$6,000 was made with their consent, and that they had previously authorized Andrew and Frederick to sell for that price. If they had not in fact so previously authorized them, then it seems entirely clear that they have not exercised the trust and confidence reposed in them personally by the testator in relation to the sale of this land, and therefore the agreement executed by the other executors would not be sufficient execution of the power under the will, even if the other executors had signed

their names as parties to the contract. The decision of our courts, referred to by the counsel for complainant, on the powers of an attorney to sign a contract, are all cases in which the question arose on the authority conferred on an agent by his principal, and were not cases of executions of joint powers by donees of the power, nor did they involve the principle of the right to delegate powers which were themselves delegated by will or otherwise. *Long v. Hartwell*, 34 N. J. Law, 116; *Milne v. Kleb*, 44 N. J. Eq. 378, 14 Atl. 646; *Doughaday v. Crowell*, 11 N. J. Eq. 201.

The bill for specific performance must therefore be dismissed upon this ground. The question arising on the cross bill is one of fact, and, without going into the evidence in detail, I will merely state that the charge of misrepresentation is not sustained, and the cross bill is dismissed. At the argument application was made by defendants to dismiss the cross bill without prejudice, but this was not consented to, and it is proper that the dismissal should be absolute and on the merits.

KLIE et al. v. VON BROOCK et al.

(Court of Chancery of New Jersey. April 30, 1897.)

LEASE—PROPERTY DEMISED—WASTE—EQUITABLE
RELIEF—ADJOINING LANDOWNERS—
LIGHT AND AIR.

1. The owner of a corner lot covered by a building abutting on a blank wall at the rear bought the adjoining lot, and began to erect on it a one-story building with basement and vault. There was an understanding from the first that V. should have a lease of the new building for a restaurant, and his wishes were followed in the arrangement of the interior. The building covered the whole lot to within 10 feet of the blank wall. From the center of the rear a projection extended about six feet further, but to the width of half the lot only, leaving on each side an open space, which was excavated to nearly the depth of the basement, and walled with brick. Ordinary windows opened on these spaces, but there were no doors opening on them or the yard, four feet wide, at the rear. The object of such arrangement was to afford light and air to the basements of both buildings. Before the building was completed, V. knew just what it would be, and a lease was made which recited that the lessee had hired "all that certain store, basement, and vault now in course of erection on that certain lot of land and premises * * * known as 'street number 35, N. street.'" Held, that the building only was demised, and not the spaces or yard in the rear.

2. The lessee rented from a third person the lot next adjoining, and to the building on it added a brick extension in the rear, the wall of which was built up to the line. In this wall were left places for a window and door opening on the yard, the intention being to open a door from the rear of the restaurant. The owner of the restaurant thereupon closed the openings left in the third person's wall by building up to the line on his side a brick wall 12 inches thick. Held, that the rights of the lessee in the third lot were no greater than those of its owner, and the owner of the restaurant lot was justified in so closing the openings.

3. Since the lessee's only right in the yard was that to light and air, the building of the 12-inch wall was not a material diminution, and

was excused by the fact that his own wrong in leaving the openings on the yard made it necessary to construct the wall.

4. A lessee in possession under a lease for five years commits waste when, without the permission of the lessor, he partially destroys a party wall by cutting out an opening for a door to connect with adjoining premises, though done with the permission of the other joint owner of the wall.

5. Where a person owning two adjoining and connecting buildings, in one of which he keeps a saloon, lets the other for a restaurant, on the express condition that no beverages shall be sold there in competition with the saloon, and the lessee hires the premises adjoining the restaurant on the other side, and commits waste as against the restaurant owner by cutting a door through the party wall to connect with the other premises, intending to open a saloon therein, the restaurant owner may require the lessee to repair the waste at once by closing the door, instead of accepting security for restoration at the end of the term.

Bill by John D. Klie and John F. Klie against Charles Von Broock and Walter W. Wiederman for injunction. Heard on the bill, combined answer and cross bill, and replication. Decree for complainants.

William S. Stuhr and John I. Weller, for complainants. A. I. Smith, for defendants.

PITNEY, V. C. The undisputed facts in the cause are as follows: The complainants, prior to March, 1895, were the owners of a corner lot covered by a building, in the city of Hoboken, bounded on the north by Newark street, and on the east by River street. The building was four stories high, about 36 feet front on Newark street, 70 feet on River street, and had a width in the rear of 42½ feet from River street. The increased width in the rear is due to an offset of 6½ feet in the west side line at a distance of 33 feet from Newark street; the side lines being parallel to each other. The first floor was used by them as a liquor saloon, and the other floors as an apartment house. The legal title to the lot adjoining the foregoing on the west, and fronting on Newark street, was at that time held by the Hoboken Land Improvement Company, subject to a contract to purchase from that company held by Messrs. Ernst and August Schellans, and there was a small building upon it,—as I infer, one story in height. Late in February, 1895, the defendant Von Broock purchased this contract from the Schellans for \$13,250, and immediately assigned it to the complainants for the same consideration. That lot was 28 feet 2 inches in front, 70 feet deep, and 21 feet and 6 inches in width in the rear, fitting in, on the east side, to the offset above mentioned in the west line of the complainants' corner lot. This lot was known as "No. 35 Newark Street." On the west of it was a lot known as "No. 39 Newark Street," also owned by the Hoboken Land Improvement Company, upon which was erected a four-story building, and between Nos. 39 and 35 was a 12-inch brick party wall, extending back about 35 or 40 feet. On the rear of No. 39 was a wooden extension, 10 or 12 feet high, to the full depth of

the lot, and abutting on the easterly line, without any openings towards No. 35, and forming a fence or division between the two lots. The rear of these lots abutted on the blank wall of a theater. Immediately after the complainants became the assignees of the contract for No. 35, they removed the old building, and commenced the erection of a one-story building with basement upon it. There was an understanding from the first between complainants and the defendant Von Broock that Von Broock should have a lease of the new building for a restaurant. He was consulted with regard to the interior arrangement of it, and his wishes followed in some of its details. Before it was finished, to wit, on the 14th of June, 1895, the complainants and the defendants entered into a written lease and agreement as follows: "Witnesseth, that the said parties of the first part have hereby let and rented to the said parties of the second part, and the said parties of the second part have hereby hired and taken from the said parties of the first part, all that certain store, basement, and vault now in course of erection on that certain lot of land and premises situate on the southerly line of Newark street, in the city of Hoboken, Hudson county, New Jersey, particularly mentioned and described in a certain agreement dated September twenty-fourth, eighteen hundred and eighty-three, and made between the Hoboken Land and Improvement Co. and William Hersee, and recorded January 17th, 1889, in Book 17 of Miscellaneous Records for said Hudson county, on p. 367, and assigned on the 19th day of June, 1894, by the said William Hersee, to Ernst Schellan and August Schellan, and by the said Ernst Schellan and August Schellan to Charles Von Broock, by assignment dated Mar. 4, 1895, and by the said Charles Von Broock assigned to said John D. Klie and John F. Klie, by assignment dated Mar. 4, 1895, and recorded, etc., as by reference to said agreement and assignments will fully appear, and known as premises 'street number 35 Newark street,' Hoboken, New Jersey, excepting and reserving to the parties of the first part the right to use, in connection with their business, the ladies' toilet room in said leased premises, in common with the said parties of the second part, during the hours that said leased premises are kept open by said parties of the second part for business purposes, for the term of five years, to commence on the first day of August, 1895, at the yearly rent of \$1,200, payable in equal monthly payments in advance on the first days of each and every month during said term, and also all water rents or rates which may be levied or assessed against said premises during the continuance of this lease. And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises, and to remove all persons

therefrom. And it is further agreed that all the necessary repairs to said leased premises during the continuance of this lease, both inside and outside, excepting repairs to the roof, shall be made by the said parties of the second part at their own cost and expense. And the said parties of the second part covenant to pay to the said parties of the first part the said rent as herein specified, to wit, the sum of \$1,200 a year, in equal monthly payments in advance on the first days of each and every month during the terms of this lease, and also all water rents or rates which may be levied or assessed against said premises during the continuance of this lease. And the said parties of the second part further covenant that they will not assign this lease or underlet the said premises, or any part thereof, to any person or persons whomsoever, without first obtaining the written consent of said parties of the first part. And the said parties of the second part covenant that they will not, during said term, sell upon said leased premises, or offer for sale thereon, or give, in connection with their business or otherwise, with or without consideration, any vinous, spirituous, or malt liquors, or any ale or lager beer, under penalty of forfeiture of this lease or the term of said parties of the second part thereunder. And the said parties of the second part further agree that they will not, during said term, sell or offer for sale any cigars on said premises, excepting such as they may purchase for the purpose of such sale from said parties of the first part, and which the said parties of the first part agree to sell and furnish to said parties of the second part at the cost price of the same to said parties of the first part and a profit thereon of ten dollars a thousand on all such brands of cigars as are or shall during said term be sold by said parties of the first part in their premises adjoining said leased premises for ten cents apiece, and a profit of five dollars a thousand on all such brands of cigars as are now or may during said term be sold by said parties of the first part for five cents apiece. This lease is made and accepted on the following express conditions: First, that in case the parties of the second part shall during said term sell upon said leased premises, or offer for sale thereon, or give away in connection with their business or otherwise, with or without consideration, any vinous, spirituous, or malt liquors or any ale or lager beer; or, second, in case the said parties of the second part shall assign this lease, or underlet the said premises or any part thereof, without the written consent of the parties of the first part,—that then, in either of said events, the parties of the first part, their heirs or assigns, in their option, shall have the power and the right of terminating and ending this lease immediately, and be entitled to the immediate possession of said premises, and to take summary proceedings against the parties of the second part, or any person or persons in possession

as tenant, having had due and legal notice to quit and surrender the premises, holding over their term. And at the expiration of the said term or the termination of this lease the said parties of the second part will quit and surrender the premises hereby demised in as good a state and condition as reasonable use and wear thereof will permit, damages by the elements excepted. And the said parties of the first part covenant that the said parties of the second part, on paying the said rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold, and enjoy the said demised premises for the term aforesaid."

The building was erected according to plans and specifications, under the supervision of an architect, and the lessees undoubtedly knew, when they signed the lease, just what the building would be when finished. It covered the whole lot from the front to within about 10 feet of the rear. From that point a projection extended about 6 feet further,—that is, to within 4 feet of the rear, but to the width of only about 12 feet, leaving on each side an open space of about 5 or 6 feet, which was excavated to nearly the depth of the basement, and walled in with brick walls a little higher than the earth, thus making an ordinary window area, with a sink in the bottom to carry off rain water. Besides these two window areas, there was left a clear strip of open yard about 4 feet wide, extending across the whole width of the lot. The object of this was to afford light and air to the basement of the new building, and also to leave light and air for the westerly side of the main floor and basement of the rear of the four-story corner building. In building on this lot the complainants made use of the party wall between No. 35 and No. 39 as far to the rear as it reached, and then built an independent wall on their own side of the line as far as the main body of the building, which, as we have seen, is 10 feet from the rear of the line. Upon each of the two areas two windows opened from the basement,—one upon each from the main building, and one upon each on the side of the rear extension. There was no door leading into the back yard or areas. The rear basement was used as a kitchen, the range being on the west. On the main floor was a gentlemen's toilet room on the west side, and a ladies' toilet room on the east side adjoining the complainants' liquor saloon, and there was an open doorway connection with the complainants' saloon, so that persons could pass freely from one to the other. The restaurant was finished in August, 1895, and the defendants immediately took possession, and have since occupied it for their business. By the permission of complainants, the defendants, in the fall of 1895, inclosed the easterly area, and placed in it their ice box and refrigerator. In the spring of 1896 the defendants conceived the idea of enlarging their business, and rented from the Hoboken Land Improvement

Company the premises adjoining on the west (No. 39), and immediately commenced to alter them, and fit them up for a restaurant. In doing this they tore down the wooden building in the rear, which had formed a dividing barrier between Nos. 39 and 35, and erected a one-story brick building in its place, with the side wall placed, or intended so to be, up to the line of the Hoboken Land Improvement Company's land, and left in this wall two open spaces on the side next No. 35,—one a window opening upon the west area of No. 35, and another a door opening upon the main yard. The object of this door was to make a passageway from No. 39 to the kitchen of No. 35, and with this view they tore out the window looking from the kitchen upon the west area, and prepared to make a door in its place, by enlarging the opening. Complainants, being apprised of this project, protested, and forbade it, and made use of a window which opened from the rear of the corner lot occupied by them upon the yard of No. 35 to gain access thereto for the purpose of building a brick wall as a hoarding or barrier on the rear of the westerly line of No. 35, and thus shut up the window and door so proposed to be opened upon their lot from No. 39. In this attempt, made on Saturday, May 9th, they were forcibly resisted by the defendants. At about the same time they heard that the defendants were about to break through the party wall between No. 35 and No. 39, in the basement, and make a passageway between the two premises. They thereupon prepared their bill in this cause, and presented it to a vice chancellor on the afternoon of May 11th, setting out their title to the two lots, the lease to the defendants, and most of the facts hereinbefore stated, and praying an injunction against the breaking through of the party wall in the basement, and also against interference with their entry upon the yard in the rear of No. 35 to erect a brick hoarding against the door and window opening upon their premises from No. 39. A restraining order was granted, but before it was granted or served the defendants had succeeded, by employing laborers on Saturday evening, May 9th, to work that night and the next day,—Sunday,—in cutting an opening in the party wall, and constructing a door and passageway therein between the two buildings. Under the protection of the restraining order the complainants gained access to the inclosed yard in question from a window in the rear of their corner building, and erected a solid brick wall 12 inches wide, and about 12 or 14 feet high, close up to their westerly line, partly upon a new foundation, and partly upon the stone coping of the area wall of the westerly rear area, the result of which was to prevent the defendants from using the door and window which they had left in the wall of the new building on the Hoboken Land Improvement Company's land, but to leave them the use of the passageway resulting from the breaking through of the party

wall. The defendants subsequently partially restored the window in the basement, and inserted in it a ventilator operated by electricity to cool the air of the kitchen. The defendants, by their cross bill, pray that the complainants may be decreed to abate and take down this wall in the rear. Complainants pray that the defendants may be restrained from using the passageway in the party wall, and may be decreed to fill it up, and restore it to its former condition. The questions litigated are: First. Did the lease from the complainants to the defendants include the yard in the rear of the restaurant, or did it cover only the right of the use of the yard for light and air? Second. Were the complainants justified in building the brick hoarding or barrier on the west side of the rear of lot No. 35? Third. Was the breaking through of the party wall, and inserting a door in the basement, waste on the part of the defendants? And, if so, then, fourth, should the defendants be ordered to restore it?

I think the first question must be resolved in favor of the complainants. The construction of the clause of demise in the lease is not free from difficulty, but it seems to me that the better view is that the thing demised was the building itself as it stood, and not the yard in the rear. If the parties intended to include in the letting the whole lot, it would have been easy to express that intention in a few words. And the express mention of the building is an indication that nothing more was intended to be demised. The word "on" in the first part of the clause cannot be read as "and." Then the plan of the building must be considered. There were no doors opening upon the little yard, and the only means of access to it were ordinary windows, and such do not indicate any intention that they should be used as doors in order to gain access to the yard, but the contrary. And, in fact, the yard was capable of little or no actual occupation or use. Then, again, complainants would naturally desire to keep it free from obstructions to light and air for their corner lot, and free from any objects which might in any degree annoy their customers or tenants. Stress was laid by defendants' counsel on the last clause of the described premises, namely, "and known as premises 'street number 35 Newark street.'" But, clearly, these words, by correct grammatical construction, refer to the preceding description of the lot on which the building demised was in course of construction, and not to the thing demised. Further, I am unable to distinguish between the two little areas and the remainder of the uncovered space. They are simply depressions in the earth, made to give light and air to the basement; and the rain-water sinks in their bottoms indicate that they were not constructed or intended as a part of the building so as to pass with it. My conclusion is that the only right in this yard which the defendants acquired by their lease was the right of light

and air, and this right flowed from the fact that the building demised to them was provided with windows opening upon it.

Second. As to the right of the complainants to erect the brick wall intended as a hoarding or screen to obstruct the newly constructed door and window which opened into this yard and area from No. 39. This question must be considered precisely as if that work had been done by the Hoboken Land Improvement Company itself, and the defendants were not tenants of that building; for I cannot see that the defendants have the right to add their right as lessees of No. 39 to that as lessees of No. 35, or stand in any better light before the court on this part of the case than would their landlord of No. 39. There can be no doubt of the right of an owner of a vacant lot to erect a screen or hoarding on his own premises, in order to prevent his neighbor, who builds up to the line between them, and places windows in his building looking upon his neighbor's ground, making use of them for that purpose. In fact it is not an uncommon occurrence, and quite a natural and proper thing to be done by the person whose vacant land is about to be subjected to such a use by his neighbor. The precise question here is narrowed down to this: Whether or not the erection of the hoarding in this case was an actual infringement of the right of the defendants to the light and air of the yard in the rear of their restaurant on No. 35. It did, in a very slight degree, tend to reduce the light which entered their basement windows, by narrowing by one foot the width, or rather shortening the length, of the open space or yard in the rear of their building. But the defendants brought this slight injury upon themselves by attempting to make a use of the yard which was certainly not within the letter of their contract, and clearly not within the contemplation of the parties when the lease was made; and I think that unjustifiable attempt prevents them from complaining of the adoption by complainants of the only efficient means they had to prevent a misuse of the premises. Besides, the matter of light in the rear of the demised premises has, by the voluntary act of the defendants, become of slight importance. The window opening from the basement of the main building upon the westerly area has been devoted to the purposes of ventilation, and not of light, and the whole of the projection from the main building has been shut off from the basement by a temporary wooden partition, and the projection itself is used simply for a spiral stairway from the main floor of the restaurant to the kitchen. The eastern window of the main building has been stopped by the placing of a refrigerator therein. The kitchen itself is lighted entirely by gas.

There remains the third question, namely, that of waste. The defendants obtained permission from the Hoboken Land Improvement Company to cut the doorway through the par-

tion wall, but, clearly, that company could not give them the right to do so without the permission of the complainants, who owned one-half of the wall. And the result is the same whether we consider that ownership as of the particular one-half which was on their side of the line, or as the undivided one-half of the whole. The question, then, is whether or not, under the terms of the lease, the defendants acquired such a right in the premises as authorized them to make the opening. The opening, as first made, was between four and five feet wide, and seven or eight feet high. The bricks and mortar were actually removed, and these composed an essential part of the building itself. Now, it seems to me too plain for argument that such an abstraction amounted to waste at the common law. It was a "spoil" and "destruction" pro tanto of the building. 2 Bouv. Law Dict. tit. "Waste"; 6 Jac. Law Dict. tit. "Waste," p. 393, and at page 399, where the author uses this language, citing authorities: "If a lessee flings down a wall between a parlor and a chamber, by which he makes a parlor more large, it is waste. It cannot be intended for the benefit of the lessor, nor is it in the power of the lessee to transpose a house. So, if he pulls down a partition between chamber and chamber, it is waste. Or if a lessee pulls down a hall or parlor, and makes a stable of it, it is waste. If a lessee pulls down a garret overhead, and makes it all in one and the same thing, it is waste. Breaking of a wall covered with thatch, and of a pale of timber covered, is waste." To the same effect precisely are 7 Bac. Abr. tit. "Waste," at *256; Tayl. Landl. & Ten. § 348; Kerr, Inj. *250. *251, where the author says: "An alteration of buildings which changes their nature and character is waste, even although the value of the premises be thereby increased. Thus the converting two chambers into one, or a conversao, or the converting a hand mill into a horse mill, or a corn mill into a fulling mill, or a malt mill to a corn mill, or a logwood mill to a cotton mill, have been held to be waste. So, also, the conversion of a private house into a shop is waste. So, also, may the building of a new house, where there was one before, be waste, if it impair the evidence of title." And he cites Lord Romilly in *Smyth v. Carter*, 18 Beav. 78, for authority that a tenant will be restrained from pulling down a house and building another which the landlord objected to. "It is not sufficient," said his lordship, "that the house proposed to be built is a better one. The landlord has a right to exercise his own judgment and caprice whether there shall be a change. If he objects, the court will not allow a tenant to pull down one house, and build another in its place." And see 1 Washb. Real Prop. *113, where the learned author adopts the rule as laid down by Lord Romilly. This restriction on the right of a tenant for years is based upon the character of his tenancy. "He has the use, but not the dominion, of the prop-

erty." *Farrant v. Thompson*, 5 Barn. & Ald. 828, per Holroyd, J.

Evidence was given as to whether or not the destruction in this case materially injured the party wall. I think that the weight of the evidence is that it did materially injure it. The wall itself, being only 12 inches in thickness, was, at best, a very slight affair to maintain a four-story building; so much so, that it will, sooner or later, require a shoring on each side. Now, it seems to be contrary to common knowledge and common sense to say that taking out and absolutely abstracting a piece of the wall four or five feet wide and seven or eight feet high will not weaken it, and materially weaken it. A contrary view would result in holding that several such openings could be made in this wall without injuring the building. Then the evidence satisfies me that the attempt to properly secure and support the wall over the opening was not well carried out, and was not successful. New jambs of brick were added to the ragged edges of the opening, in order to make it square and proper to be stopped by doors. Those jambs, being of new material, required the greatest care in their construction in order to make them unite and be homogeneous with the old work; but the complainants' architect swears that upon an inspection made during the hearing he found a crack and opening between the new and the old work. Then iron beams or lintels were placed upon these new jambs to sustain the weight of the wall above. The architect in question gave it as his opinion—and I agree with him—that the proper mode of sustaining those lintels was to place them upon iron plates, placed in turn upon the top of the old part of the wall on each side, and then to key them up with iron wedges, so as to make them bear up and press against the old brickwork. Instead of this, they were simply laid upon the bare bricks of the new jambs, which, as we have seen, were, from defective construction, insufficient for that purpose. The result of this mode of adjusting them was to render them substantially useless so far as regards preventing any subsidence in the wall above the opening. The architects called by the defendants swear that the opening was made in the usual manner, and well done. But I cannot accept their judgments on this subject. It seems to me they are not sound. But, in my judgment, the test in such a case is not alone whether a material injury is done to the building, but whether it is altered in a material manner, and to an extent beyond what is fairly implied from the terms of the original contract of letting. It is said by the treatise writers, and authorities are cited for the position, that the severity of the ancient rule of waste has been relaxed, and that many alterations are now held not waste which in ancient times would have been held as waste. I have examined the cases which are said to illustrate this modification, and my conclusion is that in most of them a permission by the

owner to the tenant to alter and change the building is either found in the terms of the demise, or is to be implied from the circumstances of the case. Thus, if the owner of a dwelling in a neighborhood which is rapidly being converted from a dwelling region into a business region, lets it to a party for a long term of years, knowing that he expects to use it for business purposes, that, by implication, is permission to him to make such alterations as are necessary and usual for that purpose. And so, where a demise is made for a great number of years—say, 100 or 200—for a fair rental value of the premises, there it must be presumed that the parties intended that the tenant for years should have well-nigh unrestricted use of the premises, provided he does not reduce their rental value; for in such a case the reversion, independent of the rent, is of mere nominal value. So I should say that if a building be erected and let for an hotel, and through oversight or miscalculation some mistake in the interior arrangements occurs, which materially interferes with its beneficial use for that purpose, and requires a change, it is probable that the right to make such change could properly be inferred from the circumstances. An illustration is found in this case. At the special request of the tenants, the landlord divided the basement into two parts by a cross wall of brick, not a part of the original plan, and not necessary for the support of the building. This was done in order to keep the heat of the range in the kitchen from penetrating to the front part of the basement. When the building came into actual use, it was found that this wall was an injury, rather than a benefit, and was, in whole or in part, removed by the defendants. They assert that it was done with the consent of the landlords, but the landlords deny this. Be that as it may, I think it was not waste, and its removal was not relied upon as a part of complainants' case.

The cases in this country relied upon to show an amelioration of the strict English rule are *Jackson v. Tibbits*, 23 Wend. 341, and *Winship v. Pitts*, 3 Paige, 259. *Jackson v. Tibbits* was an ejectment by landlord against tenant based upon waste committed by the tenant in the leased premises, which were a tavern in the village of Utica, and the waste was the cutting a door between two rooms in the second story, and putting a window in the door of the cellar kitchen. It appeared that they were beneficial, and not injurious, to the premises. The judge, at the trial, charged the jury that they amounted to waste, and worked a forfeiture of the defendant's rights in all the premises. There was evidence, however, of waiver by the plaintiff of the waste. The opinion was per curiam, by Marcy, J., and he granted a new trial, not only on the ground that the act committed was not waste, but also that, according to the authorities, the whole premises were not forfeited, but only the part wasted; and, further, that there was proof from which the jury

might have inferred a waiver. Of course, in considering the effect of this case, and others like it, we must bear in mind that the courts are always anxious to save an actual forfeiture of the term. *Winship v. Pitts*, supra, was decided by Chancellor Walworth. There a tenant of a corner lot, which had vacant land in the rear abutting on a side street, proposed to erect a stable there; and the landlord, owning other property in the neighborhood, filed a bill for an injunction. The chancellor held that the mere erection of a stable on vacant land was not waste. In fact, it never was waste. A dictum to the contrary by Lord Coke was very shortly afterwards overruled. After a full review of all the cases in both countries, Prof. Dwight, sitting in the commission of appeals, in *Agate v. Lowenbein*, 87 N. Y. 604, declares that: "There can be no pretense of any relaxation of the rule against waste in the case of tearing down houses, or taking away inner walls or partitions. It would be difficult to set any limits to such acts by judicial decisions. Where such changes are desired, they should be left to the agreement of the parties." In this view I heartily concur. Then there is a distinction taken by the judges between an alteration in the outside walls of a building forming a property boundary and those more trifling alterations which may be made in the interior partitions,—taking away or cutting a door through an interior partition, or altering a street window into a door. As late as 1817, Lord Ellenborough, after hearing the most distinguished counsel of the day, held that the cutting of a doorway through the outside wall of a demised house into an adjoining house, and keeping it open for a long space of time, amounted to a breach of a covenant to repair, which was a continuing breach, and which caused a forfeiture, and entitled the landlord to recover in an action of ejectment against his tenant. *Doe v. Jackson*, 2 Starkie, 293. In *Doe v. Jones*, 4 Barn. & Adol. 126, attempt was made to forfeit a lease on account of a breach of covenant to repair. The term was for 40 years, and the lease contained a covenant to keep in repair the premises, "and all such buildings, improvements, and additions as shall be made by the lessee during the term," with a proviso for re-entry in case of breach. The lessee changed the lower windows opening on the street, and stopped up a doorway, making a new one in a different place, in an interior partition of the house: and it was held that there was no waste, because it appeared that the changes were not injurious, and were contemplated by the language of the lease. *Doe v. Jackson*, supra, was cited, but the judges distinguished it on the ground that in that case the breaking was of a wall between two houses, and not in an interior partition of the house. *Young v. Spencer*, 10 Barn. & C. 145, was an action on the case by landlord against tenant for injury to the leased premises. It appeared that the defendant had opened a door from the

house into the street, and the jury found specially that no injury was done to the house itself, or to any of the other houses owned by the plaintiff on that street. The judge directed a judgment for the plaintiff, but the court held that it was for the jury to say whether there was any injury to the plaintiff's reversionary right, and granted a new trial. Some of the authorities cited by the defendants' counsel were cases of equitable waste, and so not applicable here; the distinction being that equitable waste is an abuse by a tenant, without impeachment of waste, of his legal right to commit waste. I can find no authority holding that a breach in, and partial destruction of, a wall dividing the demised premises from those adjoining owned by another party is not waste. In the present instance there can be no pretense that the right to make such a breach can be implied from anything contained in the contract, or found in the circumstances surrounding its inception and conclusion. The building was designed especially for a restaurant, to be used in connection with the complainants' liquor saloon, and the defendants were consulted, and knew and agreed to all the details of its construction. Indeed, in their answer they claim a greater voice in those details than the complainants admit. It was not contended that, as constructed, it did not answer the expectation of the parties. There was and can be no pretense that the change effected by the opening in question tends to make the building more convenient for the use for which it was designed and leased. These considerations lead to the conclusion that the case is not covered by any well-considered authority in which tenants have been held justified in changes of this character.

Fourth. As to the remedy. In the prayer of complainants' bill they ask that the defendants may be ordered either to restore the opening in the party wall, or to give security for its restoration at the end of the term. By thus praying for alternate relief, I understand that the complainants did not intend to give to the defendants an option of submitting to the latter remedy, but simply to ask that the court should give it if the first remedy of immediate restoration was not considered by the court proper and equitable. The defendants, by their answer, and at the hearing, offered to give security for restoration at the end of the term, but complainants, at the hearing, insisted upon immediate restoration. It is well settled that complainants are entitled to immediate relief, and are not obliged to wait until the end of the term. *Agate v. Lowenbein*, 57 N. Y. 604, and cases cited at page 612 et seq. In the present case the waste was committed against the known wishes and protest of complainants, and with such haste that it was substantially completed before complainants could obtain preventive relief from this court. It further sufficiently appears that the carrying out of defendants' plan will be in-

consistent with the spirit, if not the letter, of the agreement. The intention was that the restaurant should be conducted in such a manner as to increase the patronage of complainants' liquor saloon, and should not be, in any sense, a competitor for their business. The complainants allege in their bill that the intention of defendants is to keep a rival liquor saloon in No. 39. This is not denied by defendants in their answer. In fact, they say they propose to keep an hotel there. If so, and a passageway is kept open between the two buildings, patrons of the restaurant in No. 35 may possibly be served with intoxicants from a bar in No. 39 without a breach of the letter of the agreement. This consideration shows the motive, or one of the motives, behind complainants' action, and it cannot be affirmed that it is unworthy or inequitable. In the somewhat similar case of *Bonnett v. Sadler*, 14 Ves. 526, Lord Eldon did not think it inequitable. In that case the complainants were the proprietors of a carriage factory and sales-room, and owned an adjoining house, which was a dwelling. The defendants leased the dwelling, concealing from the complainants the fact that they intended to set up a rival establishment; and, after getting possession, proceeded to change the front and interior of the building so as to make it fit for that purpose; and Lord Eldon remarked upon their conduct in that respect as inequitable. And Lord Selborne, in *Goodson v. Richardson* (1874) 9 Ch. App. 221, at page 224, spoke approvingly of a landowner who was interested in a water company standing on his strict rights in equity to prevent a rival company from laying its water mains in the street in front of his lands. The presumption is that the restriction against selling liquors contained in the lease affected the amount of the rent. At all events, the complainants are entitled to the benefit of their contract, and are justified in using all legal means to preserve it. For these reasons, complainants, in my judgment, have a clear right to relief in this court.

The authorities justify the use of a mandatory injunction in such cases. The leading case is *Vane v. Lord Barnard*, 2 Vern. 738, known as the "Raby Castle Case." This was followed by *Rolt v. Lord Somerville* (1737), decided by Lord Hardwicke, and reported in 2 Eq. Cas. Abr., at page 759, where there was a cutting of trees, and also pulling down houses and buildings. The prayer was that the premises might be restored. Lord Hardwicke said that he could not compel the restoration of the trees; but he said, "Yet, as to the pulling down the houses and buildings and laying the lead pipes, they may be restored or put in as good condition again,"—citing, with approbation, the case of *Vane v. Lord Barnard*. I think the present a proper case for immediate restoration. I will advise a decree that the defendants be restrained from permitting the opening in the party wall made

by them on or about May 10, 1806, to remain in its present condition, or from permitting the party wall between the leased premises and those of the Hoboken Land Improvement Company on the west to be in any other condition than it was prior to the opening made therein by the defendants; and, further, if complainants desire themselves to do the work of restoration, then that the defendants be restrained from preventing the complainants from so doing at a reasonable time and in a reasonable manner; and the court will name a special master, under whose supervision the work of restoration shall be done, if the parties cannot agree thereupon. The provision for restoration may also include the window opening upon the area if the brickwork has not already been restored to its original condition.

TRENTON PASS. R. CO., Consolidated, v. WILSON.

(Court of Chancery of New Jersey. May 11, 1897.)

CONSOLIDATION OF STREET RAILROADS—CONSTRUCTION OF AGREEMENT—RIGHTS OF PARTIES.

1. P. and W. were the owners of the majority of the shares of the T. Street-Railroad Company, and determined to buy the entire stock of the O. Street-Railroad Company and form a consolidated company. W. agreed with P. to advance the amount necessary to purchase the O. Co.; the sum to be repaid to him in cash from the sale of the bonds of the consolidated company. P. agreed to turn over to W. the stock of the C. Co., as fast as purchased, as further collateral for the money advanced for such purchase of stock; the stock to be returned to P. as soon as the advance by W. was repaid. W. advanced the money, and the consolidation was effected,—the agreement of consolidation submitted to the stockholders providing that the stock of the companies consolidated should be convertible to the shareholders of the T. Co. share for share; to the shareholders of the C. Co. at the rate of 14¹/₂ shares of consolidated stock for each share of the C. stock. The agreement also provided for the payment of the debts of the two companies. At the meeting of the stockholders and directors of the consolidated company the day of the filing of the agreement, there was no disclosure by either W. or P. to the other stockholders that there was between them any contract on terms different from those specified in the agreement. Immediately after the consolidation, P. assumed control, and, on the books, charged the railroad company with the amount due W. for cash advanced, and thereafter issued to W. a note of the consolidated company for the amount of his advances, secured by bonds of the company, which bonds W. thereafter sold, and applied the price on his debt. *Held*, that the secret agreement between P. and W., providing for other terms of consolidation, was not binding on the consolidated company; Pamph. Laws 1888, p. 74, under which the consolidation was effected prescribing that the agreement of consolidation should provide the manner of converting the capital stock into the new corporation, and that the agreement should be taken to be the agreement and act of consolidation of the companies.

2. It is immaterial whether the repayment for advances for the purchase of the C. stock was made to W. as the owner of such stock, or as creditor of the T. Co.; and the fact that P. entered the same as a debt on the books of the con-

solidated company was not sufficient to create an indebtedness in favor of W., if it did not in fact previously exist, as the acts of P., the sole manager in control, were unknown to the other directors of the company, except one director, who was in the employ of W.

3. The fact that the consolidated company is the owner of the C. property which was transferred to it, and that W. advanced money to purchase such stock on the faith of the agreement of repayment, and without this agreement would not have made the purchase, creates no equity as against the consolidated company.

4. That the suit by the company against W. for an accounting, and for repayment of the money derived from the bonds, is really brought for the benefit of P., who is a large stockholder, is no defense, as the corporation in such action represents the right of every stockholder.

5. That P. refused to pay over to W. the stock in the consolidated company does not create any equity in W., as against the consolidated company, so as to make it a condition precedent to the return of the money obtained by W. through the sale of the bonds that the company should transfer to him the stock issued in lieu of the stock of the C. Co. purchased by his money.

Bill by the Trenton Passenger Railroad Company, Consolidated, against Samuel K. Wilson, for discovery and an accounting. Decree for complainant.

For opinion on demurrer to bill, see 32 Atl. 1.

This is a suit brought by the complainant corporation against a former director, based upon alleged illegal appropriation of the company's property and moneys, and the bill is filed for the purpose of obtaining a discovery and an accounting. The complainant is a corporation formed by the consolidation of four other corporations, and the bill charges misappropriations of the funds of the consolidated corporation after the consolidation, and also of the funds of one of the constituent companies before the consolidation. By the bill, as amended, three separate misappropriations of complainant's own funds after the consolidation are charged: First, the sum of \$1,900, taken on or about October 1, 1891, at which time a note of the consolidated company for \$130,000, payable to defendant, was also received by the defendant, illegally, as charged, and to secure which defendant shortly after October 1, 1891, received bonds of the company amounting to \$260,000. Second, the sum of \$130,000, which was received by defendant, in payment of the note, from the company's funds, produced by the sale of bonds sufficient for that purpose; and, third, the interest on this \$130,000 received by the defendant from October 1, 1891, to September 1, 1894, and paid from the complainant's funds, which interest amounts, as now appears by the evidence, to about \$24,000. The fourth claim set up in the bill, as amended, is that in the spring of 1891, and before the consolidation, the defendant and Lewis Perrine (called in the bill a "Purchasing Syndicate"), who were both then directors of the Trenton Horse-Railroad Company, one of the constituent companies, took from the treasury of the latter company, without authority, \$25,053.08, subsequently re-

turning \$22,400 only, so that \$2,653.08 is claimed to be due to complainant, as succeeding to the rights of the constituent company. It now appears, however, that, according to complainant's statement of the account submitted on the argument, nothing is claimed to be due to complainant from defendant on this so-called "Purchasing Syndicate" account of the Trenton Horse-Railroad Company, but that the defendant, on the contrary, is entitled to a credit on this account for a balance of about \$3,300 due to him from complainant as successor to the Trenton Horse-Railroad Company, which amount is to be allowed him as a credit in the general account. The main question left in dispute at the hearing, as a result of the accounting, which has been taken as part of the evidence on the hearing, is, therefore, the defendant's liability to account for the funds of the complainant taken for the payment of the \$130,000 note and interest thereon, and for the \$1,900 in cash taken on October 1, 1891. For the purpose of the present decision, I shall consider only this single question, leaving the other questions arising out of the accounting, and which are mainly matters of detail, as to which there is no substantial dispute, to be settled hereafter, if the parties do not agree. The material facts bearing upon this main question, as I find them to be established by the pleadings and proofs, are as follows:

Previous to January, 1891, the defendant and Lewis Perrine, Jr., together owned or controlled all of the capital stock of the Trenton Horse-Railroad Company, one of the constituent companies, except 66 shares. The entire stock of this company was 1,444 shares, of \$25 each, amounting to \$36,100, of which defendant owned 363 shares, and 1,015 shares were held by Lewis Perrine, Jr., and his family, as follows: Lewis Perrine, Jr., 548 shares; Addie Slack Perrine, wife of Lewis Perrine, Jr., 128 shares; Henry P. Perrine, his brother, 182 shares; and Mrs. Mary A. Bell, a sister, 157 shares. The remaining 66 shares were held by 23 persons or estates, the largest single holding being 10 shares. The company had a bonded debt of \$100,000, the defendant, Wilson, holding about \$25,000 of these bonds. It had, besides, a considerable floating debt, and the stock would probably not have brought over \$5 a share. The defendant was a man of large means, and had been in the habit of rendering financial assistance to the Trenton Company, by loans and otherwise. The City Railway Company, to some extent a rival or competing company, had been organized, and was then also operating its road in Trenton. Lewis Perrine, Jr., who, since the death of his father, Gen. Lewis Perrine, some years previous, had been in charge of the management of the Trenton Company, about January, 1891, conceived the plan of bringing about the consolidation of the Trenton and City Companies by the purchase of the entire stock of the latter company (\$90,000 par value), and then forming a consolidated company, which should take in these two com-

panies, and also two minor companies, the Hamilton Company and South Clinton Company, which were in fact mere adjuncts or extensions of the Trenton Company, and had been constructed by it from its own funds, and for which stock had never been actually issued. The equipment of the road electrically was a part of the plan proposed in connection with the consolidation. Perrine, who was himself without the means or credit necessary for this purpose, applied to defendant for his assistance, and after several consultations an agreement in writing was made between them on March 23, 1891, relating to the consolidation, and a supplement thereto was signed by both on March 28, 1891. These agreements are set out in full in the defendant's answer, and at this point I shall only state their general effect, so far as they bear upon the main question now in issue, viz. the liability of the consolidated company to pay Wilson the \$130,000, and his right to receive it from the funds of the consolidated company. By the agreement of March 23, 1891, which was an agreement between Wilson and Perrine as individuals, the scheme of consolidation adopted was the organization of a company with \$1,500,000 capital stock, and the company was also to issue at once bonds to the amount of \$1,000,000, \$190,000 of which were to be used to pay off the bonded indebtedness of the Trenton and City Companies already existing; \$300,000 to be divided among the four principal owners of the Trenton Company in proportion to their stock,—Lewis Perrine, Jr., Samuel K. Wilson, H. P. Perrine, and Mary A. Bell; and \$510,000 bonds were to be offered for sale to the public, or pledged with some trust company for advances to equip the companies electrically, and repay Wilson \$135,000 advanced by him in cash to buy the City Railway Company. The entire stock of the consolidated company was, by the agreement, to be divided between Wilson and Perrine, the latter receiving \$760,000, a controlling interest; Wilson, \$500,000 for advancing the \$135,000 in cash to buy the City Railway Company; and the remaining \$240,000, or so much as was not needed to float the bonds to be offered to the public, was to be equally divided between Perrine and Wilson. During the negotiations, as Wilson swears, Perrine had proposed that a portion of the stock of the consolidated company, also, should be divided among the four principal owners of the Trenton Company, in addition to the bonds, but he (Wilson) refused to consent to this, and a provision in the agreement dividing \$150,000 of stock among these owners was stricken out before signature. No provision was made in either of the agreements for any portion of the stock of the consolidated company being issued to any of the shareholders of the Trenton Company. On these terms, Wilson bound himself to advance in cash \$135,000 to purchase the City Railway Company; "said sum to be repaid to him in cash out of the proceeds of the first

sale of the bonds hereinbefore provided for, or for bonds above at par, at his election; and he [Wilson] agrees to render such other financial assistance as may be necessary, either by advances of money, or indorsement of notes of accommodation, as he may deem necessary, and as he may be willing to do." Perrine, on his part, "hereby agrees to complete said consolidation and manage property, and to join with Wilson in all notes," etc., assuming one-half liability in the premises; and the following provision is added as to Wilson's further security: "Said Lewis Perrine, Jr., further agrees to turn over to Samuel K. Wilson the stock of the City Railway Co. as fast as the same is received and paid for, as further collateral for aforesaid advance of \$135,000. Said stock to be returned to said Lewis Perrine, Jr., as soon as said advance of \$135,000 as aforesaid is returned and repaid to Samuel K. Wilson, or otherwise liquidated to his, the said Wilson's, satisfaction."

By the supplementary agreement of March 23, 1891, provision is made for a further division of bonds, \$100,000 each to Wilson and Perrine, and also for Perrine's consultation with Wilson in regard to expenditures, improvements, and extensions, which are to be mutually agreed on; and Perrine's salary as general manager of the consolidated company is fixed at \$5,000. Upon the execution of this agreement the parties proceeded to the purchase of the City Railway stock, operating for that purpose through a negotiator or promoter, Mr. L. B. French, in order that the holders of the City stock might not know that the purchase was made in the interest of the rival company, and on this account increase their demands for the stock. French consummated the purchase by an agreement with Mr. Skirm, acting for the owners of the City stock; and the price to be paid was \$125 per share for the entire 900 shares (\$112,500) besides the payment of the floating debt of the City Company, to the extent of \$34,000, and Skirm agreed to deliver at least 700 shares. All excess of the debt over \$34,000 was to be paid by the holders of the City stock, and the entire amount to be paid by the purchasers, therefore, on this basis, was \$146,500, besides French's compensation, which seems to have been about \$15,500 more. On March 27, 1891, defendant advanced directly to French for the purchase \$75,000, and on April 2, 1891, \$47,400 additional; in all, \$122,400. From the payment to French of \$47,400, which was made by Wilson's check, French took out \$12,500 in cash, which he retained apparently on account of his compensation; and on April 4, 1891, he paid to Skirm, by his own checks, the balance, \$109,900, and Skirm then delivered at least 600 shares of the stock to French. \$75,000 of this amount was received, as Mr. Skirm says, in payment for 600 shares of the stock, and \$34,900 to pay the debts of the City Company, a large part of which (\$22,400) was in the form of notes upon which he (Skirm) was

personally responsible. \$22,400 of this City Company indebtedness was settled on April 4, 1891, as appears by the books of the City Company, but the books of the Trenton Company do not show that it was connected with this transaction of payment of the debts of the City Company. The money advanced by Wilson being thus, to the extent of \$47,400, used for the payment of the debts of the City Company and the expenses of the purchase, further sums were necessary for the purchase of the stock, and to satisfy French in full; and this money was raised by payments made by the Trenton Horse-Railroad Company, all of which appear on its books as charges to "Expense of City Railway Purchase." On April 30, 1891, the Trenton Company, by Perrine, as president, gave its note to French for \$3,153.15 in full settlement. The Trenton Company also, on May 1, 1891, discounted three of its notes, all made by Perrine as president, and indorsed by Wilson, and amounting together to \$18,500. Wilson on this day also gave his check to the Trenton Company for \$7,500, and from the \$26,000 so derived the Trenton Company on May 2d and May 4th paid to Skirm, by its checks, \$25,000, on account of the balance due. As the indebtedness of the City Company exceeded \$34,000, and an adjustment of the purchase price was therefore necessary, this was settled between Perrine and Skirm; and on May 1, 1891, it was settled by a note for \$5,967.80 given to Skirm in full settlement. This was a note of the Trenton Company indorsed by Wilson, and the only note not indorsed by Wilson in these transactions, in which the Trenton Company's notes were given, was the note for \$3,153.15 given by the Trenton Company to French. The latter note was paid at maturity from the funds of the Trenton Company, but all of the other notes (the \$18,500 note and the \$5,967.80 note, amounting to \$24,467.80) were renewed (with Wilson's indorsement) from time to time by the Trenton Company until the consolidation, and then by the consolidated company, which finally paid all of these notes from its own funds. At the time of the consolidation these four notes were carried on the books of the Trenton Company as liabilities of the Trenton Company, and the Purchasing Syndicate, on its books, was charged with \$34,553.08 as the expense of purchasing the City Railway; this including the \$25,000 paid to Skirm, the note of \$5,967.80, besides discount and minor expenses amounting to \$430.13. The final result of the purchase of the City Railway, so far as relates to the amount paid and the sources of payment, is as follows:

Amount required for entire expenses of purchase of stock, and expenses, as follows:

900 shares of stock, \$125 per share	\$112,500 00
City Company debt to be paid.....	34,000 00
French's compensation retained from Wilson's check.....	12,500 00
Note to French in settlement.....	3,153 15
Discount on notes, etc.....	430 13

\$162,583 28

The ultimate sources of payments of these accounts, according to the evidence, seem to have been as follows:

Paid by S. K. Wilson as follows:	
Directly to French.	\$122,400 00
Paid to Trenton Co.	7,500 00
	<hr/>
	\$129,900 00
Paid by consolidated company after consolidation, being notes of Trenton Company previously given	
	24,467 80
Balance paid from funds of Trenton Company before consolidation, or by consolidated company after consolidation	
	8,215 48
	<hr/>
	\$162,583 28

The evidence shows that the two sums of \$3,153.15 and \$430.13 were paid from the funds of the Trenton Company before consolidation, but the exact amount paid by it in addition has not been satisfactorily shown, probably for the reason that the basis of arriving at the amount of the note given on adjusting the payments of the excess of the debt of the City Company above \$34,000 do not appear. The total amount which, by the books of the Trenton Company, seems to have been paid by it on account of the purchase, and charged to the Purchasing Syndicate, is \$34,553.08; and this, if correct as to the amount, shows that the payments made by the funds of the Trenton Company before consolidation were \$1,870.80 more than the balance above stated. After the purchase of the City Company stock the City road was managed by Mr. Perrine from the offices of the Trenton Company, and he had entire charge of both roads. Perrine, upon the purchase of the City stock, had all the shares transferred to his name, instead of Wilson's, and remained the sole owner of the shares upon the City Company's books at the time of the subsequent consolidation. These shares were, however, actually delivered to Wilson subsequent to the purchase; but the date of delivery is shown only by Wilson, whose statement is that they were delivered during the summer or fall of 1891, and that he is not certain whether they were delivered before or after the consolidation. During the summer of 1891 Wilson assisted the Trenton Company by a further loan of \$2,000, which was advanced for its running expenses. For this latter amount, and also for the \$7,500 advanced to the Trenton Company on May 1, 1891, to complete the purchase of the City stock, Wilson appears on the books of the company as a creditor, but there is no entry to his credit of the \$122,400 advanced to French. An account called "Expense of City Railway Purchase" was entered on the books of the Trenton Company, which were kept under Perrine's direction, and this account is charged on September 30, 1891, with \$34,553.08; and on the latter date the account is transferred to an account called "Purchase Syndicate," who are charged with this amount (\$34,553.08) as "cash and notes of Trenton Horse-Railroad Company applied to purchase of the City Railway Company." These ac-

counts were opened by Perrine's directions, and none of the money of the Trenton Company, which was applied for these purposes, came to Wilson's hands; and on the other hand, as above stated, he advanced to the company \$7,500 of the funds which were so applied by Perrine. After the purchase of the stock, Wilson seems to have left the practical carrying out of the consolidation to Perrine, the latter being a lawyer; and Wilson himself does not appear to have had other counsel or advice, either in relation to the agreement between Perrine and himself, or as to the provisions in the consolidation agreement necessary for his protection, in relation to the repayment by the consolidated company of the advances he had made for the purchase of the stock of one of the constituent companies. These advances, to the extent at least of \$122,400, did not appear upon the books of the Trenton Company as a debt or liability of that company, nor did this company appear to be the purchaser of the City stock; and, on the contrary, the Purchasing Syndicate were, on the company's books, debtors of the Trenton Company, instead of its creditors, for money advanced to it by the company, or on its behalf, to purchase the stock. The status of the Trenton Company at the time of the consolidation was, as shown by its books, simply that it was a creditor of the Purchasing Syndicate for over \$34,500 advanced by it for the purchase of the City Railway stock, and had, so far as appeared by its books, no ownership of or right to the stock so purchased.

The consolidation was effected under the Laws of February 21, 1888, c. 48, p. 74, authorizing the consolidation of horse-railroad companies, and of April 16, 1891 (P. L. 455), permitting horse or other street railways to consolidate in the manner provided for the consolidation of horse-railroad companies. The former act (P. L. 1888, p. 74, etc.) provides the method of consolidation, which is to be by means of a joint agreement, entered into by the directors of the several corporations under the seal of the company, for the consolidation, and prescribing its terms and conditions, and, among other things, "the number of shares of the capital stock, the amount or par value of each share, and the manner of converting the capital stock of each of the said companies into the new corporation," etc. This agreement is to be submitted to the stockholders of each company at a meeting specially called, on notice prescribed, and it is to be voted on by ballot of each company separately; and, on the adoption of the agreement by a three-fourths vote, that fact is to be certified on the agreement by the secretaries of the respective companies under the seals of the companies. The agreement (or a certified copy) is then to be filed in the office of the secretary of state, and (section 1, subd. 2) "shall from thence be deemed and taken to be the agreement and act of consolidation of the said companies." By section 3 of the act, on the consummation of the consolidation all the fran-

chises, property, and rights of each of the constituent companies vest in the consolidated company, subject to creditors' rights and liens; and by section 7 the consolidated company is authorized to issue bonds sufficient to cover the indebtedness of the constituent companies, and to complete, reconstruct, and better equip the railroads, securing the bonds by mortgage on its franchises; and these bonds may be given in satisfaction for the debts, on such terms as may be agreed on between the holders and the directors of the consolidated company. The agreement of consolidation in this case is annexed to the answer, and, in reference to the terms of consolidation, provides as follows: "Sixthly, that the capital stock of the consolidated company shall be \$1,500,000, being 15,000 shares of \$100 each; and, seventhly, that the stock of the constituent companies is convertible as follows: To the shareholders of the Trenton Horse R. R. Co., 1,444 shares, being share for share; the same to the shareholders of the Hamilton and South Clinton Companies, 200 and 100 shares, respectively, and the balance, 13,256, to the shareholders of the City Railway Company for their 900 shares in the latter, and being at the rate of $14 \frac{1}{225}$ shares of consolidated stock for each share of the City Railway stock." The agreement further (section 8) conveyed all the railroads, property, rights, etc., of each company; and these properties, rights, and franchises were accepted (section 9) subject to two debts specified, viz. the bonded debt of the Trenton Horse-Railroad Company for \$100,000, and the like debt of the City Railway Company for \$90,000. No other debts were specified as existing, but there was no express stipulation (except as to the Hamilton and South Clinton Avenue Companies) that there were no other debts; and I am inclined to the view that the true construction of these two clauses, taken together, is, that the property conveyed was subject by way of lien to these debts, and not that these specified debts were to be understood as the only debts of any of the companies. No provision was made in these articles of consolidation that any payment, either in cash or bonds of the consolidated company, should be paid to any shareholders of the City Railway Company upon the exchange of stock, either for advances paid to purchase this stock or otherwise.

At the first meeting of the stockholders of the consolidated company, held on September 28, 1891, after the adoption of the consolidated agreement by the constituent companies, the joint agreement for consolidation was adopted, with the terms, provisions, and conditions therein contained, and directed to be filed, and shares of the capital stock of the consolidated company were directed to be issued in exchange for the shares of the constituent companies, as provided for in the agreement. At this meeting, Perrine, Wilson, and seven others were elected as directors for one year, and Perrine was elected president, and Wilson vice president, for one year, and

until their successors were chosen. At the same meeting of stockholders, resolutions were passed authorizing the consolidated company to borrow \$1,000,000, and issue its bonds, secured by mortgage, to pay the indebtedness of the companies merged and consolidated, and to aid in the completion and equipments of its roads. Resolutions of a similar character, accepting the consolidation agreement, electing officers, and authorizing the mortgage, were passed at a meeting of the directors of the consolidated company held on the same day, 28th September, 1891, after the stockholders' meeting. Defendant was present at this meeting of the directors, and voted for them, and I think the evidence establishes that he heard the agreement of consolidation read. He, however, denies this. At this directors' meeting the stock of the consolidated company was authorized to be issued in exchange for the shares of the constituent companies, and the president was authorized to take the proceedings proper or necessary to effect the exchange or carry it out. The president's salary was fixed at \$5,000 per year, and he was authorized to fix the salaries of the secretary, treasurer, and the other employees and agents of the company. At meetings of the stockholders and directors of the consolidated company held on September 30, 1891, the day of the filing of the agreement, the action of the board of directors taken on September 28, 1891, in reference to the issuing of the bonds and mortgage, was ratified. At this meeting of the board of directors, the defendant seems to have been present, and the mortgage was read. At no time during these proceedings for consolidation was there any disclosure, by either Wilson or Perrine, to the other stockholders or directors, that there was, between them, any agreement for consolidation upon terms different from those specified in the agreement, or that any portion of the bonds of the consolidated company were to be issued, either to the holders of the City Railway stock in addition to their shares provided for at the rate of over 14 to 1, or that the amount advanced by Wilson for the purchase of these shares of one of the constituent companies was intended to be claimed as a debt of one of the other constituent companies, which the consolidated company was liable to pay. Nor, on the other hand, does Wilson's attention seem to have been called by Perrine to the effect of the articles of consolidation, if adopted in this form, upon his right, as against the consolidated company, to require the performance of the terms agreed upon between himself and Wilson, especially in reference to the repayment out of the funds of the consolidated company of Wilson's advances for purchasing stock of a constituent company. Wilson evidently relied upon Perrine to protect him. Perrine, instead of inserting in the articles a provision for additional payment, or for bonds to holders of the City stock, which would seem to be the only method in which such a vital and mate-

rial point in the terms of consolidation could be reached at all, adopted the plan of treating these advances as a debt of the consolidated company from the very outset, by entering the transactions upon its books as a debt due from the Trenton Horse-Railroad Company to Wilson for advances made to that company previous to consolidation. Immediately upon the consolidation, Perrine assumed complete control of the management of the company. Its books were opened under his direction and control, and upon these books, at the outset, and in the charges against "Railroad and Appurtenances," the total amount (including \$1,500,000 capital stock) was \$1,933,636.62. Among the items of charge is one for \$131,900 due S. K. Wilson "for cash advanced T. H. R. R. Co. as follows: March 27, 1891, \$75,000; April 2, 1891, \$47,400; May 1, 1891, \$7,500; August 18, 1891, \$2,000; total, \$131,900." The purpose of the advances is not stated on the books. Mr. Wilson from this date appears as a creditor on the books of the complainant for this amount, and about November 5, 1891, he received from the complainant \$1,900 on account of the principal of the advances, and \$3,957 for interest on advances accrued to October 1, 1891. On that date (November 5, 1891) Perrine executed and delivered to Wilson the note in question, for \$130,000, as follows: "\$130,000. Trenton, N. J., October 1st, 1891. One (1) year after date we promise to pay to the order of Sam'l K. Wilson, at the banking house of the Trenton Banking Company, one hundred and thirty thousand $\frac{9}{100}$ dollars, without defalcation or discount; value received. Interest at 6 per cent., payable semiannually. The Trenton Passenger Railway Co., consolidated. Lewis Perrine, Jr., President."

The entire transaction was managed by Perrine alone, and was not brought to the attention of the board of directors, or of any of the directors, except Stokes, who was in Wilson's employ. There was no concealment, however, of the transaction upon the books of the company, which, in Wilson's account, as well as in the other proper places, openly disclosed from this time forward the payments on account of the note, and the transactions relating thereto. At the time of receiving the note, Wilson held the 900 shares of the City Railway stock, which had been delivered to him, but he had not then received any shares of the consolidated company issued in exchange therefor. The shares of the consolidated stock issued in exchange for the Trenton, Hamilton and South Clinton Companies seem to have been issued substantially according to the agreement, viz. share for share to each stockholder of record or entitled to shares, and Wilson received his share of these. As to the City Railway Company, Perrine caused to be issued to himself $13,241\frac{1}{2}$ shares, and to Wilson $141\frac{1}{2}$; the latter being the equivalent of a single share of the City Railway stock. The agreement of consolidation provided that the shares of the con-

solidated company should be issued upon the surrender of the stock of the constituent companies, but all of the City Railway stock was, at the time Perrine issued the stock to himself, in Wilson's possession, as collateral for his advances; and Perrine, who, under the resolution above referred to, was authorized to carry out the exchange of the stock, does not then appear to have requested Wilson to deliver the City stock, or to have notified him that all of the new stock had been issued to him (Perrine). The City stock was held by Wilson for about a year, when it was delivered to Perrine under the circumstances, hereinafter stated. On January 20, 1892, Wilson and Perrine by a written agreement entered into between them individually, agreed that the first mortgage bonds of the company should be deposited with the Central Trust Company, the trustee under the mortgage, subject to their joint order, or that of their legal representatives. Two hundred and forty bonds were delivered to the trust company under this order, and receipted for by the trustee. On January 28, 1892, Perrine, as president of the company, by letter of that date, requested the trustee to certify 260 bonds on the order of Mr. Wilson, on presentation by him, with the statement that "these bonds have not been sold, but simply deposited with Mr. Wilson as collateral for loan." After the receipt of this letter the trust company seems to have held 260 bonds subject to Mr. Wilson's order. In the meantime, and up to April, 1892, Perrine had undertaken, with the assistance of Wilson's credit, to equip the road electrically, and had, up to this time, equipped about one-half of the road, at a large expense, which was carried as an indebtedness of the consolidated road. But his efforts to market the bonds of the company under the mortgage of 1891 to meet this expenditure were unsuccessful, and, in order to raise funds by improving the security of the bonds, Perrine arranged with Gay & Stanwood, brokers, of Boston, to take the whole issue of \$1,000,000 bonds at the price of \$980 per bond of \$1,000, but that new bonds and a new mortgage should be executed. These agreements, which were in writing, were approved at a meeting of the directors of the company on April 14, 1892, at which defendant was present; and a new mortgage was authorized, substantially on the terms of the first mortgage, but with the provision added that the trustee, after retaining \$390,000 of the bonds to meet the underlying bonds of the Trenton and City Companies (\$190,000), and \$200,000 for the purpose of constructing extensions of the road, should deliver the other bonds to the railroad company upon delivery to it of a copy of a resolution of the board of directors stating the number required, and the purpose to which the proceeds were to be applied, which purpose was to be one of the purposes set forth in the resolution, viz. for paying the indebtedness of the companies merged or consolidated, and equipping the road; and the company

agreed that the proceeds of the bonds so certified and delivered should be used only for the said purposes. After the execution of this mortgage and of the new bonds, Mr. Wilson, in May, 1892, received 240 of the new bonds, and these he delivered to the trust company on or about May 7, 1892; Perrine, as president, advising the trust company, by letter of that date, that these bonds "are pledged by our company to Mr. Wilson as collateral security for certain cash advances made by him to said railway," and requesting receipt to be issued to Wilson for these, and also for 20 bonds additional, making 260 in all, as collateral. The company issued a receipt dated May 3, 1892, to Mr. Wilson, stating that they held 240 bonds subject to his order, and also acknowledged receipt from Wilson of the 240 bonds originally issued, and for which the new bonds were substituted. Some time after the bonds had thus been delivered to Wilson, and a year or more after he had received the City stock as collateral, Wilson delivered to Perrine the City stock at Perrine's request, and upon his statement, as Wilson says, that he wanted it to file to complete the papers of consolidation, or to deposit in the state house as part of the consolidation papers. On this statement, Wilson surrendered the City stock, retaining the 260 bonds, but does not appear to have requested from Perrine the consolidation stock issued in exchange for the City shares, nor did Perrine offer to deliver these. From the time of this delivery up to August, 1893, no payments were made on account of the note, the whole proceeds of the sale of bonds to the brokers being needed for the equipment and purposes of the road; and the defendant, in addition, lent his credit to the road, by indorsements and guaranties, to a very large amount, and in the aggregate over \$1,000,000 up to this time. On August 14, 1893, the first payment was made from the complainant's funds on account of the \$130,000, and the entire payments made on account of the note by complainant's checks directly to defendant are as follows: August 14, 1893, \$3,000; September 9, 1893, \$7,000; November 6, 1893, \$15,000; February 1, 1894, \$15,000; March 5, 1894, \$10,000; in all, \$50,000,—paid by complainant's checks on its own funds, all signed by Perrine as president, and given directly to the defendant. The balance of the money received by defendant upon the note was by checks or drafts of the General Trust Company for the proceeds of bonds held by it subject to the order of Mr. Wilson. Previous to July 16, 1894, Wilson had returned to the company, or allowed it to receive, the proceeds of some of the 260 bonds held by him as collateral, and in the trustee's hands, and on this date there were 92 bonds so remaining. By letter of July 16, 1894, Wilson directed the trustee to deliver 92 bonds to Gay & Stanwood, for \$960 each; stating that the bonds were held by him as collateral, and requesting, therefore, to be advised of re-

ceipt of proceeds of sale. Perrine, as president of the complainant, added a postscript that "approved price of bonds was 98, and interest from April 1, 1894, to delivery." On the following day, Wilson sent 8 additional bonds, to make up \$100,000 bonds for Gay & Stanwood. The source from which these 8 bonds were obtained does not appear, but defendant's answer seems to admit that all of the bonds defendant realized on were part of the original deposit.

Previous to these joint directions of Wilson and Perrine in reference to the disposition of these 92 bonds, differences had arisen between them in reference to financial matters, and before July, 1894, Wilson had apparently notified the trust company not to permit the company to draw the balance of funds in its hands as trustee to the credit of the company for the proceeds of sale of its bonds. These differences seem to have been adjusted, and on July 2, 1894, Wilson wrote a letter to the trust company, requesting it to honor draft of the company for balance in the trustee's hands, "without disturbing bonds held by you for me as collateral, said bonds amounting to \$92,000." This letter of Wilson's was inclosed to the trust company in a letter of Perrine's dated July 17, 1894. The trust company, pursuant to Mr. Wilson's directions, sent the 100 bonds to Gay & Stanwood, received from them the stipulated proceeds of sale, and from these proceeds of sale paid over to the defendant, by its own checks to defendant's order, \$100,312.50 on the following dates: August 6, 1894, \$50,008.33; September 4, 1894, \$25,125; and September 15, 1894, \$25,179.17. None of this money was paid directly by the trust company to the complainant, but it was all received by Wilson from the trust company as proceeds of the bonds held by it subject to Wilson's order. The checks, however, appear on their face to be drawn on "Account of Trenton Pass. Ry.," and on "Trust Account," and were paid and charged by the trustee to the bond-trust account with the complainant. The last check of \$25,179.17 was more than sufficient to pay the balance of principal due on the note after applying the previous payments, which balance was \$4,868.67; and the difference (\$20,132.50) was charged by the complainant on its books to Mr. Wilson in his personal account, on which there was then owing by the company to Wilson, for loans, about \$10,500. The interest paid to Mr. Wilson on the \$130,000 note from time to time amounted in all from November 4, 1891, to July 2, 1894, to \$23,900.75, all of which seems to have been paid direct to Wilson from the funds of the company, or to have been allowed to him as credits in his personal account. In September, 1894, serious differences arose between Perrine and Wilson in reference to the management of the road, and Wilson, in order to protect himself, as he says, then insisted upon a transfer from Perrine to himself of a majority of the stock of the consolidated

company, and refused further financial assistance or indorsement unless this was done. Up to June, 1894, Perrine held in his own name the entire stock issued in exchange for the City Company stock, except the single certificate issued to Wilson for 14+ shares, as the equivalent of 1 share of City stock. The bonds of the company having been floated without recourse to the stock, the entire stock of the company was, under the agreements between Wilson and Perrine, to be divided between them as follows: \$760,000 to Perrine, \$500,000 to Wilson, and the balance, \$240,000, not needed to float the bonds, to be equally divided between them. Perrine on June 1, 1894, without notice to Wilson, or consultation with him, made a different division of the stock, giving Wilson at that time 4,551+ shares, and divided the entire balance, 8,689+ shares, among himself, his wife, brother, and sister, he retaining 6,892. This division between the Perrines was not based on their proportionate ownership of shares in the Trenton Company, but, so far as appears, was an arbitrary division by Lewis Perrine, without any money payment. When Wilson demanded a control of the majority of the stock in September, he did not know that this division had been made. In the latter part of September, 1894, the company was in financial distress, by reason of Wilson's refusal to continue his indorsements; and Perrine then informed Mr. Buchanan, the counsel of the company, of Wilson's receipt of the money from the sale of the bonds. Perrine, in company with the counsel of the company, at once visited Wilson at his residence, and the company's counsel then stated to Wilson, at Perrine's request, the effect of Wilson's withdrawing the money of the company; the statement, as made in both Perrine and Wilson's presence, being that, in view of what he (the counsel) knew about the origin and history of the bonds, they (Wilson and Perrine) had both been guilty of a crime, and were liable to punishment by imprisonment, and that in his (the counsel's) judgment the only way to escape was to restore the money. The counsel also stated that unless the money was restored the company would go into the hands of a receiver. Perrine also told Wilson, after the counsel's proposition, that the only alternative to the proposition to restore the money was to continue to indorse, and Perrine threatened to break up the roads unless Wilson continued to indorse. Wilson refused to continue his indorsements unless a majority of the stock was transferred to him, and the parties separated. This demand for the return of the money made in Perrine's presence, and apparently by his direction, was the first intimation to Wilson that Perrine, either individually or as an officer of the company, repudiated the agreement between them in reference to repaying Wilson for the advances he had made to purchase the City stock for the benefit of himself and Perrine. The demand for the return of the money was not accompanied

by any offer on Perrine's part to return to Wilson the shares of stock in the consolidated company which had been issued to Perrine for the City stock purchased by the use of Wilson's money and credit. Nor did Perrine in fact propose to restore this stock, or any part of it, to Wilson, as appears by his statement made shortly after to Mrs. Wilson, that he would never yield to Mr. Wilson's having a majority of the stock, and that "he was going to protect himself and leave Wilson in a hole."

Wilson's indorsements for the consolidated company up to this time had been, in the aggregate, nearly \$1,600,000, and during the year 1894, up to October, was nearly \$200,000. His refusal to indorse further unless he had control of a majority of the stock, and Perrine's refusal to concede this point, led to the final breach between these parties. Shortly afterwards Perrine, still holding in his own name, or controlling, all of the stock of the consolidated company issued in exchange for the City stock, except the 4,551+ shares held by Mr. Wilson, took steps to realize upon the shares he held. The first step taken by Perrine was a proposed lease by the consolidated company to the Trenton Traction Company, which was incorporated on December 7, 1894, for 999 years. The execution of this lease was temporarily enjoined, upon the application of Mr. Wilson, and the hearings adjourned on the application of the consolidated company, still under Perrine's direction, from December 26, 1894, to January 8, 1895. On or before December 26th the plan of leasing to the traction company was abandoned, and on that day, by the agreement of that date made between Perrine and the traction company, Perrine, who is, in the agreement, stated to represent himself and also Henry P. Perrine, Mary A. Bell, and Addie Slack Perrine, agrees to sell 9,941 shares of the consolidated stock "now owned by him and the said persons he represents" for \$24 per share (in all, \$238,584),—\$35,000 to be paid at the signing of the agreement, when 1,456 shares were to be assigned to the traction company, and the balance, \$203,584, in three installments of \$67,861.33 each, payable June 26, 1896, September 26, 1896, and December 26, 1896; the deferred payments carrying 5 per cent. interest. Perrine also, by this agreement, assigns to the traction company all his interest in the canceled certificates of stock of the four consolidated corporations, and his interest in the property owned by said four companies prior to consolidation, and agrees to procure from the parties he represents formal written assignments of their interest in the canceled stock and property. It was further agreed that the remaining 8,485 shares should be transferred and delivered to Robert S. Woodruff, to be held by him until all the payments were made, and, if default was made in payment of any installment, the 8,485 shares held by Woodruff and the 1,455 shares transferred were to be transferred back to Perrine or his

legal representatives. Woodruff was to give the traction company a proxy to vote on the stock held by him, and the traction company to have this for one year; and it was further agreed that, upon the signing of the agreement, the resignation of at least five directors of the consolidated company should be delivered to the traction company, to be presented by it at any stockholders' or directors' meeting. On December 28, 1894, Henry P. Perrine, Addle Slack Perrine, and Mary A. Bell assigned to the traction company their interests in the canceled stock of the Trenton, Hamilton, and South Clinton Companies, and in their properties which they owned at the time of the consolidation, with the proviso that if defaults should be made in any of the payments required by the agreement made on December 26, 1894, between Lewis Perrine, on his and their behalf, and the traction company, the assignment should be null and void. On December 28, 1894, the traction company made the first payment of \$35,000 by its check to Mr. Woodruff's order, who deposited the check, and gave his own check to Lewis Perrine for the amount; the latter giving to the traction company a receipt for it, as the first payment under the contract. On that date the Perrine stock in the consolidated company was surrendered, and new certificates issued, of which 1,456 were issued to the traction company (including seven shares to each of its seven directors), and certificate to R. S. Woodruff for 8,469 shares. The agreement of purchase had provided that, as far as practicable, the 1,456 shares to be transferred on the payment of the first installment should be the shares issued in exchange for the Trenton Horse-Railroad Company stock. This was done, apparently, under the advice of counsel of the traction company, as there might be some question as to the legal incorporation of the City Railway Company; and, of the 1,456 shares first delivered to the traction company, there were accordingly 1,010 (or 1,017) shares issued originally for the Trenton Horse-Railroad Company stock, and 439 for the Hamilton and South Clinton Street. None of this 1,456 shares was issued for the City stock, and, on the other hand, none of certificate issued to Woodruff for 8,469 shares was issued, except for shares originally issued in exchange for City stock. This stock is still in Woodruff's hands under the agreement, the delivery of it having been enjoined by orders of this court made in a suit brought by Wilson against both the consolidated and traction companies, and also against Woodruff and the Perrines. Pending this injunction, payment of interest on the unpaid principal has been made, and the payment of the principal has, by agreements signed by Lewis Perrine, on behalf of himself, and as attorney for the other vendors, been postponed until after the determination of this chancery suit, involving questions touching the ownership of the stock. Immediately after the transfer of stock to the traction company and Woodruff was made, a

meeting of the directors of the consolidated company was held, on December 29, 1894, which was attended by the defendant, who was notified, and who had continued up to this time as director and vice president. Mr. Perrine and all the other six directors of the consolidated company were present, and by-laws were then for the first time adopted, over the objection of Mr. Wilson. Five of the directors, being all except Mr. Wilson and Mr. Stokes, who was in the former's employ and acted for him, resigned, and five persons named by the traction company were elected in their places; Mr. Barr being elected president of the board at the first meeting. After the election and organization of the new board, Wilson and Perrine still being present. Barr said that on examination they found that Wilson owed the company \$160,000; and, after some words between them, Barr said that, if Wilson did not pay this amount, the company would sue him. This bill was filed on —, 1895, against the defendant for an accounting; charging misappropriations of the company's funds as above stated, and charging that these sums were taken from its treasury without the knowledge, consent, or authority of its board of directors, and especially that the proceeds of the bonds were applied by defendant to the payment of the note, against the objection and protest of its president. The defendant demurred to the bill upon the ground that Perrine should have been made a party, and that the suit was for his benefit, but this demurrer was overruled upon the general ground that there was nothing shown on the face of the bill which prevented the complainant company from holding defendant for a misappropriation of its funds to his own use without joining Perrine. See 32 Atl. 1. The defendant then answered, setting out the agreement with Perrine, and his advances on the faith of it, but also alleging, on the amended answer, that the advance made to Perrine for the purchase by him of the City stock was for the use of the Trenton Company, and with the intention of turning over the stock to that company, in order to effectuate the consolidation. Defendant admits the receipt of the note as charged, the payments thereon, his receipt of the bonds, and the application of the proceeds of sale of sufficient of them to pay the balance due on the note, but sets up that all these transactions were with the knowledge, consent, and authority of the officers and directors. He then claims that the transfer of stock to the traction company is upon some trust for the benefit of Perrine, and that the terms of payment for the stock are dependent on the result of this suit. The defendant also insists that, if he is not entitled to retain the money received on the note, he is then entitled to all of the shares of the stock of the company which were issued in exchange for the shares of the City Company purchased by him, and that, upon the whole equities of the case, no decree can be made in favor of complainant

for a return of this money except upon the condition that these shares of stock be returned to him; that for this purpose the traction company, Woodruff, and the Perrines are necessary parties, and no decree can therefore be equitably made against defendant in this suit for the return of the money, and the bill should be dismissed. By the answer the further objection was made that the complainant's consolidation was illegal, but this objection was not urged at the hearing. The receipt by defendant of funds of the complainant for the payment of the note and interest being admitted, the defense at the hearing was based upon four grounds: First, that the advances of defendant were in fact made to the Trenton Horse-Railroad Company, and constituted an indebtedness on its part to defendant, which the consolidated company was liable to pay, on the consolidation, as one of the debts of the traction company; second, that the defendant advanced the money necessary to purchase the City stock, and did the other acts necessary for the consolidation, relying upon reimbursement according to the agreement between himself and Perrine, and that the complainant company, having in fact received the benefit of defendant's advances, by its receipt of the stock and property of the City Company by the consolidation, is not to be entitled to reclaim the money without restoring defendant to the status quo, and, inasmuch as this is impracticable, no reclamation of the money can be made; thirdly, that complainant's suit is practically for the benefit of Perrine, and is controlled by him, and that its purpose and practical object is to repudiate Perrine's agreement with Wilson, and recover the money paid by him to Wilson under it, practically for the benefit of Perrine, and a recovery by complainant is therefore inequitable; and, fourth, that inasmuch as any recovery should be upon the condition of the return of the stock, and this is not possible except in a suit where all the persons interested are present, no decree at all can be made against defendant in this suit, and the bill should be dismissed. The complainant, it should be stated, does not, upon the hearing, contend that the application of its funds to the payment of the note was against the protest of Perrine. He did not appear as a witness in the cause, although kept advised by the complainant's counsel from time to time of the progress of the cause, and of the character of the evidence given. And it further appears that all of Wilson's liabilities as indorser for the complainant or the Trenton Company have been discharged, except upon a note of the Trenton Company for \$3,000, which is held to secure outstanding bonds of the Trenton Company to that amount.

James Buchanan, R. S. Woodruff, and Frank Bergen, for complainant. S. K. Robbins, Mr. Pancoast, and S. H. Grey, for defendant.

EMERY, V. C. (after stating the facts). The case, as presented on the hearing, involves a

large amount of detail in the proofs; but, so far as relates to the ultimate equitable rights of the complainant and defendant, the case is one, as it seems to me, which must be determined by the application of fundamental principles of law relating to the consolidation of corporations. The act under which the consolidation was effected prescribes (P. L. 1888, p. 74, § 1, subd. 1) that the agreement of consolidation shall provide the manner of converting the capital stock of each of the constituent companies into the new corporation, and, as to the nature and effect of the agreement, expressly prescribes (section 1, subd. 2) that the agreement "shall be deemed and taken to be the agreement and act of consolidation of the companies." The agreement is therefore the fundamental law of the new or consolidated company, and of all of its stockholders who receive stock under it, and is the fundamental law, in the same manner, and with the same effect, as the charter or original certificate of a corporation on its organization. No material or vital change in the terms of consolidation, as expressed in the agreement, can be made by any portion of the shareholders, in their own interest, without the unanimous consent of all stockholders; and the general rule must also be that the company itself, the result and creature of the agreement of consolidation, cannot be estopped, either legally or equitably, from enforcing, as against all of its stockholders, the terms of the fundamental agreement. In the present case the secret agreement between Perrine and Wilson provided, in effect, for other terms of consolidation in favor of the holders of City Railway shares than those expressly prescribed in the articles. In these articles the exchange was declared to be made on the basis of 14 new shares to one City share. By the secret agreement the owner of the City Railway shares was to receive in addition from the consolidated company the entire cost of the purchase of these City Railway shares, and this additional amount was to be secured by a pledge of first mortgage bonds of the company. The materiality of this change in the terms of converting the City Company stock is manifest. On the face of the articles, the profit of the consolidation was apparently altogether in the ownership of the City stock, which was the only stock increased or "watered"; and the profit on the consolidation, apparently, was the increase in par value of the consolidated stock over the par value of the City stock, or the amount paid for the City stock. But if the consolidated company, in addition, was to pay the holders of the City stock the cost of purchasing this stock, and secure payment of this cost, by lien on the property of the consolidated company, then the City stockholder received a large additional bonus on the conversion of his stock, and this bonus was made a lien on the property prior to all of the stock. Such a vital point in the terms of consolidation as the payment by the consolidated company of the purchase money of the stock of one of the con-

stituent companies to the owners of this stock could not be binding or valid against the consolidated company unless it was expressed in the articles. And, so far as relates to the necessity for express provision in the articles, I am inclined to think that, under the circumstances of this case, it is immaterial whether the repayment for advances for the purchase of the City stock is to be taken as made to Wilson as the owner of the City stock, or to him as a creditor of the Trenton Company for the amount advanced to it to enable it to become the owner; for although, by the act relating to consolidation, the new company is liable for all of the debts of the old companies, any debt, which the Trenton Company, before the consolidation, owed for advances to purchase the City stock as its stock, would be discharged, so far as the Trenton Company and the consolidated company were concerned, by the agreement itself, providing that for this City stock so held by it the Trenton Company should receive 14 shares to 1. If, in addition, the consolidated company should be obliged to pay to the Trenton Company, or for its benefit, the debt of the Trenton Company incurred in purchasing the City stock exchanged, it is evident that this would, as between the Trenton Company and the consolidated company, be a payment in excess of the amount fixed by the articles. If Wilson had not, by his participation in the consolidated agreement, as director of the Trenton and consolidated companies, fixed the terms of conversion of the stock of the City Company, and if he had in fact advanced money to the Trenton Company, which it had used for the purchase, simply for its benefit, and not for Wilson's, the debt might, perhaps, so far as Wilson was concerned, have remained, notwithstanding the consolidation, as a debt due from the Trenton Company, and therefore a liability of the consolidated company. But inasmuch as the treatment of these advances for purchasing the City stock as a debt due from the Trenton Company to Wilson would be to effect, so far as the consolidated company is concerned, and as between it and the Trenton Company, a vital and material change in the articles of consolidation, which Wilson himself participated in making, my present view on this point is that, in view of the failure of the articles to expressly provide that these advances for purchasing the stock of one of the constituent companies were to be paid to the owners of the stock, such payment from the funds of the company is a violation of the fundamental articles of consolidation, even if paid as a debt of the Trenton Company. But it is not necessary to decide this point; for, as a matter of fact, I find that the purchase was not made for the Trenton Horse-Railroad Company, nor, up to the time of the consolidation, was it so treated by either Perrine or Wilson. The agreements of March, 1893, are individual agreements for the purchase for their individual benefit only. Some provisions for sharing the bonds of the company with the two other

principal owners of the Trenton Company are inserted, but no provision is made for the remaining owners of the Trenton stock; and the entire stock of the consolidated company is apportioned between Perrine and Wilson, and the provision which gave the other principal owners of the Trenton Company shares of the stock was stricken out by the parties at Wilson's express request. Wilson's present statements that the purchase was made for the Trenton Company are so shaken by his affidavits to the contrary, and by his actions up to the time of consolidation, and, indeed, up to the time of filing the amended answer in this suit, that they cannot be accepted as giving the true nature of the transaction, as understood between him and Perrine, in reference to this point, or as overcoming the force of their written agreement, which is consistent with all the actions of both parties under it. The entry in the Trenton Company's books, crediting Wilson with \$7,500 advanced on May 1, 1891, is the only circumstance tending to show—although only indirectly—that the Trenton Company claimed some interest, to this extent, in the purchase; but it would, in my judgment, be exaggerating the effect of this entry to consider it, either alone, or in connection with Wilson's evidence, as establishing ownership of the entire City stock on the part of the Trenton Company, or as establishing an indebtedness by this company to Wilson for the \$122,400 paid by him to French for stock which was delivered, not to the company, but to Perrine, and then to him, in strict accordance with their written agreement. The entry in the books of the Trenton Company is explainable, as it seems to me, on other grounds, and on the view that the advance by Wilson of this \$7,500 on account of the \$135,000 fixed in the agreement, not being made directly to French, but through the Trenton Company, the entry was properly credited on its books, as between the Trenton Company and Wilson, to show that, of the \$25,000 advanced on May 1, 1891, to complete the purchase, Wilson had advanced \$7,500. This, so far as Wilson was concerned, was advanced as part of the \$135,000 under the agreement. Whether, for this \$7,500, Wilson is to be considered as still a creditor of the Trenton Company, after the consolidation, will be considered hereafter. After the consolidation, Perrine, it is true, treated the advances of Wilson as a debt of the consolidated company, not only by the entries he directed on its books, but also by his letters to Wilson and to the Central Trust Company, and Wilson also so treated them. But these entries on the books of the consolidated company, made in the private interest of Wilson and himself, stating that the advances were a debt of the Trenton Company, are not sufficient to create the indebtedness in favor of Wilson, if it did not in fact previously exist. These entries, and the acts of Perrine as president and sole manager in control of the affairs of the consolidated company, so far as these transactions with Wilson are concerned,

manifest that this method of treating the advances as a debt of the Trenton Company was the method devised by Perrine for carrying out the terms of his agreement with Wilson for repayment, the consideration of which was, to Perrine, that he should receive about 8,400 shares of complainant's stock without the payment of any money. None of the other directors of the complainant knew of the agreement while these entries on its books were made, nor do any of them, except Stokes, who was in Wilson's employ, seem to have in fact known of any of the entries in complainant's books relating to the advances by Wilson to the Trenton Company, or to have known of the note in question, and its payment, until after it was paid. The directors permitted Perrine to manage the whole affairs of the company, without supervision or control, and while it is true that they might, therefore, perhaps, bind the company, as to third persons, by their acquiescence in Perrine's acts, yet such acquiescence cannot be treated, by Perrine or Wilson, as authority from the company for their misappropriations of its funds to their own benefit, or as authority for making admissions as to the existence of indebtedness on the part of the complainant to either Wilson or Perrine for a claim of this character.

On the whole case, I fail to find any evidence sufficient to establish, as against the complainant, and in favor of Wilson or Perrine, that the advances made by Wilson for the purchase of the stock were advances to the Trenton Company, or were, previous to or at the time of the agreement of consolidation, so treated by either of them. In reference to the question of treating these advances as a debt of the Trenton Company, another consideration of great weight is urged by complainant's counsel. If these advances were in fact a debt of the Trenton Company, then it must be because the latter company was the real owner of the City Company stock, and it must have been such owner in fact at the time of the consolidation. In the absence of any provision, previous to consolidation, by which this stock of the City Company, so belonging to the Trenton Company, was prevented from passing to the consolidated company, the act relating to consolidation, ipso facto, on the filing of the agreement, vested in the consolidated company all the existing property, franchises, and rights of the Trenton Company. It is claimed, and apparently with much reason, that this would include the Trenton Company's interest as owner of the city stock. But so far as relates to this branch of the case, relating to the real purchasers of the City stock, and the payment of advances therefor, I dispose of it without expressing an opinion upon this point, and hold: First, that the purchases were not made by Wilson for the use of the Trenton Company, but for the use of himself and Perrine, under their agreements; and, secondly, that the repayment to Wilson from the funds of the consolidated company of the amount he had advanced for

purchasing the stock was in violation of the articles of consolidation relating to the terms of converting the stock of the City Company. Complainant's counsel insist that the agreements between Perrine and Wilson are in themselves fraudulent and void, but the validity of the agreements as between the parties is not necessarily involved in this suit by the consolidated company, which has the right to stand on the terms fixed by the agreement of consolidation, irrespective of the private agreements of stockholders, whether these are valid or not as between the parties thereto. I make no decision, therefore, upon this point. This withdrawal of the company's funds by Wilson for payment of his advances to purchase the City stock being therefore in violation of the agreement for consolidation, the company is entitled to recover the amount withdrawn for this purpose, unless the defenses set up by way of equities are such as to deprive the company of the right to enforce the terms of consolidation against Wilson.

The first equity relied on is that the complainant is now the owner of the City Railway property, which was transferred to it, and that defendant advanced his money to purchase the City stock on the faith of the agreement for reimbursement, and without this agreement would not have made the purchase. As against Perrine, who made this agreement, this equity may, perhaps, be valid. In *Knoop v. Bohmrich*, 49 N. J. Eq. 82, 23 Atl. 118, there was alleged to be a private agreement between the complainant and another stockholder, before the organization of a corporation, that the property of the latter should be taken in payment of his stock at a valuation which, as against the corporation itself, was excessive. Vice Chancellor Van Fleet said (page 84, 45 N. J. Eq., and page 120, 23 Atl.) that, though the corporation might not be bound by the contract, the complainant would, in equity, be bound by the preliminary contract, to the extent of depriving him of the right to maintain an action in equity on behalf of the company to compel the stockholder to pay for his stock in a different manner. But the vital question in the present case is whether this equity of the defendant, if it exists, is an equity with which complainant is chargeable by reason of its ownership of the City road. And the insuperable obstacle, as it seems to me, in the way of imposing any such equity on the present complainant, is that the entire terms upon which complainant was to receive the conveyance of the City road, and the payments it was to make for this conveyance, were fixed by the articles of consolidation, which were agreed to by defendant. This consideration was, as fixed by these articles, the issuing of shares of its stock in exchange for the City stock at the proportion specified. And it is clear, I think, that these terms thus expressly fixed by fundamental articles covered the entire subject of the transfer of the City road to complainant, and payment therefor, and must

exclude and prevent the addition of further payments in consideration of the conveyance. As against the complainant corporation, who has paid the full price stipulated by the articles for the City road and for the City stock, I can see no basis upon which the defendant can have any equity to require it to pay an additional sum. The defendant, after consolidation on the basis adopted, certainly could not, as plaintiff or complainant, have compelled the company to pay any additional price to reimburse him for his advances; nor can I see how the fact that he has obtained the amount of the advances from the company in violation of the articles can have the effect of imposing an equity on the complainant to pay this additional price. This case does not, in this respect, come within the class of cases, cited by defendant's counsel, where, on the repudiation of an illegal or void contract by a complainant who is a party to the illegal contract, the complainant is obliged to restore the consideration, or make other equitable compensation for benefits received. The question here is whether a complainant, having paid the full price stipulated by a valid contract, must pay more, or allow defendant to take more from its funds, under a secret agreement, to which complainant was no party, and by which it cannot be bound. Nothing less than the unanimous consent of the complainant's stockholders to the withdrawal of its funds for this purpose would, as it seems to me, be sufficient to authorize it, and to operate as a defense to the recovery in equity. Nor am I now prepared to say that even such unanimous consent of those who are stockholders at one particular time would be sufficient to estop the corporation itself forever. The withdrawal here was in violation of the fundamental articles, and I am inclined to think that the only way in which it could become permanently effective as against the corporation was by an amendment to the articles, by unanimous consent. But this question is not involved as to the withdrawal, for no knowledge of this secret agreement between Perrine and Wilson on the part of any of the other stockholders or directors is shown, nor any consent on their part to the withdrawal of the funds of the company for that purpose. The fact that Stokes, the director who was in Wilson's employ, knew of the entries on complainant's books, in which the note was carried as a debt of the consolidated company, and that the other directors might have seen those entries, does not estop these directors, or the company through them; for, even if they are to be charged with knowledge of these entries, the fact that the entries, which were made by Perrine's direction for his and Wilson's benefit, did not disclose the real character of the debt, but were made in such manner as to indicate a bona fide debt of the consolidated company, and the absence of actual knowledge on their part of the origin and nature of this debt, prevent the creation of an estoppel against them or the company

by reason of allowing the payments. 2 Spelling, Priv. Corp. § 636, and cases cited. But whether the directors were personally estopped, as stockholders, or not, by reason of allowing or not preventing these payments on the note, the corporation itself is not estopped from insisting on its full rights under the consolidation agreement, unless all of the stockholders are estopped. The corporation, in an action of this character, represents the right of every stockholder; and if there is any stockholder who has the right to call upon the corporation to enforce this corporate right, even though it be against all the other stockholders combined, the corporation itself must certainly have the right to bring the action on its own behalf. It is here the corporate right which it to be enforced, either by the action of the corporate authorities, or, if they refuse, then by the individual stockholder prosecuting a corporate right for the benefit of the corporation itself. Inasmuch, therefore, as the defendant has failed to show an estoppel or acquiescence by all of the complainant's stockholders in the withdrawal of these moneys by him, and with knowledge on their part of the substantial character of the debt for which they were withdrawn, I am obliged to hold that there is no equity, as against the complainant, which estops it from setting up that the full price to be paid for the City road was the price fixed by the articles, or which estops it from recovering the amount, in addition to this price, which has been taken from its funds by defendant.

The second equity or defense set up against the recovery is that this suit is practically controlled by Perrine, and is really brought for his benefit, and is therefore substantially a proceeding by which he is enabled to get the full benefit of Wilson's advances, while repudiating his own express agreement that they should be repaid, and his own official acts as president in procuring the payment from the company's funds. As to the bona fides of the transfer of the stock, the allegation of the answer is that, by the agreement for sale of the stock, the terms upon which the traction company were to become the owners of the Perrine stock was to depend upon the result of this suit, which was to be brought at once. The agreement and the other evidence relating to the purchase, which I have stated above, and which appear affirmatively to be the only agreements between Perrine and the traction company on the subject, show, in my judgment, that these allegations of the answer are not sustained, but that the purchase of the stock is bona fide, and that the suit is not in fact controlled by Perrine, or prosecuted for his benefit. In this position of affairs as to the purchase of the Perrine stock and payment therefor, it does not seem to me that there is any basis of equity for depriving the complainant of its right to recover its funds improperly taken by defendant, by reason of the relation of Perrine to this suit.

The remaining equity set up by defendant

is his right to have equitable terms imposed as a condition of the decree for complainant. These terms sought to be imposed as the equitable condition of recovery are that Woodruff and the traction company should thereupon transfer to the defendant the stock of the consolidated company representing, and issued in lieu of, the stock of the City Company purchased by the defendant's money. This original City stock was purchased principally, but not entirely, by the use of defendant's money, and he advanced about \$130,000 of the entire \$160,000 and over required for the purchase. To raise the balance, over \$30,000, the Trenton Company contributed cash and its obligations, a large part of which have been satisfied by complainant. Defendant held the stock nominally as collateral, perhaps as purchaser or owner; and, when he surrendered the stock, defendant seems to have supposed, in good faith, that the bonds of complainant which he had taken as collateral were valid and effectual securities in his hands for the purpose of securing repayment of his advances. If these bonds are held to have been improperly deposited for this purpose, and the defendant is obliged to restore the proceeds thereof applied to the payment of his advances, it is strongly and very forcibly urged by counsel for defendant that the decree for recovery should go only on the condition of restoring the City Railway stock to defendant. As against the persons chargeable with the creation of the situation which gives rise to the equity, and chargeable with the duty of returning the stock this equity might be enforceable, but the obstacle to imposing the performance of this equity on the complainant is insurmountable. The complainant is not in any way responsible, either equitably or legally, for the position in which defendant finds himself by reason of carrying out the secret agreement between Perrine and himself to take from its funds the advances made to purchase the stock of the constituent company, nor is it responsible for Perrine's retention or control of the stock issued in exchange of the collateral City stock. The equity to a return of the shares, either absolutely, or as security for the advances, if it exists, is an equity in favor of Wilson against Perrine and his assignees of the stock, and is the result of Wilson's dealings with Perrine in carrying out a private agreement for consolidation, which was, so far as these advances were concerned, in violation of the actual consolidation agreement adopted and filed. The company, as above stated, is legally and equitably entitled to have the consolidation agreement, which is its only agreement on the point now in issue, carried out. And the enforcement of these provisions of this fundamental agreement as to the terms of converting stock can neither be changed directly, by allowing defendant to retain money taken in violation of them, nor indirectly, by refusing their enforcement except upon the terms of enforcing also an equity which defendant has or may

have against Perrine, by reason of their joint violation of the articles, and Perrine's alleged inequitable appropriation, as between him and defendant, of the shares issued by the company, and received by Perrine for himself and Wilson, or for Wilson, as the full purchase price which complainant was to pay under the articles. The complainant, having issued the City stock in strict pursuance of the provisions of the consolidation, has obviously no longer the power to control the delivery of this stock, whether in Perrine's hands or otherwise; and to hamper its rights to recover funds withdrawn by a director by a condition precedent that it should return stock rightfully issued, so far as the complainant is concerned, seems to be an inequitable, rather than an equitable, condition, and it should not, therefore, be imposed. No such terms, of course, could practically be imposed in a suit to which Perrine and his assignees were not parties, but the real force and bearing of this contention as to terms is that in view of the entire equities between the parties to the suit, disclosed by the entire proofs in the case, no equitable decree can be made in complainant's favor except upon these terms; and, inasmuch as these terms can only be imposed in a suit to which all these persons are made parties, the complainant, therefore, as is urged, is entitled to no decree at all in the present suit, but must file a bill making all these other parties defendant, in order that the equities of all parties in the entire case may be reached. I have therefore considered the imposition of equitable terms in this view, and hold that, so far as the complainant is concerned, there is, on the whole case, no equitable obligation on its part to return this stock to Wilson which can or should be enforced by way of imposition of terms or otherwise, and that, as between complainant and Wilson, the whole equities of the case, so far as relates to the return of Wilson's advances, are fully disposed of without any adjudication as to Wilson's equities arising, by reason of such recovery, upon Perrine's ownership of the disputed stock or its proceeds. No principle relating to the consolidation of corporations is to be more strictly and inflexibly applied than the rule that secret agreements for terms of consolidation, other than those prescribed by the agreement of consolidation, cannot be enforced against the company, directly or indirectly, for the benefit of any portion of the stockholders. Any relaxation of the rule would, as it seems to me, tend directly to make the consolidation of companies convenient instruments of fraud. The defendant, therefore, must account to the complainant for its funds withdrawn to pay the \$130,000, to the extent that this note represented, or was based upon the consideration of, moneys advanced by defendant for the purchase of the City stock. This will include the \$122,400 directly advanced by defendant to French, and which was, in the view taken above, no liability of the consolidated company. As to the \$7,500 advanced by Wilson to

the Trenton Horse-Railroad Company, he became, by this advance of cash to that company, *prima facie* a creditor to that amount, entitled to be repaid by it or by complainant, as any other of the Trenton Company's creditors would be. This money so advanced by Wilson to the Trenton Company was, however, used by Perrine, its president, with Wilson's consent, to assist in paying the balance of the purchase money on the City stock; and the precise question as to the status of Wilson to the Trenton Company, in reference to this advance, is whether the subsequent use by the Trenton Company of the money advanced by Wilson to it for Wilson's benefit, in part, by paying it on stock of which he was the owner, or in which he had an interest, is sufficient to disentitle Wilson to recover the advance as a debt due to him from the Trenton Company, and from the complainant as his successor, for which he was entitled to be paid from the company's funds. My opinion is that Wilson is not to be treated as a creditor for this advance of \$7,500, even though he was so credited in the Trenton Company's books, for the reason that the Trenton Company seems to have advanced at least this amount of money from its own funds for the purchase of the City stock, and all of this stock was subsequently delivered to defendant, who held this stock for the reimbursement of all his advances, including the \$7,500. It appears, therefore, that the Trenton Company has discharged its liability to defendant for the \$7,500 by using it for the purpose for which it was advanced, and by giving defendant the entire benefit of the sum advanced. In other words, the advance to the Trenton Company by Wilson is to be treated as an advance for a special purpose, which has been fulfilled by the Trenton Company for Wilson's benefit, and the advance therefore cannot be recovered. As to the \$2,000 advanced in August, 1891: This was an ordinary debt of the Trenton Company, due for operating expenses, and was payable by complainant as any other debt of the Trenton Company. The \$1,900 payment made in November, 1891, by complainant, to defendant, should be applied to this indebtedness, and for the balance defendant should be allowed on the account. Complainant may give notice of motion to settle decree, and on this motion I will hear and dispose of any remaining questions as to the account which are left in dispute.

PHILLIPS v. BROWNE et al.
(Supreme Court of Rhode Island. May 4, 1897.)

MECHANIC'S LIEN.

The respondent held title by an unrecorded deed to real estate that complainant had improved under a contract with respondent's grantor. She from time to time, as if by the authority of her grantor, gave instructions about the work, and the complainant had no knowledge of her title till after the work was done. *Held*, that he was entitled to a lien on the land for a balance due for labor and material.

Bill by Charles A. Phillips against Sarah B. Browne and another. Decree for complainant as to defendant Browne.

The complainant, Phillips, built two houses and did other work for one Pitman, who died insolvent. After his death the complainant learned that, while the houses were going up, Pitman had conveyed the land they were on to the respondent Mrs. Browne, but the conveyance thereof was not recorded until after Pitman's death. The respondent was Pitman's bookkeeper, and claimed that the conveyances were made to her in consideration of a promise of marriage. The complainant claimed that the conveyance was without consideration, and was withheld from record by the respondent, who knew he was expending labor and material on said houses. The complainant claimed a lien for the balance due him on the property conveyed to the respondent. The bank was held to be improperly made a party, as it was only the transferee of a mortgage formerly held by one Perkins, there having been simply a change of mortgagees.

Cook & Angell, for complainant. Arnold Green, for respondents.

PER CURIAM. The bill does not charge actual fraud, and we are convinced that no intent to defraud the complainant existed in the minds of the defendant Browne or of the late Henry Pitman. All the parties evidently had confidence in Mr. Pitman's ability to pay his debts at maturity, and it seems almost certain that this confidence would have been justified but for his untimely death. But the circumstances of the case, as they appear from the pleadings and proof, we think, entitle the complainant to equitable relief. The land upon which he was expending labor and materials was conveyed to the defendant Mrs. Browne without his knowledge, and he continued his outlay supposing it was still the property of Pitman, and available, if needed, for his debts. The grantee neither recorded her deed, nor informed the complainant of the change of ownership, but continued to give instructions from time to time about the work as if by Pitman's authority. We think it was her duty to notify the complainant of her title, that he might have made arrangements with her for payment of the accruing balances due him, or proceeded to get security by lien on the property which had been conveyed away from Pitman, or otherwise. The conveyance was a circumstance which was important to him to know in dealing with the property, and which equity required the defendant to communicate to him before receiving the benefit of his labor and materials. Having permitted him to suppose that the land belonged to Pitman, and on that supposition to expend upon it labor and materials, she is estopped to set up her title adversely to his claim for reimbursement out of it. Though her title may be good as to other parties, it would be contrary to good

conscience to permit her deed from Pitman to defeat the complainant's right to levy upon the land as if it were still Pitman's property. *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344; *Banking Co. v. Duncan*, 86 N. Y. 221, 229. In the latter case the general principle where purchasers are concerned, which is supported by innumerable authorities, is applied to the case of a creditor as follows: "In this case the plaintiffs are creditors, but we see no reason why the same principle should not protect creditors who have given credit upon the faith of the apparent ownership of property in possession of the debtor against a secret, unrecorded conveyance, fraudulently concealed by the grantee, as when, with knowledge that the debtor is holding himself out as owner, and is gaining credit upon this ground, he keeps silence, giving no sign." See, also, 1 Story, Eq. Jur. §§ 384, 385, 389; *Bigelow, Frauds*, 16, 17; 2 Herm. Estop. § 773; *Id.* § 940, No. 3; *Cawdor v. Lewis*, 1 Younge & C. 427; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65; *Perry-Herrick v. Attwood*, 2 De Gex & J. 21; *Pickard v. Sears*, 6 Adol. & E. 469; *Gregg v. Wells*, 10 Adol. & E. 90, 98; *Beatty v. Sweeney*, 26 Mich. 217; *Woods v. Wilson*, 37 Pa. St. 379, and cases cited on page 384. The security held by the defendant bank was simply substituted for the mortgage for the same amount given before the advances for which the complainant now sues. If the new mortgage were set aside, equity would require that the old one should be revived. The complainant has no superior equity to the defendant bank. We conclude that the complainant is entitled to a decree giving him a lien upon the lands in question for the payment of the balance due on Pitman's note, subject to the mortgage lien of the defendant bank, and that the defendant bank is entitled to be dismissed with costs.

STATE ex rel. KEELER v. OSBORN et al.
(Supreme Court of Errors of Connecticut. May 25, 1897.)

ADMINISTRATOR OF FIDUCIARY—SETTLEMENT OF ACCOUNTS—LIABILITY TO BENEFICIARY.

1. Gen. St. § 617, providing that, when any fiduciary shall die without having accounted, his personal representative shall settle the accounts of such decedent, and the amount found due to or from him shall be paid "in the same manner as if the account had been settled in the lifetime of such decedent," requires the personal representative to settle the account, irrespective of whether the estate is solvent or the trust funds are on hand; and hence such a settlement is not conclusive on him that he has on hand the specific trust funds which are due under the settlement.

2. The claim of a ward against the estate of his deceased guardian for the amount found due on accounting by the guardian's personal representative stands on a par with the claims of other creditors where the guardian so mixed the ward's funds with his own that they cannot be identified.

Appeal from court of common pleas, Fairfield county; Howard J. Curtis, Judge.

Action by the state on the relation of Lewis D. Keeler against Theodore W. Osborn and

others on an administrator's bond. There was judgment for defendants on facts found by the court, and plaintiff appeals. No error.

Joseph A. Gray, for appellant. A. T. Bates, for appellees.

FENN, J. This is an action upon an administrator's bond. The complaint alleges that the defendant Osborn received into his hands, as administrator of the estate of David S. Cosler, certain specific money to the amount of \$292.73, which said Cosler held in his lifetime as the estate of Samuel P. Holmes, for whom he was guardian, and which said Osborn, after accounting for the same under the provisions of Gen. St. § 617, refused to pay over to the present guardian of said Holmes. The court below rendered judgment for the defendant. It appears from the finding that said Cosler at the time of his death had in his possession no specific property or moneys constituting the whole or a part of the estate of said Holmes, for whom he was guardian. The said ward's estate had been previously mingled with Cosler's own property, so that it was not distinguishable in any way. At the time of his death, said Cosler had in his possession no specific money, and no money came into said Osborn's hands as a part of said Cosler's estate. Said Cosler left an account of his dealings with his ward's estate, from which the amount due such estate could be found. The relator having been appointed guardian of said Holmes, said defendant Osborn, at his request, in accordance with Gen. St. § 617, settled the account of the decedent, Cosler, as guardian of said ward, in the court of probate. Said account showed a balance of \$292.73 due the estate of said Holmes, but the same did not represent that specific money or other property of that value belonging to the ward's estate was in the hands of said Osborn, or had been found by him among the possessions of the deceased, Cosler. Subsequent to said accounting the relator demanded from said Osborn payment of said balance of \$292.73, and Osborn refused to pay the same, treating said claim on a par with all other claims against the estate. Thereupon the relator began this action upon the bond of said administrator, Osborn.

Said refusal to pay said claim at that time was entirely justifiable, in view of the condition of said estate, which was at all times sufficient to pay all of the post mortem expenses of the settlement of said estate, and to pay the ward's claim if the same was entitled to a preference over all other ante mortem claims; otherwise it was not sufficient. The court below, in a memorandum of decision, states what the entire record fully verifies, namely: "This action has been conducted, tried out, and all rulings made in preliminary matters upon the plaintiff's claim that the gist of the action was the possession by Osborn of specific property of the ward." And the court adds: "Therefore, this fact

not being established, judgment is given for the defendant, whose administration of the estate has been unobjectionable, unless the ward's claim was entitled to be immediately paid in any event." Seven reasons of appeal are assigned, but these, as the relator himself says, present two main claims only. The principal one of these relates to the effect of the accounting under Gen. St. § 617. Concerning this it appears that upon the trial in the court below the plaintiff objected to any evidence tending to show that specific money or property belonging to the estate of Samuel P. Holmes was not found among the possessions of said Cosier, deceased, and did not come into the hands of said Osborn; and also to evidence tending to show that no money whatever came into said Osborn's hands as a part of said Cosier's estate. Upon the admission of such evidence by the court, the plaintiff duly excepted. The plaintiff also claimed that the action of the defendant Osborn in accounting under the provisions of Gen. St. § 617, was an admission by him of the fact that he had the minor's estate, as, if he had none, he should not have accounted; and that the acceptance of the accounting of the court of probate was conclusive upon the defendants that the administrator had this property, and he could not contradict the record of the court of probate, and under the facts in this case he must pay said sum of \$292.73 from the decedent's estate; that the action of the court of probate was conclusive upon him in this case, and under the terms of the statute he should pay over as the deceased guardian would have done, and had no discretion about it. But we think the plaintiff misapprehends the scope and bearing of the statute. It enacts that "whenever the executor of a will, or administrator with the will annexed, or administrator of an intestate estate, conservator of a ward, guardian of a minor, trustee, or trustee in insolvency, shall die before completing and accounting for his trust, the executor or administrator of such decedent shall settle the account of such decedent in the court of probate, and the amount found due, from or to him, shall be paid in the same manner as if such account had been settled in the lifetime of such decedent." Pursuant to the requirements of this statute, it became the duty of Osborn, as administrator of Cosier, to settle the guardian account in the court of probate. It was equally his duty whether Cosier's estate was solvent or insolvent, whether there was specific property or moneys on hand belonging to the trust or whether there was not. In either event the one essential—the amount due "from or to" the decedent—would appear and be found. The rest would be incidental, and should be stated according to the facts. Then, the account being thus settled and determined, the matter of payment is not otherwise provided for than that it shall be in the same manner as if such account had been settled in the lifetime of such decedent. The result

would seem to be that the defendant Osborn stands to the relator in the same position as if the guardian account, showing a cash balance of \$292.73, had been settled by Cosier just previous to his death, instead of by Osborn afterwards.

This brings us to the remaining claim presented by the reasons of appeal, which, as stated by the plaintiff, is this: "The defendant having received estate enough of the ward to pay this ward's claim, somewhere in the property received by him, he must pay it. No matter if it could not be positively identified as the precise property, and no matter if the deceased had mingled other property with it, that fact could not defeat the plaintiff's suit, or enrich the estate of the deceased." But to hold this would be to render judgment in favor of the relator upon a cause of action which the pleadings do not present, and would be contrary to all precedent and principle. The true rule applicable in cases of this kind is that stated by this court in *Bacon v. Bacon*, 51 Conn. 19, and is this: Where, upon the settlement of an account of a deceased administrator, guardian, trustee, or the like, an amount is found due from the estate of such decedent, if such amount, or any of it, is in or represented by or traceable to specific property held in the fiduciary capacity by the deceased, or is money set apart and kept, or susceptible of identification, as a trust fund, in such cases the claim of the beneficiary is upon the administrator for property that belongs to the trust, and which the administrator has no title to retain, in which the creditors of the decedent have no interest, and such right is not itself the claim of a creditor. But if the trustee in his lifetime wrongfully disposed of the property so that it cannot be found, the claim then is for the wrongful act, and is a claim upon the estate like that of any other creditor. There is no error. The other judges concurred.

STATE v. BRADNECK.

(Supreme Court of Errors of Connecticut. May 25, 1897.)

HUSBAND'S FAILURE TO SUPPORT HIS WIFE—CRIMINAL PROSECUTION—EVIDENCE.

1. The judgment for defendant, in an action by a husband against his wife for divorce for adultery, is not admissible in a prosecution of the husband for neglecting to support his wife, in which he sets up as an excuse, and offers evidence to show, the same acts of adultery alleged in the divorce suit.

2. On a prosecution of a husband for refusing to support his wife, he put in evidence that one D. was caught at night in the wife's bedroom, and that D. endeavored to escape, but was arrested by an officer as he ran out of the house. *Held*, that the conversation between D. and a witness, and D.'s statements when the officer seized him, were not admissible as part of the *res gestæ*.

3. D., as a witness, denied that he committed adultery with defendant's wife at the times claimed by defendant, or at any time. On cross-examination he also denied that, at a certain time

and place, he stated to one H. that he was criminally intimate with defendant's wife. *Held*, that it was error to hold defendant to the answer of the witness, and exclude evidence of such statements by D. in surrebuttal.

Appeal from criminal court of common pleas, New Haven county; Hobart L. Hotchkiss, Judge.

John H. Bradneck was convicted of refusing to support his wife, and appeals. Reversed.

Prentice W. Chase, for appellant. George M. Gunn, Pros. Atty., for the State.

FENN, J: The appellant was tried in the court of common pleas for the transaction of criminal business in New Haven county, charged with the crime of refusing and neglecting to support his wife. He was convicted, and appealed to this court.

It appears, from the finding, that upon the trial the state offered evidence to prove the neglect and refusal of the appellant to support his wife; that the appellant offered no evidence to contradict this, but relied for his defense upon the claim, as an excuse, that his wife had been guilty of adultery with one Daniel Donegan, of New Haven. Under such claim the appellant offered testimony tending to prove, and claimed he had proved, various acts of adultery on the part of his wife with said Donegan upon particular dates in July, August, September, and October, 1895. The state, in rebuttal, offered in evidence the files and records in certain divorce proceedings brought by the appellant against his wife, tried in the superior court, and dismissed. This evidence was objected to; but the court, after examining the papers, said: "It appears, from an examination of the files in the divorce proceedings in the case of John H. Bradneck v. Mary C. Bradneck, that the specific statement filed by the plaintiff contains allegations of adultery on all the dates which have been claimed here; that these allegations were denied, and therefore put in issue. I think the record is admissible." To this ruling the appellant excepted. The court, in its charge to the jury, referring to this evidence, said: "There is one thing I ought to suggest to the jury, and that is that Mr. Bradneck, on his own volition, or at his own volition, has had a portion, at least, of this case submitted to a tribunal which had jurisdiction of it. He brought an action for divorce against his wife, and had a trial, and that tribunal was not satisfied that he had there proved the charges on the dates which he now alleges in this court were the dates on which she committed adultery. While I do not rule that this is conclusive evidence in this case, it is my duty, having admitted it, to suggest to the jury that it is evidence to which they ought to give serious consideration."

We think it clear that in admitting this evidence the court below erred. That criminal sentences are not evidence in civil issues has been often held, the reason being that the parties to a criminal prosecution and those in a

civil suit are necessarily different, and the objects and results of the two proceedings are equally diverse. See *Betts v. New Hartford*, 25 Conn. 185; *Whart. Ev.* 777. So the converse of this rule, namely, that a judgment in a civil action is not admissible in a subsequent criminal prosecution, is equally true. Thus, for example, a judgment recovered against a defaulting tax collector and his sureties, in a civil action at the suit of the county, was held not competent evidence against them in a prosecution on the criminal side afterwards instituted for the default. *Britton v. State*, 77 Ala. 202. So, in *Riker v. Hooper*, 85 Vt. 457, a former judgment in a civil action was held not conclusive in a penal action between the same parties, though the same question was litigated in both actions, because the measure of proof is different in the two actions. The only case upon which the state relied, in argument before us, as holding a different doctrine, is that of *Dorrell v. State*, 83 Ind. 357. This was a prosecution for the unlawful removal of a fence from land; and it was there considered that a judgment in a former civil action between the defendant and the prosecuting witness, rendered before the commission of the alleged trespass, whereby the disputed boundary line between their respective lands was defined and settled, was admissible in evidence. But the court here also recognized the general rule that civil judgments are not admissible in criminal prosecutions, but decided as it did because it thought that the establishment of the boundary line was one of the "legal consequences" of the judgment, to prove which, as well as the fact of its rendition, a judgment is always admissible, even against strangers. The error to which we have referred, in admitting the evidence in question, was not relieved by what the court stated to the jury, to the effect that such evidence was not conclusive, but merited serious consideration. As was held by this court in *Town of Bethlehem v. Town of Watertown*, 51 Conn. 494: "A judgment is conclusive, or is nothing. If not conclusive, there is no rule by which courts can measure and determine its effect."

The appellant offered evidence to prove that on one occasion the said Donegan was caught at night in the bedroom occupied by the appellant's wife; that he endeavored to escape, but, as he came running out of the house, hat in hand, he was arrested by an officer. Thereupon the appellant's brother, who was present at the time of such arrest, was asked, as a witness for the defense: "What was the conversation that you had with Daniel Donegan at the time when Officer Shields grabbed him, or what statements, if any, did he make?" The question was objected to by counsel for the state on the ground that what-over Donegan then said was hearsay, and not admissible in the absence of Mary Bradneck. It was claimed by the appellant to be admissible as part of the *res gestæ*, as words ac-

companying an act and explanatory of the act. The question was excluded, and the appellant excepted. A similar question was asked of another witness, and a similar ruling made, and exception taken. These rulings were correct. *Stirling v. Buckingham*, 46 Conn. 461. The declarations in question neither grew out of the main fact,—the alleged adultery,—were contemporaneous with it, nor served to illustrate its character. It would be useful to the appellant only as a statement out of court by one person concerning the past conduct of another not present at the time such statement was made. But a far different situation was presented later during the trial. The said Donegan was offered as a witness for the state upon rebuttal, and testified regarding the events which happened on the various dates on which it was claimed that he had committed adultery with Mrs. Bradneck, and denied that on those dates he had been in her apartments, and in general testified that he had never committed adultery with her, or been unduly intimate with her. On cross-examination Donegan was asked if he had not, at a certain place and on a certain day, while in conversation with one Evans, stated to said Evans that he was criminally intimate with Mrs. Bradneck. The witness replied in the negative. In reply to the objection of the state that Mrs. Bradneck ought not to be convicted of adultery on any general statements that this witness or any other might have made outside the court, the court replied that the question was admissible as proper cross-examination of the witness, but that the court would hold the defendant to the answer to the extent that he would not be permitted to bring in witnesses on surrebuttal to prove that the witness had made these statements out of court. The appellant did afterwards offer several witnesses upon surrebuttal to prove such statements, but the court adhered to its ruling, and excluded all such evidence. This was error. *Hedge v. Clapp*, 22 Conn. 262.

The other reasons of appeal are of slight importance, and do not seem to require special attention. There is error, and a new trial is granted. The other judges concurred.

GILDAY v. WARREN.

(Supreme Court of Errors of Connecticut. May 25, 1897.)

INTOXICATING LIQUORS—TRANSFER OF LICENSE.

A transfer of a liquor license without the consent of the county commissioners does not pass title as against the transferor's creditors, under Gen. St. 1888, § 3071, providing that a license may, with the consent of the county commissioners, be transferred to any suitable person, but the person to whom such license "is to be transferred" shall make application, submit a recommendation, and give bond, in the same manner as an original applicant.

Appeal from court of common pleas, New Haven county; John P. Studley, Judge.

Replevin by John M. Gilday against Joseph R. Warren for a liquor license. There was judgment for defendant on demurrer sustained to the reply, and plaintiff appeals. No error.

Edmund Zacher, for appellant. Isaac Wolfe, for appellee.

FENN, J. This is an action of replevin, brought against the defendant, Joseph R. Warren, a deputy sheriff for New Haven county, to recover possession of a liquor license. The facts, as they appear upon the face of the pleadings, the complaint, answer, and reply, are these: On January 31, 1896, the county commissioners for New Haven county issued to one Thomas E. O'Brien, of New Haven, a license to sell and exchange spirituous and intoxicating liquors in the town of New Haven until December 31, 1896. On June 18, 1896, the plaintiff, for a valuable consideration, purchased of the said Thomas E. O'Brien said license, and took the same into his possession. On June 19, 1896, one Maurice Luby caused a writ of attachment to be issued against the estate of said Thomas E. O'Brien in a suit upon a note held by said Luby against said O'Brien, which said suit was returnable to the court of common pleas for New Haven county on the first Monday of July, 1896. By virtue of said writ, the defendant in this suit, being a deputy sheriff for New Haven county, attached as the property of said O'Brien said license aforesaid, by leaving on said June 19, 1896, a true and attested copy of the complaint, with his doings thereon indorsed, at the usual place of abode of said O'Brien, and a like true and attested copy with the town clerk of New Haven, as is by statute in such cases provided. On July 7, 1896, the said Maurice Luby recovered judgment in said suit aforesaid against said O'Brien for the sum of \$209.78; and on said July 7, 1896, execution was duly issued upon said judgment, and the same given to said Joseph R. Warren, the defendant in this suit, to execute and return; and by virtue of said execution the said Warren levied upon said license, and took the same into his possession, and duly advertised it for sale upon execution as by statute provided. On July 9, 1896, the plaintiff in this suit took said license from the possession of said officer by virtue of this replevin. The pleadings terminated in a demurrer to the plaintiff's reply, which was sustained by the court below. Thereupon, the plaintiff refusing to plead over, the court found all the allegations of the defendant's answer to be true, and rendered judgment in favor of the defendant.

The plaintiff correctly says that, though a number of reasons of appeal are assigned, there is but one question presented by such proceeding to this court, namely: Did the court below err in sustaining the defendant's demurrer on the ground that it did not appear in the pleading demurred to that at the time of the attachment of said license the same had been transferred to the plaintiff, Gilday, with the consent of the county commissioners (Gen.

St. 1888, § 3071), and that, therefore, there did not appear to have been any legal transfer or delivery of said license from O'Brien, to whom it was issued, to the plaintiff, and so the title to the same was in O'Brien? The statute in question is in these words: "Any licensee, or in case of his death, his executor or administrator, may, with the consent of the county commissioners, transfer his license to any other suitable person, but the person to whom such license is to be transferred shall make a similar application, submit a like recommendation, and execute a bond of the same amount and character, as in section 3064 is required of the person to whom said license was originally granted." Under this provision it is the claim of the plaintiff that the act of the licensee in selling and delivering the certificate of the license to the purchaser is sufficient to invest the latter with title to said license against attaching creditors, without any act on the part of the commissioners. The defendant, on the contrary, contends that the plaintiff, in order to hold said license against attaching creditors of the original licensee, must show that before attachment the license had been transferred to him, with the consent of the county commissioners, after compliance with the provisions of the aforesaid statute. Since the law prohibits the sale of intoxicants without a license, it follows that the granting of the license confers a right which previous thereto did not exist. *State v. Gray*, 61 Conn. 46, 22 Atl. 675. This right is personal. It cannot be transferred except by virtue of the express provisions of the statute (section 3071). If it is done by virtue of such enactment, it must be done in strict compliance and accordance therewith. The transfer must be with the consent of the county commissioners, and it must be to a suitable person; and upon this the county commissioners decide in giving or withholding their consent. But, further, not only must the person be suitable, and the consent of the county commissioners granted, but the proceedings must be in the prescribed form, embracing an application, a recommendation, and a bond, as required of the person to whom the license was originally granted. That all of these things are essential to the creation of the right in the transferee is evident both from the very character of such right and also from the language employed in the statute providing what shall be done, not by the person to whom the license is, but by the one to whom it is to be, transferred, making these acts, therefore, precedent conditions to any transfer of title or right.

The appellant suggests, in opposition to the view above expressed, the language of chapter 128 of the Public Acts of 1895 (page 509), providing for the attachment of liquor licenses under the authority of which the attachment in this case was made. He urges that under that statute the sale of the license on execution and the consent of the county commissioners are not concurrently necessary to give title, but only in order to use the license, for which

purpose it is expressly provided that compliance with certain requirements shall be necessary. He insists that there is here a distinction recognized between title to the license and the right to beneficially employ it. And he then urges that it could not have been the intention of the legislature to make one rule for the man who purchases a license at a sale on execution and another for a man who purchases a license directly from the original licensee. And he concludes: "In both cases the title to the license is complete in the purchaser at the time of the sale, and the subsequent consent of the county commissioners in either case is not intended to confer title, but to permit the use of the license by the purchaser." But in answer to this, without undertaking to determine the validity of the claim made as to the act of 1895, which is not now properly before us for consideration, we do not think the other provision (Gen. St. § 3071) capable of such a construction as the appellant seeks to give it. There is no error. The other judges concurred.

HEALY v. FALLON et al.

(Supreme Court of Errors of Connecticut. May 25, 1897.)

MECHANIC'S LIEN—FILING CERTIFICATE—BUILDING CONTRACTS—INTEREST.

1. A mechanic's lien attaches when materials are furnished or labor performed, irrespective of when payment is to be made; and hence the validity of a lien is not affected by the fact that the certificate of lien was filed before any sum was due under the contract.

2. The claim that under a building contract the architect is sole judge of performance, so that no recovery can be had for the contract price without his certificate, is waived by the owner in an action for the contract price by failing to plead failure to obtain such certificate, and pleading that the contract was not properly performed.

3. In an action for the price under a building contract, plaintiff may be allowed interest as damage for the detention of the amount found to be due him, though such price was subject to unliquidated deductions for plaintiff's deviations from the contract.

Andrews, C. J., dissenting.

Appeal from superior court, New Haven county; John M. Thayer, Judge.

Suit by William J. Healy against Hugh Fallon and others to foreclose a mechanic's lien. There was judgment for plaintiff on facts found by the court, and defendants appeal. No error.

Charles H. Fowler, for appellants. James H. Webb and James E. Wheeler, for appellee.

TORRANCE, J. This is a complaint brought to foreclose a mechanic's lien. It alleges, in substance, that the plaintiff furnished materials for, and rendered services in the construction of, a dwelling house on land of the defendants under an agreement with them by which the plaintiff was to build said house complete, and was to be paid, on its completion, the sum of \$4,325; that said house was

completed on the 26th day of November, 1894; that the defendants had paid only \$2,800 on account of the sum agreed to be paid; and that the plaintiff, on the 7th of December, 1894, had filed a certificate of lien as required by law, a copy of which was annexed to the complaint. The relief prayed for was (1) a foreclosure of the lien and (2) \$1,800 damages. To this complaint the defendants filed an answer, substantially admitting all the allegations of the complaint, except that as to the completion of the house, as to which allegation they stated that they had "not sufficient information to form a belief." They also filed, at the same time, the following "special defense": "(1) The defendants say that they entered into a certain written agreement with William J. Healy, whereby the said William J. Healy was to build for them a dwelling house in a good and workmanlike manner, and upon its completion they were to pay the amount as set up in said agreement in writing. (2) The said William J. Healy has never completed said dwelling house. (3) That said dwelling was not built in manner and form as agreed upon. (4) That they are not indebted to the said William J. Healy in manner and form as alleged." To this special defense the plaintiff replied by denying paragraphs 2 and 3, and alleging that "the defendants accepted said house, upon its completion, without complaint as to the existence of defects therein, and have ever since occupied the same." The defendants rejoined by denying so much of the reply as alleged that they "accepted the house, upon its completion, without complaint as to the existence of defects therein." The defendants also filed in the case a bill of particulars, setting forth in detail the matters in respect to which the plaintiff had failed to build and complete the house as agreed. Upon these pleadings the case was tried, and the court upon the facts as found upon the record rendered judgment for the plaintiff.

The substance of the finding may be stated as follows: By the terms of the written agreement referred to in the special defense, the plaintiff was to build a three-story frame dwelling house, complete, according to the plans and specifications mentioned in the agreement. The work was to be done under the supervision of the architects, and to their satisfaction. The first payment was to be \$1,200, and to be made when the building was shut in, the roof tinned, and the chimney topped out; the second was to be \$1,600, to be made when the building was plastered; and the third and last was to be \$1,525, to be paid within 15 days after the work was completed, all material and rubbish belonging to the contractor removed, and all drawings and specifications returned. The agreement also contained the following: "Provided, that for all payments a certificate shall be obtained from and signed by the architects, said certificate in no way lessening the full and final responsibility of the contractor, and that security against mechanics' and other liens is to be furnished

by said contractor." The plaintiff and the defendants entered into this agreement in June, 1894. In that month the plaintiff began work under the contract, and completed the building in November, 1894. The defendants immediately, by themselves and their tenants, went into the occupancy of said building. The defendants have never made the last payment called for by the contract. The architects referred to in the agreement still reside in New Haven. "They examined said building upon its completion, and told both plaintiff and defendants that the building was properly completed, and that said last payment was due; but they did not give to either party a certificate in writing that the payment was due." The materials furnished and services rendered by the plaintiff in the construction of the house were in substantial compliance with the contract, "and the materials so furnished and services so rendered by the plaintiff, and for which he has never been paid, were of the value of \$1,525." "By mistake slightly wider clapboards were used in the gables of said house than were stipulated to be used, and some of the boards used in the floors were wider than those called for. The usefulness and value of the house were not diminished thereby, and the difference in cost of using them instead of those called for was less than \$50. To remove them and replace them by such boards as should have been used would cause the defendants and their tenants great inconvenience, and would involve the plaintiff in a large expense." The lien was duly filed on the 7th day of December, 1894, to secure the payment of the balance claimed to be due under the agreement. "The defendants claimed that, as said house was not finished strictly as called for in said contract, the plaintiff had no lien for the materials furnished and services rendered by him as aforesaid, and also that the plaintiff could not demand payment therefor until he had obtained a written certificate from the architects that such payment was due, and could have no lien upon said premises until such certificate was obtained." The court overruled said claims. "The court deducted from said sum of \$1,525 the sum of \$50, for damages to the defendants for the plaintiff's failure to comply with the contract, and found the amount due the plaintiff from the defendants, with interest to the date of judgment, to be \$1,626.98," and rendered judgment for the plaintiff therefor as on file.

The errors of which the defendants really complain in their brief, and upon which alone they dwell in the oral argument, are not very clearly stated in the assignment of errors; but, as we understand them, they are the following: (1) The court erred in holding, upon the facts found, that the plaintiff had any lien at all upon the premises; (2) in holding that anything was due to the plaintiff from the defendants until plaintiff had obtained a certificate from the architects, as called for by the contract; (3) in allowing interest to the date of judgment upon the amount found to

be due after deducting the \$50 allowed for damages.

In support of the first claim the defendants urge two things: (1) That the certificate of lien was filed four days before any money became due and payable by the terms of the contract, even if the plaintiff had fully performed it; (2) that he did not perform it, and therefore, by its terms, nothing was due and payable to him when he filed his lien. This claim seems to be based upon the assumption that a mechanic, under the statute, cannot have a lien for his debt unless and until the debt is presently due and payable; but this is clearly not so. One of the main purposes of our statute concerning mechanics' liens of this kind was to secure debts not yet due, so that they might be collected when they became due. The statute created a lien upon the premises in favor of the plaintiff as soon as he began to furnish material and render services under the contract, and notwithstanding the fact that the contract fixed the times of payment in the future, and the certificate, when filed, merely continued the statutory lien. There is nothing in this first claim.

In support of the second claim the defendants say that, under the written agreement, the architects are the sole arbiters of the question whether the plaintiff has or has not complied with his contract, and of the question whether anything, and, if so, how much, is due to him; that the certificate of the architects is a condition precedent to the liability of the defendants to make any payment under the contract; and that, since this has not been obtained, and the arbiters are living, and ready and willing to act, nothing was or is due to the plaintiff, and he could not invoke the aid of the superior court to determine the questions tried in the court below. If we concede, for the sake of the argument, that the provisions of the contract above referred to have all the force and effect claimed for them by the defendants, still they are provisions made in favor of the defendants, and may be waived or abandoned by them at any time; and we are of opinion that the defendants have waived and abandoned them in the case at bar. By the pleadings in this case both parties in effect asked the court below to determine the very questions which the defendants now claim can be determined only by the architects. The defendants, instead of setting up and insisting upon the provisions in question in bar of the claims of the plaintiff, asked the court, in effect, by their pleadings, to try the question whether the plaintiff had performed his contract, and, if not, whether anything, and, if so, what amount, was due to him. This is the fair interpretation to be put upon the pleadings, and upon the issues formed by them. Under these pleadings both parties went to trial, and were fully heard as to all matters covered by the issues, and took their chances as to the result. Under the pleadings the court properly found that the plaintiff had substantially performed

his contract, that the deviations from it were unintentional and slight, and that the defendants had accepted and were in the enjoyment of the results of the work done and materials furnished by the plaintiff. Under these circumstances the court was justified in applying the rule sanctioned and approved by this court in *Pinches v. Lutheran Church*, 55 Conn. 183, 10 Atl. 204. By thus pleading and going to trial the defendants must be held to have waived or abandoned the provisions of the contract in their favor upon which they now rely.

We are also of opinion that the court did not err in allowing interest to the date of judgment upon the sum found to be due after deducting the damages caused by the deviations from the contract. It was not allowed as interest *eo nomine*, for there was no contract, express or implied, for the payment of interest as such. It was allowed as damages for the detention of the sum found to be due, and the damages were measured by the rate of interest. "Interest, by our law, is allowed on the ground of some contract, express or implied, to pay it, or as damages for the breach of some contract or the violation of some duty." *Selleck v. French*, 1 Conn. 32, 33; *Jones v. Mallory*, 22 Conn. 386, 392. The court, in effect, rightfully found, under the pleadings, that the defendants owed the plaintiff, after deducting the damages caused by the deviations from the contract, the sum of \$1,475, and that this sum should have been paid to him by a certain time, from which time it, in effect, added interest to the date of the judgment; and no complaint is made about the time selected as the starting point for interest. By the finding of the court it thus appears that the plaintiff was deprived of the use of \$1,475 from the time when it should have been paid to him to the date of the judgment, and the defendants during that time had the use of that money. It is difficult, on principle, to see why he should not recover, as compensation for that detention, damages measured by the legal rate of interest upon the sum so detained for that time. It is said, however, that the amount due was unliquidated up to the time of the judgment, and that interest is never allowed upon unliquidated amounts. It may be conceded that the amount due the plaintiff was in a certain sense unliquidated up to the time of the judgment, inasmuch as the amount due him under the contract, which was a liquidated amount, was to be lessened by the as yet unascertained damages, caused by his deviations from the contract; but it is not true that damages measured by the rate of interest are never allowed for the nonpayment of money where the claim is an unliquidated one. In an action for the value of personal property destroyed by the negligent act of the defendant, where the claim was in a sense an unliquidated one, damages were allowed in the shape of interest upon the value of the property as found upon the trial. *Parrot v.*

Ice Co., 46 N. Y. 361; *Frazer v. Carpet Co.*, 141 Mass. 126, 4 N. E. 620. In our own state such damages are allowed in actions for damages for the conversion of goods, and in actions of trespass for taking personal property, although in such cases the claims are in a certain sense unliquidated until the amount is ascertained by the court or jury. *Clark v. Whitaker*, 19 Conn. 319; *Cook v. Loomis*, 26 Conn. 483; *Oviatt v. Pond*, 29 Conn. 479. In the case of *Regan v. Railroad Co.*, 60 Conn. 124, 142, 22 Atl. 508, which was clearly a case where the damages were unliquidated, this court said: "The defendant claimed that the rule of damages was the value of the goods at the time of their destruction, without interest, but the court allowed interest from the date of the injury to the date of the judgment. It has been sometimes said that interest is not to be allowed on unliquidated demands. There are actions, such, for instance, as assault and battery or slander, to which the rule is applicable. But, where the demand is for property that has a market value susceptible of easy proof, there is no propriety in such a rule. A loss of property having a definite money value is practically the same thing as a loss of so much money. The loss of the use of the property is practically the same thing as the loss of the use of (or interest of) so much money. We think, therefore, a just indemnity to the plaintiff required the addition to the value of the goods at the time of their destruction of the interest from that time to the date of judgment." We think the damages allowed by way of interest in the case at bar come within the principles applied in the cases cited. The claim was wholly a pecuniary one, and was not at large, as are claims for damages for assault and battery, slander, or others of like nature. It represented a loss of a pecuniary value ascertainable with reasonable certainty, as of a definite time; and we think damages in the shape of interest should be recoverable from that time, for such a loss, for only in this way can equity be done between the parties in the case at bar. There is no error. The other judges concurred, except **ANDREWS, C. J.**, who dissented.

ASHBORNE v. TOWN OF WATERBURY.

(Supreme Court of Errors of Connecticut. May 25, 1897.)

NEGLIGENCE—BURDEN OF PROOF—WITNESSES—CROSS-EXAMINATION.

1. In an action for personal injuries, it is reversible error to charge that the parties are subject to the same rule of proof, and that having pleaded freedom from negligence, and plaintiff's contributory negligence, defendant must establish them by a fair preponderance of the evidence.

2. Before defendant has opened his case, he cannot bring out evidence which properly belongs there on the cross-examination of plaintiff's witness, when it is not germane to the direct examination.

Appeal from superior court, New Haven county; William T. Elmer, Judge.

Action by Anthony W. Ashborne against the town of Waterbury for injuries received from a fall upon a defective highway, brought to the district court of Waterbury, and thence by appeal to the superior court for New Haven county, where it was tried to the jury on the general issue. A verdict for \$6,000 was rendered for plaintiff, and defendant appealed. Error.

The plaintiff, on the trial, introduced evidence tending to show that, in walking along South Main street, in Waterbury, about midnight, he stepped into a gully in the sidewalk, which caused him to stumble and fall; that this side of the street was built on the edge of a high bank, which had been guarded by a railing; that the railing at this point was down, and had been for some weeks; and that by reason thereof he fell over the bank, and was seriously injured. The defendant claimed, and offered evidence to show, that the railing had been down, if at all, but a very short time; that there was no gully or other defect in the walk; and that the plaintiff fell over because he was drunk.

Greene Kendrick and John P. Kellogg, for appellant. John O'Neill and Robert A. Lowe, for appellee.

BALDWIN, J. (after stating the facts). The trial judge, after charging the jury that the plaintiff was bound to prove by a fair preponderance of evidence both that the town was negligent in not maintaining a sufficient railing, and that he was injured while in the exercise of ordinary care, recapitulated the testimony at length, and then proceeded as follows: "If you are satisfied that the plaintiff has failed to sustain his allegations of negligence on the part of the town, and the affirmative fact that the plaintiff was in the exercise of due care; if you are satisfied that he has not sustained that position by the weight of evidence,—then you must find for the defendant. You must apply the same rule to the defendant that you do to the plaintiff. If you are satisfied that the plaintiff has sustained that position by a fair preponderance of the evidence, your verdict must be for the plaintiff. On the contrary, if you are satisfied that the defendant has, in the evidence which he has adduced here, shown that the town was not guilty of negligence, and, even if it was, that the plaintiff was guilty of contributory negligence; if you are satisfied that the weight of evidence thus convinces you,—then the verdict must be for the defendant." By these concluding remarks the jury were told to apply the same rule to the defendant that they did to the plaintiff, and that they must find for the town, if satisfied that it had shown by the evidence which it introduced that it was not negligent, or that the plaintiff was. It is, of course, plain that the defendant was not bound to prove anything.

but was entitled to a verdict, if the plaintiff failed to establish his case by his own evidence. From the beginning to the end of the cause, the burden of showing its negligence and his own care rested on him. The parties were not, in this particular, subject to the same rule, and for this error a new trial must be granted. It is true that in other parts of the charge the burden of proof assumed by the plaintiff was distinctly and properly stated; but here, for the first time, the positions occupied by the parties were put in direct comparison, and the misconception of that belonging to the town related to a vital point, on which it is quite possible that the verdict turned. *Button v. Frink*, 51 Conn. 342, 350. Dr. Axtelle, a witness for the plaintiff, who had attended him professionally after the accident, was asked, on cross-examination, what were the plaintiff's habits, with regard to temperance, before the accident; whether he had since that seen him intoxicated; and whether, in his opinion, the injuries received would be aggravated if followed by an intemperate course of life. These questions were not germane to the direct examination, and were properly excluded. The time had not come for the defendant to open its case. The other rulings on evidence were also correct; but it is unnecessary to discuss them, as the questions presented are not likely to recur on another trial. There is error, and a new trial is ordered. In this opinion the other judges concurred.

O'CONNOR v. TOWN OF WATERBURY.

(Supreme Court of Errors of Connecticut. May 25, 1897.)

BOUNTIES TO UNION SOLDIERS—DRAFTED MEN—
AUTHORITY OF TOWN TO PAY—LIMITATIONS—
ADVANTAGE OF STATUTE—HOW TAKEN.

1. Acts 1895, c. 818, authorizing any person who "enlisted or re-enlisted" in the United States army for suppression of the Rebellion, and was honorably discharged, and who thereby became entitled to but has not received any bounty voted by any town, to recover the same from such town in an action on such statute, etc., does not apply to drafted men.

2. A town has no power to give a bounty to persons drafted into the United States army, in the absence of a statute authorizing it to do so.

3. Where a complaint anticipates a plea of the statute of limitations, and alleges a new promise or acknowledgment, advantage of the statute may be taken by demurrer to the complaint.

Case reserved from district court, New Haven county; Albert P. Bradstreet, Judge.

Action by John O'Connor against the town of Waterbury. Case reserved on demurrer to the complaint. Demurrer sustained.

The amended complaint is as follows:

"(1) On August 22, 1863, the plaintiff was a legal resident of said town of Waterbury. (2) On said day the plaintiff was duly and legally drafted from among the residents of said town into the military service of the United States, under and in pursuance of the

provisions of the act of congress which provided for the enrolling and calling out the national forces. (3) On November 5, 1864, the plaintiff was examined, found fit for duty, and mustered into the military service of the United States under the provisions of said act. (4) The plaintiff remained in said service until April 28, 1865, when he was honorably discharged by the proper officers of the government. (5) After being drafted and mustered into said service, the plaintiff was credited to and was applied on the quota of said town, and assisted in filling said quota under the provisions of said act of congress, and was of great and substantial benefit to said town in relieving it from draft under the provisions of said act. (6) On August 4, 1863, at a meeting of the legal voters of said town, legally warned and held for that purpose, it was voted 'that the sum of three hundred dollars be paid by the treasurer of this town, out of moneys to be raised, to each person who shall be drafted from this town in accordance with the provisions of an act of congress for enrolling and calling out the national forces, who shall be found liable to serve by the board of enrollment provided for by said act.' (7) On September 5, 1863, at a meeting of the legal voters of said town, legally warned and held for that purpose, it was voted 'that three hundred dollars shall be paid to each person who is or may hereafter be drafted to fill the quota now called for by the government from this town, and who shall be liable to answer to said draft in one of the three ways provided by the law, in case such person shall elect to abide said draft or shall furnish a substitute, to be paid when such person or substitute shall have been accepted and mustered into the service of the United States.' (8) On the third Monday of January, to wit, on the 18th day of January, 1864, at a meeting of the legal voters of said town, legally warned and held for that purpose, it was voted 'to confirm the doings of the town meeting held on September 5, 1863. In voting that three hundred dollars shall be paid to each person who is or may hereafter be drafted, and all of the other votes passed at said meeting of September 5, 1863, promising aid or appropriating money to drafted men, were legalized and confirmed.' (8½) On August 13, 1864, at a legal meeting of the voters of the town of Waterbury, legally warned and held for that purpose, it was voted 'that the selectmen be, and are hereby, authorized to pay or to draw their orders on the town treasury for the sum of three hundred dollars in favor of each person who may be drafted and held under such draft, and who shall be accepted and mustered into the service of the United States, upon the quota of this town.' (9) On October 5, 1896, at a meeting of the legal voters of said town, legally warned and held for that purpose, it was voted 'that the plaintiff's claim for bounty due to him from the town be allowed, with interest.' (10) The defendant has never paid the whole or any part of said boun-

ty, or the interest thereon, and the same, with said interest, is still due. The plaintiff claims \$1,000 damages."

The defendant demurs to the complaint for the following reasons:

"(1) The town was not authorized by law on August 4, 1863, to pay bounties to a drafted man. (2) The town was not authorized by law on September 5, 1863, to pay bounties to a drafted man. (3) The town was not authorized by law on the third Monday of January, 1864, to confirm and make legal and binding upon the town the bounty voted to drafted men at the meeting of September 5, 1863. (4) The special acts of the legislature authorizing towns to confirm the illegal votes paying bounties to drafted men were and are unconstitutional and void, in that they grant exclusive emolument and privileges to a class who by law are not entitled thereto. (5) It is the duty of congress, and not of the state of Connecticut or of the town of Waterbury, to provide for the public defense. (6) The public act of 1895 did not authorize towns to pay back bounties to drafted men. (7) The plaintiff is not entitled, on the facts stated in the complaint, to the interest prayed for, or to any interest whatever. (8) On the facts stated in the complaint the bounty prayed for appears to have been long since outlawed, and a recovery thereof is barred by a lapse of time. (9) The act of 1895, providing for the enforcement of bounty claims against towns, is unconstitutional and void, in that by an arbitrary removal of the statute of limitations as a plea in bar it thereby gives to contracts with one class of men a privilege which is denied by law to the parties to ordinary contracts. (10) The vote of October 5, 1896, was void because it sought to confirm a claim resting upon votes themselves void, or, if valid, a claim which appears to have been outlawed for many years, and hence said vote was *ultra vires*, and of no binding force or validity."

The first and second sections of chapter 318 of the Public Acts of 1895, are as follows:

"Section 1. Any person who enlisted or re-enlisted in the army or navy of the United States for the suppression of the Rebellion, and who was honorably discharged from service, and who thereby became entitled to any bounty voted by any town and has not heretofore received the same, may recover from such town the amount of any such bounty in an action upon this statute. Any such person shall be entitled to judgment against a town upon proof from the records of the adjutant general's office by a certificate duly attested by the adjutant general or his assistant, that he was duly enlisted and credited to such town and that such a vote has been passed by the town, and where a town has been divided or a portion of a town has been set off to another since such enlistment, the claim shall be against the town now containing the territory within which such soldier or sailor resided at the time of his enlistment.

"Sec. 2. The statute of limitations shall not be pleaded by the defendant in any such action."

John O'Neill, for plaintiff. Greene Kendrick, for defendant.

ANDREWS, C. J. It is clear that the plaintiff is not entitled to recover in this action by reason of the act of 1895. That act is limited to enlisted men. The plaintiff was not an enlisted man. The legislature might be very willing to extend a favor to one who entered the army or navy voluntarily, and be very unwilling to extend a like favor to one who entered the army or navy only because he was dragged there by force. Besides, the complaint is not brought on that statute, according to the rule laid down in 1 Swift, Dig. side pages 585, 757. It is immaterial, therefore, so far as this case is concerned, to inquire whether or not the said statute is constitutional.

The latest date at which the plaintiff's cause of action can be said to have accrued was November 5, 1864, when he was mustered into service. This suit was commenced on January 2, 1897, a period of more than 32 years after the right of action existed. Chief Justice Hosmer said, in *Lynde v. Denison*, 3 Conn. 391: "A forbearance for a period of twenty years, when unexplained, is a fact from which payment of a sum demanded ought to be presumed." He cites *Phil. Ev.* 114, and *Bailey v. Jackson*, 16 Johns. 210. This rule has been approved in *Chapman v. Loomis*, 36 Conn. 459, and in *Fanton v. Middlebrook*, 50 Conn. 44. The plaintiff argues that advantage of the statute of limitations cannot be taken by demurrer. He states, and rightly, that the objection to this mode of pleading is that it raises no issue. It deprives the plaintiff of an opportunity to reply a new promise or an acknowledgment. The complaint in this case, as if expecting the statute of limitations to be set up in answer, seeks to reply to it in advance by alleging the new promise contained in the vote of the defendant town of October 5, 1896. It is to the whole complaint that the demurrer here is interposed.

The exact question presented by the pleadings in the case can best be understood by separating the averments. It appears on the face of the complaint that between the date when the cause of action accrued and the commencement of the action a period of time had elapsed from which the payment of the plaintiff's claim would be presumed. Let us suppose the defendant to have made an answer alleging that such period of time had intervened, and then that the plaintiff had, by way of reply, set out the vote of October 5, 1896, and to that, that the defendant had demurred. The demurrer in the case presents precisely the same question; that is to say, is the vote of October 5th such a new promise or acknowledgment as removes the bar of the statute of limitations? The complaint purports to set

out that vote in its exact words: "That the plaintiff's claim for bounty due to him from the town be allowed, with interest." As this action was not commenced till January 2, 1897, how can the superior court or this court know that by the word "plaintiff" in the vote of the town was intended John O'Connor? We do not, however, rely on this.

Towns have no authority to subject their citizens to taxation except for purposes clearly authorized by law. If the vote just quoted is a new promise or acknowledgment sufficient to bind the town, then the citizens of that town must be taxed to pay the amount of the claim made by the plaintiff. And the same infirmities would attend the power of the town to subject its citizens to taxation by such a vote as attended its power to pass the original bounty votes. As those votes would not have been binding on the town, except for the special authority conferred by the legislature on the town to pass them, so this new promise does not bind the town, for the reason that there has been no authority given by the legislature to the town to make it. *Booth v. Town of Woodbury*, 82 Conn. 118; *State v. Fyler*, 48 Conn. 145; *Turney v. Town of Bridgeport*, 55 Conn. 412, 12 Atl. 520; *White v. Town of Stamford*, 87 Conn. 578.

The superior court is advised that the complaint is insufficient, and to sustain the demurrer. The other judges concurred.

BOYLE v. McWILLIAMS.

(Supreme Court of Errors of Connecticut. May 25, 1897.)

TRIAL — HARMLESS ERROR — RUNAWAY HORSE — NEGLIGENCE OF DRIVER.

1. Any error in sustaining a demurrer to certain paragraphs of a defense was harmless where the facts set up in them could have been given in evidence under the pleadings on which the case was tried.

2. Technical error in failing to sustain a demurrer to a paragraph of a reply which should have been made more definite is not ground for a new trial where it could not have affected the result reached by the court.

3. In an action for the death of a mule it appeared that defendant was driving a horse which was not well broken, and was afraid of trains; that when he came to a point where tracks crossed the street the horse became frightened at an engine, and ran away, throwing defendant out of the wagon; that it was caught, and turned over to defendant, who drove back towards the crossing, which was then closed by gates while a train was passing; that defendant, without waiting for the gates to be fully raised, or for waiting teams to pass over, drove towards the crossing; that his horse was excited, and, dashing in among the teams, ran against plaintiff's mule, and drove a shaft into it. *Held*, that defendant was chargeable with negligence in undertaking to drive over the crossing.

Appeal from court of common pleas, New Haven county; John P. Studley, Judge.

Action by John Boyle against John C. McWilliams to recover damages for negligence in causing the death of a mule, brought to the court of common pleas in New Haven county,

and tried to the court. Facts found, and judgment rendered for plaintiff, and appeal by defendant for alleged errors in the rulings of the court. No error.

James P. Pigott and Daniel A. McWilliams, for appellant. Prentice W. Chase, for appellee.

TORRANCE, J. This is an action to recover damages for killing a mule. In substance, the complaint alleges that the death of the mule was caused by the negligence of the defendant in driving the shaft of his wagon into the breast of the mule. The defendant filed an answer consisting of two defenses, the first being, in effect, a general denial, and the second setting up in four paragraphs certain matters, the substance of which may be stated as follows: (1) The defendant, at the time of the accident to the mule, was driving a horse which had been his property for nearly two months. (2) He had purchased said horse relying upon the representations of the seller that it was "sound and true." (3) Prior to the time of the accident, the defendant had frequently driven said horse along the highway where the accident happened, and elsewhere through the streets of New Haven, "without any attempt on the part of said horse to run away, shy, or otherwise act in a manner different from that of an ordinary gentle, sound, and true horse." (4) Shortly before the accident to the mule, "said horse became frightened, restless, and annoyed by the engines crossing said Bridge street at a point where the tracks of said railroad company are protected by gates, said gates being down, and upon the lifting of said gates said horse ran away, and immediately thereafter the defendant was thrown from the seat of his wagon, and rendered helpless and unconscious, and at about the same time the animal mentioned in the complaint was one of several waiting the lifting of the gates to cross said tracks." To this second defense the plaintiff filed a demurrer, and the court sustained the demurrer as to paragraphs 2 and 3, and overruled it as to paragraphs 1 and 4 of said defense. The plaintiff then filed a reply to paragraphs 1 and 4 of the second defense, the second paragraph of which reply reads as follows: "The plaintiff admits so much of paragraph 4 of the defendant's second defense as is consistent with the plaintiff's complaint, and denies the balance of said paragraph 4." To this second paragraph of the reply the defendant demurred because it did not specify the allegations which it purported to deny, and because it was evasive. The court overruled this demurrer. The case was then tried to the court, and upon the facts found judgment was rendered for the plaintiff.

The substance of the material facts found may be stated as follows: On the day of the accident, and prior thereto, the defendant, a grocer in New Haven, was returning on his delivery wagon, accompanied by a friend, to

his store, and was driving along Bridge street. He had owned the horse he was then driving about two months. It had been brought from the West a few months before, had not been well broken, and was easily frightened by railroad trains. "The defendant, who was not an experienced driver, had found it necessary on a prior occasion to turn about and drive away from the railroad crossing herein-after mentioned, in order to keep his said horse, which was frightened by a train, from running away." The tracks of a steam railroad cross Bridge street at grade, and gates operated by machinery are kept there to protect the public in using the crossing. The number of tracks, the passing of frequent trains and switching engines, and the raising and lowering of the gates combine to make this crossing dangerous, "and especially so to those driving across with horses not well broken." When the defendant, in driving along Bridge street as aforesaid, reached this crossing, his horse became frightened by one of the switching engines, and ran away, throwing the defendant and his friend out of the wagon. The horse ran about an eighth of a mile, when it slipped and fell down, and was caught by some bystanders, "who disentangled it, got it up, hitched it into the wagon again, and turned it over to the defendant when he appeared soon after." The defendant then got into the wagon, and drove back towards the crossing, for the purpose of returning to his store, advising his friend not to ride with him, because of the excited condition of the horse. When the defendant arrived within about 100 yards of the crossing, he guided his horse up to the rear of a cart standing on the side of the street. At this time the gates were closed to allow a freight train to pass over the crossing, and some 15 or 20 teams on both sides of the crossing were waiting for the gates to be raised. The defendant, without waiting for the gates to be fully raised and become stationary, or for the other teams to pass over, drove towards the crossing. His horse was excited, and was jumping, and as it approached the crossing was frightened by the steam escaping from a switching engine near by, "and ran, the defendant losing all control, and dashed in among the teams, which were then upon the crossing passing over, and ran against the plaintiff's said mule, driving a shaft into it, and killing it. A short distance further on, the defendant's said horse ran into a car, and the defendant was thrown, his head striking the ground, and the defendant rendered unconscious." The court found, in substance, that the defendant, under these circumstances, was guilty of negligence in undertaking to drive his horse over the crossing, and also that the plaintiff was not guilty of contributory negligence.

Upon these facts the defendant claimed as matter of law that the injury complained of was the result of unavoidable accident. This claim the court overruled. Upon this appeal

the defendant claims that the court below erred (1) in sustaining the plaintiff's demurrer; (2) in overruling the defendant's demurrer; (3) in basing its judgment upon facts found which were not in issue in the case; (4) in rendering judgment for the plaintiff, after having decided all the facts in issue in favor of the defendant; (5) in not holding upon the facts found that the injury complained of was due to unavoidable accident; (6) in imposing upon the defendant a higher degree of care than the law demands.

These claims will be briefly considered in the order above stated. The first is, in substance and effect, that the action of the court deprived the defendant of the right to prove the facts set up in the second and third paragraphs of the second defense. But the facts so set up, if available at all as a defense, in whole or in part, either alone or in connection with the paragraphs of the second defense, which the court allowed to stand, and to the extent that they were thus available, could be given in evidence under the pleadings on which the case was tried, and, for aught that appears, were so given in evidence. This being so, it is impossible to see how the action of the court in sustaining the demurrer in part harmed the defendant. If, then, the court erred at all in this matter,—a point which it is here unnecessary to consider,—it was a harmless error, and does not entitle the defendant to a new trial.

The same thing is true with regard to the second claim. We think the defendant's demurrer to the reply should have been sustained. The paragraph demurred to was clearly objectionable and bad, in that its admissions and denials were not as specific as the rules require; but it is impossible upon this record to see how the action of the court in overruling the demurrer can have so harmed the defendant as to entitle him to a new trial. If the demurrer had been sustained, and the denials and admissions of the reply had been made as specific as the rules require, it might possibly have lightened a little the labors of the defendant on the trial, but it is difficult to see how it could have affected in any material way the trial itself, or changed the result reached by the court. So far as appears, a full and fair trial was had upon what was, in effect, a general denial of all the material allegations of the complaint, and the defendant had the opportunity to prove every fact that could legally avail him as a defense, in whole or in part, and doubtless he availed himself of that opportunity. Under the circumstances disclosed by the record, we think this technical error did the defendant no harm, and for such an error a new trial is never granted.

The third claim is that the facts found upon which the judgment was rendered were not within the issue; and the fourth is that the court, having decided all the facts in issue in favor of the defendant, erred in rendering judgment on them in favor of the plaintiff.

Upon a careful inspection of the record, we are of opinion that these two claims are destitute of any valid foundation.

The fifth claim is that the facts found show that the injury complained of was due to unavoidable accident. This appears to have been the only claim made before the trial court, and it was there claimed as matter of law, and, presumably, is so claimed here. Whether the injury was caused by the negligence of the defendant, or was due to unavoidable accident, was, we think, under the circumstances disclosed by the record, a question to be determined by the trier as one of fact from the evidence. If, however, it is possible, upon any permissible view of the record, to regard it as one of law, or its decision as involving the application of rules of law, we are of opinion that the court below did not err in overruling the defendant's claim upon this point, or in finding as it did upon this point.

The sixth and last claim is that the court imposed upon the defendant a higher degree of care than the law demands. The record fails to show any foundation for this claim. There is no error. The other judges concurred.

STATE ex rel. HOSFORD v. KENNEDY.
(Supreme Court of Errors of Connecticut. May 25, 1897.)

MUNICIPAL CORPORATIONS—REMOVAL OF CHIEF OF POLICE—OATH OF OFFICE—QUO WARRANTO—TITLE TO OFFICE.

1. Where a section of a city charter provides that the warden and burgesses shall have power to appoint policemen, one of whom shall be designated chief of police, and for the removal of policemen on a vote of five of the burgesses, a removal of the chief of police by a vote of less than five of the burgesses is invalid.

2. A provision of a charter limiting the number of policemen, and requiring that one of them shall be appointed chief of police, when construed with another section of the charter providing that "the treasurer, collector, chief of police, and bailiff" shall give bonds, creates the office of chief of police.

3. Where a charter provides for a certain number of policemen, and for the appointment of one of their number as chief of police, the person appointed does not hold two offices, so that he can be removed from the office of chief of police in any other manner than that prescribed for the removal of policemen.

4. A provision in a charter that the warden may administer the oath of office to other officers will not defeat the title of the chief of police to office because the oath was taken before a notary public, if otherwise in accordance with the charter.

5. In quo warranto to determine title to office, the fact that the record of the warden and burgesses of a city states that petitioner was properly removed is not conclusive so that it cannot be shown that the legal number did not concur in the removal.

6. In quo warranto to determine title to office, the failure of relator to file a replication was not an admission of respondent's allegation in his plea that relator had been duly removed from his office, the plea of general denial putting in issue the allegation in the information that the removal of the relator was illegal.

7. Where the information in quo warranto is demurrable, and lays no foundation for bringing

respondent into court, the defects are waived when respondent appears and pleads to the merits.

Case reserved from superior court, New Haven county; Milton A. Shumway, Judge.

Information by the state on the relation of George D. Hosford against John A. Kennedy in the nature of quo warranto. Facts found and case reserved for advice of the supreme court of errors. Judgment of ouster advised.

The information alleged that on July 9, 1895, the relator, duly appointed a policeman by the warden and burgesses of the borough of Naugatuck, was duly designated and appointed by said warden and burgesses chief of police until he should be legally removed from office; that he duly qualified and entered upon the duties of his office; that on August 7, 1896, the warden and burgesses, having heard charges presented against the relator, did, by a vote of less than five burgesses, find the charges proved, and voted to suspend and remove the relator from the office of chief of police by a vote of less than five burgesses, contrary to the provisions of the borough charter; that the respondent, on August 19, 1896, and from thence hitherto, has exercised said office without legal warrant, and during the time aforesaid has usurped, and still does usurp, the franchises to said office pertaining. The plea, in effect, denies that the vote suspending and removing the relator was a vote by less than five burgesses; and alleges that the relator was by the vote of said warden and burgesses legally suspended and removed from his office as chief of police, and that said warden and burgesses also legally suspended him without pay; that afterwards the respondent, being a policeman of said borough, was designated by the warden and burgesses as chief of police. Upon trial the court found that upon the motion of August 7th, suspending and removing the relator from office, three burgesses voted in favor thereof and three burgesses in opposition, and thereupon the mayor voted in favor, and declared the same carried; that subsequently, and in like manner, the board suspended the relator as policeman for 10 months without pay; that thereupon the relator was removed and ousted from his office of chief of police, and the respondent was designated in his place as chief of police, and thence hitherto has exercised the office of chief of police, and has ousted the relator from said office, and kept him from the discharge of the duties thereof. The reservation presents the question of law involved as follows: "If the action of the warden and burgesses as above set forth was ineffectual in law to remove the relator from the office of chief of police, then I find that the respondent without legal warrant has used and exercised that office; but if the relator was, by said action, legally removed, then I find that the respondent has not usurped the office."

Goodwin Stoddard and William D. Bishop, Jr., for relator. John O'Neill and William Kennedy, for respondent.

HAMERSLEY, J. (after stating the facts). The borough of Naugatuck was established by an act passed in 1893 (Sp. Acts 1893, p. 190), and amended in 1895 (Sp. Acts 1895, p. 155). The charter (section 63, cl. 35) authorizes the warden and burgesses "to establish and maintain a watch or police for said borough," and in section 60 specifically prescribes the manner of appointment and removal, the tenure of office, and the powers of the members of the "police" which may be established. The section as amended in 1895 is as follows: "Sec. 60. The warden and burgesses shall have power and authority from time to time, to appoint such number of policemen, not exceeding twenty-five, as they see fit, one of whom shall be designated as chief of police, who shall take the oath provided by law for constables of towns, and shall hold their offices until removed or expelled by said warden and burgesses for cause, but no policeman shall be removed or expelled by said board unless five of the burgesses vote in favor of doing so, and the action of said board so voting as afore said, shall be final, and no appeal shall be allowed there from; and such policeman shall have full power and authority within said borough, to arrest, with or without previous complaint and warrant, all such persons [stating in detail all powers conferred]." We think this section, in connection with section 63 and other parts of the charter, limits the number of members of the force or department of police which the borough is authorized to establish, vests the power of appointment and removal of all members in the warden and burgesses, prescribes the same tenure of office and manner of removal for all members, vests in all members the powers specified, and requires the designation or appointment of a head of the police who is a member of the police force, and counts as a policeman in determining the number of members that may be appointed, and whose office of chief of police embraces all the powers specified in this section, as well as those belonging to the head of the force. These provisions are prescribed by the charter, and cannot be altered by any action of the warden and burgesses. When the charter says that the "policemen" (including the one designated as chief of police) shall hold their offices during good behavior, it fixes the tenure of office of the chief of police; and, when it says that no policeman shall be removed unless five of the burgesses vote in favor of doing so, it applies as well to the policeman at the head of the department as to the subordinate policemen. The claim is made that the charter creates no such office as chief of police, but simply provides for an honorary title, coupled with some additional duties and emoluments, which may be given to one or another of the policemen, at the pleasure of the warden and burgesses. Such claim cannot be supported by a reasonable construction of language of section 60, and the charter plainly treats the position of chief of police as a public office in section 18, which provides that "the

treasurer, collector, chief of police and bailiff of said borough shall give sufficient bonds with surety to the warden * * * for the faithful performance of their respective duties before entering on the performance of the same," in connection with section 63, cl. 4, by which the warden and burgesses are authorized to make by-laws "to prescribe the amount of bonds to be given by any officers of said borough who are required to give bonds by this act." Indeed, the existence of a police department almost necessarily involves a public officer who shall be its head. And so our General Statutes have contemplated the existence in each municipality possessing a police department of some official who shall be the head of its police force (State v. Plinkerman, 63 Conn. 176, 197, 28 Atl. 110), although, as a police department has not heretofore been considered as appropriately belonging to towns and boroughs, such statutes refer in terms only to the chief officer of police in cities. An alternative claim is made that the charter creates two offices,—i. e. that of policeman and that of chief of police; that the relator held both of these offices; that by virtue of his office of policeman he could exercise the powers given by the charter to policemen, and was bound to perform the duties imposed upon policemen, and by virtue of his office of chief of police he had none of the powers given by the charter to policemen, and was not bound to perform any of the duties of a policeman, but only such duties as may be imposed upon a chief of police. Therefore he may be removed from the office of chief of police (not in the manner prescribed for the removal of policemen, but in the manner described in the general provisions of the charter relating to the removal of other borough officers), and still retain and exercise the office of policeman, although he cannot retain the office of chief of police if removed from the office of policeman.

It is clear that a person appointed as one of the policemen under the charter holds an office, and that a person appointed as chief of police holds an office. It is also clear that when a policeman is appointed chief of police he has all the powers given by the charter to policemen. He has these powers, however, because they are given to the chief of police by the charter in defining the powers of all members of the force under the description of "policemen." It is not true that he is bound to perform all the duties that may be imposed upon policemen. Such obligation is inconsistent with the office of chief of police. If the language of section 60 is submitted to critical analysis, independently of all considerations that must affect the construction of a statute, there is an apparent ambiguity, and some ground for the respondent's alternative claim; and when this language is considered in connection with other parts of the charter, and the evident purpose of the legislature to establish a police force, with a tenure of office unaffected by political changes in the appointing power, the ques-

tion is still not altogether free from doubt. It seems, however, to us that the controlling intention of the legislature as expressed by its acts does not give to the chief of police two distinct offices, held by distinct tenures, and subject to distinct processes of removal; that the term "policemen," as used in section 60, is intended to apply not so much to naming an office as to defining the appointment, tenure of office, specific powers, and removal of all members of the police establishment, including the person appointed to the office of chief of police. All members of the force are called "policemen." This is a name adopted as common to all in defining powers common to all. Each member of the force holds an office because the powers conferred can only be exercised by a public officer; but conferring such powers on the incumbent of an established office does not create another and distinct office. The office held by each patrolman is called "policeman." It might as well be called "patrolman." It is not the name, but the function, that controls. The head of the force holds an office whose functions consist of powers given to all policemen,—i. e. to all members of the police force,—and of some additional powers. His office is created by the charter under a distinct name. Some of his powers are derived from the fact of his being a member of the force described as "policemen," but it does not follow that these powers, when used by the policeman holding the office of chief of police, must constitute a distinct office. The office held as patrolman is created merely by force of powers given by the charter to all members of the police force. When these powers are used by the member of the force who holds the office of chief of police, they are attached to that office. The necessity which established an office where those powers were exercised by a patrolman ceases to exist, and the office ceases with the necessity, or is merged in that of chief of police, created and named by the charter. The chief of police cannot be said to hold a distinct office as policeman merely because certain of his powers, as well as his tenure of office and method of removal, are prescribed by the charter in prescribing the powers, tenure of office, and method of removal of policemen; i. e. all members of the force or department of police established in pursuance of the charter. In reaching this conclusion, we have considered the possible effect of the difference between section 60 as enacted in 1893 and amended in 1895 on the true meaning of the act as amended; but such effect is not of sufficient weight to call for special comment. It appears that the vote of removal was a vote to "suspend and remove" the relator from the office of chief of police. The power of removal being limited to a specific mode, it cannot be exercised in a different manner under the guise of suspension, even if the warden and burgesses, under other provisions of the charter and by-

laws, made in pursuance thereof, may, by a major vote of the board, enforce the penalty of suspension for misconduct. The vote in question was plainly a vote of removal, and nothing else. It also appears that after the vote of removal from the office of chief of police the board voted to suspend the relator from the office of policeman for 10 months. It is not proper to determine in this case whether such vote can be treated as applicable to the relator in his office of chief of police, or whether, if it can be so treated, it was a reasonable and valid exercise of the power of suspension. The respondent justifies only by virtue of a legal removal of the relator from the office of chief of police, and a legal appointment of the respondent in his place.

The finding that the oath of office was administered to the relator by a notary public, if it properly appears in the record, does not affect the relator's title to his office. The provision in the charter that the warden may administer the oath of office to all other officers of the borough cannot operate to defeat his title merely because the oath of office, in other respects in accordance with the charter, was taken before a notary public.

The claim of the respondent in argument that upon the trial the record of the warden and burgesses stating the fact of removal was conclusive, and that it could not be shown that the legal number of burgesses did not concur in the removal without first causing the record to be amended, is without foundation. One main purpose of a quo warranto is to go beyond the record to the very truth of the appointment. The cases cited by the respondent are consistent with this principle. There is nothing in the respondent's claim that the failure of the relator to file a replication operated as an admission of the respondent's allegation in his plea that the board removed the relator from his office of chief of police, because the general denial in the plea put in issue the allegation in the information that the removal of the relator was by a vote of less than five burgesses, contrary to the provisions of the charter, and because the pleadings are too defective to clearly present the proper issues. An information in the nature of a quo warranto must proceed "according to the course of the common law." It is not a civil action within the meaning of the practice act in providing "one form of civil action" and prescribing the pleadings. Gen. St. § 905. Illustrations of the proper mode of pleading in quo warranto since the passage of that act are given in the forms adopted by order of court. In the present case the information is demurrable, and laid no foundation for bringing the respondent into court. These defects were waived by the respondent when he appeared and voluntarily pleaded to the merits. But the respondent's plea is called an "answer," and is no more a proper plea in substance than in name. When the pleadings do not fully disclose the ground of defense,

the issues may be settled by the court. *Id.* § 880. The parties here went to trial on the issue of fact, was the vote purporting to remove the relator from the office of chief of police passed by the vote of less than five burgesses? and the issue of law, was such removal contrary to the provisions of the charter? The court has found the fact for the relator, and at the request of both parties reserved the question as to the judgment that should be rendered for the advice of this court. Under such circumstances, in the absence of sufficient definition of the issues by the pleadings, we may assume that the issues tried by the court were settled by the court before trial; and certainly the parties, by going to trial on these issues, and in making the request for the reservation made by the trial court, are now estopped from denying that the issues tried were the issues settled. When the respondent *in quo* warranto pleads in the form of an answer to a complaint, instead of a proper plea to the information, the relator should move to have the pleading expunged. The refusal of a trial court to so order upon such motion is error. Under the circumstances of the present case we do not think the informalities in pleading should prevent the relator from having the judgment to which he is entitled after a trial upon the merits. It would have been better, however, had the trial court compelled the parties to frame their pleadings according to law. The superior court is advised to render judgment of ouster. The other judges concurred.

MOONEY v. CLARK, Mayor, et al.¹
(Supreme Court of Errors of Connecticut. May 25, 1897.)

INJUNCTION—RAILROAD GRADE CROSSINGS—ABOLITION—SPECIAL COMMISSION—CONSTITUTIONAL LAW.

1. A taxpayer may enjoin the city from entering into an unauthorized contract involving illegal expenditure and taxes, and need not wait until the tax is levied.

2. Act June 22, 1895, appoints a special commission to act for the city of Bridgeport in agreeing with a railroad entering such city as to the time and manner of abolishing its grade crossings, and the division of the cost thereof between the city and the railroad, and provides that, when such agreement is approved by the board of railroad commissioners, it shall be binding on all parties, and shall be deemed an order of such board. *Held*, in a suit by a taxpayer to restrain the city authorities from confirming a contract by such special commission, that the act is a valid exercise of the legislative power to determine the manner of abolishing grade crossings, and appointment the cost of such abolition.

3. Since the abolition of such grade crossings is for the general welfare of the city, and contemplates the acquiring of new streets, the requirement that it shall pay part of the cost thereof does not diminish its assets, but only changes the form thereof.

Appeal from superior court, Fairfield county; Samuel O. Prentice, Judge.

Suit by Frank J. Mooney against Frank E. Clark, mayor, and others, aldermen, of the

city of Bridgeport, to restrain them from confirming a contract entered into by the agents of the city concerning the elimination of grade crossings. There was a judgment for defendants on demurrer sustained to the complaint, and plaintiff appeals. No error.

Robert E. De Forest and Jacob B. Klein, for appellant. Daniel Davenport and George P. Carroll, for appellees.

ANDREWS, C. J. The plaintiff in the complaint prayed for an injunction to restrain the city authorities of Bridgeport from taking certain action which he alleged they were about to take, and which would subject the taxpayers of that city to heavy illegal taxes. The superior court refused the injunction and dismissed the complaint. From that judgment the plaintiff has appealed to this court. If it were true that the consequences of the action complained of would follow as asserted by the plaintiff, then his complaint was not prematurely brought. "*Obsta principis*" is an exceedingly good maxim to act upon in cases where illegal taxation is threatened. But we think the consequences feared by the plaintiff will not follow, and that there is no error in the judgment of the superior court. To make this view entirely plain, we must examine the case with some care, both as to the action itself and its legal effect.

The defendants are the common council of Bridgeport. On the 20th day of April, 1895, Frank E. Clark, William E. Seeley, and Frederick S. Stevens, who were appointed, by a resolution of the general assembly enacted in 1895, agents on behalf of that city to enter into an agreement with the New York, New Haven & Hartford Railroad Company, reported to the common council of that city that they had, pursuant to that resolution, made an agreement with the said railroad company in respect to the matters mentioned in the said resolution, and submitted the same, which is:

"Whereas, the general assembly of the state of Connecticut at its last session passed a resolution which was approved June 22, 1895, and which provides that, in order that the safety of the public may be insured, all crossings at grade over the main tracks of the railroad of the New York, New Haven & Hartford Railroad Company, in the city of Bridgeport, shall be abolished, and also that said city and said railroad company may within six months after the passage of said resolution agree upon the manner, plans, method, and time in which said crossings at grade shall be abolished, and upon all other matters mentioned in section 6 of said resolution, and what amount, or what proportion, or what items of the cost thereof shall be paid by the city of Bridgeport, and, for the purpose of making said agreement, empowers the mayor of said city of Bridgeport and William E. Seeley and Frederick S. Stevens to act for said city: Now, therefore, in accordance with the provisions of said resolution of the gen-

¹ For concurring opinion, see 37 Atl. 1080.

eral assembly, and subject to the approval of the board of railroad commissioners, the said city of Bridgeport, acting herein by its agents, Hon. Frank E. Clark, its mayor, and the said William E. Seeley and Frederick S. Stevens, thereunto duly authorized by said resolutions, and said New York, New Haven & Hartford Railroad Company, acting herein by John M. Hall, its vice president, hereunto duly authorized, do hereby agree as follows:

"(1) For the purpose of abolishing the crossings aforesaid, the location, grade, and plan of said railroad through said city, and the number of its tracks, shall be substantially as shown upon the plans marked, 'Plans for the Abolition of Grade Crossings on the Main Line, New York, New Haven & Hartford Railroad Company, City of Bridgeport, of Conn.' (said plan being signed by the respective agents of the parties hereto), and the work of excavation, construction, alteration, and grading of said tracks, streets, approaches, bridges, and abutments according to said plans shall be done by said railroad company, both upon its own land, and upon the highways affected by said plans, except as hereinafter specifically otherwise provided. The grades of the railroad tracks and of the highways shall be as shown upon said plans. The stone abutments of all bridges shall be of equal workmanship of the abutments of the existing bridge across Fairfield avenue (west), unless modified by the railroad commissioners. Said railroad company, during the progress of said work, shall have the free use of such streets or portions of streets, and the right to temporarily close such streets, as may be necessary for the convenient prosecution of the work. Crescent avenue and Railroad street are hereby extended from their present easterly termini to the westerly line of the proposed freight station yard of said railroad company east of Central avenue, and East Washington avenue shall be extended and constructed by said city to Seaview avenue, provided said railroad company elects to lay a siding on the north side of its main tracks as hereinafter provided; and so much of South Railroad avenue between Broad and Main streets as is occupied by the structure of said railroad company, as shown on said plan, is hereby discontinued as a highway, and Clark, Wilmot, and North and South Railroad avenues, west of Fairfield avenue (west), and all streets and private ways, whether existing or projected upon or across the property of said railroad company along its main-line tracks, not shown upon said plans, are hereby discontinued, except the private ways between a point opposite the east end of Union street and Fairfield avenue (east). South Railroad avenue is hereby extended from Wordin avenue to Howard avenue, forty feet wide. Said railroad company shall lay and maintain a track at grade upon the south side of South Railroad avenue, from Fairfield avenue eastward to the westerly line of South avenue, free from all burdens or assessments of any kind, so long as said railroad company main-

tains the same; said track to be connected by proper switches with such side or spur tracks as now exist, or as may hereafter be granted or permitted by said city. Said railroad company shall bridge, as shown upon the plans, the following named streets: Bostwick avenue, Hancock avenue, Howard avenue, Wordin avenue, Iranistan avenue, Park avenue, South avenue, Myrtle avenue, Warren street, Lafayette street, Broad street, Main street, Wall street, Fairfield avenue, Sterling street, Noble avenue, Clarence street, Kossuth street, East Main street, Pembroke street, Hallett street, Seaview avenue, Central avenue, and Bishop avenue,—with the head room in each case of not less than twelve feet in the clear between the crown of the street and the bottom of the girder, unless otherwise shown on the plans. The location of the pipes, wires, poles, or tracks of any water, gas, telephone, or electric light, telegraph, or power company, or street-railway company, and all public or private sewers or drain pipes, shall be changed, at the expense of said several companies, whenever in any manner they interfere with the prosecution of said work, or the construction or maintenance of the same according to said plans, in such manner or in such time as the board of railroad commissioners shall order. For the accommodation of manufacturing and other shippers in East Bridgeport, said railroad company shall construct a fifth track, leading from its proposed freight station in East Bridgeport, or from some point between said freight station and Seaview avenue, to the easterly line of Hallett street; and the same may be placed either on the north or south side of the main tracks, but shall cross Seaview avenue on a level with said main tracks. Such fifth track shall be considered as a part of the work herein provided for, and shall be included in the cost thereof; and said railroad company shall have the right to use such portion of any street or streets immediately adjoining the railroad location as may be necessary for the location and maintenance of such fifth track, and said company shall be free from all burden and assessments on account of said fifth track so long as it shall maintain the same.

"(2) It is understood and agreed that the work herein provided for shall commence on or before the first day of April, 1896, and proceed as rapidly as possible until finished.

"(3) In consideration whereof, said city hereby agrees to pay to said railroad company one-sixth of the entire cost of constructing a four-track railroad from Fairfield avenue (west) to Bruce's brook, as by the alignment and grade shown on the plans above named, including the work done on the highway as per said plans, and including all bridges ready for ties, all damages to property resulting from a change of grade of streets, or the discontinuance of the same or parts thereof, and the cost and damages to all lands which have been or may be acquired by said railroad company for the purpose of said four-track construction, together with a

reasonable allowance for the services and expenses to the date hereof of Frank E. Clark, William E. Seeley, and Frederick S. Stevens, the persons appointed by said resolution to act for said city, and for such services as is imposed upon them by the provisions of this agreement: provided, that the total cost to be paid by said city shall not exceed in the aggregate the sum of \$400,000. Said railroad company shall keep a detailed account of the cost of said construction, excluding therefrom the cost of the passenger station and ground and approaches thereto not required for said four-track construction, and all switches and side tracks, and all other items properly belonging to the superstructure of said railroad. In case any question shall arise between said city and said railroad company as to any item charged or claimed as a proper charge for the construction account, either by said railroad company or said city, and the said city and said railroad company cannot agree as to its allowance as a proper charge to said construction account, all such disputed items shall be left to the arbitrament of the board of railroad commissioners of the state of Connecticut, whose decision shall be final and conclusive in the matter. In case any question shall arise between said railroad company and said city as to the value of any land owned or acquired by the railroad company, or damages thereto on account of the necessary use thereof, or damages thereto by the construction of said four-track railroad, and said city and said railroad company shall be unable to agree as to the value or amount thereof, then the equitable value of the portion of such property used, occupied, or damaged shall be determined by the Hon. Frank E. Clark, William E. Seeley, Frederick S. Stevens, William D. Bishop, I. De Ver Warner, and James Staples, or by a majority of them, under oath, and their decision shall be final and conclusive between the parties as to the amount properly chargeable to the cost of the work herein provided for. The amounts paid for all items of construction, land damages by reason of change of grade, discontinuance of streets or parts thereof, and all damages of every kind paid on account thereof for the prosecution of said four-track construction, shall be submitted to Frank E. Clark, William E. Seeley, and Frederick S. Stevens, as a committee to audit the same in behalf of said city, and shall be verified if required by said committee. If said committee at any time shall neglect or refuse to audit or approve said accounts when requested to do so, the board of railroad commissioners shall, upon the request of either party, audit such accounts; and, when so audited and approved by either said committee or said railroad commissioners as above provided, the amount thereof shall be accepted by both parties as a part of the entire cost of construction. It is further agreed that said accounts shall be audited as often as once in 30 days, if required by the railroad company, and when so audited the

proportion to be paid by the city to said railroad company shall be a debt due said railroad company, and shall draw interest at the rate of 5 per cent. per annum until paid."

In the council it was moved that the report be accepted and approved, and that the contract be affirmed and ratified. This motion was referred to the appropriate committee. Before that committee had reported, this suit was brought. These are the facts.

The record before us does not disclose whether or not the said contract has been approved by the board of railroad commissioners. If it has not been so approved, the plaintiff has no occasion for an injunction. The resolution, which appears in full in a footnote,¹ seems to contemplate that the contract shall not be obligatory on any one unless it receives such approval. If, however, it has been, or shall be hereafter, approved by that board, then it becomes an order of that board, and enforceable as such. It is in the latter aspect that the legality of the contract is to be considered. We assume that the contract has been or will be approved by that board. The policy of this state, for quite a number of years, has been to remove all grade crossings of railroads by highways. To accomplish this end, the legislature has been constantly making efforts, sometimes by mild and permissive means, and at others with a pretty strong hand. The most notable instance, perhaps, as it applied to a case of the very highest danger, was the Asylum Street bridge commission, in which the legislature, by direct interference, sought to remove the danger of a grade crossing in the city of Hartford by its own agents. That was in 1884. Of that act this court, in *Woodruff v. Catlin*, 54 Conn. 295, 6 Atl. 853, said: "The act, in scope and purpose, concerns the protection of life. Neither in intent nor in fact does it increase or diminish the assets either of the city or of the railroad corporations. It is the exercise of the governmental power and duty to secure a safe highway. The legislature, having determined that the intersection of two railroads with a highway in the city of Hartford at grade is a nuisance dangerous to life, in the absence of action on the part of the city or of the railroads may compel them severally to become the owners of the right to lay out new highways and new railroads over such land, and in such manner as will separate the grade of the railroads from that of the highways at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the expenses shall be paid by either corporation alone, or in part by both; and may enforce obedience to its judgments. That the legislature of this state has power to do all this for the specified purpose, and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue." The doctrine of that case was repeated and acted upon in *Appeal of New York & N. E. R. Co.*, 58 Conn. 541.

¹ See note at end of case.

20 Atl. 670, and in *Woodruff v. Railroad Co.*, 59 Conn. 79, 20 Atl. 17. In 1889 the legislature made the board of railroad commissioners a general commission, and commanded them to act on their own motion to accomplish the removal of those grade crossings which were specially dangerous. Acting on that command, the railroad commissioners ordered the removal of a grade crossing by the New York & New England Railroad in the town of Bristol. That order, and the act under which it was made, were approved by this court in *Appeal of New York & N. E. R. Co.*, 62 Conn. 530, 26 Atl. 122, where it was held that it was competent for the legislature to act in the duty of providing safe highways, through a general commission as well as through a special one. The case has been sustained by the supreme court of the United States. *New York & N. E. R. Co. v. Town of Bristol*, 151 U. S. 556, 14 Sup. Ct. 437.

Danger from grade crossings was as highly threatening, and in some respects even more serious, in Bridgeport than at Asylum street in the city of Hartford. The New York, New Haven & Hartford Railroad extends through the entire length of the city, a distance of more than four miles, and on both sides of the harbor, which it crosses by a drawbridge. A part of the way it lies along the shore of the harbor, obstructing all passage from the business parts of the city to the steamboat landing and the docks. It appears in the agreement that there are 24 streets crossed at grade by the railroad,—some of them, as it is stated, the most frequently traveled ones in the whole city. It is a town of 60,000 inhabitants, and is rapidly growing. Its people are largely engaged in manufacturing, and their prosperity is affected in a great degree by the readiness with which they can receive and transmit goods from and by railroad. Its growth in wealth and population depends materially upon its railroad facilities. The railroad receives large amounts of freight and very many passengers from the city, and desires to extend its facilities. The railroad company has completed its four tracks from New York to New Haven, except that part which lies in the city of Bridgeport. The completion of that work awaited the adoption of some plan by which these grade crossings could be avoided. The state would not permit the danger of these crossings to be increased by the additional tracks at grade. The city, for its own welfare, was not willing that such increase of danger should be allowed, and the railroad shared in the same unwillingness. It was this condition of things in Bridgeport which the legislature in 1895 was called on to meet when it enacted the special act under which Mr. Clark and the others acted in making the contract above recited. That contract declares that, in order that the safety of the public may be insured, all crossings at grade over the main tracks of the railroad of the New York, New Haven & Hartford Railroad Company in the city of Bridgeport shall be abolished in the man-

ner therein provided. It appoints Mr. Clark and the others to act for the city, and authorizes them to make an agreement with the said railroad company as to the manner, plans, method, and time in which all the said crossings at grade shall be abolished, and then declares, "And such agreement shall be final and conclusive upon all parties concerned, when approved by the railroad commissioners of this state, and that then the agreement shall be deemed to be an order of said board, and enforceable in the manner provided in the seventh section of the resolution." Assuming now, as we do, that the agreement has received, or will receive, the approval of the railroad commissioners, this case comes fully within the principles laid down in the authorities we have cited. The resolution, the agreement, and the approval by the railroad commissioners are but the parts of one governmental act to secure safe highways in the city of Bridgeport. The legislature, having determined that the grade crossings of the various streets in that city constitute a nuisance dangerous to life, has proceeded, in the way pointed out in the resolution and agreement, to compel the city and the railroad to become the owners of new highways and new railroads, to accomplish that end, and has determined who shall do the work, and who shall pay the expenses, and is doing this through the instrumentality of the persons named in the resolution, and of the railroad commissioners. That the legislature of this state has the power to do this, it is now necessary only to state, not to argue. This governmental act does not increase or diminish the assets of the city or of the railroad. It only changes the form in which the assets exist. "It violates no contract, takes away no property, and interferes with no vested rights." *Appeal of New York & N. E. R. Co.*, 62 Conn. 538, 26 Atl. 122; *State v. Asylum St. Bridge Commission*, 63 Conn. 98, 26 Atl. 580; *State's Attorney v. Selectmen of Branford*, 59 Conn. 402, 22 Atl. 336; *City of Middletown v. New York, N. H. & H. R. Co.*, 62 Conn. 492, 27 Atl. 119. The special act is constitutional, and there is no error in the judgment complained of. The other judges concurred.

NOTE.

Sp. Acts Conn. 1895, p. 416.

Providing for the Abolition of Grade Crossings in Bridgeport.

Resolved by this assembly:

Section 1. That in order that the safety of the public may be insured, all crossings at grade over the main tracks of the railroad of the New York, New Haven and Hartford Railroad Company, in the city of Bridgeport, shall be abolished in the manner hereinafter prescribed.

Sec. 2. Said city and said railroad company may, within six months after the passage of this resolution, agree upon the manner, plans, methods, and time in which said crossings at grade shall be abolished, and upon all other matters mentioned in section six of this resolution, and what amount, or proportion, or what items of the cost thereof, including a reasonable allowance for the services and expenses of the mayor, and William E. Seeley, and Frederick S. Stevens,

shall be paid by the city of Bridgeport. For the purpose of making said agreement, the mayor of the city and William E. Seeley and Frederick S. Stevens of said city are hereby empowered to act for said city, and such agreement shall be final and conclusive upon all parties concerned when approved by the board of railroad commissioners of this state, and shall then be deemed to be an order of said board and enforceable in the manner provided in section seven of this resolution.

Sec. 3. If it shall be agreed as aforesaid that any highway crossing or crossings of said railroad tracks shall be abolished by carrying the same over or under said tracks, and the grade of said highway or of any highway connecting therewith at or near said crossing is to be thereby changed, and that said city shall pay the special damages resulting to property owners from such change of grade, either or both of the parties to such agreement shall certify that fact to the clerk of said city, and it shall thereupon be the duty of the board of appraisal of benefits and damages of said city to estimate and appraise to the owners of land abutting on the raised or lowered portions of said highway the special damages resulting to them therefrom, over and above any special benefit resulting to them from the abolition of such grade crossing and such change of grade, and to estimate and appraise to the owners of any land situated in said city any special benefits accruing to them from the abolition of said grade crossing and said change of grade; provided, that the whole amount of benefits so assessed for said particular abolition and change of grade shall not exceed the whole amount assessed to the owners of said abutting land for said change of grade; and provided, further, that no benefits or damages for said change of grade shall be assessed to or against said railroad company. And all the provisions of the charter of said city relative to the mode of assessing benefits and damages for the lay out of streets by the common council and to appeals therefrom, and relative also to the payment of the same and to filing liens therefor and the effect of the same, are incorporated and made a part of this section, and made applicable to assessments made under this section.

Sec. 4. If, however, the agreement hereinbefore provided for shall not have been made, then and in that event the board of railroad commissioners are hereby authorized and directed to determine the plans, fix the time, and order the methods by which said crossings shall be abolished.

Sec. 5. Said commissioners, upon written application to them therefor, by said city or said railroad company, are hereby empowered and directed to determine the manner, plans, method, and time in which said work shall be done and such crossings at grade be abolished. Before making such determination, said commissioners shall hold a public session in the city of Bridgeport for the purpose of hearing said city and said railroad company, and any other persons interested, relative to the manner, plans, method, and time in which such work shall be done and said crossings at grade be abolished, and shall give such notice as they shall adjudge reasonable of the time, place, and purpose of said session, to said city and said railroad company and other persons, by publication in two daily newspapers published in said city.

Sec. 6. Said commissioners shall determine upon the manner, plans, method, and time in which such work shall be done and said crossings at grade be abolished, and are empowered and directed to determine and order from time to time what changes shall be made in the manner in which the tracks of said railroad shall be carried through said city, what highways or private ways shall be carried over or under the tracks of said railroad, what highways or private ways, and what parts thereof, shall be discontinued or closed, and what, if any, new highways shall be laid out; and to determine within what time and in what manner said changes shall be

made. Said commissioners are authorized and directed to require said railroad company to make such changes in the grade, alignment, radii of curves, and location of the tracks of said company, and to make such changes in the grade, lines, and width of any street or highway within said city, whether now crossing said tracks at grade or otherwise, as said commissioners shall judge necessary and proper for the purposes of this resolution; and they shall have power to authorize and require said railroad company to construct a new drawbridge across the navigable waters of Bridgeport Harbor in the line of the existing drawbridge or near the same, and between it and the lower bridge, so called, and to determine the place where the draw in said bridge shall be constructed, and the plan of the same, and said bridge shall be free of the obligations imposed by section 3503 of the General Statutes. And said commissioners are also authorized and directed to make all orders in relation to said changes and to any and all matters and things appertaining thereto, including the temporary use, occupation, or closing of any street in said city, and including the number of tracks to be constructed by said railroad company, which they may deem necessary and proper for the due execution of the purposes of this resolution. And the said commissioners are also authorized and directed to order any water, gas, telegraph, telephone, electric light, or power company, or street railway company, to change the location in the manner designated by the commissioners at its own expense, of its pipes, wires, poles, or tracks; also to make suitable orders as to the relocation of any public or private sewer or drain pipe.

Sec. 7. After the manner, plans, methods, and time in which said work shall be done shall have been determined upon, it shall be the duty of said commissioners to cause the same to be executed, and for that purpose they may apply to the superior court for Fairfield county for writs of mandamus or for proper process either in law or equity, and said court shall have full power to grant the necessary and proper relief. And it shall be the duty of said railroad company, under the directions of said commissioners, to do all the work of excavation, construction, alteration, and grading of said tracks, streets, approaches, bridges, and abutments required in doing said work.

Sec. 8. Said railroad company and said city may jointly and severally take any land or any interest therein which they shall deem necessary properly to carry out said work in any and all particulars, as called for in said plans so determined upon, in the same manner as is now provided by statute for taking land for railroad purposes. But, whenever any land is so taken for highway purposes, the appraisers so appointed shall, in estimating the damages to the owner or owners thereof, take into account any special benefits resulting to them from the layout of any new highway or highways, alteration in the width, line, or location of any existing highway or highways, or the discontinuance of any existing highway or highways, or parts thereof, in doing said work, and only the excess of the damages, if any, over said benefits shall be awarded to such owner or owners for such taking of land.

Sec. 9. In order to facilitate the completion of said work, whenever any damages shall be awarded to any person for taking his land for highway purposes, and it shall be necessary to pay for the same before said land is entered upon and taken, it shall be the duty of said railroad company to pay the sums so awarded, and if the amount thereof is to be reimbursed to said company by said city under the provisions of this resolution, the same may be collected, with interest, from said city by said railroad company in the same manner and to the same extent that debts lawfully contracted by municipal corporations in this state are enforced.

Sec. 10. The common council of the city of Bridgeport is hereby authorized, under the corporate name and seal and upon the credit of said

city, to issue bonds or other certificates of debt, and the same or the avails thereof, when sold as hereinafter authorized, may be appropriated by said common council for the purpose of paying the expense imposed upon said city by this resolution, but for no other purpose whatsoever; and said bonds may be issued in such sums and on such time and at such rate of interest, not exceeding five per centum per annum, payable semi-annually, and shall be prepared, signed, and authenticated in such manner and form, with coupons or otherwise, as said common council may determine, and the same may be sold from time to time under the direction of the mayor and the board of aldermen of said city; and said bonds or certificates when issued as aforesaid shall be obligatory upon the said city of Bridgeport to all intents and purposes, and may be enforced and collected in the same manner and to the same extent that debts lawfully contracted by municipal corporations in this state are enforced.

Sec. 11. Said city shall provide a sinking fund for the payment of the principal of the bonds or certificates hereinbefore authorized, and in each municipal year during which any of said bonds shall be outstanding, the board of apportionment and taxation of said city shall appropriate a reasonable and suitable sum for the purpose of said sinking fund, which, with the accumulations thereon, shall be sufficient to pay said bonds or certificates at their maturity, and said sinking fund shall be in the care and under the direction of the board of sinking fund commissioners of said city; and said fund shall be securely invested by said board for the sole purpose of redeeming all of said bonds or certificates issued by this authority at their maturity.

Sec. 12. Whenever said work shall have been done and said crossings at grade shall have been abolished, said commissioners shall direct what proportion of the entire expense, including land damages, together with their expenses and clerk hire, shall be paid by the said railroad company, by the city of Bridgeport, and by the state of Connecticut, in such proportions as the commission may deem equitable, and when such payments shall be made.

Sec. 13. The decision of said board of commissioners upon all questions of the plans or methods of abolishing said grade crossings shall be final and conclusive upon all parties concerned, but any party aggrieved by any order of the commissioners concerning the apportionment of expense may appeal to the superior court for the county of Fairfield, within thirty days after such order has been passed, giving notice to the adverse parties in accordance with the provisions of section 3518 of the General Statutes, and the comptroller is directed to act in behalf of the state in reference to such apportionment.

Sec. 14. After said work shall have been done and said crossings at grade shall have been abolished as provided for in this resolution, the common council of said city may direct that an amount, not exceeding one-half of the whole expense of the city therefor, be assessed upon the persons or corporations other than said railroad company whose property is specially benefited or improved thereby in proportion to such benefits; and the board of appraisal of benefits and damages of said city shall proceed to assess the same, and the provisions of the charter of said city relative to the mode of assessing benefits for the construction of sewers within said city and to appeals therefrom, and to the payment thereof, and to filing liens therefor, are incorporated into and made a part of this section and made applicable to the assessments provided for in this section.

Sec. 15. Said city is hereby authorized to purchase and said New York, New Haven, and Hartford Railroad Company is hereby authorized to sell to said city the present railroad bridge across the Bridgeport Harbor, with the approaches to said bridge on either side thereof, if said city and said railroad company shall agree upon the price and terms of sale.

Approved June 22, 1895.

SEEDS et al. v. BURK et al.

(Supreme Court of Pennsylvania. May 24, 1897.)

WILLS—CONSTRUCTION—POWER OF SALE—LIEN OF DEBTS.

Testatrix, after payment of her debts, gave her estate to a trustee to invest, and pay the proceeds to her father, and after his death to divide the corpus between her brothers and sisters named. She empowered her trustee to improve any of her real estate, and to borrow money for that purpose; to divide the same into lots, and sell or dispose of all or any of them, and to invest the proceeds of sales or exchange in such real or personal security as the trustee might deem proper. *Held*, that the power of sale was discretionary, the presumption being, in the absence of a showing to the contrary, that the personal estate was sufficient to pay the debts, under the act of 1832, which requires an allegation of insufficiency, and the exhibition of an inventory, as conditions precedent to the grant of an order of sale; and a purchaser took subject to the lien of the debts.

Appeal from court of common pleas, Delaware county.

Action by Samuel H. Seeds and another, executors of the estate of T. B. Bowers, deceased, against Taylor C. Burk and others, impleaded with Samuel McIlvain, executor of the estate of Maggie McIlvain, deceased, on a bond executed by Maggie McIlvain, who died seised of certain real estate on which plaintiffs claimed their debt, though unscheduled, was a lien, and which was sold by the executor and trustee to Taylor C. Burk and others under a power contained in her will. There was a verdict directed by the court in favor of plaintiffs, subject to the point reserved as to whether the sales by the executor and trustee divested the lien of plaintiffs' debt. From a judgment on the verdict against the defendants *de teris*, Taylor C. Burk and others appeal. Affirmed.

The will of Maggie McIlvain is as follows: "I, Maggie McIlvain, of the city of Chester, county of Delaware, and state of Pennsylvania, being of sound and disposing mind, memory, and understanding, do make and publish this, my last will and testament, hereby revoking any wills by me at any time heretofore made. Item first: I direct all my just debts and funeral expenses to be fully paid by my executor hereinafter named, as soon as conveniently may be after my decease. Item second: All the rest, residue, and remainder of my estate, real, personal, and mixed, of whatsoever kind and wheresoever situate, I give, devise, and bequeath to my trustee hereinafter named, his heirs, executors, or administrators, in trust, nevertheless, to keep the same invested in good and safe security or securities, and to receive and collect all rents, issues, and profits thereof, and to pay over the net proceeds thereof to my father, Samuel McIlvain, for and during the term of his natural life, free and clear of and from all liability of any past, present, or future indebtedness of the said Samuel McIlvain, and so that the same shall not be in any way or manner whatsoever liable to any attachment, levy, or

execution of any kind; and from and after the death of the said Samuel McIlvain, to divide and pay over the corpus of the said trust estate among my brothers and sister, to wit, Andrew McIlvain, Samuel McIlvain, Jr., William Henry McIlvain, and Minnie McIlvain, in equal shares, share and share alike; and in the event of the death of one or more of my said brothers or of my said sister during the lifetime of the said Samuel McIlvain, then to pay over the same share or shares of such deceased brother or sister to any child or children of the said brother or sister so deceased, such deceased brother's child or children or sister's child or children taking such share or parts only as his or their parent or parents would have taken if living; to them, their heirs, executors, administrators, and assigns forever. Respecting any portions or pieces of my real estate of which I may die seised, I do hereby authorize and empower my said trustee to improve the same by the erection of dwelling houses thereon, or such other buildings as in his judgment may be for the best advantage to my said estate, and for this end, and to accomplish this purpose, I hereby authorize my said trustee to borrow money upon the security thereof, and to execute and deliver good and sufficient bonds and mortgages therefor, to divide the same into such lots or parcels as in his judgment may best improve my said estate, and to sell and dispose of all or any of the said lots with the improvements thereon, either at public or private sale or sales, and either for cash or upon ground rents, or partly for cash and partly for ground rents, at such time or times and in such parts or parcels as my said trustee may, in his discretion, deem proper and right, and in like manner, either at public or private sale, to sell, dispose, or extinguish any, all, and every ground rent which, upon any sale of my said real estate, may be reserved by my said trustee; and upon all and every such sale I do hereby authorize and empower my said trustee to receive, take, and accept such price or prices for my said real estate as may be reasonably had or gotten for the same, or any part or parcels thereof, and by proper deed, deeds, conveyances, or assurances in the law, to be duly executed, acknowledged, and perfected, to grant, convey, and assure my said real estate and every part or parcel thereof unto the purchaser or purchasers thereof in fee simple, free and clear of and from all trusts herein given or declared, and without liability on the part of any such purchaser to look after the application of the purchase money. And whenever my said trustee shall sell or exchange any of the said real estate hereby given to him, I do authorize and empower him to invest the proceeds of every such sale or exchange in such real or personal security or securities as he may deem proper and right, and to take and receive the income thereof, and to pay and appropriate the same to the same purpose and in the same names as he is hereinbefore di-

rected with respect to the profits and income of my real estate; and should such reinvestments be made by my said trustee on any unimproved real estate, then, and in that event, I hereby authorize and empower my said trustee to improve and dispose of the same as, in his judgment, it should be desirable, and for this end to have and enjoy the same with reference to the improvement, mortgaging, exchanging, and sale of the same as is conferred upon him with reference to the real estate of which I may die seised by this my will. And, lastly, I hereby nominate, constitute, and appoint my father, Samuel McIlvain, to be the sole executor and trustee of this, my last will and testament."

David F. Rose, W. B. Broomall, and D. M. Johnson, for appellants. John B. Hinkson, for appellees.

STERRETT, C. J. In *Cadbury v. Duval*, 10 Pa. St. 285, it was ruled that a purchaser under an absolute testamentary direction to sell land was bound to see to the payment of scheduled debts, because he had notice; but that he was not bound to see to the payment of general debts, because other means for the satisfaction of that class of claims were provided by statute. In contemplation of law, conversion takes place immediately on testator's death, and claims which were not then liens on his land attach to the proceeds as personal estate, and become payable as in ordinary course of administration. But it is insisted that discretionary powers of sale stand on a different footing; that, because conversion takes place from the date of execution of the power, general debts have in the meantime acquired a lien on the deceased debtor's land which can only be divested in the mode provided by the statute. No case precisely in point has been cited, but analogous cases (*Taylor v. Haskell*, 178 Pa. St. 106, 35 Atl. 732; *Drayton's Appeal*, 61 Pa. St. 172) show, and it is practically conceded, that this position is well taken. This much premised leads up to the question involved in this case,—whether or not the power contained in the will of Miss McIlvain was absolute or discretionary. Analysis will certainly show that it was not absolute. There is no express direction, peremptory in character, that the executor shall in any and every event sell the land; and it seems just as clear that there is no necessary implication. The provision for payment of debts is no more than the law would have implied. It does not follow that sale of the land will be necessary. The personal estate is the primary fund for payment. The presumption arising under the act of 1832, which requires an allegation of insufficiency, and the exhibition of an inventory, as conditions precedent to the grant of an order of sale, is that the personal estate is sufficient; and there is every reason for the application of this presumption here. There is not only no proof of insufficiency, but the allegation of the filing of an inventory of personal estate, of

which no account appears to have been filed, nor distribution made, far in excess of the debts, remains uncontradicted. In any event, only so much of the land as may be necessary to make up the insufficiency can be sold, and the burden is on those representing the estate to show how much,—which they have failed to do. So far as appears, there was no necessity for sale, even assuming the power related to payment of debts. The will shows on its face that testatrix herself had no thought of insufficiency, for the specific direction “to invest the proceeds of every such sale or exchange in such real or personal security or securities” as the trustee “may deem proper and right,” excludes its use for other purposes. Nor does the creation or form of the residuary disposition sustain the theory of absolute power. It, too, is what would have been implied without a will. It embraces no more than the “surplusage” which the law sets apart to heirs and next of kin. The general expression, “divide and pay,” per se includes, and the context shows it was intended to include, real and personal estate. Land, as well as personalty, may be the subject of division in kind. Following the detailed direction “to pay over,” which prima facie relates to personalty, there is an independent provision “respecting” real estate which clearly individualizes it, and leaves the question of its conversion solely to the trustee’s discretion. The expression “authorize and empower” in itself implies discretion. Hill, Trustees, 485. If, in his judgment, it appears that it is not “for the best advantage” of the estate, the trustee may refuse to sell. There is no authority that can coerce him, and the land may therefore never be sold. The question of conversion lies wholly in the discretion of the trustee. It follows from what has been said that the plaintiffs acquired a lien on their debtor’s land, and that the judgment *de terris* entered by the court below must be affirmed. Judgment affirmed.

WELSH v. ERIE & W. V. R. CO.

(Supreme Court of Pennsylvania. May 27, 1897.)

INJURY ON RAILROAD—PRESUMPTION.

Though a railroad be negligent in guarding a crossing, it cannot, in the case of one found on the track near the crossing, with no evidence of how he came there, be presumed that this was the cause of his death, or that he was lawfully on the crossing.

Appeal from court of common pleas, Wayne county.

Action by Mary Welsh against the Erie & Wyoming Valley Railroad Company for death of plaintiff’s son. Judgment for plaintiff, and defendant appeals. Reversed.

Homer Greene, for appellant. Chas. A. McCarty and Frank P. Kimble, for appellee.

DEAN, J. A highway or street in the borough of Hawley, Wayne county, crosses the
37 A.—33

railroad track of defendant company at grade. The defendant maintained gates at the crossing, and a man to operate them during the day, but not at night. It also maintained three lamps at the crossing, which were kept lighted during the night. Between 9 and 10 o’clock at night on November 23, 1895, Thomas Cunlon, a fireman on an engine which stood on a siding near the crossing, found Patrick Welsh, son of plaintiff, lying a few feet from the crossing, between the tracks of the railroad. He was badly bruised and crushed, and died in a few hours afterwards. The plaintiff alleged that her son’s death was the result of the railroad company’s negligence, and brought this suit. The court submitted the evidence to the jury, on three questions: (1) Was the nonoperation of the gates at nighttime negligence? (2) Was the absence of a flagman in the nighttime negligence? (3) Was there negligence in failure to maintain sufficient lamps at the crossing? If they found against defendant on either question, then they were instructed to find whether Patrick Welsh was lawfully upon the crossing when he received his injuries, and, if he was, plaintiff was entitled to damages. There was a verdict for plaintiff, and defendant now appeals. The appellant prefers but one assignment of error,—the refusal of the court below to affirm its fourteenth point, as follows: “Under all the evidence in this case, the verdict must be for defendant.”

No one saw deceased on the crossing. Though near to it, he was not on it when found. No one saw him struck by a train. If struck by a train, whether he was on the crossing when struck, or was approaching it from the railroad track, is not known. Assuming, then, as to the general public, that the company was negligent in not operating the gates at night, or in not maintaining a flagman at night, or in not keeping a sufficient light, this negligence must be so connected with the injury to deceased as to afford a presumption that the negligence caused the injury. But how can we presume the negligence caused the injury when there is no necessary connection between the alleged negligence and the injury? To make the connection, we must presume he was thrown from the crossing to the track, and further presume he was lawfully upon the crossing when struck. If he had been seen walking upon it, or even going on the highway towards it, the jury might have found that he was lawfully upon it. The law does not presume that the presence of a person upon a railway track is lawful. It will presume that a traveler upon a highway leading to a railroad-track crossing is lawfully upon the track for the purpose of crossing it; but, if only found there, he may have been there as a mere loiterer, or he may have been a trespasser walking on the ties to reach a destination not touched by the highway. In this case the jury were permitted to presume negligence on part of defendant, then to presume that deceased was lawfully on

the railroad track, and then to still further presume that defendant's negligence caused his death. The plaintiff was bound not only to prove negligence as to the general public using the crossing, but to go further, and show that this negligence was the proximate cause of a particular individual's death, or, as in this case, of Welsh's death. A presumption must be based on a fact or facts, not on a presumption. *Railway Co. v. Henrice*, 92 Pa. St. 434; *Railroad Co. v. Evans*, 53 Pa. St. 253. In *Railroad Co. v. Schertle*, 97 Pa. St. 450, a brakeman, while coupling cars, fell under the wheels of the engine, and was killed. The track at that point was defective,—also, the step of the tender on the engine; and it was urged as an inference that his fall was due to one or other of the defects. This court, in reversing the judgment, said: "There was not a particle of proof that either the track or step had anything to do with his death. For aught that appears, he may have fallen in a fit, or for some cause wholly disconnected from either. The case was submitted to the jury without evidence, and the verdict has no better foundation than a guess." The evidence here shows that this young man was intoxicated in the village shortly before he was found. The jury might, on such facts, with as much reason as is shown by their present verdict, have guessed that he lay down on the track in a stupor. The assignment of error is sustained, and the judgment is reversed.

IN re ROAD IN OTTO TP.

Appeal of McKEAN COUNTY COM'RS.

(Supreme Court of Pennsylvania. May 24, 1897.)

STATUTES—TITLES.

The proviso in Act April 15, 1891 (P. L. 17) § 1, providing for appeal from the report of damages assessed by view, "provided that notice be given to the commissioners of the proper county * * * of the time and place of holding such view," is void, under Const. art. 3, § 3, providing that the subject shall be clearly expressed in the title; the title being "An act to provide for an appeal by * * * all * * * interested in the damages awarded * * * from the decree * * * confirming the report of the viewers assessing such damages."

Appeal from superior court.

Petition for a public road in Otto township from Rixford to Moody Hollow road was presented to the court of quarter sessions of McKean county, and viewers were appointed, who reported in favor of the road. The county commissioners filed exception to the report, which was sustained, and the report set aside. An appeal was taken to the superior court, which reversed the judgment, and the commissioners appeal. Affirmed.

The opinion of the superior court is as follows (Willard, J.): "The only question raised by this record is whether the second proviso of the act of April 15, 1891 (P. L. 17), is constitutional. The act is entitled 'An act to pro-

vide for an appeal by county commissioners, cities or other municipalities, and all persons interested in the damages awarded for laying out, widening, grading, opening or changing the lines or grades of any public street, road or alley in this commonwealth, from the decree of the court of quarter sessions confirming the report of the viewers assessing such damages.' The first section provides for an appeal by county commissioners and others indicated in the title from the report of damages assessed by view, review, and re-review, appointed by courts of quarter sessions. Then follows: 'Provided the appeal be taken within thirty days after the final confirmation of the report of said jury; provided that notice be given to the commissioners of the proper county, or their clerk, of the time and place of holding such view.' On October 10, 1895, a petition was duly filed in the court below, praying for the appointment of viewers to lay out a road between certain terminal points therein designated. Viewers were appointed according to law, and their report was duly filed, confirmed nisi, and the width of the road duly fixed by court. To this report the commissioners of McKean county filed the following exception: 'First. No notice of the time and place of the view was given to the county commissioners or their clerk, as required by the act of assembly of April 15, 1891 (P. L. 17).' On April 8, 1896, the exception was sustained, and the report of the viewers set aside, by the court below. The error assigned here is to the action of the court in sustaining the exception and setting aside the report of viewers. While we appreciate the necessity of notice to the county commissioners in views and reviews of this nature, this desirable object (so forcibly urged by the appellee's counsel in his paper book and argument at bar) must be reached by appropriate legislation. It is our duty to sustain the statute if we can possibly do so without violating the letter and spirit of the constitution, but in construing statutes we are not to ignore the plain mandate of the organic law. Article 3, § 3, of the constitution provides: 'No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title.' In an opinion this day filed in *Com. v. Lloyd*, we held and cited numerous decisions of the supreme court sustaining our position that the title to an act need not be a perfect or full index to the entire subject of the bill, and that fair notice of its contents was all that was required. We also held that the title must not be misleading, but must give fair notice of the subject contained in the bill itself. Applying these rules to the second proviso of the act under consideration in connection with the title, we cannot say they are not germane; but we do decide without hesitation that the title gives no notice or warning of the subject of the second proviso. The title clearly indicates legislation concerning appeals by county commissioners and others from the decree of the court of quarter sessions confirming the report

of viewers assessing damages, and there is no indication whatever of any legislation on any matter or thing connected with the proceeding till the time of taking the appeal from the decree of the court. In reading this title, no legislator, commissioner, or other person interested could know or surmise that anything in the bill referred to any proceeding prior to the time of the appeal, or that any provisions were intended to be embraced in the bill relative to the appointment of viewers, their proceedings or report, or that they would be required to give notice to any one of the time and place of the view, except the notice required by the terms of the general law. Suppose the legislature should pass an act entitled 'An act relating to the issuing of executions in this commonwealth,' with a proviso added to some section of the act providing that the sheriff should serve the summons in the original action upon which the execution is founded and issued ten days before the return day, the subject of such a proviso would not be expressed or suggested in the title, and the proviso would be void; but it would be equally as binding as the proviso in the act we are considering. The subject of this proviso is not only not clearly expressed in the title; it is not suggested. We are therefore of the opinion that the second proviso of the first section of the act of April 15, 1891, is null and void for the reason that the subject of legislation therein contained is not so clearly expressed in the title of the act as to give any notice of the legislative purpose. It is so clearly contrary to the provisions of section 3 of article 3 of the constitution as to render it void. The specifications of error are sustained, the judgment reversed, and procedendo awarded."

Thomas F. Richmond, for appellant. W. E. Burdick, for appellee.

PER CURIAM. We find nothing in either of the specifications of error that would justify a reversal or modification of the judgment. The superior court was clearly right in holding that the second proviso in the first section of the act of April 15, 1891, is unconstitutional and void. Its judgment is so fully vindicated in the opinion sent up with the record that it is unnecessary to add anything to the reasons therein given. Judgment affirmed.

GLEIM v. HARRIS et al.

(Supreme Court of Pennsylvania. May 24, 1897.)

INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Where deceased could have seen the approaching train at several places within 330 feet of the crossing, his failure to stop and look and listen while driving that distance was negligence per se.

Appeal from court of common pleas, Cumberland county.

Action by Rosanna Gleim against Joseph S. Harris and others, receivers of the Philadel-

phia & Reading Railroad Company, to recover for the death of plaintiff's husband. A compulsory nonsuit was entered, and from a judgment dismissing a motion to set aside the same the plaintiff appeals. Affirmed.

The court of common pleas rendered the following opinion in dismissing the motion (Biddle, P. J.):

"About 6 o'clock in the morning of December 10, 1895, Michael Gleim, the husband of plaintiff, started from home, with four horses hitched in a large country wagon, for the purpose of getting a load of wood at the mountain. In the southern end of the borough of Mt. Holly Springs, the turnpike on which he traveled intersects the defendants' railroad at an acute angle; and when he was 330 feet from this crossing he stopped the horses, and looked and listened for an approaching train. He rode the saddle horse and drove the team, while his nephew Charles accompanied him, stood in the wagon, near the middle of the bed, and, at his uncle's instruction, kept watch for the cars. The morning was a cold one. The road was frozen, and the wagon made considerable noise as it moved along over the hard ground. Mr. Gleim had on a large overcoat, with a comforter around his neck, and a cap pulled down over his ears. At the point of stoppage a person standing on the road could have seen up the track over 1,400 feet, but one standing in the wagon could not see so far, on account of the limbs of the trees which lined the side of the road. Neither Mr. Gleim nor his nephew heard or saw anything which indicated that a train was coming, and the former then said, 'I guess we are perfectly safe to go on,' and the latter replied, 'I would think so,' whereupon the horses were started at a slow trot, and at that place had just passed over the crossing when the rear end of the wagon was struck by a train. The result of the collision was that plaintiff's husband was thrown violently to the ground, and sustained injuries from which he died one week subsequently. A danger signal was blown by the engineer when the locomotive was about 150 feet distant from this crossing, and at that time the front horses had crossed the railroad and the rear ones were on it. Charles testified that it was daylight, and that he was constantly looking in the direction of the approaching train from the moment the horses were started at a trot until the danger whistle was blown, and that he did not see the train until he heard the whistle; yet how he could have failed to see it, except through negligence, is inexplicable. The evidence proved conclusively that, from various places on the last 330 feet of road over which the horses passed, a person could see between the trees about 1,400 feet up the track, and that the nearest tree to the crossing was 28 feet from the middle of the rails, between which point and the track there was an unobstructed view up the railroad for 1,300 feet. The evidence also was quite convincing that the regular station signal was blown at the whistling post,

which was 1,113 feet from the scene of the accident, but whether or not this occurred is unessential to a determination of the case. It being proved that the deceased, at a number of places within 330 feet of the crossing, could have seen the train by which he was killed, his failure to stop, look, and listen while traversing said distance was negligence per se, and the judgment of nonsuit was therefore properly entered. The legal principle involved is distinctly laid down in *Railroad Co. v. Beale*, 73 Pa. St. 504; *Myers v. Railroad Co.*, 150 Pa. St. 336; 24 Atl. 747; *Gangawer v. Railroad Co.*, 168 Pa. St. 265, 32 Atl. 21; and numerous analogous cases. And now, November 5, 1896, the motion to set aside the judgment of nonsuit is dismissed."

John Hays and H. S. Stuart, for appellant.
J. W. Wetzel and Conrad Hambleton, for appellees.

PER CURIAM. We are not convinced that there is any error in this record. The judgment denying the motion to take off the nonsuit is affirmed on the opinion of the learned president of the common pleas.

McMANIGAL v. SOUTH SIDE PASS. RY. CO.

(Supreme Court of Pennsylvania. May 24, 1897.)

STREET RAILWAY—COLLISION.

A street railway is not liable where a horse, being driven between its tracks and the curb, suddenly and without warning springs across the track in front of a car coming down grade, when about 10 feet from it; collision then being inevitable.

Appeal from court of common pleas, Lycoming county.

Action by Hugh McManigal, by his next friend, John McManigal, against the South Side Passenger Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

T. M. B. Hicks and W. H. Spencer, for appellant. C. La Rue Munson and Addison Candor, for appellee.

PER CURIAM. The sole question in this case is whether the court "erred in refusing to set aside the judgment of compulsory nonsuit." A careful consideration of the testimony has failed to disclose any evidence that would have justified the court in setting aside the judgment. It conclusively appears by uncontradicted testimony that the collision in which plaintiff was injured was one of those unfortunate accidents which sometimes unavoidably occur without any apparent negligence on the part of any one. Plaintiff was driving northerly on Market street, South Williamsport, between defendant company's track and the curbstone, while its car was approaching him on a down grade from the opposite direction. When the car was about 10 feet from plaintiff's horse, the latter sudden-

ly sprang across the track in front of the car, and the collision was inevitable. It came without warning to either party; and, so far as shown by the testimony, nothing could have been done to avert it. On the ground, therefore, that there was no evidence of defendant company's negligence to go to the jury, we are all of opinion that the motion to take off the judgment of nonsuit was rightly denied. Judgment affirmed.

In re FETHERMAN'S ESTATE.

(Supreme Court of Pennsylvania. May 24, 1897.)

WILL—CONSTRUCTION—ESTATE GIVEN.

A will giving, by the second item, all testator's property to his six children by name, "share and share alike," and, by the third item, directing that the share bequeathed to his son P. be paid to a trustee, to be appointed by the orphans' court, he to invest it and pay the income to P. during his life, free from his debts, and, after his death, "then, as to the principal, in trust to and for the only proper use and benefit of" his children by his first wife, to be equally divided between them, share and share alike (P. having, at the time, children by his first wife and one by his second wife), creates, as to P.'s share, an active special trust for and during his life, with limitation over of the corpus to his children by his first wife, so that his second wife, as his executrix or otherwise, has no right to or interest in said corpus.

Appeal from orphans' court, Monroe county.

In the matter of the estate of Charles Fetherman, deceased. From a decree discharging rule of Harriet E. Fetherman, executrix of Peter H. Fetherman, deceased, to show cause why money should not be paid to her, she appeals. Affirmed.

Harry C. Cope, for appellant. David S. Lee, Joseph H. Shull, and Staples & Erdman, for appellee.

STERRETT, C. J. This appeal of Harriet E. Fetherman, executrix, etc., of Peter H. Fetherman, deceased, from the decree discharging her rule to show cause, etc., involves the construction of the will of Charles Fetherman, the father of appellant's late husband. After providing for the payment of debts, etc., Charles Fetherman, in the second item of his will, gave all his property, real, personal, and mixed, to his six children, by name (one of whom was his son Peter H.), "share and share alike." In a subsequent item he provided for a public or private sale, by his executor, of all the real estate of which he died seised. In the third item he created, as to his son Peter's share or interest in his estate, an active, special trust, etc., in the words following: "Item. I hereby direct that the share of my estate devised and bequeathed to my son Peter H. Fetherman shall be paid to a trustee to be appointed by the orphans' court: * * * and the said trustee, having fully qualified, shall put and place the said share out at interest on good real security, or in the funded debt of the United States or of the

state of Pennsylvania, or such other security as may be deemed sufficient by the said orphans' court, and shall pay over the interest or dividends thereof, from time to time, when the same shall be received, to my son Peter H. Fetherman, during his natural life, free from his debts, contracts or engagements; and, from and after his decease, then, as to the principal, in trust to and for the only proper use and benefit of all and every child and children by his first wife which he, my said son Peter H. Fetherman, may leave, and the lawful issue of any of them who may then be deceased having left such issue, to be equally divided between them, share and share alike,—such issue of any deceased child or children of my said son Peter taking, however, only such part or share thereof as his, her, or their deceased parent or parents would have taken, had he, she, or they been living." When the will was executed, in March, 1891, testator's son Peter had six children living,—five by his first and one by his second wife. The first wife's children were parties to this proceeding, some of them by attorney, and the others by their respective guardians. The trustees, duly appointed by the court under the special trust above quoted, were also made parties thereto, and united with said children in denying that appellant, as executor, etc., of her late husband, or otherwise, had any right to or interest in the corpus of said trust in their hands, or any part thereof; and their contention was fully sustained by the court below. Hence this appeal.

A careful consideration of the provisions of the will leaves us in no doubt as to the accuracy of the conclusion reached by the learned president of the orphans' court. Any other construction of the will would not only defeat the manifest intention of the testator, but it would do great violence to the language employed by him in creating the trust as to the share of his son Peter. The second and third items of the will must be read and considered together. When so considered, it is quite clear he never intended that the one-sixth of his estate given to Peter in the second item should go to him absolutely, to be disposed of as he might see fit. On the contrary, he clearly intended that it should go into the hands of a trustee or trustees, appointed by the court, to be invested in the manner specifically directed in the third item, and that the income, interest, and dividends thereof should from time to time, as received by the trustees, be paid to his son Peter during his natural lifetime, etc., and from and after his decease the principal or corpus of the trust should be "to and for the only proper use and benefit of" Peter's children by his first wife. In other words, as to the share in question, the testator created an active special trust for and during Peter's natural life, with limitation over of the corpus of the trust to his children by his first wife. That intention being clearly and distinctly expressed, and being at the same time unquestionably lawful, there

is no reason why it should not be given full effect. There is nothing in either of the assignments of error that requires extended discussion. The language employed by the testator is clearly insufficient to create an estate tail. The word "children" is primarily a word of purchase, and there is nothing whatever in the context to indicate that it was intended to be employed in any other sense. Decree affirmed, and appeal dismissed, at appellant's costs.

IN RE COXE'S ESTATE.

(Supreme Court of Pennsylvania. May 24, 1897.)

ESTATES IN REMAINDER—COLLATERAL INHERITANCE TAX.

It is from remainder-men alone that present payment of collateral inheritance tax on bequests or devises in remainder can be collected, under Act May 6, 1887 (P. L. 79) § 3, providing that the tax on estates in remainder is not payable "until the person * * * liable for the same shall come into actual possession of such estate, by the termination of the estates for life or years"; provided that "the owner shall have the right to pay the tax at any time prior to his coming into possession"; and provided, further, "that the tax on real estate shall remain a lien on the real estate on which the same is chargeable until paid. And the owner of any personal estate shall make a full return of the same * * * within one year from the death of the decedent, and within that time enter into security for the payment of the tax, * * * and, in case of failure so to do, the tax shall be immediately payable and collectible."

Appeal from orphans' court, Luzerne county.

In the matter of the estate of Eckley B. Cox, deceased. From a decree fixing the amount of inheritance tax, and directing its payment by the executors, Alexander B. Cox and another, they appeal. Reversed.

A. H. McClintock and S. P. Wolverton, for appellants. L. A. Watres and Lemuel Amerman, for appellee.

MITCHELL, J. The testator left his whole estate, less some unimportant legacies, in trust for his widow for life, with remainder to his nephews and nieces living at his death, and the issue of nephews and nieces then deceased. The life estate to the widow is exempt from the collateral inheritance tax, but the entire estate in remainder is liable, and the question presented is whether the tax is now demandable from the executors. By section 3 of the act of May 6, 1887 (P. L. 79), the tax on estates in remainder is not payable "until the person or persons liable for the same shall come into actual possession of such estate, by the termination of the estates for life or years"; provided that "the owner shall have the right to pay the tax at any time prior to his coming into possession"; and provided, further, "that the tax on real estate shall remain a lien on the real estate on which the same is chargeable until paid. And the owner of any personal estate shall make a full re-

turn of the same to the register of wills of the proper county, within one year from the death of the decedent, and within that time enter into security for the payment of the tax to the satisfaction of such register, and in case of failure so to do, the tax shall be immediately payable and collectible." It is under this last clause that the commonwealth claims that the tax in the present case is now collectible, and the learned court below has held that the executors are the owners liable for its payment. This construction, however, cannot be sustained without doing violence to the letter, as well as the plain intent, of the statute. The tax is not payable until "the person liable for the same" shall come into actual possession. This cannot possibly mean any one but the remainder-man, for he is the only one to come into actual possession by the termination of the precedent estate for life or years; and in the proviso, which adds that the "owner shall have the right to pay the tax at any time prior to his coming into actual possession," the "owner" must, for the same reason, be the remainder-man, for he is "the person liable for the same," and the only one who is to come into possession. And when in the second proviso "the owner of any personal estate" is directed to make a full return of the same, and enter security for the payment of the tax, and in case of failure to do so the tax is to become immediately payable, the "owner" meant is the same person as in the preceding clauses,—the person liable to pay, and the person who is to come hereafter into actual possession, i. e. the remainder-man. The intent of the statute is to charge the beneficiary of the estate, and whether the phrase used is "person liable" or person who "shall come into actual possession" or "owner," it always means the same person,—the remainder-man. It is to him alone that the commonwealth must look for present payment of tax on property, whether real or personal, the actual possession or enjoyment of which is postponed by an intervening period of life or years. Under the act, executors and administrators are charged with the duty of deducting the tax before payment of legacies or distributive shares, or the delivery of specific articles bequeathed; and therefore, under some circumstances, they may be considered as persons liable to pay the tax, but they are not in any sense "owners," within the language of section 3. They cannot be compelled to make present payment of the tax on estates in remainder, for the very obvious reasons that they are not the parties primarily charged with the payment, either present or future; they are not responsible for the owner's default of return and security, which makes the future tax payable immediately; and in the present case they cannot pay it now without taking it out of the widow's estate, which is not liable to the tax at all. It is said that the remainder-men under the testator's will are not now ascertainable. On this we express no opinion. The commonwealth disputes this position, but the parties

charged by it as remainder-men are not before us. All we need to say now is that, if the remainder-men are not yet ascertainable, that is no reason why the tax should be collected from the life tenant who is exempt. The only effect of such condition would be that the tax would not be presently collectible at all, and the commonwealth would have to depend on its lien on the real estate, and its claim on the executors when they make distribution. Decree reversed, and petition dismissed, with costs.

STEWART v. JACKSON et al.

(Supreme Court of Pennsylvania. May 27, 1897.)

JUDGMENT BY CONFESSION—AGAINST LESSEE AND SUBTENANT.

Provision in a lease for entering an amicable action of ejectment, with power of attorney to confess judgment in favor of the lessor against the lessee or any subtenant in default of payment of rent, does not authorize entry of judgment against a subtenant, warrant of attorney not being signed by him, though he can be ejected on a judgment entered against the lessee.

Appeal from court of common pleas, Fayette county.

Action by D. S. Stewart against W. P. Jackson and others. From an order refusing to strike off judgment against defendant Lawson, he appeals. Reversed.

Edward Campbell and R. P. Kennedy, for appellant. Boyd & Umbel, for appellee.

FELL, J. The plaintiff in this action of ejectment leased two hotel properties to W. P. Jackson, one of the defendants, for nine months from April 1, 1891, with an agreement that, if the lessee held over after the expiration of the term, he should become a tenant from year to year. J. G. Lawson, another of the defendants, and the appellant in this case, soon after the execution of the lease entered into exclusive possession of one of the hotels, with the knowledge and consent of the lessor, but whether under an agreement with him or as a subtenant of Jackson is in dispute. The lease, which covered both hotels, contained a provision for entering an amicable action of ejectment with power of attorney to confess judgment in favor of the lessor and against the lessee or any subtenant in the event of the nonpayment of the rent as it fell due. In February, 1892, an amicable action of ejectment was entered against Jackson, the lessee, Lawson, who occupied one of the hotels, and T. M. Mitchell, who occupied the other. Judgment was confessed against all three defendants by virtue of the warrant of attorney contained in the lease, which was signed by Jackson only, and a habere facias possessionem with a fieri facias for costs was issued against all three. The breach alleged was Jackson's failure to pay the rent reserved. On the application of Lawson, a rule was granted to show cause why the judgment against him

should not be struck off, which, after hearing, was discharged. The assignments of error relate to the order of the court discharging the rule.

We have, then, a judgment entered against three defendants on a warrant of attorney signed by one of them only. The only ground on which it is attempted to sustain the judgment against Lawson is that he was a subtenant, and bound by the terms of the lease. It is true that, if he was a subtenant, he was subject to the terms of the lease between his lessor and the owner, and he could have been ejected by proceedings on a judgment entered against Jackson. There was full authority for entering a judgment against Jackson, and its enforcement would have turned out of possession every one claiming under him; but we find no authority for entering a judgment against Lawson. He had not signed the warrant of attorney, and his coming in as a subtenant gave no one authority to confess judgment against him. A judgment by confession must be self-sustaining on the record, and, as there is nothing on this record to sustain a judgment against Lawson, the rule to strike it off should have been made absolute. The order of the court of December 3, 1894, is reversed, and the rule to show cause why the judgment entered against Jay G. Lawson should not be struck off is made absolute.

NATIONAL MUT. INS. CO. v. HOME BEN. SOC. OF NEW YORK.

(Supreme Court of Pennsylvania. May 27, 1897.)

REINSURANCE—REFUSAL OF PREMIUM.

1. Where a life insurance company agrees "to transfer, or cause to be transferred, to the best of its ability," its membership to defendant, and defendant agrees to reinsure its members, on execution of "satisfactory transfer applications," on the basis of their original applications, and to rate them at the same amount, with premiums payable the same as they had been, defendant cannot refuse to reinsure a member on the ground that his application for transfer is not satisfactory, on account of physical condition and age; but it must reinsure all who elect to have their insurance transferred to it instead of another, as allowed by the statute under which the contract is made.

2. An insurance company bound by its contract with another company to reinsure its members, by denying that it is bound to reinsure one of them, and refusing to accept from him a premium, renders tender of a subsequent premium unnecessary.

Appeal from court of common pleas, Schuylkill county.

Action by the National Mutual Insurance Company, to the use of Julia O'Brien, against the Home Benefit Society of New York. Judgment for plaintiff, and defendant appeals. Affirmed.

2 Laws N. Y. 1892, p. 2013, par. 209, under which was made the contract of reinsurance between plaintiff and defendant, is as follows: "Every corporation, company, society, organi-

zation or association of this or any other state or country transacting the business of life or casualty insurance upon the co-operative or assessment plan, as defined in this article, shall be subject to all the provisions of this article, and not to the provisions of article two, and every such corporation, company, society, organization or association of this state, shall hold, within the county in which its principal office is located in this state a stated annual meeting of their members or policy holders or representatives of local boards or subordinate bodies, in such manner and subject to such regulations, restrictions and provisions as the constitution and by-laws of the same may provide. In case of secret or fraternal societies having a grand or supreme body, such meeting of the supreme or grand body may be at such time and place as may be designated by it. At such meetings a full and specific report of all receipts and expenditures of the preceding year or since the last meeting, as the case may be, shall be submitted. Not less than five days' notice of each meeting shall be given to each director and to each member and policy holder, who shall have been such for thirty days, in such manner as the by-laws may direct, except that in lieu thereof such notice may be given to the subordinate body of a society having a grand or supreme body, or to a local board subordinate to the association. Every such association, corporation or society, other than secret fraternal societies now authorized to do business in this state, must hereafter before the adoption of any by-law or amendments thereto, cause the same to be mailed to the members and directors of such association, society or corporation, together with a notice of the time and place when the same shall be considered, which notice shall be the same as hereinbefore required for stated meetings. All associations, societies, companies, corporations or organizations now transacting or hereafter desiring to transact the business of life or casualty insurance in this state upon any other plan than that defined in and by this article, shall comply with all the provisions of the general life and health insurance laws. No such corporation organized under the laws of this state shall transfer its risks to or reinsure them in any other corporation unless the contract of transfer or reinsurance is first submitted to and approved by a two-thirds vote of a meeting of the insured called to consider the same, of which meeting a written or printed notice shall be mailed to each member, certificate holder or policy-holder at least thirty days before the day fixed for such meeting. If such transfer or reinsurance shall be approved, every member, certificate-holder or policy-holder of the corporation who shall file with the secretary thereof within ten days after the meeting a written notice of his preference to be transferred to some other corporation than that named in the contract, shall be accorded all the rights and privileges, if any, in aid of such transfer, as would have been accorded under

the terms of such contract had he been transferred to the corporation named therein. No such corporation, association or society organized under the laws of this state shall transfer its risks or assets or any part thereof to, or reinsure its risks or any part thereof in, any insurance corporation or association of any other state or country which is not at the time of such transfer or reinsurance authorized to do insurance business in this state under the laws thereof."

Nicholas Hebllich, Edmund Luis Mooney, and John G. Johnson, for appellant. George W. Ryon and James Ryon, for appellee.

McCOLLUM, J. There is nothing in the allowance of the amendments complained of which furnishes ground for reversing the judgment. The use plaintiff is the beneficiary named in the policy issued by the National Mutual Insurance Company on the life of her husband. But for the contract of March 28, 1894, her right to maintain an action against the insurer for the amount of the policy could not be questioned. If the insurer had unjustly declared the policy forfeited, and thereupon refused to accept from the insured the premium proffered in accordance with its terms, it could not, while insisting upon the forfeiture, set up the failure to tender the next quarterly premium as a bar to his suit for the enforcement of his rights. *Girard Life Ins. Co. v. Mutual Life Ins. Co.*, 86 Pa. St. 236. In the case cited the company declared the policy forfeited for nonpayment of a quarterly premium on the day it was due, and on tender of the same, two days thereafter, declined to accept it. This occurred more than a year before the death of the insured, and there was no payment or tender of quarterly premiums after the rejection of the one above mentioned. It was held, in an action against the company by the administrator of the insured, that "where the company has declared a policy forfeited, and refused to accept a premium, the fact that the insured subsequently failed to pay premiums as they fell due will not affect the right to recover on the policy." That which is not a bar to an action on the policy by the insured or his administrator is not a bar to a suit against it by the beneficiary named in it. If, therefore, the defendant in this case was bound by its contract with the National Mutual Insurance Company to reinsure Edward O'Brien on the basis of his original application to and the terms of his insurance with the latter, his failure to tender the July premium cannot operate as a defense. Its denial that it was bound to reinsure him, and its refusal to accept the April premium, rendered a tender of the next quarterly premium unnecessary. We cannot find in the evidence anything which operates as a release of the defendant from any liability imposed by its contract. The respective rights of O'Brien and the defendant under the contract were

not extinguished or qualified by anything said or done by either of them. The case was tried in the court below on the apparently mutual theory of the parties to it that the plaintiff was entitled to recover the amount of the policy or nothing. No claim or suggestion appears to have been made by either of them that there might be a recovery for a less sum. It was the existence of the liability claimed by the plaintiff and denied by the defendant, and not the extent or measure of it, that was in dispute.

The National Mutual Insurance Company agreed "to transfer, or cause to be transferred, to the best of its ability," the membership of it to the defendant. It could do no more in this direction, because the New York statute under which the contract was made expressly conceded the right of every member to it, on giving the required notice, to elect to be transferred to, or reinsured by, another company. The defendant agreed to reinsure the members of the National Mutual Insurance Company, upon execution of satisfactory transfer applications, on the basis of their original applications to it, and to rate them at the same amount, with premiums payable at same dates, as they were then paying in it. What effect has the requirement of a satisfactory transfer application upon the liability of the defendant? Does it warrant the refusal of the defendant to reinsure a member on the ground that his application for transfer "is not satisfactory, on account of physical condition and age"? This is the distinct ground on which the defendant refused to reinsure O'Brien. If it is tenable ground for refusal, the agreement respecting the basis of reinsurance and the rating of members amounts to nothing, because the defendant may reject the transfer application of any member whose age or health may appear to it as presenting an undesirable risk. The contract, as construed by the defendant, falls to afford to the membership of the National Mutual Insurance Company the protection contemplated by the statute under which it was made. It was not so construed by that company when its members were requested to approve it. On the contrary, their approval was obtained on the express assurance that they would be transferred, without examination, as at the age of entry in the National Mutual Insurance Company, and at the same rates and dates of payments as with it. This assurance was warranted, we think, by the terms of the contract. The words, "satisfactory transfer application," etc., considered in connection with what precedes and follows them, do not mean that the defendant will reinsure the applicant for transfer on condition that his age and health are satisfactory to it. To attribute to them this meaning is to defeat the obvious purpose of the contract, and of the statute which authorized it. The paramount purpose of the contract was protection to the members of the National Mutual Insurance Company by reinsurance with the defendant. In our view of

the contract, it bound the latter to reinsure the members of the former who elected to have their insurance transferred in accordance with its provisions. The defendant sent an application for transfer to O'Brien, who fully and correctly answered all the questions propounded in it, and signed it as instructed. It neither disclosed nor concealed anything which released the defendant from its obligation to him. It must therefore be regarded as a "satisfactory transfer application," within the meaning of the contract. Thenceforth the defendant was liable for the amount of his policy with the National Mutual Company on his compliance with its provisions respecting premiums, and the payment of them. As we have already seen, his failure to tender the July premium is not a bar to this action. The views herein expressed are in accord with the able opinion filed by the learned court below on discharging the rule for a new trial. We infer from the record that the defendant was not allowed a credit for the April and July premiums, amounting to \$154.50. If this inference is in accordance with the fact, we direct that the court below cause a credit to be entered on the judgment for that amount. The judgment, subject to the above direction, is affirmed.

COMMONWEALTH v. EISENHOWER.

(Supreme Court of Pennsylvania. May 27, 1897.)

HOMICIDE—DEFENSES—CONDUCT OF TRIAL—ORDER OF RECEIVING EVIDENCE—REMARKS OF COUNSEL—ARGUMENT—SEPARATION OF JURORS—NEW TRIAL—DISCRETION OF COURT.

1. The fact that a lost drainage tube (necessarily and properly inserted by the surgeon) found its way into decedent's spinal canal and caused his death, does not relieve from responsibility the person who, by feloniously shooting him, made the operation necessary.

2. In a criminal case the court properly required "stood-aside" jurors to be recalled in the order in which they had been stood aside.

3. Where the accused testified in his own behalf, it was not error to recall him for further cross-examination while the rebuttal testimony of the state was being offered.

4. Objectionable remarks of counsel will not be considered on appeal unless the attention of the trial court was called thereto at the time.

5. The presumption of improper influence arising from separation of the jurors in a capital case is not conclusive.

6. The discretion of the trial court in refusing a new trial in a criminal case is not reviewable.

7. Permitting private counsel to close the case for the state is no ground for reversal.

Appeal from court of oyer and terminer, Schuylkill county.

Theodore Eisenhower was convicted of murder, and appeals. Affirmed.

George Dyson and Charles N. Brumm, for appellant. Edgar W. Bechtel, Dist. Atty., and John F. Whalen, for the Commonwealth.

PER CURIAM. A careful consideration of the voluminous record in this case has convinced us that there is no error therein of

which the prisoner has any just reason to complain. The trial appears to have been so conducted by the learned president of the Eighth judicial district, who specially presided thereat, as to secure for the accused a fair and impartial trial. We find nothing in any of his rulings that would justify us in reversing the judgment of the law pronounced on the verdict, nor is there anything in either of the specifications of error that requires discussion.

It was conclusively shown, and is not denied, that as John Schwindt, the deceased, was returning home from his work in company with a fellow workman, he was followed by the prisoner, whose presence was unknown to them, and shot in the back with a pistol, at short range. The ball entered near the tenth dorsal vertebra, and passing through the spinal column, partly severing the cord, lodged in the vertebra on the opposite side. It was claimed by the commonwealth, and the evidence tended strongly to prove, that the pistol-shot wound thus inflicted by the prisoner was the cause of Schwindt's death within less than 10 days thereafter. Without attempting to collate or further refer to the evidence on which the commonwealth relied for a conviction of "murder of the first degree," it is quite sufficient to say that it was not only abundant and practically undisputed, but it tended strongly to prove that a willful, deliberate, and premeditated murder was committed by the prisoner. While the shooting was not, nor could it be, denied by him, he claimed that he mistook the deceased, John Schwindt, for his half-brother, William Schwindt, with whom he had been on unfriendly terms for some time, and whose life, as shown by the testimony, he had repeatedly threatened. Conceding what, according to the evidence, was doubtless the fact, that by mistake the prisoner shot the wrong person, that, of course, could not in any degree lessen his guilt. The grounds of defense relied on were (1) insanity of the prisoner at the time of the shooting and prior thereto; and (2) that John Schwindt's death resulted, not from the pistol-shot wound, but from the surgical operation performed by the physicians in their efforts to extract the pistol ball, etc. Some testimony was introduced for the purpose of sustaining each of these positions. The case was fairly submitted to the jury, on all the evidence properly before them, in a clear, comprehensive, and fully adequate charge, in which they were distinctly and accurately instructed by the learned trial judge not only as to the questions pertaining to the two lines of defense above stated, but also as to all the questions presented by the evidence on both sides. Referring to the allegation relating to the second ground of defense, that a lost drainage tube (inserted by the surgeons in attendance to relieve their patient, etc.) "found its way into the spinal canal, and caused the death of John Schwindt," the learned judge said: "But suppose it did; the prisoner cannot escape by showing that death was the result of an accident occurring in an operation which his felo-

nious act made necessary. There is no pretense that the drainage tubes were not required, or that they were improperly placed." This was clearly correct, and, without specially referring to them, the same remark is applicable to the instructions given in relation to both lines of defense. The jury, under proper and adequate instructions, refused to find in favor of the prisoner on either ground, and we have no doubt they were fully warranted by the evidence in so doing.

There was no error in denying the motion to recall first the juror that had been last "stood aside." The action of the court in requiring the "stood-aside" jurors to be recalled in the order in which they had been stood aside was in conformity to the practice which has long prevailed in this country and in England. 1 Thomp. Trials, § 49, note 6. We have never known the practice in this state to be otherwise. The action of the court therefore deprived the prisoner of no right, nor could it have done him any injury.

The second to fifth specifications, inclusive, are based on a misapprehension of the record. The order in which a trial shall proceed must be left largely to the discretion of the court. The prisoner, having taken the stand in his own behalf, was open to cross-examination by the commonwealth. He was recalled during the time the rebuttal testimony of the commonwealth was being offered, not to give evidence in rebuttal, as his counsel asserts, but for further cross-examination. The other matters complained of do not require special notice. There is no merit in either of them. Nor is there any merit in the sixth specification. In disposing of the motion for a new trial the learned judge says the court's attention was not called to the alleged remarks of the district attorney at the time. Unless that is done, remarks of counsel cannot be considered. Com. v. Windish, 178 Pa. St. 167, 34 Atl. 1019. The remarks complained of are not properly on the record. They are embodied in the reasons for a new trial, but the discretion of the court in refusing a new trial is not reviewable in such circumstances as appear in this case. Alexander v. Com., 105 Pa. St. 1.

While, in cases of conviction of capital offenses, the fact of the separation of the jurors further than is necessarily required to enable them to perform their duties as such, and under the care of a sworn officer, creates a presumption of improper influence, it is a presumption which the commonwealth may rebut by clear and satisfactory evidence. Moss v. Com., 107 Pa. St. 267. In this case the evidence was amply sufficient for that purpose.

The action of the court in permitting private counsel to close the case for the commonwealth furnishes no ground for reversal. The general conduct of a trial is largely within the discretion of the judge presiding, and it is only when some abuse of that discretion is clearly shown that an appellate court will interfere. Nothing of the kind appears in this case.

The subject of complaint in the eighth and

last specification has already been noticed. The charge of the court in relation thereto was quite as favorable to the prisoner as he could reasonably ask. Several of the assignments of error are destitute of merit, and, as already stated, there is nothing in any of them that would justify a reversal of the judgment. They are all overruled. The judgment of the court below is affirmed, and it is ordered that the record be remitted for the purpose of execution.

KLING v. ELECTRIC TRACTION CO. (Supreme Court of Pennsylvania. May 24, 1897.)

STREET RAILROADS—INJURIES TO PERSONS ON TRACK—NEGLIGENCE.

1. Where the motorman was able to stop an electric car within about its length, when halfway between two cross streets, its speed was not sufficient to justify a finding of negligence of the motorman, causing injury to a child struck by the car.

2. Where an electric car struck a child which suddenly went from the sidewalk onto the car track at about the middle of a block, and there was no one on the last cross street to be warned, and no one to get off or on the car at that point, the failure of the motorman to sound the bell at such street was not negligence.

Appeal from court of common pleas, Philadelphia county.

Action by Katie Kling, by Levi Kling, her father and next friend, against the Electric Traction Company, for personal injuries caused by defendant's negligence. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. Howard Gendell, for appellant. Thomas A. Fahy, for appellee.

WILLIAMS, J. The story of the plaintiff's injury is free from difficulty, and without any conflict in the testimony as to any important particular. The defendant's car was moving along South Tenth street, making its usual circuit. The plaintiff, who was a mere child, was playing with several other children upon one side of the street. As the car was rapidly approaching, she suddenly started to run across the street in front of it, and reached the track just in time to be hit by it, and to suffer the injury of which she now complains. It was about 8 o'clock in the evening of the 25th of June, and the headlight on the front of the car was burning. The motorman appears to have been watchful, and upon discovering the movement of the child he turned off the current, and applied the brake with such vigor as to stop the car within a short distance, estimated at from 20 to 40 feet. The noise made in suddenly stopping the car attracted attention in the neighboring dwellings. When the car was brought to a standstill, the child was found under it and between the tracks, and was extricated from her perilous condition without other apparent injury than external bruises and two scalp wounds. These soon

healed, leaving no more serious results than scars. This action is brought by her father, as next friend, to recover for such injury as she has suffered on account of the accident. If she had been of sufficient age to be chargeable with contributory negligence, it is probable the defendant would have relied upon the circumstances connected with the collision as proof of such negligence; but her years remove this question from the case, and leave only that of the negligence of the defendant. The evidence upon which this question was submitted to the jury related to the speed of the car, and the absence of a signal at the crossing of Fitzwater street, which was the last street crossed by the car, and was half a square or more from the place of the accident. The learned trial judge said in his charge to the jury: "Now, the plaintiff in this case complains, and has endeavored to establish by the testimony of a number of individuals,—among them, Mr. Lewis and Mr. Morgan,—that this car was running at an unusual rate of speed. * * * The witness has said it did not slow up at Fitzwater street, and that no bell was rung. * * * Therefore the plaintiff claims that is sufficient to justify you in assuming that these parties were negligent. * * * Therefore, if you believe these facts to have been established, it is sufficient to justify you in forming the opinion that the company was negligent." But we are without any definite information as to the speed of this car. The witnesses are of opinion that it was greater than usual, but it was not so great but the motorman was able to stop it within about its length. We are not prepared to lay down any rule in regard to the rate of speed at which an electric car may be run between crossings, nor to say that the mere fact that the defendant's car was moving faster than usual at the time the plaintiff ran in front of it would be, in the language just quoted from the charge, "sufficient to justify" the jury in finding the defendant guilty of negligence. All that can be safely said upon this subject is that the car must be kept well in hand, and that the speed must not be so great as to make this impossible, or to endanger the safety of the public using the streets with reasonable care. But these passenger railways are created to facilitate the movements of the general public, and to furnish rapid transit for citizens from their homes to the business center of the city. They are practically indispensable in all great cities. The same rules as to speed that may be applied to ordinary vehicles propelled by horses are not applicable to street cars. They move upon a track from which they cannot turn, which is plainly visible, and which is prepared with a view to the rapid movement of cars upon it. The cars can be seen and heard for considerable distances, and are required to warn persons who may be upon their tracks of their approach. The purpose of their owners and the demand of the public are that the greatest rate of speed consistent with the safety of other persons using

the street or highway shall be maintained; and we are unable to say that any rate of speed that does not transcend these limits is negligent, or should be submitted to the jury as "sufficient to justify" a verdict against the railway company. As to the failure to ring the bell at Fitzwater street, it is enough to say that the evidence shows that the cars stopped there only when there were passengers to get on or off at that crossing, and that it was not a regular stopping place. On the day of this accident there was no one to get on or off this car at that street, and there was nothing to require it to do more than slacken its speed as it crossed the street. There was no one upon the street to be warned, and no occasion for striking the gong or bell. It went on, with an unobstructed track before it, into the next square, when suddenly this child dashed into the street just before it. The motorman saw the movement, and at once applied the brake with such force as to attract attention from people who were indoors for some distance along the street, and with such effect as to stop the car almost instantly. There was nothing in all this to require the striking of the gong, or to suggest its necessity to the motorman. The fact that this was not done, under the circumstances disclosed by the evidence in this case, was not the cause of this accident, nor could his failure to do so amount to negligence. Upon a careful examination of this record, we are unable to find any evidence of negligence on the part of the defendant sufficient to justify the submission of the question to the jury. The case strongly resembles that of *Funk v. Traction Co.*, 175 Pa. St. 539, 34 Atl. 861, in every important particular. The injury was not inflicted at a crossing where the passage of footmen should be looked for. The child was upon the sidewalk until it ran suddenly on the track, and was struck on the instant of reaching it. The immediate cause of the injury was therefore her own thoughtless act, for which the defendant is in no way responsible; and, no act of negligence on the part of the motorman being shown, there can be no recovery. *Chilton v. Traction Co.*, 152 Pa. St. 425, 25 Atl. 606; *Railroad Co. v. Spearen*, 47 Pa. St. 300. The assignments of error are sustained, upon the facts of this case, and the judgment is reversed.

IN RE CONTESTED ELECTION OF FLYNN.
(Supreme Court of Pennsylvania. May 27, 1897.)

ELECTIONS—BALLOTS—MARKING.

Under Act June 10, 1893 (P. L. 425, 430), providing that "the ballots shall be so printed as to give each voter a clear opportunity to designate his choice * * * by a cross mark (X) in a square * * * at the right of the name of each candidate, and inside the line enclosing the column" (section 14), and that "he (the voter) shall mark in the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each other office to be filled." it is not sufficient to make the figure 1 in the square

provided, or to make a cross in the square below it.

Mitchell, J., dissenting.

Certiorari to court of quarter sessions, Lackawanna county.

Contest of the election of John J. Flynn to the office of councilman of the borough of Olyphant. Decree for contestant. Flynn appeals, with certiorari. Reversed.

Everett Warren, Henry A. Knapp, and C. P. O'Malley, for appellant.

McCOLLUM, J. The specifications of error raise but one question, and that is whether the ballots mentioned in them should have been rejected as illegal and void, because they were not marked in accordance with the fourteenth and twenty-second sections of the act of June 10, 1893 (P. L. 425, 430). It is conceded that the ballots were not so marked as "to meet the exact requirements of the law"; but the learned court below, believing that the marking was intended as a compliance with it, held that they were valid. So much of the act of 1893 as is applicable to this case will be found in sections 14 and 22. The pertinent part of the former is that "the ballots shall be so printed as to give to each voter a clear opportunity to designate his choice of candidates by a cross mark (X) in a square of sufficient size at the right of the name of each candidate, and inside the line enclosing the column, * * *" and the pertinent part of the latter is that "he (the voter) shall mark in the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each other office to be filled." The ballots in question are not marked alike. There is no cross mark on either of them in the square provided for it. On two of the ballots "the mark of a one" (1) appears in the square provided for the cross mark (X), and on one of these there is a cross mark in the square directly below the square to the right of and opposite the name of the candidate. On one of the ballots in question there is no mark in the square opposite the name of the candidate, but there is a cross mark (X) in the square below it. Not one of these ballots is marked according to law. In *McCowin's Appeal*, 165 Pa. St. 233, 30 Atl. 955, the present chief justice, after quoting from sections 14 and 22 of the act said: "The marking mentioned in the last quotation is applicable only to candidates whose names are printed on the official ballot. They cannot be legally voted for in any other way than by marking as specified in said section." The case cited, and *Redman's Appeal*, 173 Pa. St. 59, 33 Atl. 703, differ in their facts from the case in hand, but the principle on which they were decided is applicable to and governs the latter. To hold that the ballots in question are valid, is to set aside the plain provisions of the act prescribing the place and manner of "marking," and to substitute therefor the surmises of the election officers and the courts respecting the intention of the voter. The presump-

tion is that the voter knows where and how to mark his ballot. He is furnished, on his request, with a card of instruction and a specimen ballot, and if, by reason of any disability, he desires assistance in the preparation of his ballot, he is permitted to select a qualified elector of the district to aid him in the preparation of it. Compliance with the provisions of the act of 1893 furnishes the only safe guide to the intention of the voter, and the facilities afforded for such compliance are quite sufficient to render noncompliance inexcusable. For reasons already stated, we decline to hold that the mark of a one (1) in the square provided for the cross mark, or a cross mark (X) in the square below it, has the effect of a cross mark (X) in the proper place for it. It follows that the ballots in question should have been rejected as illegal. They were counted for Edward J. Burke for the office of councilman of the Third ward of the borough of Olyphant. Fifty-two legal votes were cast for him for said office, and fifty-three legal votes cast for his opponent, John J. Flynn, for the same office. Flynn, having received a majority of the legal votes cast for said office, was duly elected thereto, and entitled to the same. The decree of the court of quarter sessions is reversed, and set aside, and it is ordered that the costs be paid by the petitioner.

MITCHELL, J., dissents.

RAYMOND v. SCHOONOVER.

(Supreme Court of Pennsylvania. May 24, 1897.)

REPLEVIN—DEFENSE IN RIGHT OF ONE NOT A PARTY—LIEN OF JUDGMENT—ASSIGNMENTS OF ERROR.

1. An assignee for benefit of creditors of one who is a member of the firm to which plaintiff in replevin sold the machinery sued for, under contract whereby title should remain in plaintiff till full payment, should not be allowed to defend in right of a judgment creditor of the assignor, who is not a party on the record; but the judgment creditor should assert any claim it has in its own name by appropriate proceedings.

2. Though machinery sold under an agreement that title remain in the seller till full payment becomes attached to realty, so as to be subject to lien of judgment against the owner of the land, the lien gives the creditor no right of possession of the machinery.

3. Assignment of error to overruling of objections to questions should show that prejudicial answers were given.

Appeal from court of common pleas, Monroe county.

Replevin by C. W. Raymond, trading as C. W. Raymond & Co., against Amos H. Schoonover, assignee of Elizabeth Bunnell for benefit of creditors. Judgment for defendant, and plaintiff appeals. Reversed.

Henry J. Kotz and S. Holmes, for appellant. D. S. Lee and Staples & Erdman, for appellee.

MITCHELL, J. This case presents one of those attempted short cuts which not unfrequently prove to be the longest way round.

Plaintiff sold the property replevied by him to the Saylorburg Clay Company, a partnership, under an agreement whereby the title was to remain in the plaintiff until the property was fully paid for. The agreement was valid between the parties, and against every one else until a superior right intervened. No such right appears in the present case. The defendant had no title at all of any kind. He was the assignee for the benefit of creditors of one of the individual partners, and as such had no right to the possession of any part of the firm property. As against him the plaintiff's title is clear. This the learned judge substantially ruled at the trial, but he allowed the assignee to defend under the title of the Stroudsburg National Bank, claiming to be a lien creditor of the individual partner assignor, on the ground that the property in question (machinery) had, as fixtures, become part of the realty, the legal title to which was in such assignor. The case was accordingly left to the jury on that question, with direction to find for the defendant if the question was answered in the affirmative. But in so directing the court fell into error. The issue was not broad enough to carry the verdict, for, even if the Stroudsburg Bank was in position to assert the lien of its judgment on these fixtures against the title of plaintiff, nevertheless the lien gave no right of possession, and therefore, in that view of the case, the verdict should have been directed for the plaintiff, with a special finding whether the property was or was not subject to the lien of the bank's judgment. The judgment is admitted to be less than the value of the machinery, and there is, therefore, a surplus of such value unquestionably the property of plaintiff, of which he has been deprived by the form of the verdict. Had there been the special finding, the equitable powers of the court might have been competent to do justice to the several interests involved, even under the disadvantage of a defense made in the right of a party who was not on the record, and who might or might not be in position to have them bound by the verdict had it been adverse. But, as there was no such finding, the judgment must be reversed, and we are of opinion that the case should be tried in the regular way, on the issue between the parties of record. On that issue the verdict must, on the undisputed facts, be directed for the plaintiff. If the bank desires to assert its claim, it must do so in its own name and by its own appropriate proceeding.

This disposition of the case renders it unnecessary for us to consider the assignments of error to the charge on the subject of fixtures, in connection with the testimony as to the intent to put the land, also, into the partnership as part of the brickmaking plant. We leave all those questions until they shall be presented by the parties really concerned with them. It may be well again to call the attention of counsel to the fact that the second to the seventh assignments, inclusive, are in en-

tire disregard of the rules of court. They stop with the overruling of the objections to questions, and contain nothing to show that any answers were given by which appellant was prejudiced. In strict practice such assignments should be entirely disregarded, and counsel violate the rule at their peril. *Cornish v. Hooker*, 141 Pa. St. 138, 21 Atl. 526; *McElroy v. Braden*, 152 Pa. St. 78, 25 Atl. 235. Judgment reversed, and venire de novo awarded.

SPRING BROOK RY. CO. v. LEHIGH COAL & NAVIGATION CO.

(Supreme Court of Pennsylvania. May 24, 1897.)

LEASE OF RAILROAD—TO MORTGAGEE—ACCOUNTING.

1. A mortgagee of a railroad in possession under a lease reserving a rent of 20 per cent. of the gross receipts, to be applied on taxes, certain liens, and the mortgage debt, is not precluded from enforcing its mortgage because of failure to keep an account strictly as the law requires; one having been kept which was a substantial basis for an accounting, and the lessor, though complaining of the accounts rendered from time to time as not what it was entitled to, having made no further effort to get details while they were current and accessible.

2. Though a lessee required to pay as rent 20 per cent. of the gross receipts must conduct the business with fair regard to the interest of the lessor as well as itself, there is a presumption that it has done so.

Appeal from court of common pleas, Lackawanna county.

Suit by the Spring Brook Railway Company against the Lehigh Coal & Navigation Company. From the decree, plaintiff appeals. Affirmed.

E. C. Newcomb and S. B. Price, for appellant. Everett Warren, Henry A. Knapp, and Samuel Dickson, for appellee.

MITCHELL, J. This is a bill for an account, an injunction, and other relief, by the appellant against its mortgagee and lessee, which was in possession under a lease reserving a rent of 20 per cent. of the gross receipts of the road, to be applied to the payment of taxes, certain liens, and the debt of the lessor to the lessee. The duty to account is not denied, but the defendant claims that it has from time to time during the running of the lease accounted fully. On this point the master found in favor of the appellant, and, holding that there had not only been no such accounting as the law required, but also that the defendant had failed to keep such books as enabled it now to account fully, he reported that the defendant should be enjoined from proceeding on its mortgage. Recognizing, however, that this was, as he describes it himself, a "radical position," which the court might not approve, the master presented, also, an "alternative report," in which the evidence is gone over with great care and skill, and an account stated, in which the amount due from appellant to defendant is

fixed at \$11,217.34, a little more than one-third of the sum claimed by the defendant. The court below declined to approve the master's first recommendation, and adopted the alternative report. This action is the most important error alleged by the appellant. The assignments on this point, however, cannot be sustained. A conclusive answer is given by the learned judge below in the suggestion that, as there was, in 1882, an admitted debt of appellant to defendant of \$19,336.78, the failure to state an account correctly cannot raise a conclusive presumption of payment. But the learned judge went further. During the larger part of the period involved the defendant sublet the road, and the judge finds that, although the defendant itself did not keep such detailed and itemized accounts as appellant was entitled to, yet the sublessees did so in regard to nearly all the controverted matters, and from these books the master has in fact stated an account between appellant and defendant. While the master did not regard the evidence from which he made up his account as itemized or kept strictly as the law required, yet it has not been shown that it was not a substantial basis for an accounting, and it should be said, further, that its inadequacy was to some extent the appellant's own fault. Accounts were rendered by defendant to appellant from time to time during the running of the lease, and while the latter complained that they were not such as it was entitled to, yet no further effort appears to have been made to get the details while they were current and accessible, and even afterwards, during the taking of the testimony under the present bill, the books of the defendant were offered to appellant for examination of the items, but the offer was not taken advantage of. The court was, therefore, right in refusing to adopt the master's first report.

The learned judge then took up the alternative report, and examined the account upon the evidence with great care, coming finally to a conclusion in substantial accord with the master. In so doing he laid down a rule at least sufficiently strict against the defendant. "The standard of duty imposed on the defendant by the agreement of October, 1882, does not differ materially from that imposed on the usual mortgagee in possession. They are bound to account, not only for what they actually received, but also for what they should and could with reasonable care and attention have received. * * * While the agreement provides that the defendant might charge such rates as might be lawful and might seem best to it for its interests, the spirit of the agreement was that the road should be operated in the interest of both parties." This rule the learned judge appears to have applied consistently throughout his examination of the account. The bone of contention, as he says, was the amount of the gross receipts, which was the agreed measure of the rent. As to amounts actually received there was no serious dispute, but it was claim-

ed that defendant had failed to obtain earnings which it should have done, especially in the years 1885 to 1892. The railroad leased was a short road, used principally for the development of lumber territory. In 1885 the sublessee, the Philadelphia & Reading Railroad Company, surrendered the road to its immediate lessor, the defendant, and the latter leased it to the Spring Brook Lumber Company, but, instead of reserving rent at a percentage of actual gross earnings, it substituted a fixed rate per ton of freight carried. The defendant claimed that this was the best and most profitable arrangement it could make, that the only business the road had was carrying lumber, that the territory was nearly exhausted, and that what timber was left was practically under the control of the lumber company, or its president, Mr. Lewis, who was threatening to extend another road which he controlled into the territory, so that this trade would be diverted, and appellant's road become practically useless. Appellant, on the other hand, contended that this agreement was in violation of its rights, and that the defendant was bound to maintain, both by itself and its sublessees, the regular rates. The master found that defendant had departed from the agreement, and he therefore raised the rate upon which the account was to be stated from the 30 cents fixed by the parties to 85 cents per ton, which he found was a proper charge for what the defendant should have received from the lumber company. The court held the arrangement between the defendant and the lumber company not binding on the appellant, and, after reviewing the evidence on this point, reached the result that the rate fixed by the master was "as fair a conclusion as any other, and a legitimate inference from the evidence." This was, at least, going as far in favor of the appellant as would be justifiable. There is no power in courts requiring more caution in its exercise than the post facto authority to say, after a transaction is concluded, how much more profit could have been made than actually was made by the interested parties. Where a business is conducted by one who is not the exclusive owner, but is accountable in part as a quasi trustee to another, the rule undoubtedly is, as held by the learned court below, that it must be conducted with fair regard to the interest of both parties, and equity will scrutinize closely where there is any reason to suspect fraud, or even any opportunity for unfair advantage. But where, as in the present case, the interests of both parties are the same,—to get the largest rent possible from the property,—there is a presumption that the best was done which the circumstances permitted. Rates and prices must be fixed by the parties who are actually conducting the business, and therefore have the requisite knowledge. No business can be successfully managed in any other way, and in this case it was expressly agreed in the lease that the defendant "may charge for transportation, on the said railroad and its

branches, any such rates as may be lawful, and as may seem best to it for its own interest," and shall set aside 20 per cent. of the gross receipts for payment of the taxes, liens, etc., and the reduction of the mortgage debt. It is thus clear that the better the terms of the sublease were for the defendant the better they would also be for the appellant, and when, therefore, the defendant considered it was doing the best it could for itself in the arrangement with the lumber company, there is a strong presumption that it was using its judgment equally for the interest of the appellant. It may be doubted whether, if the question were before us in the first instance, we should find the evidence sufficient to overcome this presumption. But the master and the court below have concurred in their conclusions, the defendant is not here complaining, and the appellant certainly has nothing to complain of. Decree affirmed, with costs.

Appeal of MUEHLING.

(Supreme Court of Pennsylvania. May 27, 1897.)

FIXTURES—MORTGAGOR AND MORTGAGEE—INTENTION—EVIDENCE.

An agreement under which the members of a firm borrowed money to build a knitting mill and gave a mortgage required the mortgagors to place therein the necessary machinery, and to insure the same for the protection of the mortgagees. Sewing machines, hosiery knitters, and other machinery essential to the proper operation of the mill, were fastened to the floor, and run by the general steam plant. One of the mortgagors, in withdrawing from the firm, agreed to convey his interest in the real estate, machinery, etc., "subject to the mortgage." Held sufficient to warrant a finding that the parties intended to subject to the lien of the mortgage the machinery in the factory when the mortgage was executed and that subsequently placed therein by the mortgagors.

Appeal from court of common pleas, Monroe county.

Claim by James H. Shotwell, trustee, etc., to the proceeds arising from sale of certain machinery on execution under a judgment recovered by Franklin H. Muehling against Charles Muehling, trading as Muehling & Co. The auditor distributed the fund to claimant, and from a decree confirming the report the judgment creditor appeals. Affirmed.

The machinery levied on consisted of sewing machines, hosiery knitters, steam press, buttonhole machine, etc., fastened to the tables and the factory floor, and run by belts attached to shafting propelled by the general steam plant.

Henry J. Kotz and A. R. Brittain, for appellant. Staples & Erdman, for appellee.

McCOLLUM, J. The question to be determined on this appeal is whether the hosiery knitters, rippers, steam press, and dynamo purchased for and placed in the knitting mill by the owners thereof were intended by them as component parts of their factory, and sub-

ject to the lien of the mortgage upon it, or as personalty subject to removal by them at their pleasure, and against the protest of their mortgagee. The learned auditor to whom the question was referred found as a fact that it was their intention, in placing this machinery in the mill, to place it there as fixtures, and a constituent part of their factory. This finding was approved by the learned court below, and, if there was a sufficient warrant for it in the evidence, we cannot reverse it. We have carefully read and considered all the evidence, oral and documentary, and our conclusion from it accords with the finding in question. The agreement of September 11, 1889, under which the money for the erection of the factory was furnished, and in pursuance of which the factory was mortgaged, contained a requirement by the mortgagee and a promise by the mortgagors which bound the latter to place in the factory, for the proper operation of it, machinery worth at least \$10,000, and to maintain an adequate insurance thereon for the protection of the former. It seems to us that this agreement is in clear accord with the view that it was the intention of the mortgagors that all the machinery employed in the operation of the factory should constitute a component part of it. The manner in which the machinery was connected with the factory, and the fact that it was deemed essential to the proper performance of the work done there, are circumstances corroborative of this view. The mortgage was executed in conformity with the agreement, and the parties to it seem to have understood that it included the machinery as well as the buildings with which it was connected. When Johnson withdrew from the partnership of Muehling & Johnson he agreed to convey to Muehling his interest in the real estate, buildings, machinery, and fixtures connected therewith, subject to the mortgage. This agreement shows that he considered the machinery and fixtures as real estate on which the mortgage was a lien. The learned counsel for the appellant appear to concede that the machinery in the factory when the mortgage was executed was included in and bound by the latter, but they claim that the machinery in question was put in the factory subsequent to the execution of the mortgage, and is not subject to the lien of it. As sustaining this view they cite *Tillman v. De Lacy*, 80 Ala. 103, and *Clore v. Lambert*, 78 Ky. 224. These cases are referred to as authority for the proposition that "where the chattel is annexed after giving the mortgage, and is of doubtful character, there must be stronger evidence of intention to make a permanent accession to the freehold than if it were annexed prior to or at the time of giving the mortgage." But this proposition, if sustained by the cases cited, furnishes no ground for reversing the finding in question, because the evidence to support it is ample. Besides, our own cases seem to hold a different view. In *Roberts v. Bank*, 19 Pa. St. 71, a steam engine and boilers were de-

tached from a property covered by a mortgage, and it was ought to justify the severance on the ground that they were attached after the property was mortgaged; and it was held that, "though the engine and boilers were put up after the mortgage to the plaintiff was given, they constituted a part of the mortgage security, and they were not liable to removal by the mortgagor or her assigns, if such removal was injurious to the mortgagee, who has a right to benefit from any appreciation of the mortgaged premises arising from any cause." See, also, on this point *Morris' Appeal*, 88 Pa. St. 368. Decree affirmed, and appeal dismissed; the costs to be paid by the appellant.

McKEAN v. BIDDLE et al.

(Supreme Court of Pennsylvania. May 24, 1897.)

CORPORATIONS — POWER TO DECLARE DIVIDENDS.

In 1763 the members of a mutual fire insurance company, by unanimous resolution, abolished the dividend-paying feature, in order to provide a reserve fund; but in 1895, it appearing that the company had a surplus of over \$4,000,000, that its outstanding insurance was some \$14,000,000, while the whole amount of premiums or deposits liable to be returned to the policy holders on cancellation or surrender of their policies was less than \$500,000, a majority of the members passed a resolution authorizing the directors to distribute among the policy holders, in proportion to their deposits, such portion of the net income from invested funds as they thought prudent, whereupon the directors declared a dividend of 10 per cent. on the amount of deposits. *Held*, that the dividend was valid.

Appeal from court of common pleas, Philadelphia county.

Suit by Thomas McKean against Alexander Biddle and others, directors of the Philadelphia Contributionship for the Insuring of Houses from Loss by Fire, to enjoin payment of a dividend. From a decree dismissing the bill, complainant appeals. Affirmed.

The court below, in directing the entering of a decree in favor of the defendants, filed the following opinion:

"The Philadelphia Contributionship for the Insuring of Houses from Loss by Fire was incorporated by the general assembly of the province of Pennsylvania, by an act passed February 20, 1768. It had been in existence as an unincorporated 'Society for the Insurance of Houses from Loss by Fire upon the Most Equal Terms, and Apart from All Views of Private or Separate Gains or Interest,' under articles of agreement dated March 25, 1752. The society was a mutual insurance company, of which those who were insured in it were the members, and as such entitled to take part in its government and participate in any division of profits it might make. The title of the act chartering the society states that it is intended 'to ratify and confirm the articles of agreement of the contributors, and to enable them to make suitable by-laws for the better management and prosecution of

their designs.' It was provided in the twenty-second item of the articles of agreement, or 'deed of settlement,' as it was called, that any general meeting of the members of the society should have full power 'to alter and amend the present articles and make any additional rules or articles for the better and more orderly and successful or satisfactory management of the affairs of this society. At all which meetings the determination of a majority of the members present shall be conclusive and binding on the whole society.' Several important amendments have been made in the deed of settlement and the policy of the society. On April 14, 1781, it was resolved that houses which have a tree planted before them in the street, should not be insured, and if any person in future plant any tree before his (insured) house in the street, and not remove it in three months from the time of planting, his insurance should be forfeited. This regulation against trees, it is said, led to the formation of another insurance company which would insure houses with trees in front of them. It was the custom in former years, and, indeed, it has been the custom down to a very few years past, for insurance companies to affix badges on houses insured by them. Some persons asserted that those badges were intended to stimulate the volunteer firemen of former days, prior to the establishment of the paid fire department by the ordinance of December 29, 1870, to extra exertion in saving houses insured in companies of which the volunteer firemen were members; but I incline to the belief that those badges were rather an advertisement than an appeal to selfishness in the performance of a duty. The fifteenth item of the deed of settlement requires the directors to attend all fires, there to consult and determine upon such methods as may most conduce to the safety of the society and the service of the public. Insurance badges informed them which of the property in danger was insured in their society. The Philadelphia Contributionship badge consisted of four hands crossed and clasped at the wrist, by which the company came to be known as the 'Hand-in-Hand Insurance Company,' while the badge of its rival had on it a green tree, by which it came to be known as the 'Green Tree Insurance Company.' The policy of the society in regard to houses with trees before them was changed by a revision of the deed of settlement, made April 9, 1810, when it was resolved that houses and other buildings having trees planted before them may be insured in the society, but an addition to the usual deposit should be required in proportion to the risk such trees may occasion. On April 14, 1823, it was further resolved that such houses may be insured without any additional premium. It was probably the difficulty of throwing water from fire engines into houses with trees before them which led to the discrimination against them. Another important change made was in the duration of the insurance. By the deed

of settlement the policies issued by the society were for terms of seven years, and the deposit money or premium was returned to the person depositing it at the expiration of his policy, together with a dividend of the profits made in the meantime. By the revision of April 9, 1810, as amended April 14, 1838, it was resolved that every policy thereafter issued by the society should be made to continue in force for an unlimited period; that the society may, upon giving thirty days' notice, cancel any policy; and that the assured may, upon giving five days' notice and surrendering the policy, withdraw the deposit money, allowing a deduction of five per cent. The territory in which the company should insure has been changed from a limit of ten miles around Philadelphia, in Pennsylvania, to the entire state of Pennsylvania. The amount to be insured on one house has been changed from £500 to \$10,000. These are important changes in the policy of the society.

"No provision had been made for a reserve fund to meet large losses by extensive fires, and, as the members were responsible only for the amount of their deposits or premiums and one-half their deposits in addition, it was deemed advisable to make provision for a surplus or reserve fund to meet any extraordinary losses. To provide such a fund, at a meeting of the contributors held in April, 1763, the following questions were put: 'First, whether it will not be as beneficial that the interest money arising from the stock should be carried to one common account, and be applied as directed by the twenty-first article of the deed of settlement in discharging the expenses of the office, the surplus or remainder may be paid towards satisfying any loss that shall happen by fire, as to be at the extraordinary trouble and expense in calculating each contributor's proportion of interest, and crediting him therewith, and debiting his account with his proportion of all the expenses of said office, and his contribution to every fire; second, that no part of the deposit money shall be expended in repairing or paying for any damage done by fire until the balance of the interest money, as shall be accrued to the time of such fire, be first expended,—which was unanimously agreed to,' in the language used in the minutes. Since that time (1763) dividends have not been paid, and the stock or store, securities or joint effects, surplus or reserve, accumulation or assets of the society, by whatever name they may be called, have increased to such a marvelous extent as to put the securities of the company in peril from those who would dissipate its property, or the escheator, who would urge the public safety as a reason for sweeping its rich fund into the public treasury. The society had on hand December 3, 1895, assets valued at \$4,258,040.17, and the amount of insurance by it then outstanding was \$14,573,908. The practice of the company in regard to the duration of its policies has been changed, as before stated, and it now issues perpetual policies of insur-

ance, which it can cancel at any time, by returning the deposit money, while the holders of its contracts may surrender them at any time and demand a return of the deposit money. As the whole amount of deposit money or premium in the possession of the company, and liable to be returned to its policy holders, is only \$495,659.63, it is plain to be seen that, under either plan of cancellation, there would be a surplus left of several millions of dollars. Of course, no scheme of returning the deposit moneys, for the purpose of securing this rich sum for a few who might be permitted to remain, would be permitted or sanctioned by the courts. In view of the large fund in the hands of the company, and the large amount of interest annually earned by it, the corporation, at a meeting held February 18, 1895, adopted the following resolution: 'Resolved, that the present assets of the company shall remain intact, and that the directors be, and they are hereby, authorized from time to time, at their discretion, to distribute among the policy holders of the corporation, in proportion to their deposits held by the company on policies in force, respectively, such portion of the net income from invested funds as they may deem safe and prudent, after providing for losses and depreciation of assets, and making such additions to the assets as they may deem expedient: provided, that all deposits made after this date shall remain at least ten years before the holder of policies issued thereon shall receive any benefit under this resolution: provided, further, that all deposits received shall be added to the assets of the company.' At a stated meeting of the directors of the corporation, held November 20, 1895, the following resolution was passed: 'That we deem it safe and prudent, out of the net income from invested funds, to distribute among the policy holders ten per cent. of their deposits held by the company, and which has been so held prior to February 18, 1895, on policies in force at this date.' It was further resolved, at a subsequent meeting of the directors, that the ten per cent. above mentioned should be payable to the contributors on July 1, 1896.

"The plaintiff, who, in his own right and as executor of his father's will, holds several policies issued by the company on and between November 16, 1838, and May 6, 1871, amounting to \$25,250 of insurance for \$1,190 of deposits, has filed a bill to have the resolutions of February 18, 1895, and November 20, 1895, for the payment of a dividend, declared illegal and void, and the corporation enjoined from paying the same. The defendant is included in that class of corporations known as trading corporations, one of the inherent rights of which is the right to divide their gains and profits among their members; and while this corporation was instituted to protect the owners of houses from loss by fire, apart from all views of private or separate gains or interest, yet the result of prudent management for more than a century has been the accumulation of so large a fund that, whether gain or interest

was in view or not, it is now deemed safe and prudent to declare dividends from the net income from its invested funds. We have given careful consideration to the argument of the learned counsel for the plaintiff, and are unable to find any legal objection to the declaration and payment of the dividend authorized by the contributors and directors. The argument that the dividend will reduce the amount of the stock or assets of the company to which the plaintiff looks for indemnity in the case of loss might, if carried to an extreme, prevent the payment of dividends by any corporation. The possibility that in the future the company may become involved in losses on risks assumed by it might be urged against the payment of dividends by any company, be it insurance, banking, transportation, manufacturing, or any other trading corporation. This mere possibility is no reason for enjoining the payment of a dividend. Every business or trading corporation has a right to declare and pay dividends to its members (*Mor. Priv. Corp.* § 446; *Thomp. Corp.* § 2128); and it also has the right to pass its dividends for a time in order to accumulate a surplus and strengthen the company. That is what was done by the defendant corporation in this case. Having accumulated enough, in the judgment of the members, to make it safe and prudent to resume the division of its profits, it has the right to make such division. *McLean v. Glass Co.*, 159 Pa. St. 112, 28 Atl. 211. The basis of the division is a matter for the members to decide in the present case, and that adopted is entirely equitable. The tenth paragraph of the deed of settlement, as revised April 10, 1810, provides that all persons insuring in this society shall have the stock of the society as a security for the payment of any loss that may happen by fire. If we give the word 'stock' a restricted meaning, so as to confine it to the deposit moneys or premiums paid to the society, justification for which may be found in the twelfth item of the deed of settlement, before any accumulation of interest or surplus was provided, we find that it now has a surplus of invested funds, over and above the deposit moneys, amounting to nearly \$4,000,000, the interest on which is more than sufficient to pay the dividend authorized by the contributors and declared by the directors.

"The argument that the resolution of 1763 stands in the way of a dividend is clearly untenable. That resolution is no part of the contract between the plaintiff and the company. It was not held out to him as an inducement for insuring in the company, nor was any promise made to him that it would not be repealed. It was part of the policy of the company in regard to the management of its business, and is subject to the same liability to change as any other policy of its management. That resolution, depending upon the vote of the contributors, was revoked by the same authority which made it. It is no part of the charter or fundamental law of the corporation, or beyond the reach of a repeal by the contrib-

utors. Nor does it make any difference that the resolution of 1763 was adopted by a unanimous vote, while the resolution of February 18, 1895, was not unanimous. Unanimity in the government of a corporation is not required, unless its charter so provides. It is one of the consequences of being a stockholder or member of a corporation that the will of the majority shall govern, unless the fundamental articles provide otherwise. No such provision appears in the charter of the defendant company. On the contrary, the deed of settlement expressly provides that at any meeting of the society the determination of a majority of the members present shall be conclusive and binding on the whole society. We are of opinion that the contributors had ample authority to adopt the resolution of February 18, 1895, and that the directors had authority to declare the dividend of ten per cent. by the resolution of November 20, 1895. We therefore refuse the injunction, and dismiss the plaintiff's bill, with costs."

George Wharton Pepper and George Tucker Bispham, for appellant. William W. Montgomery and John G. Johnson, for appellees.

PER CURIAM. A careful consideration of this record has satisfied us that there is no substantial error in the conclusions reached by the court below. For reasons given in its opinion the decree should not be disturbed. Decree affirmed, and appeal dismissed, at plaintiff's costs.

O'BRIEN v. MAYOR, ETC., OF CITY OF PAWTUCKET.

(Supreme Court of Rhode Island. May 29, 1897.)

OFFICERS—DISMISSAL OF POLICEMAN.

A decision of the board of aldermen sustaining charges of misconduct against a policeman, and discharging him, necessarily implies a finding that such misconduct disqualified him, and is sufficient without an express finding to that effect; *Pub. Laws*, c. 603, § 1, providing that police officers shall not be dismissed except for misconduct of such character as the board of aldermen may deem a disqualification for such office.

On motion for reargument. Denied.
For opinion on appeal, see 37 Atl. 302.

TILLINGHAST, J. The petitioner moves for a reargument of this case on the ground that the board of aldermen did not expressly adjudge, before voting to discharge him, that the misconduct with which he was charged was of such a character as to disqualify him for the office which he held. We do not think this was necessary. The statute provides that "the members of the paid police department of said city shall not be subject to removal from office at any time except for misconduct or incapacity of such character as the board of aldermen may deem a disqualification for said office, and all such removals

shall be by the board of aldermen, upon charges made in writing, and of which the officer complained of shall have had notice, and an opportunity to be heard thereon." Pub. Laws R. I. c. 603, § 1, passed May 28, 1886. By the vote of the board of aldermen that "the charges against the petitioner are sustained, and that he be discharged from his office as police constable," it necessarily follows that, in their judgment, the misconduct with which he was charged was of such a character as to disqualify him for said office. The misconduct charged against the petitioner was that of entering a saloon where intoxicating drinks were sold, said entrance not being made in the performance of his duty, and of drinking intoxicating liquor in said saloon. And the board of aldermen found that the charges were sustained, and thereupon voted that he be discharged from his office as police constable. It will be observed that said statute does not specify as to the particular cause of removal, nor does it require the board to formally determine that they deem the misconduct charged to be of such a character as to disqualify the person accused for holding the office in question, before voting to discharge him; but it leaves it to the discretion of the board to determine what sort of misconduct shall be a sufficient cause for discharge, and, having found him guilty thereof, to discharge him. It is not contended by the petitioner that the misconduct alleged against him was not of such a character as to disqualify him for holding the office, but simply that the board did not expressly and formally declare it to be so as the basis of their jurisdiction to discharge him. But, as said by Durfee, C. J., in *Thornton v. Baker*, 15 R. I. 535, 10 Atl. 618: "When jurisdiction depends on the finding of a particular alleged fact, the exercise of jurisdiction implies the finding of that fact." Petition denied.

In re JOHNSON.

(Supreme Court of Rhode Island. May 29, 1897.)

FRAUDULENT CONVEYANCES—MORTGAGES—INSOLVENCY.

1. A mortgage acknowledged in June and recorded in September, with a consideration named of \$5,000, was given to secure future advances and indorsements. The mortgagee paid nothing of value when the mortgage was executed, but indorsed the mortgagors' note for \$1,000, which she subsequently paid. *Held*, that the mortgage was not fraudulent as against creditors, and that the mortgagee had a lien to the extent of \$1,000 on the property of the mortgagors in the hands of their assignee, who was elected in October.

2. Petitioner claimed a mortgage lien on property in the hands of an assignee. The mortgage was given to secure future advances and indorsements, and she had guaranteed a corporation against loss by sale of goods to the mortgagor, on which guaranty she had paid \$1,000. *Held*, that before the court could determine whether she was entitled to a lien for the \$1,000 it should be shown whether, at the time of giving the

mortgage, the corporation had sold any goods to the mortgagors, and whether such sum was paid prior to the insolvency proceedings.

Petition of Alfred S. Johnson, assignee of Munroe & Williams, insolvents, for an opinion.

Walter B. Vincent and Alfred S. Johnson for parties in interest.

MATTESON, C. J. The case stated is as follows: On June 15, 1896, the firm of Munroe & Williams gave a mortgage upon their stock in trade, consisting of bicycles, bicycle supplies, photographic goods and supplies, and their office furniture, fixtures, etc., to Susan A. Munroe, nominally to secure the payment of a note of the firm for \$5,000, but which in fact was intended to cover such advances and indorsements as the mortgagee should make for the firm at the time and subsequently to the execution of the mortgage. This mortgage was acknowledged June 29, 1896, and recorded September 15, 1896. On June 29, 1896, the mortgagee indorsed for the firm a note of that date for \$1,000, made by the firm and payable to the order of the mortgagee, four months after date, at the City National Bank, Providence, R. I. This note the mortgagee was subsequently compelled to pay. The Overman Wheel Company, a corporation from which Munroe & Williams purchased bicycles and other goods, required from them bonds, with surety, guarantying it against loss by the sale of goods to the firm, and Susan A. Munroe became surety on two bonds in the sum of \$2,200. After the execution of the mortgage these bonds were defaulted, and she, as surety, was compelled to pay on them \$1,000. On October 13, 1896, the petitioner was duly elected assignee of the firm of Munroe & Williams, who had been adjudged insolvent on their own petition, and as assignee received from the register in insolvency a deed of assignment of the property of the firm. The mortgagee has concurred in the petition of the assignee for an opinion of the court on the questions: (1) Is Susan A. Munroe entitled under the mortgage to be reimbursed out of the estate of the insolvents mortgaged to her, for the amount of the note of June 29, 1896, indorsed and taken up by her? (2) Is she entitled, under the mortgage, to be reimbursed for the amount paid by her as surety on the bonds? The indorsement of the note of June 29, 1896, by Mrs. Munroe, was an adequate consideration to that extent for the mortgage. The fact that the mortgage was nominally for \$5,000 is not enough to render it fraudulent as to creditors, the sole purpose in placing it at that amount, so far as the case shows, being to secure the mortgagee for further indorsements or advances for the benefit of the mortgagors. Nor was the delay in recording the mortgage enough to make it fraudulent as to creditors of the mortgagors. *Wilson v. Esten*, 14 R. I. 621; *Bank v. Colton*, 17 R. I. 226, 21 Atl. 349; *Ryder v. Ryder*, Index RR, 23, 32 Atl. 919. We think the first question must be answered in the

affirmative. The case does not show whether, at the time of the giving of the mortgage, the Overman Wheel Company had sold any goods to the mortgagors, so that Mrs. Munroe had incurred any liability to them on the bonds referred to, nor whether the money which she was compelled to pay on the bonds was paid prior or subsequently to the insolvency proceedings. Without a fuller statement of the circumstances attending the transaction, we do not deem it proper to give an answer to the second question.

BRADFORD v. STONE et al.

(Supreme Court of Rhode Island. April 24, 1897.)

SALE IN PARTITION—DOWER RIGHT.

Under Gen. Laws, c. 265, § 20, providing for sale in partition of interest for life or in reversion or in remainder, a dower right may be sold.

Suit by Mary G. Bradford against Henry P. Stone and others. Decree for complainant.

Albert R. Greene, for complainant. R. W. Burbank and Cooke & Angell, for respondents.

PER CURIAM. We think the testimony shows that it is for the interest of all parties that the partition should be made by sale, rather than by metes and bounds, and that under Gen. Laws R. I. c. 265, § 20, we have jurisdiction to order the sale of the right of dower of the respondent Eunice P. Eddy.

BUTTERFIELD v. BARBER.

(Supreme Court of Rhode Island. May 15, 1897.)

DECEIT—MISREPRESENTATIONS.

Defendant had made certain representations to plaintiff to be communicated to defendant's creditor, to obtain extension of time on a claim which was subsequently transferred to plaintiff. Defendant did not know that a note given in payment of the claim was to be taken by plaintiff. Held, that plaintiff could not recover for deceit, as the representations were not made with intention of inducing his action.

Exceptions from court of common pleas, Providence county.

Action by George W. Butterfield against Andrew J. Barber. From the judgment, defendant excepts. Directions to enter judgment for defendant.

P. H. Mulholland, for plaintiff. G. A. Littlefield, for defendant.

PER CURIAM. Assuming that the representations testified to by the plaintiff were made by the defendant, the testimony shows that they were made for the purpose of being communicated to Murphy, to procure an extension of time for the payment of his

claim against the defendant. At the time they were made the defendant had no expectation that the note, which was subsequently made, was to be taken by the plaintiff, who, in the meantime, had purchased the claim from Murphy. We do not think that in these circumstances the plaintiff had the right to rely on the representations, if they were made, because they were not made with the intention of inducing his action, and consequently that he has no ground to maintain an action for deceit. Case remitted to the common pleas division, with direction to enter judgment for the defendant for costs.

PATTERSON v. ATKINSON et al.

(Supreme Court of Rhode Island. May 22, 1897.)

PARTNERSHIP—POWER OF PARTNER—CHattel MORTGAGES—VALIDITY—MISTAKE.

1. A partner can give a valid mortgage on partnership property to secure an individual debt, which mortgage, however, is subject to the prior equities of partnership creditors and the other partners.

2. The mortgage of chattels in which the mortgagor owns an undivided half interest only is not void where it was the intention of the parties that only an undivided half interest was to be conveyed, and the mortgage read as it did by mistake of the scrivener, and complainant seeks to reform the instrument.

Bill by Joseph B. Patterson against William J. Atkinson and others. Heard on demurrer. Overruled.

Joseph Osfield, Jr., and Cooke & Angell, for complainant. Jacob W. Mathewson, for respondents.

TILLINGHAST, J. The object of this bill is to reform a mortgage deed of personal property. The bill sets out, in substance, that, by a mistake of the scrivener in drafting the mortgage deed in question, a part of the property which was mutually intended to be included therein was omitted; and also that said mortgage purports to convey the entire property described therein, when it was only intended to convey the mortgagor's interest in said property; and that, in order to make said mortgage deed conform to the actual intention of the parties, and to truly represent the contract entered into between them, it is necessary that it should be reformed. The bill prays that said mortgage deed may be reformed so as to give effect to the intention of the parties thereto, and for other relief. As to the power of a court of equity to reform such a mortgage deed of personal property, see *Ryder v. Ryder*, Index, RR, 23, 32 Atl. 919. The respondent Coombs demurs to the bill on the grounds: (1) That it appears therefrom that the mortgage was given on partnership property belonging to the firm of Coombs & Atkinson, to secure the individual debt of said Atkinson, which, under the law, cannot be done; and (2) that it

appears from the bill that said Atkinson owned only an undivided half interest in the machinery and goods and chattels mentioned and described, and that by attempting to convey the entire property he converted the same to his own use, and hence the mortgage is null and void.

The first and principal question raised by the demurrer is whether a co-partner can give a valid mortgage on partnership property to secure his individual debt. We think he can. Of course, such a mortgage is subject to the prior equities of the partnership creditors, and also of the other partners. But whatever surplus remains to the credit of the partner giving the mortgage, after the affairs of the firm are settled, will belong to the mortgagee. 1 Bates, Partn. §§ 183, 184; Jones, Chat. Mortg. (2d. Ed.) § 45; Thompson v. Spittle, 102 Mass. 207. See, also, Pars. Partn. (2d. Ed.) § 100 et seq. In Randall v. Johnson, 13 R. I. 338, this court held that the interest of a co-partner in partnership property is attachable by an individual creditor of such co-partner, and also that in case of such an attachment the sheriff may seize a specific chattel, and deliver it to the purchaser of the interest attached, who, subject to the partnership debts and equities, thereby becomes a tenant in common of such chattel with the other partners. In Trafford v. Hubbard, 15 R. I. 327, 4 Atl. 762, and 8 Atl. 690, the court affirmed the same doctrine. And if, against the will of a co-partner, his interest in co-partnership property may be attached by his creditor for his individual debt, we see no reason why such co-partner may not voluntarily secure a creditor by mortgaging his interest in the firm property. In speaking of the power of a co-partner to sell his interest in the firm property to a third person, Mr. Bates, in his valuable work on Partnership (volume 1, § 183), says that "such sale * * * is effectual to carry the right, after winding up, to such share of surplus as would otherwise have been due to the partner, in preference to other and unsecured individual creditors." The same doctrine is recognized in Bank v. Godwin, 5 N. J. Eq. 334. The cases cited by respondents' counsel in support of the demurrer, in so far as they are opposed to the doctrine above enunciated, were decided by courts where the right to attach partnership property for the private debts of an individual partner is not recognized because of its prejudicial effect upon the rights of the other partners; and hence, being opposed to the settled law of this state, and we think also to the weight of authority elsewhere, they are not controlling.

The second question raised by the demurrer is whether, by attempting to convey the entire property, as the mortgage on its face purports to do, the mortgagor converted the same to his own use, and thus rendered the mortgage null and void. It is true that assuming to one's self the property and right

of disposition of another's goods is a conversion thereof. And, of course, it is clear that in a case where a person gives a mortgage on property which does not belong to him, without the consent or knowledge of the owner, such mortgage is a nullity. But such is not the case here. The bill shows that the respondent William J. Atkinson, at the time of the giving of the mortgage in question, was the owner of an undivided half interest in the property, which he mortgaged to the complainant. And, while the mortgage purports to convey the entire property described therein, yet this is alleged to have been caused by a mistake on the part of the scrivener; and the complainant is seeking by his bill to rectify this mistake. And if it turns out at the trial of the case that the mortgagor only intended to convey his undivided half interest in the partnership property, and that this was in accordance with the contract between him and the mortgagee, then the mortgage will not, in effect, be one conveying or attempting to convey property belonging to his co-partner, but only his individual interest therein, and hence will not be obnoxious to the objection aforesaid. The respondents' counsel seems to take the somewhat inconsistent position that, as the mortgage purports to be a conveyance of the entire property, it is to be taken at its face value, although the bill shows that it was not so intended; and by demurring to the bill the respondents admit that it was not so intended. As the bill sets out what sort of a mortgage was mutually intended to be given, we have to deal with that, for the purposes of the demurrer, instead of dealing with the one which appears to have been given. Demurrer overruled.

GOFF v. HOSMER.

(Supreme Court of Rhode Island. May 12, 1896.)

MECHANICS' LIENS—ENFORCEMENT—PROCEDURE.

Gen. Laws, c. 206, §§ 5, 7, 9, provide that, in order to enforce a lien for building materials, notice of intention to claim a lien must be given, and placed on record, within 60 days after the materials are delivered; that legal process for enforcing the lien (the commencement of which shall be the lodging of the account or demand for which the lien is claimed in the office of the town clerk or recorder of deeds, with notice to what building and land, and to what and whose estate, the account or demand refers) shall be commenced within 6 months after commencing the delivery of materials, and that within 20 days thereafter the claimant shall file his petition in equity. *Held*, that notice, duly given and recorded, that claimant intends to claim, "and does claim," a lien for "building material" in a gross sum named, was not the commencement of legal process for enforcing the lien, where it appeared that the particular account, with notice to what building and land, and to what and whose estate, the account referred, and reciting that the same was filed for the purpose of commencing proceedings to enforce the lien, had been duly recorded, and that the petition had been filed on the following day.

Petition by James C. Goff against P. H. Hosmer for the enforcement of a lien for building materials.

Edwards & Angell, for petitioner. Nathan W. Littlefield, for respondent.

STINESS, J. Gen. Laws, c. 206, §§ 5, 7, 9, in regard to liens for materials furnished in the erection or reparation of a building, point out the steps to be taken for enforcement: First. Notice must be given to the owner, within 60 days after the materials are placed on the land, of an intention to claim such lien. Second. A copy of said notice must, also within said 60 days, be placed on record in the office of the town clerk or recorder of deeds of the town or city where the land is situated. Third. Legal process for enforcing the lien shall be commenced within six months from commencing the delivery of materials. Fourth. The commencement of legal process to enforce such lien shall be the lodging of the account or demand for which the lien is claimed in the office of the town clerk or recorder of deeds, with notice to what building and land, and to what and whose estate in the same, said account or demand refers. Fifth. Within 20 days after commencing legal process, as stated, the claimant shall file his petition in equity in court. In this case notice was duly given to the respondent, and recorded, that the petitioner "intends to claim, and does claim," a lien, accompanied by the general statement, "To building materials, \$173.10;" the date of record being April 17, 1896. After this, on August 13, 1896, the particular account for which the lien is claimed, with notice to what building and land, and to what and whose estate in the same, the account referred, was also recorded, and the petition was filed in court on the following day. Under these facts the respondent claims that the "commencement of legal proceedings" was complete under the first recorded notice, and that the lien is lost, because the petition was not filed within 20 days thereafter. His argument is that the notice of an intention to claim a lien and the commencement of proceedings to enforce it may be included in the same paper, and recorded at the same time; and that the first notice filed in this case was of that character, by reason of the words "and does claim a lien." We see no reason, as was intimated in *Tingley v. White*, 17 R. I. 533, 23 Atl. 100, why the two notices may not be combined so as to be the "commencement of legal proceedings." There is no need to have notices on record that are duplicates, and, if the first contains all that is required by the statute for the commencement of proceedings, we are unable to see why that is not enough. The purpose of the provisions which imply two notices is clear: First, notice of intention to claim a lien, both to the owner and the public; and, secondly, the first step in legal process by a notice showing what the lien relates to. The evident purpose of this last notice is to show

that legal process has begun. Hence we said in *Tingley v. White* that a conformity to the statute requires that this fact must appear, if both notices are combined. There must not only be notice of an intention, but also of a commencement of process, in order that the owner or purchaser may be apprised of the fact. If either of these two things is lacking, the provisions of the statute are not fulfilled.

The question in this case, then, is whether the first notice was such a compliance with the statute as to amount to a commencement of legal process. We do not think that it was. In the first place, no account was filed with the notice. The statute contemplates a full statement of the account, not a mere lump sum, together with the items, as far as practicable, so that the owner may know the details of the claim, and thus be able to see whether they should be paid or resisted. It is not always possible to file an account with the first notice, because the notice of an intention to claim a lien may be given before the delivery of materials is completed, and so before an account can be made up. The omission of such an account was not a compliance with the statute, and hence could not be, and evidently was not intended to be, a commencement of legal proceedings according to its terms. The second notice gave the full account, and added the statement, which we commend as good practice: "Said account is filed for the purpose of commencing proceedings to enforce the lien," etc. This fact not appearing in the first notice, it not only did not comply with the requirement of the statute as to the account, but it did not conform to the purpose of the statute in giving notice of the commencement of proceedings. It is urged, however, that this intention was disclosed by the words, "and does claim a lien," in the first notice. We do not think that they should be so construed. They simply give notice of a present claim, which is quite distinct from a notice that the claimant has begun to enforce the claim. The word "demand" is used in the statute with the word "account," but we think that this is intended to cover cases which may not be the subject of an account, or where a particular account cannot be given, and that it is not intended to substitute a general statement in place of an account in other cases. The respondent refers to the decree in the case of *Arnold v. Bradley*, Eq. 4179, entered at the present term, in support of his position. From an inspection of the papers, we find that one notice only was recorded, and that such notice related only to an intention to claim a lien. Had we known this fact, we should not have entered the decree. Several attorneys appeared in the case, which was heard in parts at lengthy intervals, a number of lien petitions having been consolidated; and as to this claim the statement was made by counsel, which was not disputed, that the notice contained all that the statute required. The question argued was whether there could be one notice instead of

two. Assuming the unquestioned fact as stated, the court said, as we say now, that we saw no reason why the two notices could not be combined; and the decree was thereupon entered without objection. We state these facts in order that the decree may not be misunderstood to be a precedent to the contrary of the opinion here expressed. We therefore decide that the second notice in this case was the commencement of legal proceedings, and that the petition was duly filed.

**MANUFACTURERS' OUTLET CO. v.
LONGLEY et al.**

(Supreme Court of Rhode Island. May 8, 1897.)

INJUNCTION—PAST INJURIES.

No cause of action for an injunction is stated by a bill alleging that defendants combined to induce certain publishers to refuse to publish complainant's advertisements, and to that end threatened to withdraw their advertisements if complainant's were accepted, and made malicious statements to such publishers, there being no averment of threatened future wrongful acts, and the consequences of past acts not being preventable by injunction.

Bill by the Manufacturers' Outlet Company against Charles E. Longley and others. Defendants demur to the bill. Sustained.

Wilson & Jenckes, for complainant. James M. Ripley, John Henshaw, Clarence A. Aldrich, David S. Baker, J. J. Hahn, John D. Thurston, and Bassett & Mitchell, for respondents.

DOUGLAS, J. The demurrers raise the question whether the statements in the bill which are well pleaded, if unanswered, entitle the complainants to the relief prayed for. The statements of the bill, as intended by the draftsman, allege that the respondents maliciously combined together to induce, and did induce, certain newspaper publishers to refuse to accept advertisements from the complainants; that in carrying out this combination they threatened to withdraw their own advertisements if the complainants' were accepted; that they also made malicious statements to these newspaper proprietors to the same end. The relief asked for is an injunction forbidding the respondents from interfering with the complainants' business by repeating these acts. We think the complainants have mistaken their remedy, if they have suffered any infringement of their legal rights. The bill contains allegations of past acts only; none whatever of apprehended, threatened, or probable wrongs, which it is the province of an injunction to prevent. The only threats alleged are that the respondents will cease to advertise in certain newspapers if the complainants' advertisements are received. But the threat has already been made, and its influence on the publishers has taken effect. An injunction against repeating it would be nugatory. If it were granted, it would do the complainants no good, for the newspapers

might still refuse their advertisements, and the respondents still occupy their space alone, to the exclusion of the complainants. Whether the respondents fulfill such a threat and cease to advertise in these newspapers is manifestly of no interest to the complainants. If of any account, it would be for the complainants' advantage as rivals in trade. And so in regard to the slanders. It is not alleged that there is any danger that they will be repeated. They are acts of the past, and their effect has occurred. If the influence of these acts continues, it cannot be prevented by injunction. The remedy for such acts, if they constitute an infringement of the complainants' legal rights, —which we are not here called upon to decide,—is by an action on the case for damages; or, if they constitute the criminal offense of conspiracy, the remedy for the public wrong is by complaint or indictment. In this view of the case, it becomes unnecessary to discuss the formal or substantial defects of the bill which were urged at the hearing.

PORTER v. POST PUB. CO.

(Supreme Court of Rhode Island. May 11, 1897.)

LIBEL—IMPORT OF LANGUAGE—DEMURRER.

1. A publication concerning a clergyman, that "action was taken, which, if it had been insisted upon to the letter, would have compelled [plaintiff] to quit the parish much sooner than next Easter," is not susceptible of the meaning that the vestrymen of the church were in possession of facts so damaging to plaintiff's reputation that they could have compelled him to sever his connection with the church forthwith.

2. A publication concerning a clergyman, that he did not return until two weeks after the expiration of his vacation, and that this "did not set well, in view of the feeling which was fast engendering against him," and "the result was that before he again occupied his pulpit the sentence of the vestrymen had already been pronounced against him," is not susceptible of the meaning that during plaintiff's absence his conduct had been investigated, and he had been found guilty of immoral conduct, and had proved himself, by his vicious habits, to be no longer worthy of respect.

3. A demurrer to a whole count for a libel contained in a single article must be overruled if any of the words are actionable.

Action by John Leach Porter against the Post Publishing Company for libel. Defendant demurs to the complaint. Overruled.

Joseph Osfield, Jr., and Wilson V. Jenckes, for plaintiff. Thomas P. Barnesfield and Comstock & Gardner, for defendant.

MATTESON, C. J. Among the statements in the article complained of as libelous is the following: "As a matter of fact, however, action was taken, which, if it had been insisted upon to the letter, would have compelled Mr. Porter to quit the parish much sooner than next Easter." The meaning attributed to this statement by the innuendo is that the vestrymen of Trinity Church were in possession of facts so damaging to the plaintiff's reputation, character, and standing as a clergyman, and

as rector of Trinity Church, that the vestrymen could have compelled the plaintiff to sever his connection with the parish and church forthwith. We think that this interpretation goes beyond the fair and natural import of the language, in that it assumes that the vestrymen were in possession of facts damaging to the plaintiff's reputation, character, and standing as a clergyman, as to which the statement is entirely silent. The assertion is only as to the action taken which would have compelled the plaintiff to quit the parish at an earlier date than the next Easter. It does not purport to give a reason for the action.

We do not think that the reference in the article to the plaintiff's predecessor, Mr. Tucker, and his connection with the church, justifies the innuendo that the plaintiff, as Mr. Tucker's successor, by his misconduct as rector, had caused the good name of the parish to become sullied, impure, and degraded, in the eyes of divers good and worthy people, since the statement makes no reference whatever to the plaintiff, beyond the fact that he was the successor of Mr. Tucker.

We do not think that the statement in the article that: "About two months ago Mr. Porter obtained the customary leave of absence, and went away for a four-weeks vacation,—at least, this appears to have been the general understanding of the case; and he left the city on Monday, July 27th, and did not return until the 12th of the present month,—a period of over six weeks. It may easily be imagined that this did not set well, in view of the feeling that was fast engendering against him among the leading people of the parish, and the result was that before he had occupied his pulpit since his absence the sentence of the vestrymen had already been pronounced against him,"—justifies the innuendo accompanying it, that it was intended to imply, insinuate, and charge that, during the absence of the plaintiff, his habits of life and moral standing, as a clergyman and rector of Trinity Church, had been investigated and discussed by the vestrymen, and that the plaintiff had been found guilty of immoral, improper, and unbecoming conduct while rector of Trinity Church, and had proved himself, by his misconduct and vicious habits, to be no longer worthy of the respect and esteem of the vestrymen or parishioners of Trinity Church. All that is asserted by the language is that the staying by the plaintiff beyond the period of the customary vacation, as it was generally understood, for a period of two weeks, had the effect to intensify the feeling which had fast been growing against him, and the result of that feeling. Nothing is implied, insinuated, or charged as to the causes which led to the existence of the feeling and the sentence of the vestrymen upon the plaintiff, but merely the bare facts of the existence of the feeling and the action of the vestrymen. The allegations of the innuendo as to the causes of these facts therefore go beyond the statement in the article, and are not permissible.

We cannot say that the other portions of the

article complained of may not bear the construction attributed to them by the several innuendoes, or that the article, as a whole, is not susceptible of the meaning put upon it by the general innuendo; and, if so, the language used of and concerning the plaintiff as a clergyman, and his relations to his parish, was clearly actionable. The statements complained of are all contained in a single article, and are all embraced in a single count in the declaration. The demurrer is to the whole count. The rule in such case is that, if any of the words are actionable, the demurrer must be overruled. *Edds v. Waters*; 4 Cranch, C. C. 170, Fed. Cas. No. 4,275; *Cummins v. Butler*, 3 Blackf. 190; *Wyant v. Smith*, 5 Blackf. 203. As, in our opinion, the article complained of, taken as a whole, and also some of the charges contained in it, are capable of the construction put upon them by the plaintiff, and therefore actionable, if the jury should find them to have been used in the sense attributed to them, we think the demurrer must be overruled.

BULL v. MATHEWS.

(Supreme Court of Rhode Island. May 15, 1897.)

ACTIONS—MISJOINDER—ARREST OF JUDGMENT—APPEAL—RECORD.

1. A count in trover and conversion is improperly joined with the common counts in *assumpsit*.

2. Objection to the joinder of a count in tort with one on contract may be taken in arrest of judgment.

3. A motion in arrest of judgment goes only to the record, and hence an affidavit filed after such motion has been certified from the district court cannot be considered.

Case certified from district court, Providence county.

Action by John Bull against Charles H. Mathews. There was judgment for plaintiff, defendant moves to arrest the same, and such motion is certified from the district court. Granted.

John F. Byrne, for plaintiff. George T. Brown, for defendant.

TILLINGHAST, J. This is a motion in arrest of judgment, on the ground of a misjoinder of causes of action. The action is trespass on the case for trover and conversion, and the declaration contains a count in trover and conversion and also the ordinary counts in *assumpsit*. At the trial of the case in the district court a decision was rendered in favor of the plaintiff for \$19.10 and costs, but there is nothing in the record to show whether the judgment was based on the count in trover and conversion or on those in *assumpsit*. No plea was filed in the case, but, as the defendant entered an appearance, the general issue is deemed to be filed. Gen. Laws R. I. c. 237, § 3. But whether, in this case, the general issue as to the count in trover, which would be not guilty, or as to the counts in *as-*

umpsit, which would be non assumpsit, is in, we have no means of determining. Within five days after the rendition of said decision the defendant filed his motion in arrest of judgment in the district court, whereupon the case was certified to this court. It is a familiar rule of common-law pleading that counts sounding in tort cannot properly be joined with counts sounding in contract, and also that such misjoinder is fatal, not only on demurrer, but also on motion in arrest of judgment. 2 Enc. Pl. & Prac. p. 803, and cases cited; *Haskell v. Bowen*, 44 Vt. 579. The effect of such misjoinder is clearly expressed in Chit. Pl. (9th Am. Ed.) 206, as follows: "The consequences of a misjoinder are more important than the circumstances of a particular count being defective; for, in case of a misjoinder, however perfect the counts may respectively be in themselves, the declaration will be bad on demurrer, or in arrest of judgment, or upon error." See, also, Gould, Pl. c. 4, § 87, and cases cited. The ordinary test for determining whether different causes of action may be joined is to inquire whether the same plea may be pleaded and the same judgment given on all the counts of the declaration, and unless this question can be answered in the affirmative the counts cannot be joined. See *Drury v. Merrill*, Index TT, 36 Atl. 835. See, also, *Court of Probate v. Sprague*, 3 R. I. 206. Applying this test to the case at bar, it will at once be seen that there is a fatal misjoinder. If the pleader in this case had simply omitted to strike out the money counts which are printed in the writ, perhaps we might disregard them; but, as he has filled them out in the ordinary way where the case is assumpsit, we feel bound to presume that he intended to rely thereon, as well as on the count in trover. It is true that, since the case was certified to this court, the plaintiff's counsel has filed an affidavit setting forth that by reason of mistake and oversight he neglected to strike out the money counts, and also that at the trial in the district court the evidence introduced was confined to the count in trover, which was the only count relied on. But, as a motion in arrest of judgment raises only those objections which are apparent upon the record (*State v. Paul*, 5 R. I. 189; 1 Black, Judgm. §§ 96-98), and as the affidavit forms no part of the record, we are not at liberty to consider it. Judgment arrested.

COATES et al. v. WILSON.

(Supreme Court of Rhode Island. May 28, 1897.)

INSOLVENCY—PREFERENTIAL TRANSFERS—FRAUD.

The mere fact that a mortgage was taken in the name of a third person, and stood on record in his name during the 60 days in which creditors of the mortgagor might apply in insolvency to vacate the mortgage as a preferential

transfer, does not render it fraudulent as to creditors, it being taken for a valid debt.

Action by W. W. Coates & Co. against Allen K. Wilson. There was a verdict for plaintiffs, and defendant petitions for a new trial. Denied.

George T. Brown, for plaintiffs. Jacob W. Mathewson and Dexter B. Potter, for defendant.

MATTESON, C. J. The mortgage under which the plaintiffs claim the proceeds of the property attached by the defendant in the suit of I. M. Lincoln & Co. against Charles E. Greene & Co. was originally taken from Greene & Co. by Thomas J. Gurry, a salesman of the plaintiffs, in his own name, but for the benefit of the plaintiffs. It was put on record by Gurry, and subsequently transferred by him to the plaintiffs. The attachment was not made until more than 60 days had elapsed, from the date of the record of the mortgage. The defendant resists the plaintiffs' right to recover, on the ground that the taking and recording of the mortgage of the plaintiffs in the name of Gurry operated as a fraud on the rights of the attaching creditors, because, if it had appeared on the record as a mortgage to the plaintiffs, the attaching creditors might have suspected that it had been given as security to the plaintiffs for an indebtedness of the mortgagors to them, and could have proceeded against Greene & Co. in insolvency within the 60 days to have the mortgage set aside. We do not think that the taking and recording of the mortgage in the name of Gurry can be regarded as a fraud upon the rights of the attaching creditors. The mortgage, having been put on record, was notice to all the world that the property of the mortgagors included in it was subject to the incumbrance, and was enough to have put all persons interested in the affairs of the mortgagors upon inquiry. It is not denied but that the plaintiffs had a valid claim against the debtors to the amount for which the mortgage was given; and it was no fraud upon the rights of others for them to take security from the debtors if they could obtain it, even if the giving of the security might result in a preference to them, unless proceedings in insolvency were seasonably taken to avoid the security. Except for such proceedings, a transfer of property which operates as a preference is good. *Elliott v. Benedict*, 13 R. I. 463; *Austin v. Manufacturing Co.*, 14 R. I. 464; *Perkins v. Hutchinson*, 17 R. I. 450, 22 Atl. 1111. The mortgage in the present instance having been on record for more than the 60 days within which proceedings could have been instituted to avoid it, the defendant had no valid defense to the plaintiffs' action. The petition for a new trial is therefore denied, and the case is remitted to the common pleas division, with direction to enter judgment on the verdict.

MOWRY, Collector, v. SLATERSVILLE MILLS.

(Supreme Court of Rhode Island. May 15, 1897.)

CORPORATIONS—TAXATION—ASSESSMENT—VALIDITY—ESTOPPEL.

1. Where a business corporation returned to the assessors an account of its ratable personalty, and the valuation thereof on the assessment roll does not exceed that so returned, such corporation is estopped to urge that the assessment roll is void, because it does not show that the assessment was limited to the kinds of personalty specified in Pub. St. c. 42, § 11.

2. An assessment of real estate as an entire tract, where the owner had returned to the assessors an account thereof showing three separate parcels liable to taxation, and two which were exempt, is invalid, under Pub. St. c. 42, § 4, in the absence of a showing that the property remained intact as a single tract, or that it was impracticable to describe and value the several parcels.

3. Where the values of the real and personal estate were entered separately on the assessment roll, and added together, and the tax apparently computed on their sum, the invalidity of the assessment of the real estate does not render the whole assessment void.

Action by Javan D. Mowry, as tax collector, against the Slatersville Mills. On plaintiff's exceptions. New trial granted.

Page & Owen, for plaintiff. J. C. Ely and Herbert Almy, for defendant.

MATTESON, C. J. This is an action on the case to recover the amount of a tax. At the trial in the common pleas division, the plaintiff offered in evidence a copy of the assessment, as follows: "Slatersville Mills purchased from John W. Slater, acct. rendered, real, \$330,000; personal, \$112,000; total, \$442,000; tax \$2,652.00." The defendant objected to its introduction, not because it was a copy, but because, as the defendant claimed, the assessment was not in conformity to law. The court excluded the paper, and the plaintiff excepted. The plaintiff also offered in evidence the account of the defendant's real and personal estate carried in by it to the assessors. This account specified the defendant's ratable personal estate as follows:

Machinery	\$149,156
Live stock on farm	1,600
Tools on farm.....	1,400
	<hr/>
	\$152,156
Indebtedness	40,000
	<hr/>
	\$112,156

This statement was objected to by the defendant, and was also excluded by the court. To the ruling excluding the statement the plaintiff also excepted.

Pub. St. R. I. c. 42, § 11, is as follows: "The fixtures enumerated in section three of this chapter; all picking, carding, spooling, drawing, spinning and reeling frames, dressing and warping machines, looms, tools and machines of all sorts, propelled by steam or water power in any factory, machine shop, print

works or manufacturing establishment of any kind, and all live stock and farming tools on farms, shall be taxed to the owner in the town where they are situated, in the same manner as if he resided there." The ground of the defendant's objection to the assessment, so far as it relates to personal estate, is that it does not specify of what the personal estate consists, and that, even if the corporation had no personal estate besides the kinds specified in section 11, it could not know that the assessors did not suppose it had other kinds, and had assessed it accordingly. It was argued that, where the authority to assess is limited to particular kinds of personal estate, the assessment roll ought to show that the assessment was made only on those kinds, so that the taxpayer may know that the assessors have kept within their jurisdiction. The defendant, in support of its objection, relies on *Manufacturing Co. v. Newell*, 15 R. I. 233, 2 Atl. 766, and *Chemical Works v. Ray*, Index RR, 181, 33 Atl. 443.

We think the court erred in its rulings. The record does not show that the defendant is a business corporation whose capital is divided into shares, as was the fact with the corporations in the cases referred to by the defendant. But assuming that such is the fact, and assuming that the assessments would otherwise have been invalid, the defendant, having carried in an account of its ratable estate to the assessors, consisting of the kinds specified in section 11, and the assessors having substantially adopted that account by assessing the defendant for the value in even thousands of the estate so specified, cannot now be permitted to urge that the assessment roll is void, because it does not show that the assessment was limited to the kinds of property mentioned in the section. As the valuation of the personal estate in the assessment for which the defendant was liable to taxation is stated at \$112,000, and the valuation given in the account is \$112,156, it is evident that the assessment did not embrace any other property than that specified in the account; and, the assessment being for \$156 less than the valuation put on the property by the defendant, the defendant has no cause for complaint on that account. The requirement that, when power to assess for taxation is limited to certain kinds of personal property, the assessment roll must show that the assessment is made only on such kinds, being for the protection of the taxpayer, that it may know that the assessors have kept within their jurisdiction, is answered when the taxpayer has carried in its account to the assessors, and they have adopted that account as the basis of the assessment.

The defendant's objection to the assessment roll, so far as it relates to real estate, is that it does not comply with the requirement of Pub. St. R. I. c. 42, § 4, that separate tracts or parcels shall be separately described and valued so far as practicable. The description of the estate in the assessment is "Slatersville

Mills purchased from John W. Slater." The account, as carried in to the assessors, shows three separate parcels, the first lying north, and the second and third south, of the New York & New England Railroad, which are liable to taxation, and church and school lots which are exempt. It was also stated by counsel in argument, though the record does not disclose this fact, that portions of the land purchased from John W. Slater had been sold by the defendant. Unless it should appear that the real estate purchased from John W. Slater had remained intact, and consisted of a single parcel, or, if it consists of several distinct and separate parcels, that it was not practicable to separately describe and value such parcels, we think that the assessment as to the real estate was invalid; for if the land has not remained intact, but portions of it have been sold, the defendant cannot know from the assessment that it does not include the portions which have been sold; and, if it consists of separate and distinct parcels, the statute, as we have seen, requires that they shall be separately described and valued, if practicable.

The defendant makes the further point that the tax is assessed, not so much for the real and so much for the personal estate, but on the entire valuation of both, and therefore contends that, if it is void in part, it is void as to the whole. It is true that, by the assessment roll, the values of the real and personal estate are added together, and the amount of the tax is computed apparently on their sum. But we do not understand that this constitutes the assessment an entire assessment, since the personal estate and the real estate are separately valued. But even if the adding together of the values of the personal estate and real estate, and the computation of the amount of the tax on their sum, is enough to constitute the assessment an entire assessment, we do not think that, so long as it is possible to separate what is legal from that which is illegal, the entire assessment should be regarded as void. In *Manufacturing Co. v. Newell*, 15 R. I. 237, 2 Atl. 766, referred to by the defendant, it was impossible to distinguish the legal from the illegal, and on that account the assessment as to the personalty was held void. Another case cited by the defendant is *Stark v. Shupp*, 112 Pa. St. 395, 3 Atl. 864. But we do not see that this case is in point. It was an action of ejectment, in which the plaintiff claimed title to land under a tax sale. The assessment offered in evidence in support of the sale showed that the valuation included not only the land in controversy, but also personal property. The tax was not levied on either separately, but on both jointly. The court said that, by the law in that state, the land could be sold only for its own tax properly assessed upon it, and not for a tax on personal property, and consequently gave judgment for the defendant. New trial granted, and case remitted to the common pleas division for further proceedings.

MEREDITH et al. v. NEW JERSEY ZINC & IRON CO. et al.

(Court of Chancery of New Jersey. May 7, 1897.)

CORPORATIONS—PURCHASE OF PROPERTY—ULTRA VIRES—INCREASE OF STOCK—RIGHTS OF ORIGINAL HOLDERS—INFRINGEMENT—REMEDY AT LAW—CONSOLIDATION OF RIVAL INTERESTS—MONOPOLY.

1. A preliminary order will not be granted to restrain a corporation, organized for mining and reducing ores owned by it within the state, from entering into a contract for the purchase of similar mines lying outside the state, since the purchase may be made and the contract carried out, and the corporation still be at liberty to discontinue the operation of work outside the state, if it be a breach of the original contract between the stockholders.

2. Where a mining and manufacturing corporation was organized under Corporation Act 1875, which provides (section 55) for the purchase of property with stock, such provision became a part of the contract between the stockholders; and where new stock is issued for the purchase of mines, which will become a part of the common property, from which all stockholders will receive the same benefit, original holders cannot insist that the new stock shall be issued to them in the proportion their holdings bear to the whole amount of stock before the increase.

3. In case the corporation deprives a stockholder of his rights in this behalf, it is liable to an action at law for damages; and where it is of sufficient responsibility to answer to such action, the stockholder is not entitled to equitable relief.

4. Rival corporations became interested in the same mineral deposit, on the supposition that two different ores, found in the same veins, could be separated; the two having been sold, one each, to the two corporations. To define and separate the two ores in practice in the earth was found practically impossible. Disputes arose as to whether the various veins uncovered were one ore or the other, and prolonged and expensive litigation followed, extending over many years. Finding that the issue was incapable of satisfactory judicial determination, a contract was made whereby the rival interests were to be consolidated, but as a condition precedent it involved the purchase of other mines and plants in different parts of the state and country. The corporations exercised no public franchise, were simply the owners of a species of property which in its natural state is of no use to mankind, and their output comprised but a small fraction of the product of the country. *Held*, that the contract did not tend to create a monopoly.

Motion by William T. Meredith and another for an injunction against the New Jersey Zinc & Iron Company and others. Heard on bill and affidavit in support of the motion, and on a single affidavit opposed. Denied.

John F. Dillon, Joseph Coult, and James E. Howell, for complainants. John L. Cadwalader, George W. Wickersham, F. J. Mather, and R. V. Lindabury, for defendants.

PITNEY, V. C. The complainants are, severally, the owners of certain shares of stock in the New Jersey Zinc & Iron Company, and seek by their bill to enjoin the performance of a contract entered into by that company with the other defendants. The New Jersey Zinc Company was organized in 1880, under the general corporation act of this state, and the purposes and objects of the corporation and

places where its business is to be carried on are designated as follows in the certificate of organization: "The places where the business of the company is to be carried on are the county of Sussex in the state of New Jersey, the city of Newark in the county of Essex in said state, and in the city of New York, county and state of New York." The objects are: "The mining of zinc and iron ores and other ores and mineral substances; the manufacture and sale of the products of such ores and minerals; the purchasing, leasing, holding, and selling such real estate, machinery, mines and mineral rights, and merchandise, and other personal property, as may be deemed necessary or convenient for the prosecution of the above mentioned business." The business of selling the manufactured product of such ores and minerals out of the state was to be carried on "in the said city of New York, and the principal part of such business within said state is to be transacted in the said city of Newark." The capital stock was fixed at \$3,040,000, divided into 30,400 shares of \$100 each. The complainants are the holders of 291 of these shares, a little less than 1 per cent. of the whole. The contract, the performance of which is sought to be enjoined, was submitted to a meeting of the stockholders, called for that purpose, and received the approval of about eight-tenths of the whole. There is no room for the inference that each and every stockholder so approving did not have the opportunity to examine and consider the propriety of the contract, and to exercise an intelligent judgment upon it. There is no room for inference that there was any mistake, or any fraud, actual or constructive, in the procurement of the contract. There is no room for the suspicion, even, that the case presented has any of the features of those cases, unfortunately quite numerous in these days, where a bare majority of the stockholders in one corporation use their power to make a contract with another corporation, in which they are more largely interested, which is very advantageous to the latter and disadvantageous to the former. In short, there is no room to suspect, even, that there is the least element of a party making a contract with itself. It follows that the general wisdom and propriety of the contract, having been approved by so large a majority of the stockholders, cannot be called in question here, and so much of the allegations of the bill and arguments of counsel as are based upon the idea of its improvidence, and unsupported by any proof, must be disregarded.

However, in order to appreciate the value of the attack on the contract based upon other grounds presently to be mentioned, it is worth while to state generally the origin and object of it. The defendant the New Jersey Zinc & Iron Company and the defendant the Hardyston Mining Company, very recently successor in title to the defendant Lehigh Zinc & Iron Company, are severally the owners of certain mineral rights situate at a place called "Mine

Hill," in the Walkkill valley, in the county of Sussex. The mineral which they own is called "franklinite," and contains zinc, and its value consists in the presence of that mineral in it. It was discovered some 50 or 60 years ago, and, when first discovered, and before the lodes or veins in which it was found were developed, it was supposed that there were two distinct minerals, so situate that they could be separately owned and mined, namely, zinc and franklinite,—the latter a peculiar mixture of mineral substances which takes its name from the village of Franklin, near which the mines are situate. Based upon this supposition, the titles to the two different minerals, found in the same lodes or veins at the place here in question, were separated. The right to mine the zinc ore was sold by itself, and the right to mine the franklinite ore was sold by itself. But when an attempt was made to define and separate in practice the two ores in the earth, it was found that it was practically impossible, and a serious dispute at once arose whether the various veins or portions of veins which were uncovered were franklinite or zinc. This state of things has led to a series of litigations in the state and federal courts, with varying results, which I may here say were not at all referred to in the bill; but in argument counsel for defendants relied—and I think properly—upon the common knowledge of the bench and bar of this state, derived from the official reports of the various suits, for a history of this controversy. Before adverting to those reports it is proper to say that the defendant the New Jersey Zinc & Iron Company is the successor in title to the New Jersey Zinc Company, organized under a special charter about the middle of the century, and which became entitled to the "zinc" ore in the tract called "Mine Hill." The title to the "franklinite" in a district known as the "South Half of Mine Hill" became vested in one party, and that of the franklinite in the north half became vested in another party.

The first suit was between the old New Jersey Zinc Company and the owner of the franklinite on the south half, and that resulted, first, in a victory for the franklinite company, as reported in 13 N. J. Eq. 322. That decision was reversed on appeal in 15 N. J. Eq. 418, and the title to both ores in effect apparently vested in the zinc company. That was in 1862. Under that decision the old zinc company prosecuted its business upon the south half of Mine Hill until some time in the next decade, when a party holding an unsatisfied mortgage on the franklinite in the south half, who was not a party to the previous litigation, foreclosed his mortgage, obtained the title, and commenced a suit in the federal court against the New Jersey Zinc Company, which resulted adversely to that company. The result of that litigation was that the present New Jersey Zinc & Iron Company was organized, and the two warring titles to the franklinite and the zinc ores were conveyed to the

new company, whereby it became the undisputed owner of all the ores in the south half of Mine Hill, and of the zinc ores on the north half. In the meantime the franklinite on the north half became vested in the Lehigh Zinc & Iron Company, and about nine years ago the New Jersey Zinc & Iron Company commenced suit against the Lehigh Zinc & Iron Company to establish its title to the north half, which suit, with varying fortunes in the courts, was finally decided against the New Jersey Zinc & Iron Company in November, 1896. This decision, however, covered only a part of the north half of the hill. Another undeveloped vein of the ore still remained unaffected by the decision.

In this state of things negotiations were entered into between the parties for the purpose of settling the litigation by the purchase by one party or the other of the opposite interests. The Lehigh Zinc & Iron Company, which had been taking out ores on the north half of Mine Hill, sent them to Bethlehem, Pa., where they had a large establishment for that purpose, to be treated and made marketable, precisely as the New Jersey Zinc & Iron Company sent their ores to Newark, N. J., where they have a large establishment for that purpose. The Lehigh Zinc & Iron Company also had a zinc mine near their works in Pennsylvania, and refused to sell or consolidate unless the settlement included all of their plant and its offshoots. There was a third company, the defendant the Passaic Zinc Company, which owned a franklinite mine near Mine Hill in Sussex county, and works on the Hackensack river for utilizing its products. The controlling stockholder in that company, a Mr. Jones, interested himself in bringing about a settlement of the controversy between the New Jersey and Lehigh Companies, and proposed to sell his works and mines at the same time. Much the greater value of all the works combined was found in the mines owned and controlled by the New Jersey Zinc & Iron Company and the Lehigh Zinc & Iron Company. The Passaic Zinc Company also had a mining and reducing plant in Wisconsin, and another in Illinois, of more or less value, and Mr. Jones insisted that these plants should go with the sale of the Passaic Zinc Works. The sworn statement of the president of the New Jersey Zinc & Iron Company is to the effect that the situation of affairs was such that it was found impracticable to effect a settlement of the controversy arising out of the difficulties in the title without buying up all of these works. With that view the contract in question was entered into, which was preliminary in its nature, and depended upon the results of an investigation of the titles of all the properties, and of the value in particular of the mines in Sussex county. Eminent experts, entirely indifferent between the parties, were chosen to appraise their value, and fixed them at a very high figure. The price to be paid by the New Jersey Zinc & Iron Company for all these properties was (roughly) \$1,250,-

000 in cash, and the issue of 82,884 shares of stock, of \$3,298,400 par value, to be distributed among the different owners. The Lehigh Zinc & Iron Company and its appendages, including the Hardyston Company, are owned almost entirely by four individuals, Messrs. Richard and August Heckscher, and S. P. and J. P. Wetherill. The Wetherills also own certain interests in some patent rights which pass with the sale. In order to legitimize the future operations of the company at points outside of the state, and to make the necessary increase of capital stock, the same meeting of stockholders, which, by a vote of about eight-tenths of the whole, approved the contract, approved a change in the certificate of organization, by which the company was enabled to mine and manufacture outside the state, and to buy and hold stocks, etc., and to increase its capital stock.

This exposition of the circumstances and real objects of the contract is made so that the objections urged by the complainants may be the better understood. They are as follows: (1) That the transaction is a violation of the charter rights of the company and the contract rights between the stockholders in the following particulars: (a) In attempting to buy out wholesale interests in a large number of corporations, for which they agree to pay a sum larger than their whole capital. (b) In attempting to go into the mining and manufacturing business outside of New Jersey. (c) In attempting to extend the business to points within the state which are not included in the original agreement. (2) That the proposed consolidation will result in the creation of a monopoly, and thereby render the complainants' stock and rights liable to forfeiture at the suit of the state. (3) The manner of increasing and distributing the increased capital stock is objected to, the particular ground of this last objection being that any increase of capital stock must be divided among the present holders of stock in proportion to their holdings. It is conceded on all hands that the original certificate of organization of this company forms a contract between the several stockholders which cannot be affected by any change in it made by virtue of any subsequent act of the legislature, but that it can only be effectually changed by virtue of some act of the legislature, then in force, which can and should be, so to speak, read into the contract. It is conceded that sections 6 and 35 of the corporation act of 1875, which was in force when this corporation was formed, cannot properly be so read into the certificate. Those sections reserve to the legislature the power to recall, in whole or in part, the legislative grant of corporate existence and immunity, and to annul the contract between the state and the corporation, but do not give the right to the corporation, or a majority of its stockholders, to alter the contract entered into between them, except by the consent of each. But it is further conceded that section 24 of that act, which provides for an increase of

the capital stock, and section 33, which provides for a change in the nature of its business by vote of two-thirds in interest of the stockholders, and section 55, which provides for the purchase of property with stock, must be so considered as a part of the certificate of organization, and hence constituting a part of the contract between the stockholders.

The change in the contract which was principally relied upon by counsel of complainants was the purchase of property and carrying on of business outside the state. With regard to this matter it is enough to say that I do not find it necessary, for present purposes, to determine whether or not it will be a breach of the contract between the stockholders for the company to proceed to prosecute mining and manufacturing enterprises outside of the state, since that is not a necessary part of the contract as I read it. or, if it be, the entire purchase may be made and the contract carried out, and the company still be at liberty to discontinue the operation of work outside of the state. The purchasing of these plants and works outside of the state is not an irretrievable step, which will commit the company irrevocably to an enterprise the prosecution of which will be a breach of the original contract between the stockholders. For that reason I think that the determination of that question may be properly deferred until the final hearing of the cause. No great or present injury will result from the prosecution of the work pending suit, and hence it is not a case for preliminary restraint by the court. This removes at once the principal objection made by the counsel of complainants to the execution of this contract. With regard to the power to execute the mortgage, that is found in the fourth subdivision of the first section of the act. The ownership of the mines in this state, and the working up of their product, is, of course, directly within the original purpose of the act.

The power to increase the capital stock is found in the twenty-fourth section of the original act, in these words: "In case more capital is necessary, an additional certificate shall be filed under the hands and seals of two-thirds in interest of the stockholders, or their legal representatives, stating the amount of such additional capital required." The power to so increase its stock, and that it had been effectively done in this case, was not disputed by the counsel of complainants in their brief or in oral argument. So that the regularity of the proposed increase is not drawn in question. The only point made in that connection was that, when a block of increased stock is issued, each of the old holders is entitled to such a proportion of it as his holdings bore to the whole amount of stock before the increase, and that complainants' rights in that behalf are about to be invaded. At the argument, counsel for defendants offered to the complainants to insure to them the right to purchase at par such proportion of the new stock as they would be entitled to under the rule relied upon.

But, casting out of view that offer, two answers are made to the objection, by the defendants: (1) That the fifty-fifth section authorizes the issuing of stock for the purchase of property, and that that section, which must also be read into the contract between the stockholders, overrides the general rule invoked; and (2) that the general rule, if there be such, requiring an equal distribution of new stock, was adopted by the courts for the purpose of preventing any particular stockholders or clique of stockholders from appropriating to themselves the right to subscribe to new stock at par when such privilege is worth a premium. 2 Beach, Priv. Corp. § 473; Gray v. Bank, 3 Mass. 364. In the case in hand, as the stock is issued for the purchase of property which will become a part of the common property, and from which the dissenting stockholder will receive the same benefit, if any, as each of his associates, I can see no reason for the application of the rule in this case. The amount of stock to be issued to the parties interested in the properties to be conveyed was fixed upon the basis of their actual value. The parties dealt at arm's length, and, as before observed, there is no reason to suspect that there is here the least element of a party making a contract with himself. Besides, it is well held in such cases that, in case the corporation deprives a stockholder of his rights in this behalf, it is liable to an action at law for damages, and there is no suggestion that the zinc company is not of sufficient responsibility to answer to such action. For these reasons I think the complainants are not entitled to relief on that ground.

It remains to consider the question of illegal combination, which would subject the new corporation to an attack by the attorney general. Upon such consideration as the four days allowed me for that purpose has permitted me to give the subject, I think that there is nothing in that ground. The circumstances show that it is not the object or purpose of the contract to create a monopoly. The affidavit of the president of the New Jersey Zinc & Iron Company shows that the zinc ores which will be controlled by it after these several purchases constitute but a small fraction of the world's supply, and that its product of zinc will also be but a small fraction of that produced throughout the country. Besides, buying up by one corporation of the property of another, and consolidating the whole into one business, to the extent and in the manner provided for in this agreement, is not, in my judgment, contrary to public policy, nor does it tend to create a monopoly. The question was carefully examined by Vice Chancellor Green in *Ellermann v. Stockyards Co.*, 49 N. J. Eq. 217. 23 Atl. 287, and that opinion was reviewed and reaffirmed in the subsequent case of *Willoughby v. Stockyards Co.*, 50 N. J. Eq. 656, 25 Atl. 277, heard by both Vice Chancellor Green and Vice Chancellor Van Fleet, and they concurred in the same result. It must be remembered, in this connection, that these com-

panies are not exercising any public franchise of carrying passengers or goods, but only the franchise of being a corporation. Their business is one that may be conducted by private individuals. They are simply the owners of a certain species of property which in its natural state is of no use to mankind, and which after it has been manufactured and made fit for use can hardly be classed as a necessity. The law forbidding forestalling the market does not, in my judgment, apply to the purchase of such property. *Jac. Law Dict.; Bouv. Law Dict. tit. "Forestalling."* By the law of the land these owners have the right to exercise their own judgment as to when, if ever, and how, they will spend their money in preparing their property for market and rendering it fit for use by mankind. Now, I am unable to find any foundation, either in law or in morals, for the notion that the public have the right to have these private owners of this sort of property continue to do business in competition with each other. No doubt the public has reasonable ground to entertain the hope and expectation that its individual members will generally, in their several struggles to acquire the means of comfortable existence, compete with each other. But such expectation is based entirely upon the exercise of the free will and choice of the individual, and not upon any legal or moral duty to compete, and can never, from the nature of things, become a matter of right on the part of the public against the individual. In fact, the essential quality of that series of acts or course of conduct which we call "competition" is that it shall be the result of the free choice of the individual, and not of any legal or moral obligation or duty. But I am satisfied that it is not the object of the consolidation to smother competition, and that the real object is to put an end, honorable and profitable to both parties, to a litigation whose issue is really incapable of satisfactory judicial determination. For these reasons, which I am sorry that my daily attendance in court since the argument has prevented me from stating more at length, I shall advise that the application for an order of restraint be denied.

COLEMAN v. REYNOLDS et al.

(Supreme Court of Pennsylvania. May 24, 1897.)

CONVEYANCING—DEED IN SUBSTITUTION OF ANOTHER—PURCHASE-MONEY MORTGAGE—RECORDS—NOTICE.

1. After sale of land to R. and L., and execution of deed to, and purchase-money mortgage by, them, it being desired by them that all interest in the land should be vested in R., and that L. should be released from obligation, it was agreed by all the parties that the recorded mortgage and the unrecorded deed should be canceled, and a new deed from the vendor to R. alone, and a mortgage from R. to the vendor, be substituted in their places. *Held*, that the deed and mortgage so given were valid, and the mortgage entitled to all the privileges and priorities of a purchase-money mortgage, as against all not mis-

led into acquiring rights on the appearance of a different state of facts.

2. A purchaser at execution sale on judgment against R. is put on inquiry whether a mortgage from R. to C. is not a purchase-money mortgage, though the last shown by the records is deed from C. to R. and L., and deed from L. to R.; the records showing, recorded prior to this, but subsequent to date of deed from C. to R. and L., a mortgage, of the date of such deed, from R. to L. and C., and, intermediate such records, a record of deed from C. to R., mortgage from R. to C., of same amount as the mortgage from R. and L. to C., and satisfaction of the latter mortgage, all bearing the same date,—that of their recording.

Appeal from court of common pleas, Wyoming county.

Proceeding by *scire facias* sur mortgage by Benton Coleman against J. C. Reynolds, mortgagor, and Lewis Armstrong and A. M. Wrigley, terre-tenants. From a judgment on a verdict directed for plaintiff against Coleman, but for Armstrong and Wrigley against plaintiff, plaintiff appeals. Reversed.

James W. Piatt and A. Ricketts, for appellant. E. J. Jorden and Chas. E. Terry, for appellees.

MITCHELL, J. Plaintiff in March, 1891, sold land to defendant Reynolds and one Lindley, conveyed it to them by deed of that date, and received from them a purchase-money mortgage, which was duly recorded. The deed, however, from him to them, was not recorded until 1893, as will be noted later on. Reynolds and Lindley having disagreed, the latter conveyed his interest in the land to the former, and desired to be released from the obligation of his bond and mortgage to the plaintiff. Accordingly, after some discussion, the parties agreed that the mortgage and the unrecorded deed should be canceled, and a new deed from plaintiff to Reynolds alone, and a mortgage from Reynolds to plaintiff, should be substituted in their place. This arrangement was carried out. The new deed from plaintiff to Reynolds and the mortgage from Reynolds to the plaintiff were executed on November 11, 1891, acknowledged a few days later, and recorded on November 23th; the first mortgage, by Reynolds and Lindley, being satisfied of record by plaintiff on the same day. In the meantime, however, on November 25th, a judgment was entered by the Scranton Savings Bank against Reynolds on a judgment note given by him the day before for previous indebtedness. In April, 1893, Reynolds, without the knowledge of plaintiff, and for reasons not explained, but which the course of events indicate rather plainly, put on record the first deed, from plaintiff to himself and Lindley. In April, 1894, the land was sold, as the property of Reynolds, under the Scranton Bank's judgment, and the defendant Wrigley, joined herein as terre-tenant, became the purchaser. The question in the case is whether he bought subject to the plaintiff's mortgage of November 11, 1891, or whether that was not to be considered a purchase-mon-

ey mortgage, and therefore was discharged by the sale on a judgment entered before it was recorded. As between the parties, this was clearly a purchase-money mortgage. It was in fact to secure the unpaid purchase money on the very land mortgaged. It is not claimed that there was any other consideration for it, and it is beyond question that the arrangement was not made for plaintiff's benefit in any way, but that he acquiesced in it merely for the convenience of the others, and on the distinct understanding of all that his rights were not to be affected. Lindley wanted to be let out of his obligation in regard to the land, and Reynolds was desirous to get rid of him. Wilson distinctly says the second mortgage was "to be done so as to let Lindley out of the deal; * * * to get rid of him in the transaction." In stating the arrangement, I have said advisedly that the first deed and mortgage were to be canceled, and the new ones substituted in their place; for, although some of the witnesses tried with varying success to evade the use of the words "cancel" and "substitute," yet the unquestionable effect of the testimony of each and all of them is that such was the intention, and the only purpose, of all the parties in the matter. Being badly advised, they did it in this way, but clumsy conveyancing will not impair rights between parties. The thing to be done was lawful, and within the power of the parties. The manner of doing it was not material between them, nor until other rights, acquired in good faith, intervened. On November 11th, when the deeds were executed, there were no such other rights. The court below held that, as all of plaintiff's title passed from him to Reynolds and Lindley by his first deed, his second deed, to Reynolds alone, conveyed nothing, but was a nullity, and when he satisfied the first mortgage he lost his purchase-money lien, and could claim on the second only as an ordinary mortgage taking rank from the date of record. A verdict was therefore directed for the terre-tenants. But this was an insufficient ground on which to rule the case. It is true that title once passed by a delivered deed cannot be divested by mere destruction of the deed. *Tate v. Clement*, 176 Pa. St. 550, 35 Atl. 214. But this refers to the destruction of title, not to its strengthening, which may always be done by additional conveyances, even if not legally necessary. And the conveyancing may be changed to suit the convenience or whim of the parties at any time until other rights intervene. A deed of release or quitclaim or confirmation is a valid instrument, although it may in fact convey no interest in the land, and have no other legal effect than to quiet the fears of some of the parties. The deed from plaintiff to Reynolds in November, 1891, even if regarded merely as a deed of confirmation or quitclaim, was a valid instrument, and must be looked at in connection with the circumstances and purpose of its execution. So regarded, it is entirely clear that the deed and the mortgage were valid and effective instru-

ments in substitution for the prior deed and mortgage, and as such binding on the parties, and that the mortgage was a valid purchase-money mortgage, entitled to all its privileges and priority as such between the parties, and against all others but those who may have been misled by plaintiff's action into acquiring rights on the appearance of a different state of facts.

This brings us to the really important question in the case,—were these terre-tenants so misled? If it were necessary to decide the case upon the point whether Wrigley was a bona fide purchaser without notice of plaintiff's mortgage, we should be obliged to say that there was sufficient evidence to send that question to the jury. Conceding that no specific item of evidence rises quite to the rank of the notice required by the cases cited by appellee, yet all the circumstances combine to show that he or his counsel did know all about it. He has not the clear standing of a purchaser at the sheriff's sale relying on the record; for he had bought directly from Reynolds, paid the agreed price to Wilson, and gone into possession before the sale. The sheriff's sale was a mere form of conveyancing to get a title clear of incumbrances, chief of which was the bank's judgment. Whether the property brought much or little, within the limits of his bargain, was of no moment to Wrigley; for he and the owner had already agreed upon a price to be paid, without reference to the amount bid at the sale. The bank, with a judgment which, on the face of the record, if plaintiff's mortgage could be excluded as junior, was a first lien for \$3,900, stood by at the sale, and let the property be knocked down for \$55. This bid was paid by Wilson out of the money which Wrigley had previously put in his hands as the purchase money under his bargain with Reynolds, and the rest of that money, as Wilson testifies, was distributed among certain of Reynolds' creditors, the bank getting the lion's share. It is difficult to regard this in any other light than as a preconcerted scheme between Reynolds and the other parties to it, in which the plaintiff's mortgage was intentionally shut out. But it is unnecessary to put the case on that ground, as the record notice is decisive. Assuming, as the most favorable aspect of the case for Wrigley, that he was an intending purchaser at the sheriff's sale, in good faith searching the record to ascertain the state of Reynolds' title, what would he have found? The argument of his counsel in this court is that a person going to the record for a search in 1894 would start at that date, and go back until he came to the title of J. C. Reynolds, the occupant of the property, and the defendant in the writ on which the sale was to be made; that he would first strike the conveyances from Coleman to Reynolds and Lindley, and from Lindley to Reynolds, recorded on the same day, April 5, 1893; and that having thus found a clear record title, to which Reynolds' possession was referable, he was not bound to look further. But this is

an incomplete view. While he would have found that the deed was recorded in April, 1893, he would also have found that it was dated and executed in March, 1891, and he was thus at once put on inquiry, not only as to any incumbrances or changes of title made by Reynolds since 1891, but also as to any subsequent conveyances by Reynolds' grantor, the plaintiff, made and put on record ahead of the deed to Reynolds and Lindley. This is not only the rule of strict law, but is the practice of safe conveyancers. "Ordinary practice should always carry the search against the grantor down to the date of the recording of his deed, if it has not been recorded within six months of its execution." Price, Liens, 348. "In searching for conveyances, search down to the day after the deed to any purchaser has been recorded." Id. 351. Wrigley, pursuing his inquiry according to this rule, would have found the deed and mortgage of November 11, 1891, between plaintiff and Reynolds. For reasons already noted, he would not be entitled to treat this deed as a nullity. True, it was from the same grantor, for the same land, which was unusual, but it was to only one of the same grantees. There might have been an unrecorded conveyance by the grantees in the first deed to the grantor, or there might have been, as was the fact, a substitution by agreement of parties. Had the deed of November, 1891, been to a third party, it would unquestionably, being first recorded within time, have cut out the title of Reynolds and Lindley under the deed of March. How far Reynolds' title under it supersedes his prior title under the unrecorded deed, we need not consider. The record put the searcher on inquiry as to the explanation of the second conveyance, and was notice of everything which inquiry would have shown him. Then, as to the mortgages, he would have found a first one, of even date with the first deed, and duly recorded, but satisfied November 23, 1891, and recorded on this same day; a second one, on the same land, for the same amount, to the same mortgagee, by one of the same mortgagors, and executed and recorded contemporaneously with the deed of November 11, 1891. Both these mortgages were prima facie for purchase money, for they were by the grantees to the grantor, on the day of the grant, and the exact state of facts existed which in Appeal of City Nat. Bank, 91 Pa. St. 163, 168, was declared to put the party on inquiry. It was there said: "The record showed the deed from Hall and the mortgage to him on the same land, both bearing the same date, and they were both recorded on the same day. These facts were sufficient to put a purchaser of the mortgage from Nichols on inquiry. Due inquiry would readily have resulted in full notice of the preferred lien of the Hall mortgage." It is thus clear that an intending purchaser searching the record at the time of the sheriff's sale was put upon direct inquiry as to plaintiff's mortgage, and, he or his counsel having neglected

to make it, he took the risk, and must bear the consequences of the facts as they really were.

There is one other question in the case, to which we may refer briefly, to avoid misconstruction from its omission. Plaintiff put his original mortgage on record in due time, and kept it there until the second was recorded. The second was a valid purchase-money mortgage between the parties, there were no intervening rights, and the plaintiff had therefore done all that was necessary to preserve his priority, up to that time, against all the world. Ordinarily no mortgagee is bound to do more, or, having once put his title clearly on the record, to concern himself about future dealings with the property by other parties. It is by no means clear that the subsequent act of Reynolds, in recording the first deed without his participation, could deprive the plaintiff of his priority, even as against a purchaser without notice. But we do not find it necessary to go further into this question. On the undisputed facts, the verdict should have been directed for the plaintiff against the terre-tenants as well as the defendants. Judgment reversed, and now judgment entered for plaintiff.

FILBERT et al. v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. May 27, 1897.)

MUNICIPAL CORPORATIONS—OFFICERS—POWERS—CONTRACTS—CONSTRUCTION—PERFORMANCE—COMPENSATION.

1. A contract to construct a reservoir for a city, with the plans and specifications made a part thereof, contained elaborate details as to the kind of work to be done and materials to be furnished. The director of public works was given the right to reject materials or work if unsuitable or defective, to supply other materials, and employ other contractors or workmen in case the work should be done defectively, and was made the sole judge of the quality of the work and materials and of the meaning of the specifications. The materials were to be furnished and work performed in "exact accordance with the plan on file in the department of public works and the specifications hereto attached," subject to changes which might be made by the city. At the close of a description of the numerous things to be done in the construction of the reservoir and the ornamentation of the grounds was the statement, "and all work necessary to make a complete and perfect reservoir ready for use and to leave the grounds in a suitable condition." Held, that the quoted clause did not make it the duty of the contractors to construct a reservoir that would not leak, regardless of whether it should be in exact accordance with the plans and specifications.

2. By ordinance the director of public works was instructed to prepare plans and specifications and to award a contract for the construction of a reservoir for a city. The contract prepared by him and approved by the council bound the contractors to adopt any change of plans that might be deemed advisable, the allowance in cost for or against them to be determined by the director, and the director was authorized to increase or decrease the amount of excavation and of materials of all kinds specified, and was constituted the sole arbiter to determine the meaning of the

specifications, and whether they had been complied with. *Held*, that the director was empowered to make changes in the plans and specifications.

3. There can be no deduction in favor of a defendant as compensation on a recovery against him for substantial performance of a contract notwithstanding defects in the work, where he makes no proof as a foundation for such an allowance.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by Ludwig S. Filbert and others, partners as Filbert, Porter & Co., against the city of Philadelphia, to recover the balance due on a contract for the construction for defendant of a reservoir known as the "Queen Lane Reservoir." From a judgment for plaintiffs, defendant appeals. Affirmed.

John L. Kinsey, City Sol., and J. W. Catharine and James Alcorn, Asst. City Sols., for appellant. Henry F. Walton, A. S. L. Shields, and John G. Johnson, for appellees.

FELL, J. The two main propositions upon which the appellant relies are: (1) That the plaintiffs' obligation was not fulfilled by the construction of a reservoir in exact compliance with the terms of their contract with the city, but that they were bound to construct a reservoir through which water would not penetrate; (2) that the director of public works had no power to make any change in the plans and specifications, and that for a construction made in compliance with the changes directed by him there could be no recovery. To answer these propositions we must consider the terms of the agreement, the cause of the defects alleged, and the character of the changes which were directed.

The plaintiffs entered into a contract with the city to construct a reservoir on a tract of land containing about 65 acres, for the sum of \$1,159,591. The general agreement, and the plans and specifications which were made a part thereof, together contain the most elaborate details as to the kind of work to be done and the materials to be furnished. The director of the department of public works is given the right to reject materials or work if unsuitable or defective, to supply other materials and employ other contractors or workmen in case the work should be done defectively or not prosecuted diligently, and as between the contracting parties he is made the sole judge of the quality and quantity of the work done and materials furnished and of the meaning of any part of the specifications. The contract provides that the materials shall be furnished and the work performed "in strict and exact accordance with the plan on file in the department of public works and the specifications hereto attached." The provision for changing the contract is as follows: "The contractor is bound to adopt any change of plans that may be deemed advisable, and an allowance shall be made for or against him, as the case may be, the amount of such allowance to be determined by the chief of the bureau

of water and approved by the director of the department of public works, and stated in writing previous to the work being done. Such alterations will not annul the contract except as to such altered parts." In the specifications, under the head of "Approximate Quantities," and following a detailed statement of the amount of excavation to be made and of materials of various kinds to be furnished, is this sentence: "The quantities are approximate only, and the director of the department of public works reserves the right to increase or diminish them as he may deem necessary." Under one of the thirty subheads in the specifications, the work to be done is named in one sentence as the tearing down and removal of buildings, etc., the making of excavations, the construction of embankments and roadways, the seeding and sodding of the grounds, the building of walls, the lining of the interior slope, the building of walks and stop houses, the removal of all surplus material, "and all work necessary to make a complete and perfect reservoir ready for use and to leave the grounds in a suitable condition."

The last clause of this sentence, which closes a description of the numerous things to be done in the construction of the reservoir and the ornamentation of the grounds with the general statement, "and all work necessary to make a complete and perfect reservoir ready for use and to leave the grounds in a suitable condition," is the basis of the contention that it was the duty of the contractors to turn over to the city a reservoir that would not leak, although the one they constructed and delivered was in exact accordance with the plans and specifications. The leaking of the reservoir appears to have been due to the insufficient thickness of the clay bottom. The clay used would have been sufficient if it had rested upon solid rock; but the foundation of the reservoir was micaceous rock, which contained fissures, through which the water which percolated through the clay found an outlet. This defect in the reservoir was not due to defective material or workmanship in its construction. To hold the plaintiffs answerable for it would be to hold them as warranting that the reservoir should be a perfect reservoir, notwithstanding that its defects might be due entirely to its site or to the specifications. This is precisely the position taken by the city, and it cannot be sustained. The contract does not admit of such a construction. It was not at any time a fixed and certain contract, as the city, through her officials, could make any changes which were deemed necessary, and the contractors were bound to build as directed. The words "all work necessary," etc., follow the enumeration of the things to be done, and they were doubtless intended to cover points of construction which might have been overlooked, or which might afterwards be found to be necessary, or which could not then be specified, as the working plans had not been completed. The contractors were given no discretion. Every line was drawn, every grade

was fixed, and every detail was provided for by the city. If the contractors had thought it wise to depart from the plans, and had done so, and built a better reservoir, they could have recovered nothing. There would have been a deliberate and willful departure from the terms of the contract, which would have defeated their entire claim for the price. We cannot conclude that, under an agreement which might be changed from time to time, and in which the only certain thing was that materials should be furnished and work performed "in strict and exact accordance with plans and specifications" prepared or to be prepared thereafter by the city, it was intended that the contractors should do more than make a reservoir complete and perfect according to the plans and specifications furnished. The words, "all work necessary to make a complete and perfect reservoir, ready for use," found at the end of one of the specifications in which the kind of work to be done is described, when read in connection with other parts of the agreement, do not indicate an intention that the contractors were to be responsible for the result if there was no default on their part.

This is not the case of an undertaking absolutely to construct a particular thing, or to construct a thing according to plans furnished by the builders, or of a failure because of accident to the works or the sinking of the foundation on which the structure was to stand. The failure to obtain the result desired was not owing to the failure to do the work as agreed, but to causes over which the plaintiffs at no time had control. By ordinance the director of the department of public works was instructed to prepare plans and specifications, and to award the contract for the construction of the reservoir. The contract prepared by him and approved by the councils bound the contractor to adopt any change of plans that might be deemed advisable, the allowance in cost for or against them to be determined by the director; and full power was given the director to increase or decrease the amount of excavation and of materials of all kinds specified. The contract authorized and entered into reserved to the city the privilege of making changes in its terms as the work progressed, and either by expression or by direct and necessary implication the director of public works was empowered to make such changes, and was constituted the sole arbiter to determine the meaning of the specifications, and whether they had been complied with. As to the wisdom of delegating the power to change municipal contracts, much might be said on either side. The delegation of such a power furnishes the opportunity for its abuse, but it seems to be almost essential to the prosecution of works of great magnitude. It is not the experience of life that large confidences are betrayed more frequently than small ones. It is conceded in this case that the changes were honestly made for the benefit of the city. The important changes made were suggested by the experience the depart-

ment had had with other reservoirs after the contract was entered into, and none of them increased the cost of the work. But we are concerned with the question of power only. We are not dealing with alterations in a contract made without authority, or which radically change the general character of the work, but with those expressly authorized and provided for, which concerned only the details of construction. If the contract had not permitted changes, it would not, of course, have been within the power of the director to make them; but we see no reason to doubt the power of the city to provide in the contract for such changes as were made, and to authorize the director to make them.

The learned judge, in his charge, clearly stated the law as to substantial performance, and instructed the jury that, if there had been no willful departure from the contract or omission in essential points, and the contractors had honestly and faithfully performed their contract in its material and substantial particulars, a forfeiture of the right of remuneration would not arise by reason of merely technical, inadvertent, or unimportant omissions or defects; and, under the evidence in the case, we cannot say that there was any error in refusing the defendant's fifth point. The instruction asked for was that, if there had been substantial but not strict performance, the defendant was entitled to such a deduction as would compensate for deficiencies. Where there is a recovery for substantial performance notwithstanding defects, there should be a deduction as a compensation to the defendant. *Monocacy Bridge Co. v. American Iron Bridge Manuf'g Co.*, 83 Pa. St. 517. But there must be proof as a foundation for the claim for an allowance. The learned trial judge, in answering the point, said that the law was correctly stated, but that there was no evidence of the cost of repairs; and our attention has been directed to none which would have justified an allowance on any ground. The judgment is affirmed.

WILLIAMS, J. I concur in this judgment, but I feel bound to put my reason for such concurrence on the record. A city, like a natural person, is bound by its improvident contracts, after performance by the other party, unless fraud is shown. This judgment can be sustained only upon that ground. As originally drawn, the specifications for the Queen Lane reservoir were all that could be desired for the protection of the city; and the contract, with the exception of a single provision, was wise and adequate. But the objectionable provision put the stipulations of the contract and the well-drawn specifications under the power of certain officers. They were empowered to supervise, which was proper enough, but they were also empowered, as they held, to change the terms of the contract at will, to add to or diminish the work required by the specifications, increase or diminish the quantity or the character of

materials used, and readjust the compensation of the contractors and the cost to the city, without the consent or knowledge of the municipality, and without responsibility for the consequences. Under this provision great changes were made in this contract. The testimony shows that these changes are responsible for the worthlessness of the reservoir and the waste of hundreds of thousands of dollars in repairs. The appellees say, in their argument: "The chief of the bureau of water, therefore, naturally endeavored to economize. The result of his economy was the specification of a depth of clay bottom insufficient for the purpose. The water, therefore, penetrating through this insufficient clay bottom, sank into the fissures of the rotten or micaceous rock, and found its way in natural channels, thus manifesting the so-called leaks." Reducing the thickness of the bottom reduced its power to hold water, and changed a material provision in the contract. Changes made in the contracts of the city should be made only by the city. The municipality ought never to attempt—nor, if the question be properly raised, has it the legal right—to abdicate its functions and invest an officer with unlimited power over its contracts and the pockets of its taxpayers. It does not seem to be doubted that these changes were honestly made, and as the result of mistaken advice from subordinate officers. They were none the less disastrous on that account. The city must pay enormously because of changes that were wholly unnecessary, and that, as the event shows, ought never to have been made. The vice is in the provision to which we have referred, and it ought never to appear again.

STERRETT, C. J., concurs in the foregoing opinion.

In re HOGAN'S ESTATE.

(Supreme Court of Pennsylvania. May 27, 1897.)

ASSIGNMENTS FOR BENEFIT OF CREDITORS—ATTACKING CLAIMS—MORTGAGES—EXECUTION IN BLANK.

1. It is not necessary that a creditor have judgment before the debtor makes an assignment for creditors, that he may attack for fraud judgments obtained by creditors before the assignment.

2. A mortgage on the separate property of a married woman is valid, though she and her husband executed and delivered it and their bond, blank as to the amount of consideration, and such blanks are afterwards filled up by the mortgagee in the presence of the wife alone.

Appeal from court of common pleas, Clinton county.

In the matter of the assignment of Edward Hogan and Nancy Hogan for the benefit of creditors. From a decree distributing the money in the hands of S. M. McCormick, assignee, Daniel Hogan and another creditor appeal. Affirmed.

The conclusions of law contained in the auditor's report are as follows:

"The law to be applied in this case, and the different propositions made, all seem to be embraced in the points submitted by C. S. McCormick, Esq. To answer and rule on these will dispose of all the questions of law brought up in the distribution. They will be disposed of in their order:

"First. That creditors at large, or who had not obtained judgment at the time of the assignment, cannot be heard to charge fraud against a creditor who had judgment. The auditor does not understand the rule of law to be as broad as it is stated in the request. S. M. McCormick, a lien creditor before the assignment, and the Holloway Bottling Company, Everett & Co., and Elizabeth Schroeder, judgment creditors after the assignment, charge fraud against the judgment of Edward Gallagher and Daniel Hogan for \$2,500. The rule, as laid down by Stewart, J., in *Wenger's Assigned Estate*, 17 Pa. Co. Ct. 203, and the cases there cited, is that: 'When the law gives creditors the right, for their own protection, to assail fraudulent conveyances made to hinder, delay, and defraud them, it has regard to such creditors only as have established their right to participate in the fund or property. In legal proceedings it is never assumed that one man is creditor of another. The law provides a way for the determination of such rights, and the party asserting a claim against another stands in the attitude of a claimant merely, until in some appropriate judicial proceeding his claim has been established. The process does not create the relation of debtor and creditor, but it declares it so that it is no longer disputable. Until judgment has been obtained, or a specific lien acquired, it cannot be definitely known that the claimant is a creditor. This, as we understand, is the reason of the rule which obtains generally, restricting the right of contest in such cases to those whose claims are in judgment, or who have a specific lien upon the fund. * * * A creditor by simple contract is within the protection of the statute as much as a creditor by judgment, but until he has a judgment and a lien, or a right to a lien, upon the specific property, he is not in condition to assert his rights as a creditor.'

"Second. That lien creditors whose liens date prior to the date of the Gallagher and Hogan judgment, and are not affected by any distribution that may be made to the said judgment, are not such interested parties as can be heard to contest the right of said Gallagher and Hogan judgment to take. This proposition the auditor agrees to.

"Third. That in assignments for the benefit of creditors the assignee stands in the shoes of the assignors, and is their representative, and in no way represents the creditors. This proposition is also true.

"Fourth. That the auditor can only inquire into the question of fraud as to the Gallagher and Hogan judgment, and cannot inquire into

the disability of Mrs. Hogan to join in the execution of the single bill upon which the judgment was entered, so long as she does not complain or ask that her liability shall be avoided. There will be no objections to the auditor affirming this point.

"Fifth. The husband is primarily liable for necessities furnished his household, whether to himself, his wife or children, with or without his knowledge. His wife is not liable unless she expressly undertakes to become so, and her undertaking must appear first in the pleadings, and afterwards, at the trial, it must be established by evidence. In support of this proposition the counsel cites the case of *Moore v. Copley*, 165 Pa. St. 294, 30 Atl. 829. In this case the court rules the point more on the question of evidence than of pleading. It does not overrule or distinguish the case of *Abell v. Chaffee*, 154 Pa. St. 267, 26 Atl. 364, where the supreme court say: 'It is time that the profession throughout the commonwealth should understand and appreciate that both the rights and liabilities of married women in Pennsylvania have been greatly and radically changed and enlarged by the act of 1887. The authorities which were applicable to questions arising before the passage of that act are entirely inapplicable now. The judgment of a married woman, which was then presumably void, is now presumably valid. It is no longer necessary to such validity to set out on the record the facts which before the act were necessary to give the judgment validity.' The case of *Adams v. Grey*, 154 Pa. St. 258, 26 Atl. 423, and immediately following the case of *Abell v. Chaffee*, is even more in point. The judgment of Good against the Hogans does not show on its face that Nancy Hogan is even a married woman. Upon its face, the judgment was perfectly regular and valid. It is doubtful whether a sufficient reason can be shown for opening the judgment, much less for striking it off, which is in effect what the auditor is asked to do.

"Sixth. That the mortgage in favor of Elizabeth Schroeder having been changed in material points, and the amount of money and character of obligation inserted in the mortgage, without the consent of Edward Hogan, and without having been agreed upon by him, rendered the said mortgage void. The auditor having found as a fact that the bond and mortgage of Elizabeth Schroeder was acknowledged and delivered in blank to her, and in the presence of Nancy Hogan filled up as to amount, time of payment, etc., it was not an alteration of the instrument in fact. There are no erasures or alterations in the bond accompanying the mortgage, and, as said before, the erasure of the amount in only one of the blanks in the mortgage shows conclusively that it was a clerical error. 'A person who offers in evidence a bond with erasures and alterations upon its face is bound to explain the erasures and alterations to the satisfaction of the jury.' *Nesbitt v. Turner*, 155 Pa. St.

420, 26 Atl. 750. If this erasure can be termed a material alteration, it has been explained to the satisfaction of the auditor. In the recent case of *Forster v. Moore*, 29 N. Y. Supp. 1032, the execution of a mortgage with the consideration in blank at the time the mortgage was executed and delivered to the plaintiff (mortgagee), it was held by the supreme court of New York that the plaintiff became the agent for the defendants to fill in the amount, and that, as it was not filled up fraudulently, it was a valid instrument, and binding against the mortgagors. Edward Hogan was not the principal in the mortgage. It was to become a lien against the separate real estate of Nancy Hogan, and she was present and acquiesced in the amount for which it was given. There was no fraudulent amount inserted in it, and, the usury having been credited upon it, it comes exactly within the ruling in the case last cited.

"Seventh. That the undisputed evidence in the cause being that the mortgage in favor of John A. Anderson, recorded in Book O, p. 171, and also the mortgage in favor of Coleman Grugan, recorded in the same book, were neither of them signed or acknowledged by Edward Hogan, they are therefore void. The auditor finds as a fact that Edward Hogan was not called by or in the interest of Coleman Grugan's estate, and was therefore not a competent witness to deny the validity of a lien regular upon its face and upon the records. Judgment was entered on the Anderson bond, and that judgment stands unattacked and unimpeached. The only persons competent to do this were Edward and Nancy Hogan, and their only mode was by an application to the court in which the judgment was entered. These mortgages were duly recorded, and so stand to this day. Neither Nancy Hogan nor Edward Hogan attacks them, and neither would be competent as a witness to do so, because of the death of Coleman Grugan. It is not alleged that either is fraudulent, and therefore they cannot be attacked collaterally. A mortgage with duly-certified acknowledgment, and duly recorded, cannot thus be collaterally or inferentially attacked or impeached. It is not even argued or intimated that Nancy Hogan had not duly executed and acknowledged these mortgages, and that the mortgagors, or one of them, had not received all the money called for therein. Consequently these parties are estopped—or at least Nancy Hogan is estopped—from setting up that the mortgages are irregular, or were not properly acknowledged. Equity will not allow them, or either of them, to receive money and not repay it. *Adam v. Mengle* (Pa. Sup.) 8 Atl. 606.

"Eighth. That there is no such evidence produced before the auditor as will justify him in declaring the judgment, or any part of it, of Gallagher and Hogan against the assignors fraudulent and void. The auditor has a right, at the instance of the creditors, to enter into

an investigation of the bona fides of this judgment, to determine whether or not it was collusive, and given to cheat, defraud, hinder, or delay creditors. If in such a case an issue be not demanded, or be waived, the question whether the judgment was collusive, and therefore void as to creditors defrauded thereby, is a proper one for the auditor's determination. 'An auditor is not always bound, therefore, to distribute to the liens as they appear on the records. A collusive judgment may be attacked before him, and, in the absence of a proper application for an issue, that question is one for his determination.' This doctrine is laid down in *Meckley's Appeal*, 102 Pa. St. 536, and the numerous cases there cited; also, in *Baird's Appeal*, 152 Pa. St. 637, 25 Atl. 879: 'It is doubtless true, as stated by Mr. Justice Sharswood in *Clark v. Douglass*, 62 Pa. St. 415, that a judgment confessed voluntarily by an insolvent or an indebted man for more than is due is prima facie fraudulent within the statute of 13 Ellz. c. 5.' It follows that the burden of proof is upon defendants and creditors in whose favor such judgment is confessed to overcome this presumption by competent proof, and show the judgment is not fraudulent. In the present case this presumption arises against the \$2,500 judgment, which was clearly shown to be for more than due, (1) to Gallagher and Hogan jointly; or (2) to either Gallagher and Hogan individually; or (3) to both together for separate or individual accounts. The presumption of a fraudulent judgment was not overcome by any proof, but was, in fact, rather strengthened. 'Although a judgment to cover existing liability, the amount of which is unascertained, may not be fraudulent as to other creditors, because of being for more than may actually prove to be owing, yet it may become fraudulent by being sought to be enforced for more than is actually due or owing.' In *Werner v. Zierfuss*, 162 Pa. St. 360, 29 Atl. 737, it is stated that, even where a judgment is given for an actual debt, the question of fraud may arise from additional evidence of something which may be considered, either in itself, or in its connection with the circumstances, a badge of fraud, and 'what evidence will be sufficient for that purpose will, of course, depend upon the circumstances of the case. It may be (1) of excess in amount; (2) of inadequate price in a conveyance; (3) of reservation of advantage to the grantor (*Bentz v. Rockey*, 69 Pa. St. 71); (4) of giving the debtor a weapon to force other creditors to a compromise, as in *Bunn v. Ahl*, 29 Pa. St. 387; or (5) the more common case of delaying or hindering them altogether.' 'The forms and devices of fraud are legion, and it would be vain to attempt to enumerate or define them.' 162 Pa. St. 367, 29 Atl. 737. The attorney's commission provided for in these claims should be allowed, because it was necessary to employ counsel to appear before the auditor and prosecute them as claims against the Hogans' assigned estates. *Imler v. Imler*, 94 Pa. St. 372."

H. T. Hall, W. H. Clough, and C. S. McCormick, for appellants. H. T. Harvey and T. C. Hipple, for appellees.

PER CURIAM. We find nothing in the record of this case that would justify a reversal or modification of the decree. We are all of opinion that the learned auditor's findings of fact and conclusions of law are substantially correct, and, for reasons given by him in his report, the decree of the court of common pleas based thereon should not be disturbed. Decree affirmed and appeal dismissed at appellants' costs.

GUNSTER v. SCRANTON ILLUMINATING, HEAT & POWER CO.

(Supreme Court of Pennsylvania. May 24, 1897.)

KNOWLEDGE OF BANK OFFICER—NOTICE TO BANK.

The vice president of a bank was also treasurer of a corporation doing business with the bank. As such vice president he discounted two notes of the corporation, and placed the proceeds to its credit, and as treasurer of the corporation drew a check on the bank, with which he obtained two drafts of the bank, signed by himself as vice president to his order as an individual, and appropriated the proceeds to his own use. *Held*, that his knowledge, as vice president, of his intent to misappropriate the funds obtained on the drafts, was not the knowledge of the bank, so as to enable the corporation to set off the amount obtained by him on such drafts against the notes of the corporation.

Appeal from court of common pleas, Lackawanna county.

Action by Joseph H. Gunster, assignee of the Scranton City Bank, against the Scranton Illuminating, Heat & Power Company. Judgment for defendant. Plaintiff appeals. Reversed.

C. H. Welles, E. Merrifield, and S. B. Price, for appellant. Everett Warren and Henry A. Knapp, for appellee.

MITCHELL, J. The referee found that there was nothing in the transaction so far out of the ordinary course of business as to make it unusual, or such as should excite suspicion, had the bank been acting through any of its officers except Jessup. Jessup was the treasurer of the defendant company, and the person who made its promissory notes, had them discounted for it, and drew its checks. These were usually, but not always, taken from its regular check book; and the body of them was usually in the handwriting of the secretary and bookkeeper, though signed by Jessup. The signature of the depositor is the essential feature of a check, and a bank is not bound to pay any attention to the handwriting of the other parts unless it shows something to excite suspicion. Nor was there anything to put the bank upon inquiry in the fact that the drafts were drawn to Jessup's own order. The check in payment of which the drafts were issued was drawn "to

the order of dft. N. Y.," and there was nothing on the face of the transaction to indicate that it was not for the regular and legitimate business of the defendant company. The referee, finding that, if Jessup had not been an officer of the bank, there would have been no valid defense, thus reduced the case to a question of law,—whether Jessup's knowledge of his own fraud at the time of its perpetration carried with it knowledge or notice to the bank which would prevent its availing itself of a credit on the check. He took the affirmative view, and the court below sustained him. The authorities on this question are not uniform. In the case most relied upon by the learned referee (*First Nat. Bank v. Town of New Milford*, 36 Conn. 93), the cashier of the bank was also treasurer of the town, and in the latter capacity had been accustomed to borrow money for the town upon notes made by him in its name. Having, in his capacity as cashier, embezzled the funds of the bank, he drew a note for \$3,000, as treasurer of the town, entered it upon the books of the bank as if regularly discounted, and thus covered his embezzlement. In a suit on the note it was held that the bank could not recover. The decision is put upon two grounds: First, that the treasurer did not intend to pledge the credit of the town, but that "he drew the note, entered it in the books, and caused it to be filed by the clerk, as a false representation and cover, precisely as he made other false representations and false entries, intending to restore the money and take out the note, and not intending to operate the town. If that is so, there was no meeting of minds, and no purchase of the note or contract of loan which will sustain this action." This was apparently the view of the majority of the court, but the opinion then goes on to add, as a second reason, that, even if there was a contract of loan, "it was made by Conklin as agent of the town with Conklin as agent of the bank. * * * He, as agent of the bank, had full knowledge, therefore, of the fraud; and now the bank, if they ratify his contract and confirm his agency, must accept his knowledge and be bound by it, precisely as if the loan had been made and the knowledge had by the board of directors." The first ground thus set forth does not appear to have been adopted in any other case, but the second has very respectable authorities in its favor, among which may be cited *Bank v. Dunbar*, 118 Ill. 625, 9 N. E. 186; *Farmers' & Traders' Bank v. Kimball Co.* (S. D.) 47 N. W. 402; and, similar in principle, *Bank v. Davis*, 2 Hill, 451; *Holden v. Bank*, 72 N. Y. 286; *Webb v. Manufacturing Co.*, 11 S. C. 396. On the other hand, the principle has been distinctly repudiated by several courts of equal authority; and in the latest text-book it is laid down without qualification that an exception to the general rule that notice to the agent is notice to the principal "arises in case of such conduct by the agent as raises a clear presump-

tion that he would not communicate the fact in controversy, as where the agent acts for himself in his own interest, and adversely to that of the principal." 1 Am. & Eng. Enc. Law (2d Ed.) 1145, and cases there cited. In *Bank v. Christopher*, 40 N. J. Law, 435, it was held, after a review of the cases, that a director offering a note of which he is the owner to the bank of which he is a director, for discount, is to be regarded as a stranger, and the bank is not chargeable with the director's knowledge of fraud, or want of consideration for the note. And in *De Kay v. Water Co.*, 38 N. J. Eq. 158, it was held that where the same person is an officer of two corporations, and he transfers securities issued by one to the other with knowledge that they are not valid except in the hands of an innocent holder for value, his knowledge is not to be attributed to the transferee; *Van Fleet, V. C.*, saying: "I understand the law to be that, where an agent representing two principals concocts a scheme to defraud one of them for the benefit of the other, it will be presumed that he did not disclose, to the principal he intended to cheat, the means by which he intended to effect his purpose." In *Innerarity v. Bank*, 139 Mass. 332, 1 N. E. 282, the exception was held to be well established that notice to the agent would not be deemed notice to the principal where the communication of the facts would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in, and the distinction sometimes made upon the actual presence of the agent—as, e. g., a bank director—at the meeting where the transaction was concluded was said not to be of importance. The same view was followed in *Allen v. Railroad Co.*, 150 Mass. 200, 22 N. E. 917, and *Corcoran v. Cattle Co.*, 151 Mass. 74, 23 N. E. 727. See, also, to the same effect, *Barnes v. Gaslight Co.*, 27 N. J. Eq. 33; *Winchester v. Railroad Co.*, 4 Md. 231; *Bank v. Gifford*, 47 Iowa, 575; *Frenkel v. Hudson*, 82 Ala. 158, 2 South. 758; *Bank v. Harrison*, 10 Fed. 243, 252; *Davis Improved Wrought-Iron Wagon Wheel Co. v. Davis Wrought-Iron Wagon Co.*, 20 Fed. 699; *Thomson-Houston Co. v. Capital Electric Co.*, 12 C. C. A. 643, 65 Fed. 341. And in *Platt v. Axle Co.*, 41 Conn. 255, it was held that the knowledge of the secretary of a prior assignment of stock standing in his wife's name could not be imputed to the corporation to defeat the corporation's lien for subsequent advances to the wife upon the same stock, and the decision does not seem to have been thought in conflict with *First Nat. Bank v. Town of New Milford*, supra, as no comment or reference was made to that case.

An instructive case is *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 273, 17 N. E. 496. The same person was treasurer of two corporations, and fraudulently drew checks upon each in favor of the other when needed to balance his accounts and make his cash appear correct on examination. There

had been also bona fide loans from each to the other, made in the same way. The court held that the account between them should be stated by charging each with the amount wrongfully transferred to it from the other, so that each should lose the exact amount taken from it by its treasurer acting in his capacity as such. This case was regarded by the learned referee in the court below as belonging to the class which imputes notice to the principal from knowledge of the agent, and the judgment could have been reached on that view. But the decision is put explicitly on the ground that "a party, even though innocent, cannot avail himself of an advantage obtained by the fraud of another, unless there is some consideration moving from himself"; referring to authorities as early as Lord Mansfield, and citing, among others, *Loring v. Brodrie*, 134 Mass. 453, 468. It is to be noted that this case, though leading to a different judgment, was not regarded in the subsequent decisions in 139, 150, and 151 Mass., cited supra, as conflicting with them, and that the principle of it would result in the same judgment, though for a different reason, as that in *First Nat. Bank v. Town of New Milford*, 36 Conn. 93, supra, and reconcile that case not only with the later case in the same court, — *Platt v. Axle Co.*, 41 Conn. 255, supra, — but with the cases in the class we are now considering. And the same principle would sustain *Bank v. Dunbar*, 118 Ill. 625, 9 N. E. 186, supra, and probably other cases in the class imputing notice to the principal from knowledge by the agent. We are of opinion that the second class of cases have not only the preponderance of authority, but of sounder reason. The rule that knowledge or notice on the part of the agent is to be treated as notice to the principal is founded on the duty of the agent to communicate all material information to his principal, and the presumption that he has done so. But legal presumptions ought to be logical inferences from the natural and usual conduct of men under the circumstances. But no agent who is acting in his own antagonistic interest, or who is about to commit a fraud by which his principal will be affected, does in fact inform the latter, and any conclusion drawn from a presumption that he has done so is contrary to all experience of human nature. If it be urged, as in some cases, that the principal, having put the agent in his place, should, as a matter of public policy, be held answerable for all the latter does, a sound answer is suggested by the court in *Allen v. Railroad Co.*, 150 Mass. 200, 206, 22 N. E. 917, — that an independent fraud committed by an agent on his own account is beyond the scope of his employment, and bears analogy to a tort willfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master.

We have not found or been referred to any express authorities in our own state. The point was touched upon in *Millward-Cliff*

Cracker Co.'s Estate, 161 Pa. St. 157, 167, 28 Atl. 1072, and some observations of the learned auditor in that case seem to be based on *First Nat. Bank v. Town of New Milford*, 36 Conn. 93, and the line of decisions following it. But the facts show that the bank was endeavoring to retain an advantage and assert a claim founded on a fraud in which its own officer had participated, and the case therefore comes plainly within the rule adopted in *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 273, 17 N. E. 496, supra, which we think entirely sound. In *Wilson v. Bank* (Pa. Sup.) 7 Atl. 145, it was said per curiam, "The knowledge of Willcock as treasurer of the tool company cannot be imputed to the bank of which he was cashier, unless he revealed that knowledge to some one or more of its officers." The decision does not rest directly on that ground, but the expression shows that the views of the court were in harmony with those we now express. Even, therefore, if the present case be made to turn on the question of knowledge, it was erroneously decided. But we do not regard knowledge as the pivotal point of the case. Upon that point both parties would stand equal. Both might, by mere inference, be charged with knowledge, as the fraud was committed by an agent with authority to act for both; but in fact neither had, or in the nature of things could have, any knowledge at all, and neither was under any obligation to presume that its agent would be guilty of fraud. The real question is, in what capacity did Jessup commit the fraud? And it is clear that it was as treasurer of the appellee. It was as treasurer he presented the notes for discount, and as treasurer he drew the checks for the proceeds. Both acts were within his authority as treasurer, and would have been lawful if they had been honest, but he drew the money on drafts which were the property of the company, and when he embezzled the money it was the money of the company. The bank had no part in his act, and gained nothing by it. The fraud had its inception and its consummation in acts done in his capacity of treasurer of the defendant company, and it should bear the loss. Judgment reversed and record remitted, with directions to enter judgment for the plaintiff for the full amount of his claim.

ACOME MANUF'G CO. v. REED.

(Supreme Court of Pennsylvania. May 24, 1897.)

ASSUMPSIT—SUFFICIENCY OF STATEMENT—WRITTEN CONTRACT.

Under procedure act requiring that the statement in actions of assumpsit shall be accompanied by copies of all notes and contracts upon which plaintiff's claim is founded, if the copy of the written contract, or any part thereof, does not accompany the statement, and its absence is not accounted for, the omission cannot be supplied by averments of the contents or the substance of the missing paper.

Appeal from court of common pleas, Erie county.

Action by the Acme Manufacturing Company against M. Reed. From an order discharging rule for judgment filed, plaintiff appeals. Affirmed.

J. Ross Thompson, for appellant. Theo. A. Lamb, for appellee.

STERRETT, C. J. This appeal from the refusal of the court to enter judgment for want of a sufficient affidavit of defense is resisted on two grounds: (1) Plaintiff's statement is insufficient, in that it does not comply with the requirements of the procedure act of May 25, 1887. (2) The averments contained in the affidavit of defense are sufficient to prevent a summary judgment for plaintiff. If either of these propositions is sustained, the appeal must be dismissed. *Byrne v. Hayden*, 124 Pa. St. 170, 16 Atl. 750; *Bank v. Ellis*, 161 Pa. St. 241, 28 Atl. 1082. In the latter it was said: "To entitle plaintiff to judgment for want of an affidavit or a sufficient affidavit of defense, the statement of his demand * * * must be self-sustaining; that is to say, it must set forth, in clear and concise terms, a good cause of action, by which is meant such averments of fact as, if not controverted, would entitle him to a verdict for the amount of his claim. * * * All the essential ingredients of a complete cause of action must affirmatively appear in the statement and exhibits which are made part thereof." In the action of assumpsit, the procedure act in express terms requires that the statement "shall be accompanied by copies of all notes, contracts, book entries, * * * upon which plaintiff's claim is founded." This is not merely directory,—it is absolutely imperative; and if the copy of the written or printed contract on which the action is founded, or any part thereof, does not accompany the statement, and its absence is not satisfactorily accounted for, the omission cannot be supplied by averments of the contents or the substance of the missing paper. Without the defendant's consent, such averments cannot be accepted as the legal equivalent of the "copy" or "copies" required by the act, except in the case of papers shown to have been lost or destroyed. Plaintiff's demand in this case is founded on an undated contract or undertaking, signed and sealed by the defendant, of which the following is a copy: "In consideration of one dollar paid me by the Acme Manufacturing Co. * * * I do hereby guarantee to the Acme Manufacturing Co. the prompt fulfillment of all covenants and conditions of the within contract on the part of Leo Schlaudecker, and that the said Leo Schlaudecker will make the payments therein specified according to the terms thereof." Accompanying this copy of the defendant's undertaking is what purports to

be a "copy" of the paper on which the undertaking is indorsed. On inspection of the so-called "within contract," it proves to be merely a blank form of order for "Storner Bicycles," etc., addressed to the plaintiff company, containing blank spaces evidently intended to be used in specifying the kind, quantity, value, etc., of the goods to be ordered. In and of itself, with the blanks unfilled, it cannot, in any proper sense of the term, be considered a "contract." By properly filling the blank spaces therein, the paper is susceptible of being made a contract, but, as presented, it is a misnomer to call it a "contract." With the exception of the words, "quantity and specifications already set in," parenthetically inserted in the first sentence, and the name Leo Schlaudecker, signed at the end of the paper, the blank order remains unfilled, and is therefore lacking in the essential features of a contract. It is entirely silent as to the kind, quantity, value, etc., of goods ordered or intended to be ordered. It contains no "covenants and conditions," nor does it specify any "payments" to which defendant's undertaking, indorsed thereon, can apply. The only reference to any of these essential matters is found in the words above quoted from the first sentence of the blank order, viz. "quantity and specifications already sent in." These words clearly indicate that Leo Schlaudecker, whose name is signed at the end of the blank order, had "already sent in" and the plaintiff had received his order for bicycles and bicycle goods to which defendant's undertaking was intended to refer. This is the only meaning of which the words quoted are susceptible. That order "already sent in" is presumably in the possession of plaintiff company, and the copies of papers set out in the statement should have been "accompanied by" a "copy" of the order to which the words above quoted evidently refer. That order, embodying "quantity and specifications," etc., and the blank order on which defendant's undertaking is indorsed, together constitute the "contract" to which said undertaking refers. In the absence of explanation, and without a "copy" of the paper to which defendant's undertaking refers and upon which it depends, plaintiff's statement of claim is incomplete and insufficient, and defendant was not bound to answer it. In other words, plaintiff was in default, and therefore not in a position to ask for a summary judgment. It is therefore unnecessary to express any opinion as to whether defendant's affidavit presents a meritorious defense or not. The rule for judgment was rightly discharged, not for the reason suggested by the court, but because plaintiff's statement does not sufficiently comply with the requirements of the procedure act. Appeal dismissed, at plaintiff's costs, but without prejudice, etc.

In re LEJEE'S ESTATE.

Appeal of PENNSYLVANIA CO. FOR INSURANCE ON LIVES & GRANTING ANNUITIES.

(Supreme Court of Pennsylvania. May 27, 1897.)

WILL—CONSTRUCTION—TRUST.

1. Testator devised \$20,000 in trust for his niece, the income to be paid to her for life with remainder over, with the provision that, if at any time she should desire to increase her income by an annuity, the trustee could at her request invest any part of the fund in an annuity for her. By codicil he added \$10,000 to the bequest. *Held*, that the provision in regard to the purchase of an annuity does not destroy the trust so as to authorize the trustee to pay directly to the beneficiary the whole trust fund, to dispose of as she might think proper.

2. The amount given by the testator under the codicil was subject to the trust in the original will.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of William R. Lejee, deceased, the Pennsylvania Company for Insurance on Lives & Granting Annuities appeals. Reversed.

John G. Johnson, for appellant. Henry S. Cattell, for appellee Charlotte A. Johnson. A. T. Freedley, for appellee Eugenia J. Marshall.

MCCOLLUM, J. The provisions in the will of William R. Lejee, and the codicils thereto, on the construction of which the whole contention on this appeal depends, are as follows: In the first clause of the will the testator leaves to Eugenia J. Marshall, and to each of the other persons named therein, \$1,000, to be paid as soon after his decease as practicable, on the assumption that they might need it for immediate support. In the fourth clause of the same he said: "I give and bequeath to the Pennsylvania Company for Insurance on Lives and Granting Annuities the sum of twenty thousand dollars, in trust for my niece Eugenia J. Marshall during her life, to be paid to her or her authorized attorney, and at her decease the principal to be divided among her children, share and share alike, the issue of a deceased child to represent the parent. Should my said niece die without children or their issue surviving her, in that case the principal so held in trust for her shall be divided among the children of my niece Williamanna Fullerton and their issue, as I hereinafter provide for such children and issue. As my niece Eugenia J. Marshall is unmarried, should she at any time desire to increase her income by an annuity, the said trustee shall, at her request, at any time, invest the whole or any part of this twenty thousand dollars in an annuity for her, nor do I restrict her as to this investment in case she should hereafter marry." In the codicil, dated March 12, 1894, we find the following provision: "The purpose of the present codicil is to add to the legacy of my niece Eugenia J. Marshall the sum of ten thousand dollars, and to give and bequeath to each of

my nephews J. Palmer Fullerton and William L. Fullerton, their heirs and assigns, also the sum of ten thousand dollars. In all, thirty thousand dollars free of tax. The said legacies to be provided for and paid with other individual bequests before any appropriation is made for those to public or benevolent institutions, which amount in all to twenty-six thousand dollars. The said legacies also to participate pro rata in the division of the rest and residue of my estate, should there be any to divide."

The main contention relates to the effect upon the trust created by the fourth clause of the will of the provision in it in regard to the purchase of an annuity. The learned court below, regarding the annuity provision as destructive of the trust, and the interests intended to be protected by it, and therefore as investing Eugenia J. Marshall with absolute ownership of the entire trust fund, awarded the same to her. It is obvious that this award, if sustained, will defeat the unmistakable purpose of the testator in creating the trust. It was clearly his intention to make ample provision for the suitable maintenance of his niece during her life, and it is probable that when he wrote his will he believed that the income of the fund bequeathed in trust as aforesaid would be sufficient for such maintenance. But, conscious that there might be a contingency in which the income from the trust fund would be inadequate for such support as he intended she should have, he provided for an increase of it in the manner and on the terms stated in the concluding paragraph or sentence of the fourth clause of his will. It was his beneficiary who was to determine whether there was occasion for increasing her income, and, on her expression to the trustee of her desire to increase it by an annuity, it was made the duty of the latter to purchase it for her, in accordance with her request. Certainly this was a concession to her by the testator of a liberal discretion, in full confidence, however, that she would exercise it in conformity with his clearly-expressed intentions. If an investment of one-fourth of the fund in the purchase of an annuity would sufficiently increase her income, it was not expected that an investment of a greater amount would be made in this form, because it would necessarily take from the persons to whom the principal was given at her death that which the testator intended they should have. It is said that under the will she may require the trustee to invest the \$20,000 in an annuity. This may be true, but nevertheless such an investment, if made, must be based on her expressed "desire to increase her income." It is also said that, having compelled the trustee to make such an investment, she may sell the annuity and dispose of the proceeds of the sale as she pleases. This also may be true, but our attention has not been called to any express direction of the testator to invest any portion of the trust fund in her name. As it is not claimed that Eugenia J.

Marshall has any "desire to increase her income by an annuity," there is no occasion to consider the effect upon the trust of the purchase of an annuity by the trustee on her request. But, while the discretion allowed to her by the testator has not been exercised, we have deemed it proper to indicate our view of his purpose in conceding it.

We cannot assent to the proposition that the provision in regard to the purchase of an annuity, considered by itself, is destructive of the trust and of the interests for the protection of which it was created. The direction by the testator to the trustee to purchase an annuity for the cestui que trust on her request, founded on her desire to increase her income in that way, does not authorize the payment directly to her of the whole trust fund, to dispose of as she may think proper. It was not so intended, nor is there any rule of construction which demands that it shall be so interpreted. This is not a case in which there is an absolute gift of a fund to the beneficiary, with directions respecting the investment and use of it. It is a case in which there is a gift of a fund to a trustee to invest, and to pay the income of it to one person for life, and at her death to pay the principal of it to the persons designated to receive it. The decisions cited by the appellee to sustain her contention are applicable to the former, but not to the latter. It may be conceded that some of the English cases, especially the case of *Messeena v. Carr*, L. R. 9 Eq. 260, seem to afford some support to her claim, but we think that none of them can be justly said to furnish a clear warrant for it. As her claim, if sustained, will defeat the plain purpose of the testator in creating the trust, and strike down important interests intended to be protected by it, nothing short of such a warrant will justify its allowance. No decision of this court which authorizes it has been brought to our notice. In some respects the appellee's claim in this case resembles the claim of the appellants in *Re La Bar's Estate*, decided on the 19th of April, last, and reported in 37 Atl. 111. The possibility that the beneficiary may exercise the discretion given to her in regard to the purchase of an annuity, and thus wholly or partially destroy the interests in remainder, is not sufficient ground for dispensing with the exercise of it, and awarding the entire fund directly to her. The exercise of the discretion in good faith may destroy these interests, but the mere existence of it cannot. For reasons clearly stated by the learned auditing judge, we concur in his conclusions that the testator intended by the codicil of March 12, 1894, to add to the sum of \$20,000 bequeathed to the Pennsylvania Company for Insurance on Lives & Granting Annuities, in trust as aforesaid, the further sum of \$10,000, to be held by the trustee for the uses and purposes declared by his will. We are not satisfied that error was committed by the court below in the distribution of the residuary estate. It follows from what

has been said that the \$30,000 awarded to Eugenia J. Marshall should have been awarded to her trustee, the Pennsylvania Company for Insurance on Lives & Granting Annuities. Decree reversed and record remitted to the court below, with direction to enter a decree in conformity with this opinion, the costs to be paid by the appellee.

WOLF v. PHILADELPHIA TRACTION CO.
(Supreme Court of Pennsylvania. May 27, 1897.)

APPEAL FOR DELAY—PENALTIES.

Penalty prescribed by Act May 25, 1874 (P. L. 227), for appeal for delay merely, will not be imposed, the court being convinced by statement of counsel that it was taken in good faith, though in the action for personal injury defense was confined to amount of damages, and there was complaint only of the size of the verdict, which was unusually large, and though, after an offer of compromise, appeal was abandoned, counsel finding that theretofore the supreme court had never acted on assignment of error based on the sustaining of an excessive verdict.

Sterrett, C. J., dissenting.

Appeal from court of common pleas, Philadelphia county.

Action by Emanuel C. Wolf against the Philadelphia Traction Company. Judgment for plaintiff. Defendant appeals. Rule for penalties under Act May 25, 1874 (P. L. 227). Rule discharged.

J. Howard Gendell and Henry C. McDevitt, for appellant. Greenwald & Mayer, for appellee.

FELL, J. Unexplained, the facts stated in the affidavit on which the rule to show cause was granted would warrant an award of damages as provided by the act of May 25, 1874. As explained by the counter affidavit and the statement of counsel made at the argument of the rule, the facts furnish no ground for the conclusion that the appeal was taken merely for delay. At the trial the defendant's liability was not denied, and the defense was confined to the question of the amount of damages sustained. The verdict was unusually large, and on the plaintiff's own showing it might well be considered excessive. The real party in interest in defending the action was the Guarantor's Company. The attorney who represented the company at the trial advised an appeal on account of the excessive verdict, and his judgment was approved by the company's principal attorney after a careful examination of all the testimony. When, however, he came to prepare the case for argument on the appeal, he considered the fact that assignments of error based on the action of the court of common pleas in sustaining an excessive verdict had never been acted upon by this court. Such assignments had been presented in numerous cases, and passed without comment. The power conferred by the act of May 20, 1891, was first exercised in *Smith v. Publishing Co.*, 178 Pa. St. 481, 36 Atl. 296, in which case the decision was ren-

dered after the abandonment of this appeal. In the opinion filed January 4, 1897, it was said by our Brother Mitchell: "It is a new power, a wide departure from the policy of centuries in regard to appellate courts, and so clearly exceptional in its character, that no case has been presented until now in which we have felt called upon to exercise it." We are entirely convinced by the statements of the highly reputable counsel who represented the appellant that the appeal was taken in good faith, and not merely for delay. The offer of compromise afterwards made, and the abandonment of the appeal, do not, under the circumstances, in the least weaken or qualify their statements. The appeal was not taken, as in *Pennypacker v. Dear*, 166 Pa. St. 284, 31 Atl. 89, in pursuance of a menace previously made, and counsel were justified in assuming that it would be useless to press the assignment. The rule is discharged.

STERRETT, C. J. (dissenting). The act of May 25, 1874, under which this rule for damages, etc., was granted, declares: "That in all cases in which a writ of error or an appeal from a decree in equity shall delay the proceedings on the judgment of the inferior court, and in the opinion of the supreme court the same shall have been sued out merely for delay, damages at the rate of six per cent. per annum shall be awarded upon the amount of said judgment or decree by the supreme court, and an attorney fee of twenty dollars and cost of printing paper book of the defendant in error or appellee shall be taxed and collected as part of the costs of suit." P. L. 227. The petition and affidavit on which the rule is grounded contains, *inter alia*, the following averments of fact: "That said suit was brought by the plaintiff to recover damages * * * for injuries received by him in consequence of the careless, negligent, and reckless management by the defendant of its cars. That at the time of the accident plaintiff was a passenger. * * * That by the testimony it appears that, in consequence of the negligent act of the defendant company, and owing to the defective condition of the brake of the car, which fact was well known to the defendant company, the car suddenly left the track, and with great force ran into a building, nearly demolishing the building as well as the car, and from the force of the collision with the building the plaintiff sustained serious injury, which permanently disabled him from attending to his business. That no exceptions were taken during the trial, and no evidence was offered by the defendant, no motion for a nonsuit was made, nor was any exception taken to the charge of the court; and from the record there appears no reason for an appeal. A motion for a new trial was made and refused. That the defendant company made affidavit that the appeal was not taken for delay. That, notwithstanding the defendant's affidavit, said cause was appealed to this court solely and merely for the pur-

pose of delaying plaintiff in recovering the amount justly due him. That no assignments of error were ever filed. * * * No paper books were ever furnished the plaintiff. That plaintiff's counsel was present on the first day of the present term of court, when the list was called, and, notwithstanding the fact that defendant's attorney had not served any paper books on plaintiff's counsel, defendant's attorney answered, 'Argument,' on the call of the case. That thereupon plaintiff's counsel stated that no assignments of error had been filed, and no paper books furnished. Defendant's counsel then stated to the court that after an examination of the assignments of error that 'the judgment of the court could not be reversed,' or words to that effect, and thereupon, on motion of plaintiff's counsel, a non pros. was granted. That the effect of the appeal has been a hardship to plaintiff," etc. It is also averred, in substance, that since the appeal was taken—March 31, 1896—"parties in the interest of defendant company have offered to compromise the case" for \$12,000; that such an offer was made as late as November last, and was refused. To these averments of fact, tending to show not only the frivolous character of the appeal, but also that it was taken for the purpose of delay, and, in the meantime, of effecting a favorable compromise with the plaintiff, the only answer of the defendant company is that contained in the affidavit of one of its counsel, who, after averring that he alone conducted its case upon the trial in the court below, says: "That after the verdict and judgment were rendered in said court he was of opinion that the appeal ought, in justice to the appellants, be taken, so that the supreme court might, in exercise of its power to set aside verdicts considered to be excessive, reduce the said verdict; that said appeal was not, therefore, taken for the purpose of delay, but for the purpose above mentioned, and in the hope that said verdict might be reduced; that said appeal was not prosecuted because counsel for appellants afterwards, and before the time fixed for argument, were of opinion that it would impose useless waste of time and labor upon the court to prosecute the same." It will be observed that in this only answer to the rule the defendant company does not even attempt to traverse or deny any of plaintiff's averments, except that wherein he distinctly declares that the appeal was taken "solely and merely for the purpose of delaying plaintiff in recovering the amount justly due him." The defendant's attempted denial of that averment is not direct and specific, but argumentative, to wit, that its attorney who tried the case in the court below "was of opinion that the appeal ought * * * to be taken, so that the supreme court might, in exercise of its power to set aside verdicts considered to be excessive, reduce the said verdict; that said appeal was not, therefore, taken for the purpose of delay, but for the purpose above mentioned, and in the hope that said verdict might be reduced." It is not

averred in the answer that the verdict in question is excessive. The expression, "verdicts considered to be excessive," cannot be tortured into an averment that the verdict in this case was or is excessive. In fact, it is not so.

We then have a case in which it clearly appears: (1) That upon the facts distinctly averred in plaintiff's petition, and not denied by defendant, the plaintiff, after presumably a fair trial in the court below, recovered a verdict and judgment for permanent physical disability, caused solely by the negligence of defendant company. (2) On the trial, defendant offered no testimony in rebuttal of the evidence relied on by plaintiff, or for any other purpose, made no motion for a nonsuit, took no exception to any of the rulings of the learned trial judge, or to any of his instructions to the jury. (3) It is virtually admitted there is nothing in the record of the trial on which to base any assignment of error, or anything to justify an appeal to this court, except the novel suggestion, of what may be called a general appeal to the judicial clemency of the appellate court, made, as alleged, "in the hope that said verdict might be reduced." (4) Between March 31, 1896, the date of appeal, and January 4, 1897, when it was non pros'd on motion of plaintiff's counsel, nothing whatever was done towards the prosecution of the appeal in the way of filing assignments of error or preparation and service of paper book on the appellee; but in the interim overtures of compromise by remission of a large percentage of the judgment were made on behalf of the defendant to the plaintiff, and by him rejected. (5) The only reason given for not prosecuting the appeal is that after it was taken, "and before the time fixed for argument," counsel for appellant "were of opinion that it would impose useless waste of time and labor upon the court to prosecute the same." When that wise and considerate conclusion was reached—whether shortly after the appeal was taken, or after the last overture of compromise was made by the company and rejected by the plaintiff in November last—does not appear, but certain it is, whenever the conclusion was reached, it was the plain duty of the defendant to discontinue its appeal, and not further delay "the proceedings on the judgment of the inferior court." To have done so would have been some evidence of good faith in taking the appeal, while omission to do so is quite the contrary. Without referring to other minor facts and circumstances, corroborative of the foregoing conclusions, it is sufficient to say that a careful examination and consideration of all the facts and circumstances of the case have forced me to the conclusion that the appeal was not merely frivolous, but it was in fact taken for delay, and in the hope that in the meantime a favorable compromise of the judgment might be effected. This belongs to the class of cases to which the statute was clearly intended to apply, and to which, in justice to the plaintiff, it should be applied in this case.

Among the reported cases in which the provisions of the act have been enforced are *O'Donnell v. Broad*, 149 Pa. St. 24, 27 Atl. 305, and *Bachman v. Gross*, 150 Pa. St. 516, 24 Atl. 712, in which this court, of its own motion, imposed the penalty because the appeal was frivolous; and *Pennypacker v. Dear*, 166 Pa. St. 284, 31 Atl. 89. If this is not a clear case for imposition of the penalties, it would be very difficult to find one. I would make the rule absolute.

IN RE LILLY'S ESTATE.

Appeal of SCHIER.

(Supreme Court of Pennsylvania. May 27, 1897.)

EXECUTORS—COMMISSIONERS—DIRECTION IN WILL.

Direction in a will that the acting executor shall receive compensation for his services in addition to "the usual commission allowed to executors," and that he share in such commission with his co-executors, shows intention of testator that the executors have a 5 per cent. commission.

Appeal from orphans' court, Carbon county.

In the matter of the estate of William Lilly, deceased. From a decree overruling exceptions of Frederick Schier to report of auditor on first account of the executors of deceased, Schier appeals. Affirmed.

C. Larue Munson, Addison Candor, and Laird H. Barber, for appellant. William G. Freyman, Horace Heydt, and E. O. Nothstein, for appellees.

McCOLLUM, J. The accountants are executors of the estate of William Lilly, deceased. Twelve of the 13 residuary legatees, being satisfied that the commissions claimed by them are reasonable, filed with the auditor a request that the same should be allowed. As twelve-thirteenths of these commissions, if allowed, would be virtually paid by them, we may reasonably infer that they gave some thought to the subject before executing and filing the request. According to the contention of the appellant, however, they elected by their request to allow the executors to receive in commissions twelve-thirteenths of at least \$15,000 more than they earned or were entitled to. While we agree with the learned counsel for the appellant that the rights of the latter, as assignee and trustee under an antenuptial contract with one of the residuary legatees, are not impaired by this action of the other residuary legatees, we think it is a circumstance which ought not to be entirely ignored in the consideration of the question presented by the appeal. The executors were friends and associates of the deceased in his lifetime, and men of known integrity and business capacity. He committed the administration of his estate to them because he had confidence in their disposition and ability to execute the trust in the interest of his beneficiaries. He had a large estate, consisting of

lands, interests in several coal-mining companies, stocks and bonds of various corporations, notes, horses, carriages, etc. He was a partner in each of the coal-mining companies in which he had interests, and he authorized his executors to hold or sell these, as to them might seem best, subject, however, to a direction to sell them at any time upon the written request of a majority of the surviving residuary male legatees to do so. He also authorized his executors to appoint one of their number acting executor, and directed that their appointee should receive compensation for his services in addition to the usual commission allowed to executors, and that he should share in such commission with his co-executors. The executors thought best with the approval of the legatees to hold the coal interests, and their conclusion to do so was manifestly an exercise of their discretion beneficial to the estate. It was understood by the executors before taking the inventory that the testator had investments in Western mortgages, but, as their status and value were then unknown, they were not included in it. Subsequent inquiry and investigation showed that the most of the mortgages had been foreclosed, and that he had land in place of them. The face value of the mortgages was about \$110,000, but the actual value of them, or of the land covered by them, cannot, under present conditions, be definitely ascertained. The labor and responsibilities involved in the proper administration of the estate, and the care and skill shown by the executors in the performance of the duties connected with the trust, must be taken into consideration in passing upon their claim, and so must the direction of the testator in regard to commissions for their services. He intended that they should have the usual commission allowed to executors. Did he mean by the words "usual commission" a commission of 5 per cent. or a commission which a court should adjudge to be sufficient to fairly compensate them for their responsibility and labor involved, and the care and skill required in the proper execution of the trust? The learned auditor thought he meant the former, and the learned court below agreed with him in this view. Many cases were cited by the auditor as sustaining his interpretation, and many cases were cited by the appellant as opposed to it. An elaborate review of the cases is not deemed necessary. Five per cent. is often mentioned in them as the usual commission, and this, we think, is in accord with the common understanding of the people as to the meaning of these words. There can be no doubt that in a very large majority of the estates of decedents there has been an allowance to the executor or administrator of a commission of 5 per cent. In *Pusey v. Ciemson*, 9 Serg. & R. 209, Tilghman, C. J., referring to the matter of commissions, said: "It is very desirable, both for the sake of the executors and the family of the testator, that there should be some standard to which both may look on the subject of commissions. And in

the cases which generally occur it appears to me, after considerable research, that the common opinion and understanding of this country has fixed upon five per cent. as a reasonable allowance. But to this rule there must be exceptions. There are estates where the total amount is small, and that, too, collected in dribblets. In such five per cent. would be insufficient. On the contrary, there are others where, the total being very large, and made up of sums collected and paid away in large masses, five per cent. would be too much. It must be left to the courts to ascertain those cases in which the general rule should be departed from." We think that this quotation states, as fairly as any that can be made, the present state of the law in relation to the allowance of commissions to executors. We are therefore not convinced that the auditor and court below erred in holding that the testator intended his executors should have a commission of 5 per cent. But, independent of the question of the testator's meaning in the use of the words "usual commission," we think the evidence in the case affords ample ground for the allowance of the accountant's claim. We do not propose to refer to or discuss the evidence in detail. The part of it which relates to the nature and value of the services rendered by the executors in the protection and management of the coal interests of the estate is quite sufficient, in connection with ordinary service in other branches of the administration of it, to justify, if not require, the allowance of the commissions claimed. There is no reason to discredit this evidence. The witnesses who gave it were disinterested, intelligent, and well qualified to testify in regard to the value as well as the nature of the services rendered as above stated. Upon due consideration of the evidence and the undisputed facts and circumstances in the case, we are of the opinion that the decree of the court below should be affirmed. Decree affirmed, and appeal dismissed; the costs to be paid by the appellant.

DENI v. PENNSYLVANIA R. CO.
(Supreme Court of Pennsylvania. May 27, 1897.)

DEATH BY WRONGFUL ACT—RIGHTS OF NON-RESIDENT ALIEN.

A nonresident alien is not entitled to the benefit of Act April 26, 1855 (P. L. 309), giving right of action to members of the family of one whose death is caused by wrongful act.

Appeal from court of common pleas, Philadelphia county.

Action by Maria Martina Deni against the Pennsylvania Railroad Company for death of a son. Judgment for defendant, and plaintiff appeals. Affirmed.

Francis H. Thole, for appellant. David W. Sellers, for appellee.

McCOLLUM, J. Stephen Deni came to this country in 1889, and he was then 27 years

old. While employed by the defendant company as a laborer on its roadbed or track, he was, on the 28th of October, 1894, killed in a collision which was imputed to the negligence of his employer. It is claimed that, inasmuch as his day's work was done, and he was in the company's car for the purpose of riding in it to his boarding place, he was a passenger, and not an employé of the company, when the collision occurred. For the purpose of this case, he may be considered as a passenger at the moment he was killed. While in this country, his wages never exceeded \$1.20 a day, and this sum represented 10 hours' work. From his wages he had to pay for his board, washing, and clothing. Assuming that he worked on full time, and on every week day of the year, the balance, after paying the necessary expenses of his own maintenance, was not large. The claim that he regularly remitted money to and for the maintenance of his mother in Italy was not supported by convincing or satisfactory evidence. His cousin, Ferdinand Deni, testified that Stephen told him on the 20th of September, 1894, he had sent his mother \$20. Joseph Narcitto testified that in August of that year Stephen told him he had \$20, and "wanted to borrow another \$20, so as to send it to his mother." These were the only witnesses who testified in regard to a specific or particular remittance, and it clearly appears from their testimony that their information respecting it was based on what Stephen said to them. Ferdinand Deni, and Palmò Deni, a brother of Stephen, testified in general terms that Stephen sent money to his mother. But it is noticeable that neither of them testified to having seen Stephen make at any time a remittance to her in any form. Ferdinand said "the attorney has the receipts from the bank that the money was sent to Italy," and that Crolo Barsotti was the banker through whom it was sent. The receipts were not produced, nor the banker called to testify, although his place of business was but a few squares from the place of trial. The plaintiff knew whether Stephen contributed to her support, and she was competent to testify in her own behalf. But her testimony was not obtained, nor does it appear that any effort was made to obtain it. Of course, Stephen's declarations were not competent evidence of contributions by him to her maintenance. Stephen Deni did not see his mother after he left her in Italy, in 1889. She still resides in her native country, and owes allegiance to the government of it. The burden was on her to show the existence in fact of a family relationship which entitled her to maintain the suit. In view of these facts and the evidence in the case the learned court below thought she could not recover, and accordingly entered a compulsory nonsuit. No case has been cited to us, nor are we aware of any, in which a nonresident alien, whether husband, widow, child, or parent of the deceased, has maintained a suit under the act of April 26, 1855

(P. L. 309), to recover damages for an injury causing death. Our legislation on this subject is in accord with the English statute of August 26, 1846, and therefore the decisions of the English courts construing this statute are often referred to in cases grounded upon our acts of April 15, 1851, and April 26, 1855. But no case has been brought to our notice in which an English court has held that a nonresident alien is entitled to the benefits conferred by the act of 1846. The same may be said of the decisions of the courts of our sister states having statutes similar to our own. May a citizen of the United States, whose son, while traveling in England, is killed in a collision on an English railway through the negligence of the owners or operators of it, maintain an action in an English court under and by virtue of the English statute we have referred to? If he cannot, it is because the statute does not include a nonresident alien. As the English statute is like ours, there would seem to be more reason for allowing a suit to be maintained under it by a citizen of this country than by a citizen of a country which has no such statute. Presumably, if the death of the plaintiff's son occurred in her own country, as it did here, she could not maintain a suit for the loss she sustained by it; and if the death of a son of a citizen of this country occurred there under like circumstances, the latter could not maintain a suit for the loss he suffered by it. No statute or law of Italy has been shown which authorizes such a suit. Our statute was not intended to confer upon nonresident aliens rights of action not conceded to them or to us by their own country, or to put burdens on our own citizens to be discharged for their benefit. It has no extraterritorial force, and the plaintiff is not within the purview of it. While it is possible that the language of the statute may admit of a construction which would include nonresident alien husbands, widows, children, and parents of the deceased, it is a construction so obviously opposed to the spirit and policy of the statute that we cannot adopt it. A nonresident defendant is not entitled to the benefit of our exemption laws, although the language of these laws may admit of a construction which would include him. It has been so held in a number of our cases. In this connection the language of Mr. Justice Sterrett in Collom's Appeal, 2 Penny. 130, is pertinent. In delivering the opinion of the court, he said: "While nonresident debtors may, perhaps, be within the letter of the act, we do not think they are within its spirit. As was said by Mr. Justice Woodward in Yelverton v. Burton, 26 Pa. St. 351, and afterwards quoted approvingly by the present chief justice in McCarthy's Appeal, 68 Pa. St. 217, we do not legislate for men beyond our jurisdiction." In one respect, at least, our act of 1855 resembles our exemption laws. It is intended primarily for the benefit of the family of which the deceased was a member. The act of 1851 gave a right of action to the personal representatives of the deceased. Mr. Justice Green referred to this act

in *Books v. Borough of Danville*, 95 Pa. St. 158, and said: "The effect of this act was to make the damages recoverable in such actions general assets of the deceased in the hands of the personal representatives, and, of course, they were available to creditors in the first instance. It follows that in all cases of insolvent estates of such deceased persons, where the victim of the injury was the husband and father, the widow and children derived little or no advantage from the action, although they were the persons most directly and severely injured." But this objection to the act of 1851 was overcome by the act of 1855, which designated the persons to receive the sum recovered, and directed that they should take it in the proportion they would take the personal estate of the deceased in case of intestacy, "and that without liability to creditors." In *Bacon v. Horne*, 123 Pa. St. 452, 16 Atl. 794, it was held that the act of May 3, 1855 (P. L. 415), relating to the recording of an assignment made for the benefit of creditors by a resident of another state, which assignment included property of the assignor in this state, was for the protection of our own citizens, and that a creditor of the assignor, who was a resident of the state in which the assignment was made, could derive no benefit or protection from the act, although he was without notice of the assignment. There is nothing on the face of the act which limits the protection afforded by it to our own citizens. It is referred to as another illustration of the general rule that we do not legislate for persons beyond our jurisdiction. We have a number of statutes which expressly confer rights upon aliens, but none which confers them by implication or inference. When the legislature intends to concede to nonresident aliens the rights which our own citizens have under and by virtue of the act of April 26, 1855, it will say so. Our conclusion is that the learned court below did not err in entering the nonsuit. Judgment affirmed.

HAINES v. BARCLAY TP.

(Supreme Court of Pennsylvania. May 27, 1897.)

MUNICIPAL CORPORATIONS—NEGLIGENCE—DUTY AS TO HIGHWAYS.

1. A township is not liable for injury to a traveler resulting from the negligent location, construction, or operation of a log chute on private premises adjoining the highway, in the absence of any statute authorizing the town to remove, or prevent the operation of, such chute.

2. Act June 13, 1836, § 6, requiring highways to be kept clear of impediments to travel, does not authorize a township to remove, or prevent the operation of, a log chute on the land of an abutting owner, though logs thereupon sometimes fall upon the highway and interfere with travel.

Appeal from court of common pleas, Bradford county.

Action by John F. Haines against Barclay township. The court directed a verdict for defendant, and from the judgment entered thereon plaintiff appeals. Affirmed.

Wm. Maxwell, for appellant. Edward Overton, for appellee.

MCCOLLUM, J. This suit was brought against Barclay township to recover damages for an injury which the plaintiff attributes to the negligence of the defendant. On the trial of it the court instructed the jury to find for the defendant on the ground that there was no evidence, or offer of evidence, on which the township could be held responsible for the injury. It seems that, while the plaintiff was driving along a public road in the township at or near the point where there was a log slide or chute located and terminating on land outside of the highway, he noticed that several logs were coming rapidly down the chute, and, being apprehensive of injury from them, he leaped, in the direction he was driving, from his buggy to the ground. The leap from the buggy was the immediate cause of the injury received. His offers of evidence show that if he had remained in the buggy he would not have been injured, but they also show that there was good cause for the apprehension which impelled him to leap from it. The end of the chute next to the highway was 58 feet from the center of the same. The chute was constructed for the purpose of bringing the logs down the hillside to the sawmill adjacent to the highway. The builders of the chute evidently supposed that the space between the lower end of it and the road was sufficient for the reception and retention of the logs, without encroaching on the highway or interfering with travel upon it. According to the offers of evidence, however, this supposition was not well grounded, because they showed that some of the logs had passed from the chute across the highway, and that others had fallen in it. The plaintiff also offered to show that the township was cognizant of these occurrences prior to the casualty in question. It follows from the offer that there was negligence in the location, construction, or operation of the chute. This was primarily the negligence of the parties who built and operated it. When and how did it become the negligence of the township? As we understand the plaintiff's contention, it is that the township, having knowledge of the existence of the chute, and of the dangers incident to the operation of it for the purpose for which it was built, should have destroyed it, or taken measures to prevent the use of it where and as it was. To sustain this contention, it is necessary to point to the statute which authorizes the township, through its officers, to do these things. If a statutory warrant for such action cannot be found, on what principle can the township be charged with negligence in refraining from it? The appellant cites, and appears to rely upon, section 6 of the act of June 13, 1836, as furnishing the requisite warrant for his contention. We cannot so construe it. The duty to keep the highway clear of impediments to travel thereon does not include the power to enter upon the land of an abutting owner, and to destroy, remove, or prevent the use of structures he has

erected there for the prosecution of a legitimate business. The appellant also cites, as authority for his contention, *Borough of Pittston v. Hart*, 80 Pa. St. 389; *Neslie v. Railway Co.*, 113 Pa. St. 300, 6 Atl. 72; *North Manheim Tp. v. Arnold*, 119 Pa. St. 389, 13 Atl. 444; *Plymouth Tp. v. Graver*, 125 Pa. St. 24, 17 Atl. 249; and *Jackson Tp. v. Wagner*, 127 Pa. St. 184, 17 Atl. 903. A careful examination of these cases fails to disclose any recognition by either of them of a power in the municipality like the power which the plaintiff claims was vested in, and should have been exercised by, the defendant. There is not even a suggestion in any of them that the township authorities may enter upon land outside of the highway, and erect barriers there, or remove or prevent the use of structures placed there by the owner. In *Drew v. Town of Sutton*, 55 Vt. 586, cited by the appellant, the court held that "a town may be liable for an injury sustained by a traveler on a highway by driving off a steep and unguarded embankment, six inches outside of the highway, in the dark, the highway being brought up to that point." *Harris v. Inhabitants of Newbury*, 128 Mass. 321, was a case in which "the land immediately outside of the highway fell off so precipitously that there was such risk of a traveler, using ordinary care in passing along the road, being thrown or falling into a dangerous place, that a railing was necessary to make the way safe and convenient." In *Goodin v. City of Des Moines*, 55 Iowa, 67, 7 N. W. 411, the court said: "The city has full and complete control of the streets, and may excavate or fill up the same at its pleasure, but in doing so it cannot encroach on private property for the purpose of erecting barriers or any other purpose." In *Hebbard v. Town of Berlin* (N. H.) 32 Atl. 229, the plaintiff was driving along a highway when his horse became frightened by an engine owned by a private corporation, and stationed near, but wholly without, the limits of the highway, and concealed from view to persons going in that direction. Plaintiff's vehicle was injured in a collision with another going in the opposite direction. Held, that the location of the engine was not a defect in the highway which rendered it unsuitable for travel, and which the township was obliged to remove or guard against. In *James' Adm'r v. Trustees of Harrodsburg*, 85 Ky. 191, 3 S. W. 135, it was held that one who, in passing along the street of a town, is injured by falling stone, the result of blasting by a citizen on his private property, has no cause of action against the town for its failure to abate the nuisance. Further citation of cases pertinent to the question under consideration is not deemed necessary. We must look to the statute for the power and duty of the municipalities in the construction and maintenance of the highways. If the power to erect a barrier outside of the highway is not conferred by the statute, the municipality is not liable to a traveler on the highway for an injury received because of the absence of

such a barrier. If it is not authorized to remove or prevent the operation of structures erected on such land for the prosecution of a legitimate business, it is not responsible for an injury caused by the negligent location, construction, or operation of such structures. For the reasons above stated we sustain the ruling of the court below. Judgment affirmed.

IN RE MARTIN'S ESTATE.

(Supreme Court of Pennsylvania. May 24, 1897.)

DECEDENTS' ESTATES — HUSBAND AND WIFE — LOANS — EVIDENCE.

1. Deceased had been a machinist until 1865, when he became sick, and went into the grocery business. Several years afterwards he started keeping a small candy and tobacco store. He paid in the purchase of realty in his own name, or in discharging incumbrances thereon, \$2,200 in 1874, \$2,600 in 1883, \$800 in 1887, and \$2,500 in 1888. His wife had no separate estate, but received payments of uncertain amounts by friends at different times not specified, and in 1883 was given an annuity of \$800, two quarterly payments of which she received before the husband's purchase in 1883. She gave him indefinite sums at unspecified times in the course of several years, and a large sum in 1883, and he made statements just after the purchase of 1883 that she had given money to him for investment. Held insufficient to show that she had advanced him any one of the several named sums, except the \$2,600.

2. Where a husband had purchased realty in his own name, and his widow claimed to have furnished the price as a loan, and as administratrix obtained leave to sell the land of the estate to pay debts, the debts other than her claim being nominal, and the heirs of the husband petitioned to have the order of sale revoked on the ground that her claim was invalid, the burden was on her to show a loan to the husband, the same as it would have been on her had she attempted to establish her claim against the estate in the ordinary way.

Appeal from orphans' court, Philadelphia county.

Petition by Isaac J. Martin to revoke an order of sale granted on the application of Jennie Martin, administratrix of the estate of Isaac Martin, deceased. An auditor was appointed, who filed a report in favor of petitioner, but the court sustained exceptions thereto, and petitioner appeals. Reversed.

Following is the auditor's report, decree omitted:

"Isaac Martin, the decedent, died intestate on the 2d day of March, 1896, his residence, at the time of his death, being in the city of Philadelphia. Letters of administration on his estate were granted by the register of wills of Philadelphia county to Jennie Martin, the widow of the decedent, on the 9th day of March, 1896. It appeared from the evidence admitted before the auditor that the only persons interested in the estate of the decedent under the interstate laws are Jennie Martin, his widow, the petitioner; Mary E. Martin, daughter of William Douglas Martin, a deceased son by a first wife; and Isaac J. Martin, Victor David Martin, and Lucretia O.

Burn, wife of Louis Burn, children by a second wife. The decedent, at the time of his death, was seised of two certain pieces of real estate, fully described in the Schedule A of the petition for the sale of the real estate for the payment of debts, and being a certain brick messuage or tenement and lot or piece of ground on the north side of Jefferson street, 78 feet westward from the west side of Eleventh street, containing in front or breadth on the said Jefferson street 16 feet, and extending in length or depth northward 63 feet 9 inches; the consideration in the deed being \$2,200. Also all that certain lot or piece of ground at the southwest corner of West street and Poplar street, in the Fifteenth ward of the city of Philadelphia, containing in front or breadth on Poplar street 17 feet 6 inches, and in length or depth southward of that width, along the west side of said West street, 6 feet; the consideration in the deed being \$2,600. It further appeared from the evidence that in his lifetime, prior to his death, the decedent owned, with his wife, premises on the east side of Sixteenth street, 14 feet northward from the north side of Seybert street, containing in front 14 feet, and extending in length or depth eastward of that width 50 feet; the consideration in the deed being \$1,400. The said widow of the decedent, having survived him, the title of the Sixteenth street premises would seem to be vested in her, the survivor, in a tenancy by the entireties. The allegation of the petitioner, in her petition for leave to sell the real estate for the payment of the debts of the decedent, was that the entire personal estate was the sum of \$85 in cash, and that his indebtedness amounted to the sum of \$12,174.35, of which \$12,000 was an alleged amount loaned by the petitioner, Jennie Martin, to the decedent; undertaker's bill, \$105; medical attendance, \$28; for repairs, \$14.85; expenses connected with the administration of the estate, \$26.50,—\$12,174.35.

"On the 14th day of March, 1896, your honorable court granted the prayer of the petition, and authorized the sale of the Jefferson street and Poplar street properties for the payment of debts. Whereupon, on the 13th day of April, 1896, Isaac J. Martin, a son of the decedent, filed a petition, asking your honorable court for a rule upon the administratrix to show cause why the order to sell the real estate should not be revoked, and that the sale thereof, advertised for Wednesday, April 15, 1896, at 12 o'clock noon, by James A. Freeman & Co., be stayed. To this rule an answer was filed by Jennie Martin, the petitioner, on the 13th day of April, 1896, asking, for reasons set forth in the petition, that the petition of Isaac J. Martin should be dismissed with costs; whereupon your honorable court made the present reference to the auditor.

"At the first meeting before the auditor, counsel for the administratrix and widow of the decedent admitted that Mrs. Jennie Martin, the petitioner, had no written evidence of the alleged loans made by her to her said

husband, the decedent, but, in support of said claim, he called Mrs. Mary Winters, 82 years of age, and sister of the decedent, who, it appears, was living at No. 1109 Jefferson street, the residence of the decedent, and the present residence of his widow, the petitioner. It appears the decedent was in his seventy-ninth year at the time of his death,—he would have been 79 on the 20th day of March, 1896,—and that his wife, Mrs. Jennie Martin, is about the same age. The petitioner was the third wife of the decedent; Isaac J. Martin, Victor David Martin, and Lucretia C. Burn being children by his second wife, and Mary E. Martin being a daughter of William Douglas Martin, a deceased son by his first wife. The decedent, in his lifetime, was a machinist, and worked at gunsmithing, at the time of the war, in Bridesburg. The witness said she 'didn't think decedent had any money'; that during the last 20 years or more he didn't do much work, if anything; that he kept a candy, tobacco, and cigar store in Jefferson street. In reference to the West and Poplar street properties, she said: 'Mrs. Jennie Martin showed me money that Mr. Seybert gave her for a present, and she then loaned it to her husband to buy the property; but I do not know about it.' That Mrs. Martin received a great many presents from Mr. Seybert, but she didn't see all she got, and she loaned it to her husband to buy the property. She knew Mr. Martin didn't have money enough to buy the properties, because he was ailing so long that he couldn't work. That he had been ailing about 28 years, she thought. He had the rheumatism in his feet, and couldn't go to work. On cross-examination, the witness said: She didn't see Mrs. Martin give her husband money to buy the house. She didn't see her loan him the money. She didn't see her hand him any money at all. She did see her several times hand him some money—two or three hundred dollars—to buy the house. Being asked if Mrs. Martin said so at the time, she replied, 'No'; and then, in answer to the question, 'How do you know she loaned it to him to buy the house?' she answered: 'She told me so. Q. When? A. I cannot tell.' And afterwards admitted the only knowledge she had that Mrs. Martin loaned him the money was, 'She told me she loaned it to him to buy the property.' She couldn't tell how much money Mrs. Martin loaned to him. She further said: 'She always said, and he told me, he had received the money to buy the property.' She couldn't tell when it was; couldn't give any dates. She admitted she had talked to Mrs. Martin about this matter. She couldn't tell how much money she had ever seen Mrs. Martin hand over to her husband; and, being asked finally: 'How many times, while you were visiting them there, did you see Mrs. Martin hand any money over to her husband?' replied, 'I told you I didn't see how much.' In answer to questions by the auditor, she said: 'She had seen her give him money on two occasions.' That she heard

Mrs. Martin say, 'She had loaned it to him to buy the property.' She heard her say that to him, 'I loan you money to buy the property,' and he said, 'He would buy it at the auctioneer's or somewheres.' She didn't count it, but Mrs. Martin told her, in the presence of her husband, that it was several thousands. She couldn't tell, however, whether it was several thousand or three thousand. She didn't know what the decedent did with the money. He didn't go right away. Her brother told her it wasn't all paid, and she loaned him the money to pay the rest. This was in reference to the Poplar street house. On further cross-examination by Mr. Andre, this witness stated that Mrs. Martin sometimes brought home from Mr. Seybert two or three hundred dollars, and when she had enough she loaned it to her husband; that this was after the war; she couldn't give the exact date. The next witness in support of the petitioner's claim was Dr. Peter Beutel, who had known the decedent intimately since 1862. This witness stated he used to loan Mr. and Mrs. Martin money, when they were short; that he loaned it to Mr. Martin; that he borrowed these moneys in 1866 and 1867. (It appears from the deeds that the Jefferson street house was purchased May 1, 1874; the Poplar street house, October 13, 1883; the Jefferson street house, January 13, 1868.) Dr. Beutel further said: The decedent told him he had just bought the Poplar street house at a sheriff's sale; that Mrs. Martin had some money, and he wanted to invest it; that he thought he had made a good investment, but, after he bought it, he found out there was a mortgage against it, and that altogether it came to fifty-one or fifty-two hundred dollars, with the charges and one thing or another; that the decedent had no money; that he kept one of these penny shops; that he had terrible sore legs, and couldn't work; that Mrs. Martin had all the money; that he had on several occasions seen Mr. Seybert hand her not less than \$250; that he knew Mr. Martin had not sufficient money to pay for the properties on Jefferson and Poplar streets, stating, 'How could a man have money when he was sick all the time?' Counsel for the petitioner also offered in evidence the will of Henry Seybert, probated March 14, 1883, providing for an annuity of \$800 to Mrs. Jennie Martin, the petitioner, payable in quarterly payments of \$200, of which two payments had matured prior to October 13, 1883, the date of the sheriff's deed to the decedent. Theodore Engel, a witness called by the counsel for the petitioner, stated: He knew the decedent and his wife since 1869. The decedent was afflicted with rheumatic gout during these years, which made him unfit for work. That he was not in a physical condition to earn money. That he kept a little shop,—a penny shop. That he would not value his stock at over \$10 to \$15. That he knew nothing about Mrs. Martin's financial condition, but he knew she had money to provide for the necessities. That she (the peti-

tioner) had told him she had wealthy friends. He never saw Mr. Seybert or anybody give her any money. He knew Mr. Martin, the decedent, prior to 1869, was a machinist. That he had made friendly visits to Mr. and Mrs. Martin, and didn't take part in any spiritual consultations. Lewis Newhoffer, the last witness called by the petitioner, testified that Mr. Martin, the decedent, had had the rheumatism in the legs for the last 20 to 22 years. That he did not work during these years, to the best of his knowledge, but kept a little candy store, in which he sold candy, a few cigars and tobacco, the stock amounting to fifteen or twenty small jars, a few boxes of cigars and packages of tobacco. From the title papers submitted to the auditor it appeared the Jefferson street property, at the time of its conveyance to the decedent, was subject to a ground rent of \$48 per annum, which was afterwards extinguished on the 8th day of July, 1887, and the Poplar street property was subject to a mortgage of \$2,500, which was satisfied June 6, 1888.

"On behalf of the children and grandchildren of the decedent, counsel called Mrs. Rosina E. Brecker, formerly the wife and widow of William Douglas Martin, a son of the decedent by his first wife. She testified she had known decedent 32 years,—or since 1864. That he was a machinist at Baldwin's. That after that date he had a very large grocery store at the corner of Twelfth or Fifteenth and Wharton streets,—she didn't remember exactly whether it was the corner of Twelfth or Fifteenth street,—which he kept between two and three years. That she married his son when he was there, and that he was still there after she was married, her husband being there in the business with his father. She did not know that he worked at the Bridesburg Arsenal any length of time, but did know he always worked at Baldwin's. That his reputation for having money she knew by hearing him say so, and by the liberality which he showed. She always saw him have money. That at the time she married William Douglas Martin, decedent was married to his present wife. On cross-examination she stated: When he left Ellsworth street he went to Jefferson street, and that when he first went to Jefferson street he didn't always sell cigars and tobacco, but sold sugar and different things. That it was a grocery store when he first took it, and he held it for a grocery store, and it has only been eight years that he had not been able to get around. That there was more than \$10 worth of stock in it, and he had more than that amount of cigars. She always knew decedent to be the head of the house, and didn't think anybody had the money there but him. That he attended to his grocery store, and was almost able to attend to it until five or six weeks before he died. That he did not carry on the grocery business to the full extent, but sold his candy, cigars, and tobacco. She could not tell how much he took in in

the course of a day or week. She often saw a crowd there. He did not employ any hands, or have a horse and wagon to deliver his goods. In reply to questions by the auditor, she said: The grocery store on Ellsworth street was a full-stocked grocery. That he carried it on a little over two years. That he sold it out when he moved to Jefferson street. It was a very large house,—a three-story house at the corner. That when they sold out the business they moved away from that house. That her husband died in April, 1869. He was a fancy chair maker. That decedent did not work at Baldwin's after he went to Jefferson street; that he worked at Baldwin's before 1867, but did not work there after he kept the grocery store. This was all the testimony submitted to the auditor, and the same is hereunto attached as a part of this report.

"The auditor, after a careful consideration of the testimony submitted to him, is constrained to say: First. There has been no sufficient evidence of a loan of twelve thousand (\$12,000) dollars by the decedent's widow to the decedent in his lifetime. Second. That there has been no sufficient evidence submitted to him of a loan of sums of money by the decedent's widow to the decedent, in his lifetime, which, with interest, would amount to \$12,000. Third. That the petitioner may have loaned or given to her husband some moneys is probable, but there is no evidence indicating a loan of any specific sum of money, and we are asked to presume, from the fact of decedent's physical condition, and from the character of the business which he carried on at the time of his death in 1896, that he had not, in 1874, and in 1883, money to purchase the Jefferson and Poplar street properties, and in 1887 the \$800 to extinguish the ground rent on the Jefferson street premises, and in 1888 the \$2,500 to satisfy the mortgage on the Poplar street premises. We are asked to presume this against the other presumption that a man who has been a machinist for the greater part of his life, and who had thereafter been engaged in business in a large grocery store, which he subsequently sold out, had not, at the age of 57 years, accumulated sufficient money to purchase these properties. We are asked to presume this from the hearsay evidence of an old lady 82 years of age, a sister of the decedent, whose testimony was not at all positive in its character, and was based, in the main, upon what she had been told by the petitioner, who seems to base her conclusion also upon the fact that the petitioner received a great many presents from Mr. Seybert; her conclusion that her brother did not have money enough to buy the properties being because he was ailing so long that he couldn't work. She admitted she did not see Mrs. Martin give him the money, and, at most, said she saw her give him 'two or three hundred dollars to buy the house. She didn't say so at the time, but told her so afterwards.' And although she did say—and this, perhaps, is her strongest testimony—that decedent told

her he had received the money to buy the property, she could not tell when it was; could not give any dates, nor state what amount of moneys had been received; and finally said she only saw him handed money on two occasions. She thought it was over a thousand dollars at the second time.

"Counsel for the petitioner cited, in support of his contention: In re Wormley's Estate, 137 Pa. St. 101, 20 Atl. 621; Sawtelle's Appeal, 84 Pa. St. 306; Bergey's Appeal, 60 Pa. St. 416; Hamill's Appeal, 88 Pa. St. 363. While it is true, and the auditor readily concedes, that where a husband has received money which belonged to his wife, the mere fact of such reception makes him her debtor, and that no affirmative proof by the wife that he received it as a loan, and not as a gift, is required, the auditor holds that there must be, as in Re Wormley's Estate, no question as to the amount said to have been loaned or given. If there had been testimony submitted to the auditor of the receipt by Isaac Martin, the decedent, of any specific sum of money which belonged to his wife, the fact of such reception would undoubtedly have made him her debtor, and no affirmative proof by the wife, that it was not a gift, would be required. The law does presume a loan from such a reception of money, and those who would assert otherwise must sustain their allegation by competent proof. In Re Wormley's Estate, 137 Pa. St. 101, 20 Atl. 621, one of the undisputed facts found by the auditor was that Mrs. Wormley received money to the amount of six hundred dollars from her father's estate, and there was evidence that the husband admitted the reception of this particular amount of money, the testimony being that 'he had got six hundred dollars from his wife, and gave her no note for it.' We are asked in the present case not only to presume the indebtedness of the decedent to his wife, but also, without sufficient evidence, to ascertain what is the amount of such indebtedness. This the auditor is unable to do from the testimony submitted to him. In Sawtelle's Appeal, 84 Pa. St. 306, there was an abundance of evidence to justify all the conclusions of fact as to the bonds and money with which the accountants had been surcharged. The court was not asked to guess at the amount of the government bonds and cash, but there was satisfactory evidence as to the exact amount. In Bergey's Appeal, 60 Pa. St. 416, there was likewise no question of uncertainty as to the amount of money, the subject of the contention. In this case the fund was the proceeds of a sheriff's sale of real estate on proceedings on a mortgage given by Jacob Bergey and Deborah Bergey, his wife, the claimants being judgment creditors of the husband on the one hand and the wife on the other, she alleging the property was her own separate property, and her husband 'had no interest in it.' There was ample evidence of the receipt by the husband of certain exact sums belonging to the wife, and the court very properly

held that, where the husband took the money, counted it in her presence, but did not give it to her, but afterwards invested it in real estate, giving her no writing at the time to secure it, but eight or nine years afterwards giving her a judgment note for it, there was no proof of a gift by the wife; that she was not bound to attempt to rescue it from her husband, or proclaim that it was not a gift; that she might rest on the idea that he received it to take care of it for her. And while declarations made at the time of the receipt of the wife's money or afterwards are evidence against the estate of the husband of the intent with which it 'had been received,' these declarations must, in the opinion of the auditor, be in reference to some particular or certain sum of money, and the court cannot be asked to fix a particular sum, where it is not evidenced by such declarations, as in the present case.

"In Hamill's Appeal, 88 Pa. St. 363, it was held, a wife's right, as a creditor of her husband, must be clearly proved, and this requirement was adequately met by proof that the husband was penniless; that the wife had \$1,200; and of the establishment, by the joint action of both, in the husband's name, of a business requiring a liberal cash capital at the start. The facts, however, in the present case, are different. There is no evidence showing what amount of money the petitioner, Mrs. Jennie Martin, had, beyond the fact of certain indefinite payments to her by Mr. Seybert, or wealthy friends; and also that, after Mr. Seybert's death, and before the purchase of the Poplar street house, she had received two quarterly payments of \$200,—together \$400. Surely, this is not sufficient evidence to show that she had \$2,200 on May 1, 1874, \$2,600 on October 13, 1883, \$800 on July 8, 1887, and \$2,500 on June 6, 1888. No evidence was submitted to the auditor to show the possession by Mrs. Martin at any particular time of any such sum of money. No bank book or other book of deposit was shown, nor any other evidence produced, showing where such moneys were kept; whether they were drawn from a savings institution or bank; nor was there any evidence, satisfactory to the auditor, that Mrs. Jennie Martin ever had these various sums of money, alleged to have been loaned to her husband. In Young's Estate, 65 Pa. St. 101, the supreme court held that the only proof to fix liability on a husband, for the wife's money, received by him, is that it must be sufficient to satisfy the tribunal that it preponderates over all theories to the contrary. Again, in this case the auditor finds there was no uncertainty whatever as to the amount of money which John Young, the husband, had received, as the share of his wife, Sarah, from the estate of her father, John A. Wiedner. The amount is specifically stated to be \$3,047.75. The notes and cash representing this amount were handed to the husband by the executor, his wife being present, the release to the executor being executed

by the husband and wife. The facts are not analogous to the present case, where, as already repeatedly stated, there is no evidence of any certain amount of money loaned by the wife to the husband, and also because, in the present case, the proof to fix the liability on the husband's estate is not of such a character as to satisfy the auditor 'that it preponderates over all theories to the contrary.' The facts in the present case are not sufficient to negative the possible theory that a man, approaching 60 years of age, had acquired and accumulated some means during his previous years of employment as a machinist, and in the conduct and ownership of a large grocery store, which was sold out by him prior to his purchase of the property on Jefferson street. In Young's Estate the auditor was able to find the wife's case to be prima facie good on the facts and the law. The auditor, in the present case, is unable to so find, and does not feel warranted, upon the evidence presented to him, to report a decree in favor of the petitioner for the sale of the real estate of the decedent for the payment of debts. The auditor recognizes that he is not passing finally upon the right of the widow to assert, and, if possible, prove, her claim against the decedent's estate, at the time of the audit and adjudication of her account as the administratrix of his estate. Should she then be able to satisfy the court of the validity of her claim in any certain amount, the award of that amount to her will be equivalent to a judgment against the estate of the decedent, which will fully protect her in every respect. Where, however, the evidence shows a total indebtedness of only \$174.35 above the alleged claim of the widow, with an admitted sum of \$85 in cash, and no accounting whatever for the stock of candy, tobacco, and cigars, said by one witness to have been worth only \$10 or \$15 and by another to have been more than \$10 worth of cigars alone, and where it is alleged in the petition filed on behalf of the heirs of the estate that any balance can be paid by them from the rents which would be received therefrom, the auditor cannot report in favor of granting the application of the petitioner for the sale of the real estate, but does report that under all the facts of the case the present petition, asking for a sale of the said real estate, should be refused, and he accordingly reports a decree to that effect."

Walton & Andre, for appellant. William F. Meyers, for appellee.

WILLIAMS, J. Jennie Martin, the claimant, became the third wife of the decedent in 1862. She does not appear at that time to have had any separate estate, or any means for acquiring one. She received occasional gifts from one Henry Seybert, the amount or frequency of which no one appears to have known except herself. Seybert died in 1883, leaving her an annuity of \$800 per annum. Martin appears to have been at work as a

machinist, and in the possession of good health, at the time of his marriage. This state of things continued for several years, and until he was attacked by rheumatism. He then went into the grocery business for some years, and at the time of his death had been keeping a small cigar, tobacco, and candy store. Neither Martin nor his wife seems ever to have kept a bank account, or to have entered their cash transactions in books of their own. In 1868, Martin purchased a property at Sixteenth and Seybert for \$1,400, having the title made to himself and his wife. It is now said by her counsel in the paper book before us that she holds the property as her own, by virtue of her survivorship. The legal presumption arising from these facts is that Martin paid for the property, and had the deed made in such manner that the entire title should vest in his wife, should she survive him. In 1874, he purchased a house and lot on Jefferson street for \$2,200, having the deed made to himself. He afterwards paid \$800 to extinguish ground rent upon it. In 1883 he bought a house and lot on Poplar street for \$2,600, subject to an incumbrance, which he subsequently paid, amounting to \$2,500 more. The legal presumption arising from these transactions is that the money was furnished by the purchaser. The claimant alleges that all the money so paid by her husband was lent to him by her at various times, running through a period of many years. The burden of overcoming the presumption in favor of her husband and establishing the loan or series of loans was on her. Nor was she relieved in any manner from this burden by the circumstances under which the validity of her claim was raised in the court below. Her husband died in March, 1896. Letters of administration on his estate were issued to her on the 9th day of March. Five days thereafter she appeared in the orphans' court to apply for leave to sell the real estate of which he died seised for the payment of debts. The schedule of debts showed a debt of \$12,000 due to herself. The only other debts consisted of the undertaker's bill and a few small items, aggregating about \$170. It is plain that the only possible reason for her application was the assertion of her own claim, which would require the sale of her husband's entire estate. An order of sale was granted. Heirs of Martin by a former marriage, hearing of this proceeding, came into court to assert that the alleged debt had no existence, and asked a rescission of the order of sale. An auditor was appointed to hear the testimony, investigate the facts, and advise the court about the existence and amount of the debt. He heard the testimony, and reported adversely to the claimant. Exceptions were filed to the report, and upon hearing the orphans' court overruled the auditor, and adjusted the amount of the debt for money borrowed by the decedent from his wife at the sum of \$8,100. They therefore renewed the order of sale. The sum of \$8,100 is

the aggregate of the purchase money and the incumbrances upon both the Jefferson and the Poplar street properties, and the orphans' court have found that the evidence is sufficient to overcome the *prima facies* of these purchases, and to establish the fact that this money was borrowed by Martin from his wife, and that it was money which, as between themselves, was her separate estate. We have examined the evidence to see whether these findings were fairly supported by it, and agree with the auditor that they are not. It is very unsatisfactory in all respects. It consists chiefly of the testimony of Mrs. Winters, who had no definite knowledge about the alleged loans, and who testified from information derived from the claimant; and of the testimony of Dr. Beutel, relating to some declarations made by the decedent in regard to the purchase of the Poplar street house. These declarations would tend to corroborate the claimant's position, so far as the purchase money of this house is concerned, which was \$2,600. But he had no personal knowledge that a loan was ever made by Mrs. Martin to her husband. There were also two or three witnesses who gave an opinion that Martin had made no money, either as a machinist or a grocer, and therefore could not have paid the purchase money on these properties. From this conclusion they drew another,—that, inasmuch as the purchase money was paid, it must have been paid out of money given by Seybert from time to time to Mrs. Martin, and loaned by her to her husband. There is, however, no proof whatever upon which these conclusions can be sustained. The evidence affords at best a foundation for a plausible conjecture, and this is the utmost that can be affirmed of it. She has failed to overcome the *prima facies* in favor of her husband, unless it may be as to the original purchase money of the Poplar street house, and the decree appealed from must be reversed. Had the *prima facies* been in favor of this claim, the duty of rebutting it would have devolved upon the objectors. The situation was exactly the opposite. Her duty was to overcome the effect of circumstances which, unexplained, made a case against her. *Young's Estate*, 65 Pa. St. 101, cited and relied on by the appellee, is not in point. In that case, the existence of the separate estate of the wife, its amount, and its payment to the husband were conceded. The only question raised was whether, in the absence of positive proof upon the subject, the money so received by the husband should be presumed to be a gift or a loan. We held the presumption to be that the money was received as a loan, and that the burden of showing the contrary rested on him who asserted it. In this case, it clearly appeared that the claimant had no definite separate estate. There was no evidence that any of her money went into his hands except that of his own declarations, which were wanting in details, and furnished neither dates nor amounts. The effort was, therefore, to charge him with pay-

ments made by himself upon purchases of real estate, the deeds for which were made to himself, by the testimony of witnesses who really know very little about it. The decree appealed from cannot be sustained. It is therefore reversed, except as to \$2,600, and a procedendo is awarded. Opportunity should be afforded the heirs to pay this sum, if they so desire, to retain the real estate.

SELTZER v. ROBBINS et al.

(Supreme Court of Pennsylvania. May 27, 1897.)

MECHANIC'S LIEN—LANDLORD AND TENANT—TERMINATION OF LEASEHOLD INTEREST—JUDGMENT—COLLATERAL ATTACK.

1. A landlord having, for default in rent, entered judgment by confession in ejectment against the tenant, and been restored to possession by writ thereon, in accordance with stipulation, accompanied by warrant of attorney, in the lease, there is no interest which can be bound by judgment thereafter rendered on mechanic's lien for material previously furnished the tenant for erection of building on the premises.

2. A landlord having, for default in rent, entered judgment by confession in ejectment against the tenant, and been restored to possession by writ thereon, in accordance with stipulation, accompanied by warrant of attorney, in the lease, before judgment was rendered on mechanic's lien for materials previously furnished the tenant, the purchaser, at sale on the mechanic's lien judgment, of the tenant's assumed leasehold interest, cannot, in ejectment against the landlord, question the latter's right under his judgment, though there were irregularities in entering the amicable action and confessing the judgment, and though the judgment has been opened to let the tenant into a defense; the judgment not having been wholly set aside, and possession ordered to be restored to the tenant.

Appeal from court of common pleas, Schuylkill county.

Ejectment by W. D. Seltzer against Isaachar Robbins and others, doing business as the National Polo Club. Judgment for plaintiff, and defendants appeal. Reversed.

M. M. Burke and John F. Whalen, for appellants. Wm. D. Seltzer and James Ryon, for appellee.

DEAN, J. On October 1, 1884, Isaachar Robbins let to Robert M. Neal certain lots in the borough of Shenandoah, by written agreement, for a term of five years, at an annual rental of \$150, payable monthly in advance. Neal took possession, and put up a roller skating rink, which he occupied for three months. There was a stipulation in the lease, accompanied by warrant of attorney to confess judgment, in ejectment, that, if the lessee made default in any payment of monthly rent for a period of 30 days, the lessor should have the right to confess judgment against the lessee, and resume possession of the premises under *habere facias possessionem*. Default in payment of rent being alleged by Robbins, on 12th of January, 1885, he instituted in the

common pleas an amicable action of ejectment, confessed judgment against Neal, and the sheriff redelivered to him possession of the premises, on which were a lot of roller skates owned by Neal. Prior to the judgment in ejectment, on December 8, 1884, David Williams filed a mechanic's lien for labor and material furnished in and about the erection of the building. On this lien he obtained judgment February 16, 1885, after the landlord had resumed possession for nonpayment of rent. On this judgment, execution was issued, and the assumed leasehold interest of Neal levied on and sold by the sheriff to W. D. Seltzer, this appellee, the sheriff executing to the purchaser a deed. On this deed, Seltzer brought ejectment against Robbins and others, doing business as the National Polo Club. At the trial, the value of the building at the end of the five years' term was claimed; also, the profits which might have been made during the term; also, the value of the roller skates. It will be noticed that each proposition is based on the assumption that Neal's leasehold interest remained the same as when he took possession under his contract with Robbins. The defendant contended that the property was not the subject of a mechanic's lien; and, further, that, Robbins having resumed possession, because of the tenant's default, before the sheriff's sale on the lien, the purchaser took nothing which would support an ejectment, or a recovery of mesne profits. The court ruled in plaintiff's favor on all three propositions, and there was a verdict against defendants for \$3,303.10. From judgment entered on this verdict, Robbins brings this appeal, preferring many assignments of error; but, in the view we take of the law, it is only necessary to notice the fifth, complaining of the refusal of the court to admit in evidence the record of the original judgment.

The written contract was put in evidence by plaintiff. Defendant, in answer, offered the records to show that possession was delivered to Robbins by the sheriff under a writ issued on a judgment in ejectment entered on the contract for default of lessee, and so was in possession when the writ in this suit was served upon him. The purpose was to show that Neal's right had ended before the sheriff's sale. On objection by plaintiff, the court rejected the testimony. This evidence was clearly admissible. We must take the written offer as the exact truth. If admitted, it would have shown a resumption of the possession by Robbins under the terms of his contract, before the sale on the mechanic's lien. The grounds on which the evidence was objected to were not sufficient to warrant its rejection. They, at most, aver irregularities in entering the amicable action, and confessing the judgment; but Robbins was put in possession under a formal writ issued on a judgment of a court having jurisdiction, and although afterwards the judgment was opened to let the defendant, Neal, into a defense, no

restitution of the premises was directed, and the court could not, in a collateral action between the purchaser on the mechanic's lien and the landlord, try the merits of an issue to open the judgment entered on the contract between the landlord and tenant. The mechanic's lien could bind only Neal's interest. That interest is measured by his contract. The record, if admitted, would have shown his interest had disappeared before the sheriff's sale. As long as the record stands with a judgment not set aside and writ upon it, by which Robbins holds possession, his right cannot be questioned in a collateral action between him and third parties. The evidence ought to have been admitted, and, if it had shown what it purports to show, that would have been the end of plaintiff's case, until Neal, in the original judgment, succeeded in having it wholly set aside, and the possession of the premises ordered restored to him. The judgment is reversed, and a venire facias de novo awarded.

HESS v. WILLIAMSPORT & N. B. R. CO.
(Supreme Court of Pennsylvania. May 27, 1897.)

RAILROADS — CROSSINGS — CONTRIBUTORY NEGLIGENCE — NEGATIVE AND POSITIVE EVIDENCE — INSTRUCTIONS.

1. In an action for death of one killed at a crossing by a backing engine and tender in the nighttime, the five persons on the locomotive testified that lights were displayed, bell rung, and whistle blown, while two witnesses walking along the track testified that they did not see the lights, or hear the bell or whistle. *Held*, that an instruction as to the relative values of positive and negative testimony, which stated merely that plaintiff's evidence was negative, and that "negative testimony of this kind has much less weight than positive testimony," was insufficient.

2. Where one killed at a crossing at night could, at any time after getting within 250 feet of the crossing, have seen the track on which a locomotive and tender were running backwards, he was shown guilty of contributory negligence in attempting to drive over the crossing, whether or not there were lights on the tender.

Appeal from court of common pleas, Lycoming county.

Action by Sarah Hess against the Williamsport & North Branch Railroad Company for the death of plaintiff's husband by defendant's negligence. From a judgment in favor of plaintiff, defendant appeals. Reversed.

The only instruction given relating to the relative values of positive and negative evidence was as follows: "On the part of the plaintiff a number of witnesses have been produced for the purpose of showing that there were no lights upon this engine or tender, that the whistle was not blown prior to the accident, and that no bell was rung. Most of the testimony of the plaintiff bearing upon this part of the case is what is called negative testimony,—that is, the witnesses testify that they did not see any lights upon the tender, that they did not hear any whistle, and they did not hear any ringing of the bell.

Negative testimony of this kind has much less weight than positive testimony."

Henry O. McCormick and Seth T. McCormick, for appellant. Wm. W. Hart and G. B. Metzger, for appellee.

DEAN, J. The defendant's employes, at about 8 o'clock in the evening of August 25, 1894, ran a locomotive and tender over the Philadelphia & Reading Railroad. There were upon the locomotive and tender a conductor, brakeman, engineer, fireman, and flagman. The locomotive was running at about the rate of 18 miles an hour, the tender in front, towards Montgomery station. About a mile from the station is a highway grade crossing, and on the crossing it collided with a two-horse lumber team, then being driven by James T. Hess, the husband of plaintiff, who was seated on top of his load. He was fatally injured by the collision, and plaintiff brought this suit for damages, averring the accident was the result of negligence of defendant in running the locomotive with speed, tender in front, and in not giving warning of its approach to the crossing. The court below submitted the evidence of defendant's negligence and contributory negligence on part of deceased to the jury, who found for plaintiff in the sum of \$10,000. We now have this appeal by defendant, assigning principally for error the refusal of the court to peremptorily instruct the jury that on the undisputed facts deceased was guilty of contributory negligence in using the crossing when the locomotive, in full view, was approaching it. On the undisputed facts, was deceased negligent? The five persons on the locomotive, whose duty it was to give warning, or see that it was given, each testified positively that lights were displayed, bell rung, and whistle blown on approaching the crossing. Two witnesses walking along the track testify negatively. They did not see the lights, nor hear bell or whistle. Although the decided weight of the evidence on this point was with defendant, we assume that there was more than a scintilla on part of plaintiff, for the learned judge of the court below, with the witnesses before him, thought so, and submitted the dispute on that evidence to the jury. His instructions, however, as to the relative value of positive and negative testimony, were very meager. They were inadequate, in view of the nature of the testimony, and in this particular, under the authority of *Urias v. Railroad Co.*, 152 Pa. St. 328, 25 Atl. 566, there was error.

But, under the authorities, how stands the case on other undisputed evidence? The highway, before it makes the crossing, runs almost parallel with the railroad for 150 feet, and then, in a distance of more than 100 feet additional, reaches the railroad track, where the collision occurred; and for this whole distance of more than 250 feet the railroad track on which the locomotive was coming was visible for nearly a mile. Assuming deceased

stopped, looked, and listened at any point of this 250 feet, he must have been apprised of the coming danger, and have been able to avoid it, if there was no insuperable obstacle to sight and sound. It is alleged, however, the night was dark, and he could not see the locomotive, because no lights were on the tender. But the locomotive headlight, with all its glare, was on the front of the engine. This light was reflected outside the rails on each side. The body of the engine could not obscure it entirely. The fires under the boilers were doing their work. The stroke of the lever was kept up. The exhaust of the engine did not cease. The rumbling of the wheels on the rails was not muffled. The undeniable fact is that there were sight and sound of this engine for half a mile before it reached the crossing. We say undeniable, because to deny it is out of accord with the proof and our observation and experience. We must, in the administration of justice, adopt that as truth which our ordinary senses demonstrate to be true. If this unfortunate man could see and hear,—which is not questioned,—then, before he drove on the track, he saw and heard this coming engine, and, miscalculating the speed of his own team as compared with that of the locomotive, met his death. The law calls this contributory negligence, and prohibits a recovery. "One who is struck by a moving train, which was plainly visible from the point he occupied, when it became his duty to stop, must be conclusively presumed to have disregarded that rule of law and of common prudence, and to have gone negligently into an obvious danger." *Myers v. Railroad Co.*, 150 Pa. St. 386, 24 Atl. 747; *Marland v. Railroad Co.*, 123 Pa. St. 487, 16 Atl. 624; *Gangawer v. Railroad Co.*, 168 Pa. St. 265, 32 Atl. 21. The judgment is reversed.

WILKINSON v. CHAMBERS.

(Supreme Court of Pennsylvania. May 27, 1897.)

WILLS—CONSTRUCTION—NATURE OF ESTATE.

1. A devise, "I give to my wife, * * * for a home, my undivided one-half interest in the real estate on which I now reside," vests in the devisee an estate in fee; there being no limitation over, and it appearing by other clauses that testator knew how to create a life estate when he so desired.

2. A clause authorizing the executors to sell or rent any property which testator possessed at his death applies only to property not specifically devised.

Appeal from court of common pleas, Chester county.

Ejectment by Edgar A. Wilkinson, administrator d. b. n., c. t. a., of John P. Wilkinson, deceased, against Anna T. Chambers. Judgment for defendant, and plaintiff appeals. Affirmed.

J. Carroll Hayes and Wm. M. Hayes, for appellant. Thomas W. Pierce, for appellee.

McCOLLUM, J. The decision of the question raised by the case stated depends upon the interpretation or construction of the will of John P. Wilkinson, deceased. The question is whether, under and by virtue of the will, his wife, Hannah A. Wilkinson, became at his death the owner in fee of the real estate in dispute. The plaintiff claims that the devise to her was of a life estate only, while the defendant, as devisee of all her estate, claims that it was of the fee. The devise in question is contained in item 2 of the will, and the operative words of it are, "I give to my wife, Hannah A. Wilkinson, for a home, my one-half undivided interest in the real estate on which I now reside." The description of the real estate which follows the operative words need not be inserted here. The claim of the plaintiff is based on the presence in the devise of the words, "for a home." Without these words, there would be no room for a contention respecting the nature of the estate devised. Do these words in the devise have the effect claimed for them? There is no provision in the will which strengthens the claim founded upon them. The authority given to the executor in item 3 cannot be construed as extending to and including lands specifically devised in items 2 and 5. A construction of it which would enable the executor to defeat specific devises of real estate cannot be sanctioned. The reasonable and proper construction of it is that which limits it to property not specifically disposed of by the will. This construction obviously accords with the intention of the testator in conferring the power to sell or lease. The claim that the wife took an estate in fee by the devise in item 2 has some support in the fact that there was no devise over. This is not necessarily a controlling fact, but it is entitled to consideration in ascertaining the testator's intention in disposing of the land in suit. That he knew how to create a life use of or in his property when he desired to do so clearly appears in item 7 of his will. The words "for a home," as used in the devise, were not sufficient to restrict it to a life estate. They do not qualify in any degree the absolute gift to the wife of all the testator's interest in the land described in item 2. This view of the case is not opposed to the decision in *Oyster v. Oyster*, 100 Pa. St. 538. In that case the testator devised land to his son "for his support," and then over to his children, who were to take as purchasers. The only question was whether the word "children," in the third clause of the will, was a word of limitation or of purchase. It was held to be a word of purchase, and, as a sequence, that the son took but a life estate in the land. The third clause of the will, standing alone, evidenced an intention to give a life estate to the son. It was construed as a whole, and the strongest, if not the only, indication of the intention was the limitation over which was included in it. *Oyster v. Knoll*, 137 Pa. St. 448, 20 Atl. 624, involved the construction of

a similar clause of the same will; and the decision in it accords with the decision in the preceding case, and rests upon substantially the same grounds. Upon due consideration of the language of the devise and of all the provisions of the will, we concur in the conclusion of the learned court below "that Hannah A. Wilkinson took an estate in fee simple in the real estate described in the second item of the will of John P. Wilkinson, deceased." It follows from this conclusion that judgment was properly entered for the defendant. Judgment affirmed.

DECKER v. LEHIGH VAL. R. CO.
(Supreme Court of Pennsylvania. May 27, 1897.)

RAILROADS—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

One about to drive over a railroad crossing must stop, look, and listen, and conditions which render the crossing dangerous do not authorize a departure from the rule.

Appeal from court of common pleas, Wyoming county.

Action by Cynthia Decker against the Lehigh Valley Railroad Company for the death of plaintiff's husband. From a judgment of compulsory nonsuit, plaintiff appeals. Affirmed.

Paul J. Sherwood and John A. Sittser, for appellant. F. W. Wheaton and C. E. Terry, for appellee.

MCCOLLUM, J. Between Main street and the crossing on which the plaintiff's husband received the injury that resulted in his death, the only place from which a train coming from the north could be seen for any appreciable distance was where Cron alley connected with Water street. It was therefore the place at which persons intending to drive across the railroad usually stopped, looked, and listened to ascertain whether a train was approaching from that direction. It was near the center of Water street, about 125 feet east of the railroad; and from it, according to the various estimates of the plaintiff's witnesses, a train coming from the north could be seen from a point from 600 to 1,200 feet above the crossing to a point from 200 to 400 feet above it. Unfortunately, the distance from the point where the train could be first seen to the point where it was lost sight of until it reached the crossing was not ascertained by actual measurement. Between Cron alley and the railroad there was no point from which a train coming from the north could be seen until the horses' front feet were on the track. But the conditions which render a crossing dangerous do not authorize a departure from the rule which requires a person approaching it to stop, look, and listen before driving upon it. The nonobservance of the rule is negli-

gence per se, and the cause of many casualties which adherence to it would have avoided. A relaxation of the rule through sympathy for those who suffer from the violation of it is not in the interest, or conducive to the security, of travelers on the highways which cross the railroads, or of travelers in the trains of the latter. On the contrary, a strict enforcement of the rule is promotive of the safety of both. In the case in hand the evidence is clear and convincing that the decedent did not stop, look, and listen at Cron alley, or at any place on Water street between Main street and the crossing, but that, without observance of the rule, he deliberately attempted to cross the track, and that the immediate consequence of his attempt was the collision in which he lost his life. To moderate the pace of his team on approaching the crossing was not compliance with the rule, nor in any sense an acceptable substitute for it. When near to the crossing he must have seen and heard what was clearly indicative of the approach of a train, namely, the lowering of the gates, and the ringing of the bells upon them. James Ehret and Joseph Hileman, who were in the office of the Farnham House, waiting for the train, heard the bells ring, and noticed that the gates were lowered from their upright position to an angle of 45° before the deceased passed under them. It is plain, therefore, that this warning of the approach of a train was disregarded by him. Henry B. Stark testified positively that the deceased did not stop at any place on Water street between Main street and the crossing. The attempt to discredit his testimony on the ground of a substantial difference between it and his testimony in the suit by the plaintiff against the Philadelphia & Reading Railroad Company for the same occurrence was a failure. It is obvious that there was no merit in the claim that the plaintiff was surprised by his testimony in this case, or that there was any material variance between it and his former testimony. The learned trial judge said in his opinion refusing to take off the nonsuit that Judge Rice held in the former case "that the evidence clearly established the fact that the deceased did not stop, look, and listen, as required to do." The testimony of Robert K. Hileman did not show that the deceased stopped, looked, and listened. The most that can be made of it is that he slackened the gait of his team when near to the crossing. As the evidence submitted by the plaintiff affirmatively shows that he did not comply with the rule prescribed for the government of persons about to drive across a railroad, there is no room for a presumption that he complied with it. No circumstances appear in the case to justify or excuse a departure from this rule. On the plaintiff's own showing, it was the duty of the court, on the motion of the defendant, to enter the nonsuit. Judgment affirmed.

MAHER v. PHILADELPHIA TRACTION CO.

(Supreme Court of Pennsylvania. May 27, 1897.)

PERSONAL INJURIES—DEATH OF PLAINTIFF—SUBSTITUTION OF ADMINISTRATOR—MEASURE OF DAMAGES.

1. Act April 15, 1851, § 18, declaring that no action to recover damages for injuries to the person shall abate by reason of the death of the plaintiff, but the personal representative of the deceased may prosecute the suit to final judgment, has never been repealed or modified, and the administrator may continue the suit, though plaintiff's death resulted from the injury sued for.

2. In such action the administrator may recover damages for the mental and physical suffering of decedent up to the time of her death, and for diminution of earning power during a period of life which she would probably have lived had the accident not occurred.

Appeal from court of common pleas, Philadelphia county.

Action by Agnes Maher, by her father and next friend, against the Philadelphia Traction Company. Plaintiff died pending suit, and her father, John Maher, as administrator, was substituted as plaintiff, and from a judgment in his favor defendant appeals. Affirmed.

J. Howard Gendell, for appellant. A. S. L. Shields, for appellee.

STERRETT, C. J. This action of trespass in the name of Agnes Maher, by her father and next friend, was brought to March term, 1894, to recover damages for injuries to the plaintiff's person, alleged to have been caused by the negligence of defendant company. The injuries having resulted in plaintiff's death on October 30, 1894, after the cause was at issue, her personal representative was afterwards duly substituted as plaintiff, under the act of April 15, 1851, and article 3, § 21, of the constitution, as construed by this court in *Birch v. Railroad Co.*, 165 Pa. St. 339, 30 Atl. 826. The latter declares that, in case of death from such personal injuries, "the right of action shall survive, and the general assembly shall prescribe for whose benefit such action shall be prosecuted"; and the eighteenth section of the former provides that no action thereafter brought, "to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representative of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction." In *Birch v. Railroad Co.*, supra, we held that this provision of the act of 1851 has not been, either expressly or by implication, repealed or modified by subsequent legislation; and we have no reason now to doubt the soundness of that conclusion. Following in the line of that case, we have since held that the amount recovered in such cases is personal estate of the deceased, and, as such, is distributable first to the payment of debts, etc., if any. In *re Taylor's Estate*, 179 Pa. St. 254, 36 Atl. 230.

On the trial, the testimony as to defendant company's negligence was more or less conflicting. Without specially referring to or attempting to summarize the testimony on either side, it is quite sufficient to say that, if the evidence relied on by the plaintiff was believed by the jury, they were clearly warranted in finding against the defendant. On the other hand, if they believed the evidence of defendant's witnesses, of which its first and second points for charge are predicated, they would have been justified in finding for defendant. In brief, the case depended on controverted questions of fact, which the jury alone could legally determine. It was accordingly submitted to them by the learned president of the common pleas in a clear and adequate charge, which appears to be free from substantial error.

It does not appear that any points for charge were submitted by the plaintiff, but on behalf of the defendant the learned court was requested to charge: "(1) If the jury believe from the evidence that the child, unexpectedly and without warning, ran from the pavement in front of the moving car, and the motorman did not see it in time to avert the accident, there can be no recovery, and the verdict should be for the defendant. (2) The mere fact of the injury and death of the child raises no presumption of negligence against the defendant company, and if the jury believe from the evidence that the motorman was attending to his business, and did not see the child in time to avert the accident, the verdict should be for the defendant. (3) Under all the evidence, the verdict should be for the defendant." The first and second of these requests for instruction were withdrawn by defendant's counsel. The third was refused, and his exception thereto constitutes the subject of complaint in the first and second specifications. A careful examination of the testimony has convinced us that the first specification cannot be sustained. In view of the evidence tending to establish the fact of defendant company's negligence, it would have been manifest error in the court to have withdrawn the case from the jury, by directing a verdict for defendant, as requested in its third point. Again, the point just referred to was never intended to raise the question that is now ingeniously claimed to be involved in the third specification of error; but assuming, for argument's sake, that it was so intended, there is no merit in the defendant's contention. As we have already seen, upon the death of the plaintiff, and suggestion thereof to the court, her administrator was rightly substituted as plaintiff; and, as such, he had an undoubted right to prosecute the suit commenced by her "to final judgment and satisfaction." It is our purpose to adhere to our recent ruling in *Birch v. Railroad Co.*, supra.

The third and last specification alleges error in part of the learned judge's charge on the subject of damages. It does not appear that any exception was taken to the charge,

but the appellee has not interposed any objection on that ground. We therefore treat the specification as valid, and proceed to consider its effect. Inasmuch as no instruction was asked on the subject of damages, the question is not whether fuller instructions might not have aided the jury in arriving at a correct conclusion, but whether those given were inadequate to furnish a proper measure or standard, or were positively misleading. We are not prepared to say that they were either. As the action had been brought in the lifetime of the injured party, and had survived by virtue of section 18 of the act of 1851, it logically follows that the damages recoverable by her personal representative should be the same as she could have recovered had death not ensued. Included therein are damages for pain and suffering up to the time of her death, and diminution of earning power during a period of life which she would have probably lived had the accident not happened. It is a mistake to suppose that the recovery in this case is for the death. It is still for the personal injury. In *Moe v. Smiley*, 125 Pa. St. 141, 17 Atl. 229, Mr. Chief Justice Paxson, speaking of the act of 1851, says: "It is idle to say that, when a man is killed by unlawful violence, it is not an injury to his person." One element of the injury in such case is the total impairment of the earning power, placed beyond the possibility of doubt by the death, and hence a simpler problem for the jury; but the measure of damages therefor is the same as if the party had survived. The language of the court below on this point was used by way of illustration, and indicated the measure of damages with sufficient accuracy. In *Railroad Co. v. Zebe*, 83 Pa. St. 318, Mr. Justice Thompson, at page 329, referring to the case of *Railroad Co. v. McCloskey's Adm'r*, 23 Pa. St. 526, says: "While it adheres to the rule of giving damages only upon such bases as are susceptible of a pecuniary estimate, it seems to regard the value of the life lost as the basis of the estimate, rather than the injury resulting from it to the survivor entitled to sue. This conclusion flowed from the form of and parties to the action, and naturally led to the result. It was a suit by the personal representatives, for the benefit of the estate. Treated in this light, and as the plaintiffs (the administrators) were not damaged by the death, but were recovering for the estate, the only estimate, it seems to me, that could be made, was of the value of the life. The wrong done to it survived, by virtue of the statute, to the estate, and gave the personal representatives their right of recovery co-extensively with its value." In an action that has survived to and is prosecuted by the personal representative, under the statute, there can, doubtless, be a recovery, not only for mental and physical suffering of the injured decedent, but also for the value of his life. This necessarily follows from the fact that the action brought by him survived to

and is prosecuted by his personal representative. It was so decided in *Muldowney v. Railway Co.*, 36 Iowa, 462; and the reason why it was held otherwise by the English courts is (as stated in the early case of *Blake v. Railway Co.*, 10 Eng. Law & Eq. 437) because the English act "does not transfer this right of action to his representative, but gives to his representative a totally new right of action on different principles." With us, however, the right to recover a solatium necessarily follows from the fact that the action, as brought by the injured party, is continued by the statute. We find nothing in the record that would justify us in sustaining either of the specifications. They are therefore overruled, and the judgment is affirmed.

BATTERSBY v. CASTOR.

(Supreme Court of Pennsylvania. May 31, 1897.)

WILLS—POWER TO SELL REAL ESTATE — DISCRETION OF EXECUTORS—DEBTS—LIEN ON REAL ESTATE—LIMITATIONS.

1. Where executors, authorized by the will to sell testator's real estate "when they should deem it for the best interest" of the widow and children, decided not to sell a certain tract, and the children, who were entitled to the residue of the estate when the youngest became of age, conveyed their interest in said tract, after their majority, to the widow, her grantee acquired a valid title, as against an executor whose lien on the real estate for the payment of a debt due him had expired by lapse of time.

2. An adjudication confirming the account of an executor, showing a balance due him from the estate, does not charge the land with its payment, where the lien of the debt was lost before the account was filed.

Appeal from court of common pleas, Philadelphia county.

Ejectment by Levi Battersby against Frank R. Castor. Allen Waters, as landlord, was permitted to intervene as defendant, and from a judgment for said defendants the plaintiff appeals. Affirmed.

That portion of testator's will disposing of his real estate is as follows: "And to such real estate as it hath pleased Almighty God to intrust me with, I dispose of the same as follows, viz.: I order and direct my hereinafter-named executors, to wit, my beloved wife, Mary Ann, and my esteemed friend, Levi Battersby, to have sole charge and the disposal of the same for the benefit of herself and my beloved children as they, in their judgment, deem best; and when they should deem it for the best interest of them, my said wife and children, then I order and direct them, my executors, or the survivor of them, to sell all my real estate, either at public or private sale, for the best price or prices that may reasonably be gotten for the same; and I do hereby authorize and empower my said executors, or the survivor of them, to sign, seal, execute, and deliver to the purchaser or purchasers thereof good and sufficient deed or deeds of conveyance for the same, in fee simple, with-

out any liability on the part of the purchaser or purchasers thereof as to the application, nonapplication, or misapplication of the purchase money, and the net proceeds of such sale or sales to invest in good and sufficient securities as they, in their best judgment, may direct, and, when my youngest child shall arrive at the age of twenty-one years, then to divide all the residue and remainder of my estate to and among my beloved children, to wit, Mary Agnes, Annie, John C., and Fanny, equally, share and share alike."

William Embery and Jos. R. Embery, for appellant. J. Howard Morrison and Joseph Ball, for appellee.

MCCOLLUM, J. Benjamin S. Haigh died in June, 1871, testate, leaving to survive him his wife and four children. By his will, executed in May and proven in July of that year, he appointed his wife and the plaintiff in this suit his executors, with power to sell his real estate. They sold the farm, but did not deem it for the best interest of the wife and children to sell the land now in dispute. As the children came of age, they conveyed their interests in this land to their mother, who on the 20th of April, 1892, sold and conveyed the same to Allen Waters for the consideration or sum of \$1,000, the payment of which was acknowledged in the body of the deed, and in the grantor's receipt indorsed thereon and signed by her in the presence of two witnesses. Waters has the title thus conveyed to him, and Castor, who is in possession of the land, and against whom this suit was brought, is his tenant.

The plaintiff in November, 1886, filed in the orphans' court his account as executor, which was confirmed finally in January, 1887. The account so confirmed showed a balance in his favor of \$907. On the 8th of December, 1894, the orphans' court, on his petition, ordered that a writ of fieri facias issue for the collection of this balance. The writ was issued, and returned levied on the land in question. On the 4th of June the same court, on the petition of the same party, ordered that a writ of venditioni exponas issue to sell the land, and on this writ the land was sold to the plaintiff on the 1st of July, 1895, for \$50; and he, having received a sheriff's deed for the same, brought this action for the possession of it. He contends that by the final confirmation of his account, and the proceedings had upon it, as we have detailed them, he has acquired a valid title to the land. He also contends that Waters acquired no interest in it by the deed of April 20, 1892. He seems to base the latter contention on the will, which he claims vested the title to all the real estate in the executors. It is true that the executors were authorized by the will to sell the real estate, and to convey the same to the purchaser or purchasers of it. The power thus given was a discretionary power, which did not, by itself, convert the realty into personalty. It was never exercised upon the land in question. A sale of this land

was not deemed by the executors for the best interest of the testator's wife and children. It was not, therefore, made. It is 26 years since the death of the testator, and 8 years past the time appointed by him for the division of the remainder of the estate among his children. After the youngest child came of age, they were entitled by the terms of the will to the remainder of the estate, which was the land in suit. They conveyed their interests in it to their mother, and she, as we have seen, conveyed it to Waters. By the deeds from the children she acquired a title to the land which the plaintiff, her co-executor, cannot defeat by the exercise of any power given by the will. This title passed to her grantee by the deed of April 20, 1892. It is a valid title against the plaintiff, if it was not divested by the sale on his claim against the estate. The account shows the nature of the claim on which the land was sold. From it we learn that every item of it on the credit side, except one, was paid prior to July, 1873, and that the excepted item represents cash paid to a doctor on the 12th of March, 1884. There is nothing on the face of it to justify an inference that a single item of it was a lien on the land when it was filed. If there was a judgment against the decedent, it was a lien on the farm which the executors sold to Eastburn, and was presumably paid from the proceeds of the sale of it. Presumably, too, the necessary expenses of administration, including reasonable compensation for the services of the executor, were paid from the general assets. These inferences or presumptions are not rebutted by the account or the testimony of the plaintiff. The confirmation of the account did not create a lien on the real estate. It was an adjudication that the account, as stated, was correct, and that the balance shown by it was due from the decedent's estate to the accountant. The existence of the debt, and the liability of the land for it, were distinct matters. If the lien of the debt on the land was lost before the account which was adjudicated was filed, the adjudication did not charge the land with it. In a suit against an executor on a note of the decedent not barred by the statute of limitations, there may be a recovery, although the lien on the land of the debt represented by it was extinguished by the act of February 24, 1834, before the suit was brought. In such case the judgment obtained in the suit is not a lien on the land. According to the testimony of the plaintiff, the balance shown by his account represents money he loaned to the decedent, and money he paid to other creditors of the estate in satisfaction of their claims. He therefore had the rights of a general creditor, who loses his lien on the real estate of the decedent at the expiration of five years from his death, if the provisions of the act of 1834 in regard to the preservation and continuance of it are not complied with. See *Rees v. Wildman* (Pa. Sup.; decided at Pittsburg last term) 35 Atl. 1047, and cases cited therein. The argument that the lien of

the debts was preserved by the will, without limit as to time, has nothing tangible to support it. A sufficient answer to it will be found in *Trinity Church v. Watson*, 50 Pa. St. 518. Judgment affirmed.

HUNTSINGER v. TREXLER et al.

(Supreme Court of Pennsylvania. May 27, 1897.)

MASTER AND SERVANT—INCOMPETENCY OF FELLOW SERVANT—INSTRUCTION.

Where there was evidence that plaintiff's injury was caused by the incompetency of a fellow servant, and that such incompetency was, or ought to have been, known to defendants when they employed him, a direction to find for defendants was properly refused.

Appeal from court of common pleas, Sullivan county.

Action by Lewis Huntsinger against E. G. Trexler and others, partners trading as the Trexler & Turrell Lumber Company, to recover for personal injuries. From a judgment for plaintiff, defendants appeal. Affirmed.

J. G. Scouten, R. J. Thomson, T. J. & F. H. Ingham, and Henry Streeter, for appellants. D. C. De Witt, John H. Cronin, and Alphonse Walsh, for appellee.

STERRETT, C. J. The only error assigned by the defendants is the refusal of the learned trial judge to withdraw the case from the jury by instructing them, in the language of their point, "that under all the evidence in this case the verdict must be for the defendants." In view of the testimony properly before the jury, it would have been manifest error to have thus instructed them. It was claimed by the plaintiff that the proximate cause of the collision in which he was injured was not the negligence, properly speaking, of George Brockham, the conductor of defendants' "log train," but his manifest unskillfulness, inexperience, and incompetency for the position of conductor of any train; and testimony tending not only to prove the fact of his incompetency, etc., but that the defendants, with full knowledge of the facts, employed and put him in charge of the train, etc., was introduced. If this testimony was believed by the jury, it is impossible to conceive how, under the charge, they could have done otherwise than find as they did. The plaintiff's contention in that regard was fairly and adequately presented to the jury by the learned judge, who instructed them that if Brockham's omission to protect the "log train," of which he was conductor, against the approaching train, of the coming of which he had been duly notified, was because of his incompetency and want of skill, "because he did not know any better, and did not know how to perform his duties, and thereby injury occurred, then, if the defendants were negligent in employing this man and putting him in the position that they did, the plaintiff

would have a right to recover." On the other hand, "if the injury was occasioned, not by his want of skill, but by his disregard of his knowledge in the matter, by his disregarding his own knowledge and what he ought to do under the circumstances, or in taking the risk and hazard upon himself, then that would be the negligence of a co-employé, for which the plaintiff could not recover." In affirming defendants' third point, he also instructed them to the same effect, thus: "The plaintiff must prove affirmatively that the cause of the accident resulting in his injury was the result of some negligent act or omission of the fellow servant, Brockham, and that Brockham was an incompetent servant for the duties he had to perform, and that the fact of his incompetency was known to the defendants when he was employed, or that it ought to have been known to them," etc. It requires neither argument nor citation of authority to show the substantial accuracy of the learned judge's instructions on this vital point in the plaintiff's case, nor is it necessary to refer specially to the testimony for the purpose of showing that such instruction was fully warranted. It is sufficient to say that the testimony before the jury tended strongly to show that Brockham was a manifestly incompetent servant for the duties he had to perform, and that the fact of his incompetency was known, or ought to have been known, to the defendants when they employed him as conductor, and put him in charge of their log train. The verdict is necessarily and properly predicated of a finding by the jury of all the facts required to justify a recovery by the plaintiff. There is nothing in the case that requires further elaboration. Judgment affirmed.

WOLF v. AUGUSTINE.

(Supreme Court of Pennsylvania. June 2, 1897.)

ARBITRATION—VACANCY.

Where a submission to arbitration makes no provision for filling vacancies, the occurrence of a vacancy revokes the submission, and it fails: the court having no power to compel the selection of other arbitrators.

Appeal from court of common pleas, Fayette county.

Amicable arbitration between Joseph Wolf and Jasper Augustine. Rule by defendant to discharge and annul the rule of the court to arbitrate was made absolute, and plaintiff appeals. Affirmed.

The opinion of the court below is as follows:

"The parties to the above action submitted all matters in controversy between them to arbitration by the following agreement under their hands and seals: 'And now, to wit, February 16, 1895, said Joseph Wolf and Jasper Augustine agree to submit all matters, including sales of land, equity suits, judgments, contentions about personal property, and all other controversies between them, of whatsoever

kind, to J. V. Thompson and A. D. Boyd, mutually chosen by them. Their award or umpirage shall be made or decided according to real equity and justice, as shall be shown by the facts submitted to them. They furthermore agree that their submission to said award or umpirage shall be made a rule of or in court, and hereby respectively bind themselves to submit to, and be finally concluded by, the award or umpirage of said referees or arbitrators, or a majority of them. If any balance shall be found against said Wolf, all judgments in controversy in this case shall be satisfied, or caused to be satisfied, by said Augustine, and the lien of said award shall be confined to only such one or more than one tracts of real estate of said Wolf as shall be necessary to secure the amount of the award so found. In case of disagreement between the parties hereto as to what real estate shall be bound by said award or lien, the arbitrators shall decide. If the arbitrators, under the evidence submitted, so decide, said Wolf shall convey back to said Augustine, with as good title and as clear of incumbrances as when he obtained them, all, or part of all, lands conveyed by Augustine to Wolf, and shall return to said Augustine all personal property in controversy, or its equivalent, as arbitrators shall decide. If the arbitrators, under the evidence submitted, so decide, said Augustine shall convey back to said Wolf, with as good title and as clear of incumbrances as when he obtained them, all, or part of all, lands conveyed by Wolf to said Augustine, and shall return to said Wolf all property in controversy, or its equivalent, as arbitrators shall decide. If said two arbitrators cannot agree, they shall appoint a third arbitrator. And the parties hereto bind themselves, their heirs, executors, and administrators, to each other, in the penal sum of forty thousand dollars, conditioned to abide by, be bound by, and to carry into effect the award or finding of said arbitrators, or a majority of them. This includes the Ross Augustine property.' This submission was filed in the prothonotary's office on February 18, 1895, in the above-entitled action. On the 13th day of April, 1896, the defendant presented his petition to court, and after setting forth the submission, and that it had been made a rule of court, averred, *inter alia*, that it was the expectation that Thompson and Boyd would undertake the duties of their appointment, and, if necessary, agree upon an umpire; that Mr. Boyd, one of the arbitrators named in the submission, had refused, and still does refuse, to act in that capacity, and that the parties had endeavored, but were unable, to agree on another arbitrator who would accept; and that Mr. Wolf would agree to no substitution for Boyd,—and praying the court to grant a rule on the plaintiff to show cause why said rule of court to arbitrate should not be discharged and annulled, and the proceedings thereunder dismissed. The rule was granted as prayed for. To this petition and rule the plaintiff filed an answer. It admits the submission, but de-

nies that there was any understanding that the two arbitrators chosen should serve. It avers, *inter alia*, that said Boyd, as attorney for Augustine, long after the execution of the submission, prepared an answer to a bill in equity filed in this court by Wolf against Augustine and others, in which answer, sworn to by Augustine, this submission was set up as a defense to said suit in equity, and as a reason why the same was withdrawn and should be dismissed; that, by reason of the preparation and filing of said answer, Augustine and Boyd are legally estopped from alleging that Boyd did not agree to act as one of the arbitrators, and especially from alleging that the submission was contingent upon Thompson and Boyd accepting the position of arbitrators; that it is denied that the parties cannot agree upon an arbitrator under the terms of the submission, for the reason that Wolf is willing to concede to Augustine the right to select an arbitrator instead of Mr. Boyd. It is further averred in the answer that the submission is a contract with a consideration, and irrevocable by either party, and that the court has no jurisdiction in the premises to discharge or annul the rule of court to arbitrate.

"Both parties have taken testimony, and on it, the record, petition, and answer, the matter must be determined. There is nothing in the testimony that would warrant us in finding that Mr. Boyd accepted the position of arbitrator. It may be conceded that he did not at once, nor for some time after his appointment, refuse to act, but he was not compelled to do so. Until he accepted, he could decline, and no length of time of itself could estop him from refusing to perform the duties of his appointment. Nor would the fact that he, as attorney for Augustine, prepared the answer in equity, compel him to act, or estop him from refusing to act. His position as arbitrator mutually chosen by the parties in the case must be distinguished from that as counsel for Augustine in the other case. Unless there was collusion or fraud between him and Augustine,—of which there is no evidence,—Mr. Boyd's professional services in the preparation of the answer in the equity suit cannot control his action, individually, in accepting or declining the position of arbitrator in this case. Nor can we agree with the plaintiff that Augustine is estopped from alleging or setting up Boyd's refusal to act. At the time the answer in the equity suit was prepared, Augustine, without consulting Boyd, may have thought that Boyd would act as an arbitrator. If, as he did, Boyd subsequently declined, Augustine should not be prohibited from alleging the fact as a reason for the revocation of the submission. It may well be, and presumably is, the fact that Augustine reposed special confidence in Mr. Boyd's ability to protect and secure his interests under this submission, and that he is unwilling to trust those interests, under this agreement, to another person. We agree with the counsel for plaintiff that this submission is not revocable

by either of the parties to it. If this were the only or controlling question in this case, the solution of it must result in a decision favorable to the plaintiff. While it is true that a naked power to submit controversies to arbitration is revocable, it is equally well settled that when the agreement partakes of the nature of a contract whereby important rights are gained and lost reciprocally, and the submission is the moving consideration to these acts, a different rule prevails. *Paist v. Caldwell*, 75 Pa. St. 166. Such is the character of this submission, and hence it is irrevocable by either party. But another question arises here. From the testimony submitted, we find that Mr. Boyd refused to accept and act as one of the two arbitrators mutually chosen by the parties to this contract. We know of no authority in the court to compel him to act. Has the court the authority, under this submission, to compel Mr. Augustine, or him and Mr. Wolf, to select another arbitrator to act in Mr. Boyd's place, or, he and they failing or refusing, to appoint an arbitrator for that purpose? That, in our opinion, is the question to be determined. By this submission the parties have contracted to have their differences settled by Mr. Thompson and Mr. Boyd, and, should they fail to agree, a third party is to be chosen by these two. The terms of this submission must control the court and the parties. There is no provision in it for filling a vacancy in this tribunal, whether occasioned by death or refusal to act of one or both of the arbitrators. The statute does not provide for filling such vacancy. Where no provision is made in the submission, it is settled that a vacancy by death in the board of arbitrators amicably chosen revokes the submission. *Huggins v. Nell*, Super. Ct. 106; *Potter v. Sterrett*, 24 Pa. St. 411. In this latter case the supreme court says: 'A submission to arbitration is like a delegation of any other power. Neither an agent or an arbitrator can delegate his power, unless expressly authorized by his constituents. An authority given to two cannot be executed by one, although the other die or refuse; nor, if given to three, can it be executed by two, although the three be authorized to act jointly and severally. A power is terminated by the death either of the party receiving it, or of the party conferring it.' We are unable to see the difference in a vacancy in a board of arbitrators caused by death, and one occasioned by the refusal to act of the arbitrator. The effect is the same, namely, to deprive the parties of the tribunal created by them for the adjustment of their differences. Unless specially provided in the submission, the remaining arbitrator cannot fill the vacancy. That power exists solely in the parties, and, if they refuse, the submission is revoked and the arbitration is at an end. It is not alleged that there was any collusion between Mr. Boyd and Augustine to revoke this submission. So far as the testimony discloses, Mr. Boyd, in declining to accept the appointment, has acted from mo-

tives of his own, without regard to the wishes of Augustine in the matter. Entertaining the views above expressed, we will make this rule absolute, and annul or rescind the rule of court to arbitrate."

W. J. Baer, L. K. & S. G. Porter, and Lindsey & Johnson, for appellant. S. E. Ewing and Boyd & Umbel, for appellee.

PER CURIAM. It is very clear that, where the submission makes no provision for filling vacancies in the board of arbitration, the occurrence of a vacancy, by death or otherwise, revokes the submission. In such circumstance the court possesses no power to compel the parties to select other arbitrators. The submission necessarily falls. The learned court below was certainly right in making absolute the rule to show cause why the rule to arbitrate should not be discharged and the proceedings thereunder dismissed, and the reasons for their action are very well set forth in the opinion filed, which we fully approve. Judgment affirmed.

In re HUBERT'S ESTATE.

Appeal of WIDMEYER.

(Supreme Court of Pennsylvania. May 27, 1897.)

WILLS—RIGHTS OF DEVISEE—CONVERSION.

Under a will giving the enjoyment of testator's real estate to his unmarried daughter in case she survive his wife, so long as she remains single, it, in case of her marriage or death, to be sold, and distributed among all his children, balance of proceeds of the real estate sold to pay debts of the estate should not be at once distributed among testator's children, but should be invested, and interest paid to said daughter, she having survived her mother, for life or until she marry.

Appeal from orphans' court, Lancaster county.

In the matter of the estate of William Hubert, deceased. From a decree confirming report of auditor appointed to distribute balance remaining in hands of William F. Hubert, administrator of deceased, Mary A. Widmeyer appeals. Affirmed.

The report of the auditor is as follows: "William Hubert, the decedent, died on March 24, 1896, having made a will dated July 1, 1890, which was duly proved on October 25, 1893. The will is apparently in decedent's own handwriting, and is very short, and crudely drawn. By reason of the imperfect spelling and poor penmanship it is somewhat difficult to decipher. A careful examination, however, satisfies the auditor that a correct reading of the instrument is as follows: 'Lancaster, July the 1st, 1890. I, William Hubert, do now make my last will, that after my death that all my real estate I will all to my wife, Sophia Hubert, that she can do as she sees best. My daughter, Sallie Hubert, if she should live longer than her mother, she shall

have as long she remains single, but if gets married it shall be sold and equal share—first there shall be a tombstone for both. William Hubert. Witness: John Trissler.' Letters of administration, with the will annexed, were granted to William T. Hubert, son of the deceased, the present accountant, who, on November 20, 1898, presented his petition to the orphans' court of Lancaster county, setting forth, among other things, that the testator left personal property worth about one hundred dollars, and a dwelling house and lot of ground on the north side of West Orange street, No. 231, containing in front fourteen feet and ten inches and in depth two hundred and forty-five feet; that the personal property was insufficient to pay his debts; and praying for an order of court to sell said real estate for payment of debts. An order of sale was granted by the court as prayed for, and the real estate was sold. The testator owned no other real estate. Sophia Hubert, the testator's widow, is dead, and the surviving heirs are William T. Hubert, the accountant, a son of decedent; Mrs. Kate Martin, Mrs. Mary Widmeyer, and Sallie Hubert, daughters of the decedent; and Mrs. Carrie Bitter, Mary Bowman, Hattie Bowman, William Bowman, and Daisy Bowman, children of Mrs. Hattie Bowman, a deceased daughter of said William Hubert. An account was filed by William T. Hubert on May 19, 1894, in which he charges himself with proceeds of real estate, \$2,350, and asks credit for debts and funeral expenses and expenses of administration paid to the amount of \$618.74; leaving a balance in his hands of \$1,731.26. This balance, which, it is to be observed, is wholly the proceeds of real estate, is the fund to be distributed. There were no claims presented by creditors, and the whole balance, less costs of audit, is therefore to be distributed among the legatees. Sallie Hubert claims that under her father's will she has a life estate in the fund so long as she remains unmarried, and asks to have it invested for her benefit. The remaining children and grandchildren contend that the fund in the hands of the accountant is to be distributed among all the heirs according to the provision of the intestate laws. The sale for payment of debts, it is claimed, worked a conversion of the real estate into personalty, and requires a distribution of the surplus, and in support of this contention their counsel cites *Grider v. McClay*, 11 Serg. & R. 224; *Dyer v. Cornell*, 4 Pa. St. 359; *Pennell's Appeal*, 20 Pa. St. 517; *Large's Appeal*, 54 Pa. St. 385; *Fahnestock v. Fahnestock* (Pa. Sup.) 25 Atl. 313; *Darlington v. Darlington* (Pa. Sup.) 28 Atl. 503; *Laughlin's Estate*, 131 Pa. St. 333, 18 Atl. 877. These cases do undoubtedly prove that the surplus money arising from the sale of land under orphans' court proceedings is, as a rule, to be considered as money, and descends as such, and not as land, but none of the cases cited, in the opinion of the auditor, establishes the principle that the necessary sale for the payment

of debts, of property devised by a testator to a particular heir or devisee, will deprive such heir or devisee of the enjoyment of any surplus of the proceeds that may remain. The law makes the claim of creditors superior to those of devisees, and, where no provision is made by the testator for the payment of debts, the law steps in, and requires that testamentary dispositions of property shall be void so far, and only so far, as may be necessary in order that the creditors may be satisfied; and, if the will be a valid one, the distribution of the balance must be in accordance with its provisions. In the judgment of the auditor, William Hubert, in his will, expressed with sufficient clearness his intention that his daughter Sallie, if she survived her mother, should enjoy his estate so long as she remains single; in case of her marriage or death it shall be distributed among all his children in equal shares. His object evidently was to provide for his unmarried daughter, who, after the death of himself and his wife, would have no one to provide for her. And while that intention is to some extent interfered with by the paramount claims of creditors, requiring a conversion of the real estate into money, we fail to see any good reason why it should not be carried into effect, so far as circumstances permit, by giving the daughter the enjoyment of the surplus until the contingency shall arise, upon which the testator directed that a distribution should be made. The balance in hands of accountant, after payment of costs of audit, is therefore ordered to be invested under the direction of the orphans' court of Lancaster county, the interest or income thereof to be paid annually to Sallie Hubert during her natural life, if she remains unmarried, and upon her death or marriage the principal to be distributed among all the children of William Hubert and their heirs per stirpes."

A. C. Reinöhl, for appellant. Brown & Hensel, for appellee.

PER CURIAM. The fund for distribution represents the net balance of proceeds of testator's real estate sold by order of court for payment of debts. The question was whether it should be presently distributed, or invested under the direction of the orphans' court during the lifetime of testator's daughter Sallie. If she so long remains unmarried, and the interest paid to her, etc., and upon her death or marriage the principal distributed according to her father's will. The learned auditor held that a proper construction of the will required that the fund should be thus invested. Exceptions to his report were overruled by the court below, and the report confirmed absolutely; hence this appeal.

We are satisfied the court was clearly right in dismissing the exceptions and confirming the report. The will was rightly construed by the auditor, and for reasons given by him the decree should not be disturbed. There is

nothing in the specifications of error that requires discussion. Decree affirmed, and appeal dismissed, at appellant's costs.

**STATE (WEST JERSEY TRACTION CO.,
Prosecutor) v. BOARD OF PUBLIC
WORKS OF CITY OF CAMDEN et al.**

(Supreme Court of New Jersey. Feb., 1896.)
**STREET RAILROADS — FRANCHISES — MUNICIPAL
CORPORATIONS — RESOLUTIONS — CONTEMPT.**

1. Under Supp. Revision, p. 369, § 30, providing that no street-railroad company may use electricity as the propelling power of its trains without having first obtained the consent of the municipal authorities having charge of the streets; and 3 Gen. St. p. 3231, prohibiting any such company from constructing its tracks on any street, without first obtaining such consent,—a "resolution" purporting to give such consent is a nullity.

2. Pending a writ of certiorari to test the validity of a city ordinance purporting to grant to a street-railroad company power to use for its purposes the streets of the city, and to use electricity as the propelling power of its cars, in which proceeding the company appeared for the purpose of upholding the ordinance, the company proceeded, in evasion of the restraining force of the writ, and under color of the advice of counsel, to lay down its tracks under and by virtue of a "resolution" of the board of public works which had preceded the ordinance. *Held*, that the company, by reason of thus proceeding, was in contempt.

Certiorari by the state, at the prosecution of the West Jersey Traction Company, against the board of public works of the city of Camden and the Camden Horse-Railroad Company, to review an ordinance. Rule that the company show cause in the matter of contempt, in an attempted evasion of the restraining force of said writ.

Argued November term, 1895, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Thomas E. French and Samuel H. Grey, for rule. David J. Pancoast, opposed.

DEPUE, J. The Camden Horse-Railroad Company was incorporated by a charter granted in 1866 (P. L. 1866, p. 640). Supplements to its charter were passed in 1868 (P. L. 1868, p. 512), and in 1872 (P. L. 1872, p. 638). The company, by its charter, was a horse-railroad company, having its location in the city of Camden. By its charter it had no power to use electricity as the propelling power of its cars. Such authority could only be obtained in conformity with the provisions of the act of 1886 (Supp. Revision, p. 369, § 30). And by an act approved March 9, 1893 (3 Gen. St. p. 3231), it was made unlawful for any horse or street-railway company organized under the general law providing for the incorporation of such companies, or under any special or local act of incorporation, to lay or construct any railroad track or tracks, or any extension of the same, through or along any street of any municipality of this state, without first obtaining the consent of the governing body having the control of the public streets, avenues, or roads of such municipality. On the 4th of

May, 1893, the company procured the adoption by the board of public works of the city of Camden of a resolution "that permission be, and the same is hereby, given to the Camden Horse-Railroad Company to lay and construct its railroad in accordance with its charter in the city of Camden." This resolution was plainly a nullity. *Halsey v. City of Newark*, 54 N. J. Law, 102, 23 Atl. 284.

To effectuate the purposes of the company, an ordinance of the board of public works was procured. This ordinance was passed June 19, 1893. It recited the fact of the passage of the resolution above stated, and that it had been suggested that the consent thereby given should have been by ordinance, and that the company "now having made application for the privilege of using electric motors to propel its cars, and erecting poles and stringing wires thereon for the purpose of supplying electricity, and this board being willing to confirm the aforesaid grant, and to grant such privilege." The ordinance, in section 1, confirmed the consent given by the resolution, and granted to the company the right and power to use for its purposes each and every street and highway in the city. By the second section, the company was authorized to use electric motors as the propelling power of its cars upon any of its railway tracks that were then laid or constructed in the city, or that might thereafter be laid, and to erect poles and string wires thereon to supply electricity. The third section ordained that, for each pole erected, the company should pay to the city treasurer one dollar, and that the poles should be of such size, length, character, and quality as should be approved by the board, and should be placed under the direction of the street commissioner. After the adoption of the resolution by the board of public works, the company commenced the work of laying tracks, and was restrained by an injunction out of the court of chancery. On the 20th of June, the next day after the ordinance was passed, the West Jersey Traction Company obtained a writ of certiorari out of this court, duly allowed, to bring up the said ordinance for review. Upon this writ such proceedings were had that the ordinance was set aside by this court (*Traction Co. v. Board of Public Works*, 56 N. J. Law, 432, 29 Atl. 163), in a judgment which was affirmed in the court of errors, at June term, 1895. The writ of certiorari was served on the secretary of the company on the day it was issued, and came to the knowledge of the president, the superintendent, and the counsel of the company. Notwithstanding the writ of certiorari, and pending the litigation in this court, the company proceeded to lay down its tracks in the streets of the city, under the pretext that such work was done in virtue of the resolution of the board of public works which preceded the ordinance. This proceeding was thereupon instituted against the company as for contempt.

The resolution under which the company professed to have acted in laying its tracks has recently been set aside by this court on certio-

rari. The fact that the resolution and the ordinance have both been vacated as illegal is of consequence only as determining the measure of redress that shall be adjudged in a proceeding of this character. The writ of certiorari, when served, operated as a stay of all proceedings under the ordinance, and any proceeding in the face of its restraining order was a contempt. *McWilliams v. King*, 32 N. J. Law, 21, 25; *Hunt v. City of Lambertville*, 46 N. J. Law, 59. The president of the company testified that, after the certiorari was obtained, the company proceeded to lay its tracks, under and by virtue of the antecedent resolution of the board of public works. It is impossible to give to the testimony any effect other than mere color for the evasion of the restraining force of the process of the court. The ordinance assumed that the resolution was invalid, and purported to validate it, and also contained a grant affirmatively of the right to use the streets of the city. It also conferred the additional right to use electric motors and erect poles, and imposed conditions for the benefit of the city. The company appeared in this court to uphold the ordinance, and, upon the decision vacating the ordinance, prosecuted a writ of error in the court of errors, with a view to sustain the ordinance by the decision of that court. It was known to the company's representatives that the writ of certiorari was sued out by the prosecutor to enjoin the laying of tracks by the defendant company in streets in which the prosecutor claimed rights in virtue of filed locations of routes for its tracks, and that the purpose of the writ, after its allowance and service, was to restrain the defendant from putting down its tracks until the conflicting rights of the parties should be determined. If the defendant desired to be quit of the restraining effect of the writ, application should have been made to the justice by whom the writ was allowed, to modify its restraining force. No such application was made, and, so far as appears in this case, the first disclosure of the purpose of the defendant to put down the tracks, the laying of which the certiorari was designed to prevent, under the pretext of the resolution, was when the testimony of the defendant's president was given in this proceeding. The president testified also that he had always been advised by the company's counsel that the resolution gave the company full authority to lay its tracks. The resolution has been set aside by this court, and the company's tracks remain in the streets wholly without authority. Nor will the fact that the act was done after consultation with counsel, and upon his advice, justify disobedience (*Railroad Co. v. Johnson*, 35 N. J. Eq. 422); especially when the proceeding is taken against the company, and is in its nature remedial, as well as for the vindication of the authority of the court. The distinction between proceedings against a corporation by way of contempt and a like proceeding against an employé is pointed out in *Railroad Co. v. Thompson*, 49 N. J. Eq. 318, 24 Atl. 544.

Proceedings by way of contempt will lie

against corporations, as well as against individuals. In the case of individuals the process is by attachment, followed by a fine or imprisonment, or both. In the case of a corporation the process in equity courts is by writ of sequestration. In courts of law, *distringas* is the appropriate writ against a corporation. 2 Archb. Prac. 108. In proceedings against a corporation for contempt, the writ of attachment is inappropriate; *distringas* will issue as an original, to be followed, if necessary, by an alias and pluries, until justice be done. *City of London v. Mayor, etc.*, of Lynn, 1 H. Bl. 206, 209, and note b; *Spokes v. Board of Health*, 11 Jur. (N. S.) 1010; *McKim v. Odom*, 3 Bland, Ch. 407, 425-427. Numerous decisions to the same effect are cited in the brief of counsel of the prosecutor.

We are constrained to adjudge that the defendant corporation is in contempt in laying its tracks in the streets in question pending the writ of certiorari. Counsel will be heard with respect to the judgment to be thereon pronounced. We are not informed as to the prosecutor's status in those streets, so as to be able to decide whether or not the prosecutor is entitled to have the condition of things restored to what it was when the writ of certiorari was served.

PEPPER et al. v. CITY OF PHILADELPHIA et al.

(Supreme Court of Pennsylvania. May 31, 1897.)

MUNICIPALITIES—POWER TO INCREASE INDEBTEDNESS—CONSTITUTIONAL LAW.

1. Const. art. 9, § 8, declares that the debt of any municipality, except as therein provided, shall never exceed 7 per cent. upon the assessed value of its taxable property, nor shall any municipality incur any new debt, or increase its indebtedness, to an amount exceeding 2 per cent. on such valuation, without the assent of the electors at a public election; "but any city, the debt of which now exceeds seven per cent., * * * may be authorized by law to increase the same three per centum in the aggregate at any one time," etc. *Held*, that the last clause was an emergency provision for cities already indebted beyond the 7 per cent. limit, and that, when subsequently such a city had reduced its debt below that limit, it could thereafter increase it only in the manner provided in the second clause.

2. The second clause, providing that no such municipality shall "incur any new debt or increase its indebtedness to an amount exceeding two per centum * * * without the assent of the electors," etc., does not authorize a city whose debt has not reached the 7 per cent. limit to increase it to that amount by successive additions of 2 per cent. or less; but, after the 2 per cent. has once been added, there can be no further increase, by municipal authority alone, though the 7 per cent. limit may not have been reached.

Mitchell, J., dissenting.

Appeal from court of common pleas, Philadelphia county.

Bill by David Pepper and others against the city of Philadelphia and others. From a decree dismissing the bill on demurrer, plaintiffs appeal. Reversed.

Wm. Findlay Brown, for appellants. James Alcorn, John L. Kinsey, and John G. Johnson, for appellees.

STERRETT, C. J. This bill was brought by the plaintiffs, citizens and taxpayers of the city of Philadelphia, against the defendants above named, to restrain them from borrowing two sums, of \$8,000,000 and \$3,000,000, respectively, purporting to be authorized by certain ordinances of councils, and from issuing certificates of indebtedness for either of said sums, etc. A general demurrer having been filed, the cause was heard in the court below on the issue thus presented, and a decree was entered, sustaining the demurrer, and dismissing the bill, with costs. From that decree, this appeal was taken. The averments contained in the bill, and admitted by the general demurrer, constitute the only facts in the case; and the question here, as in the court below, is whether, upon those facts, thus admitted by the pleading, the plaintiffs are entitled to the relief prayed for, or any other relief. In substance, the bill avers that the total debt of the city on January 1, 1874, was \$59,338,816.97; that the assets then in the sinking fund were of the value of \$15,773,644.80, and that the net debt of the city at that time was \$43,565,172.17; that the assessed valuation of the taxable property of the city at the same time was \$548,243,535; and that 7 per centum of said valuation was \$38,377,047.45; and that the debt of the city, at the time of the adoption of the constitution, January 1, 1874, was in excess of 7 per centum of the then assessed valuation of its taxable property. It further avers that, in pursuance of the authority conferred by section 8 of article 9 of the constitution, the legislature passed two acts, one approved May 23, 1874 (P. L. 230), the eleventh section of which provides as follows: "The councils of any city of the first class, the debt of which now exceeds seven per centum upon the assessed value of the taxable property therein, shall be and they are hereby authorized to increase the said debt one per centum upon such valuation." The other was approved June 11, 1879 (P. L. 137), the first section of which is as follows: "The councils of the cities of the first class be and they are hereby authorized to fund the present floating indebtedness of said cities to the extent of ten millions (10,000,000) dollars, provided the said loan shall not exceed two per centum upon the assessed value of the taxable property of said cities." It further avers that in pursuance of the act of May 23, 1874, the city increased its debt between January 1, 1874, and January 1, 1886, to the amount of \$4,772,950, and as a part of the loan made April 1, 1890, to the amount of \$709,485.35; these two sums making an aggregate of \$5,482,435.35, which was the total amount of 1 per centum upon the entire assessed valuation of the property of the city as it was on January 1, 1874, viz. \$5,482,435.35. The bill further avers that

the various loans thus made exhausted the power of the city to increase its indebtedness under said act of May 23, 1874; and also that, under said act of June 11, 1879, the city did fund its floating debt to the amount of \$9,199,459.30, and thus exhausted its power to increase its debt under said act. The increase of indebtedness thus made under the two last-mentioned acts having exhausted the authority of the city to make the increase of 3 per centum, authorized by the last clause of section 8 of article 9 of the constitution, that subject may be dismissed from further consideration. The bill further avers that on January 1, 1886, the total amount of the funded debt of the city was \$62,068,120.22, and the amount of securities then held in the sinking fund was \$20,911,775, leaving the total debt of the city at that time \$41,156,345.22. The assessed value of the property of the city at that time was \$611,309,615, 7 per centum of which is \$42,791,673.05; and hence the net debt of the city was then \$1,685,327.83 less than 7 per centum of the then assessed valuation of its property. It further avers that subsequent to January 1, 1886, the city had no lawful right to increase its debt, or incur any new indebtedness beyond 2 per centum of the said valuation, without a vote of the electors, except to borrow the sum of \$709,485.35, the balance of the debt authorized to be created by the act of May 23, 1874. It is further averred that, pursuant to the power granted by the constitution (section 8, art. 9), the city has created new debt, and increased its indebtedness from time to time since January 1, 1886, not including refunding loans, to the amount of \$20,000,000, which, together with the sum of \$1,500,000, the residue of the \$6,000,000 loan authorized May 15, 1894, not yet issued, makes a total of \$23,000,000. Of this amount, the sum of \$709,485.35 was borrowed, under the authority of the act of May 23, 1874; and, of the total sum thus borrowed, there are now in the sinking fund assets of the value of \$6,906,200; making the net amount of new debt incurred since January 1, 1886, under the constitutional authority to borrow 2 per centum of the assessed value of taxable property therein without a vote of the electors, \$15,984,314.65. It is further averred that the total debt of the city on January 1, 1897, was \$54,023,120.22, and the securities in the sinking fund and other assets available in reduction thereof reduce the same so that its net amount on January 1, 1897, was \$31,336,674.44. On same date, the assessed value of taxable property was \$818,827,549, 7 per centum of which is \$57,317,928.45, and the net debt of the city therefore was \$25,981,253.99, being less than 7 per centum of the assessed valuation of taxable property therein. It is further averred in the bill that 2 per centum of the assessed valuation of property on January 1, 1897, was \$16,376,550.98; and deducting from this the net amount of the new debt created as aforesaid (\$15,984,314.65) since

January 1, 1886, shows a resulting amount of \$392,236.33 less than 2 per centum upon the whole assessed value of taxable property on January 1, 1897. It is also averred that this last-mentioned sum is the lawful limit of the present borrowing capacity of the city at this time. The aggregate of the two proposed loans now under consideration is \$11,000,000, and, if plaintiffs' contention is correct, there is no authority, on the part of the city, to make either of them. Both of these proposed loans were authorized by city ordinances. Neither of them was authorized by a vote of the electors of the city.

The averments, facts, figures, etc., set forth in the bill, having been admitted by the pleading to be true and correct, must necessarily be taken as the basis of our judgment in determining the question whether the city has the power to make the loans aforesaid, or either of them; and that brings us to the consideration of section 8 of article 9 of the constitution, which reads as follows: "The debt of any city, county, borough, township, school district, or other municipality or incorporated district, except as herein provided, shall never exceed seven per centum upon the assessed value of the taxable property therein, nor shall any such municipality or district incur any new debt, or increase its indebtedness to an amount exceeding two per centum upon such assessed valuation of property, without the assent of the electors thereof at a public election, in such manner as shall be provided by law; but any city the debt of which now exceeds seven per centum of such assessed valuation may be authorized by law to increase the same three per centum in the aggregate at any one time upon such valuation." This, in connection with the foregoing facts, etc., admitted by the pleading, is the only source of authority to which we have been referred by the defendants for making the loans in question. The first clause of the section is a positive prohibition of any municipal indebtedness in excess of 7 per cent. of the assessed valuation of the taxable property in the municipality; and the last clause is a temporary provision for those cases in which the indebtedness was greater than the 7 per cent. limit at the time of the adoption of the constitution. It was not denied on argument that this was anything more than an emergency provision for such cities as were already indebted to an amount greater than 7 per cent. of the assessed value of the taxable property therein. It was substantially so held by this court in *Wheeler v. Philadelphia*, 77 Pa. St. 338. Mr. Justice Paxson there said: "The fact was, however, known to the convention that at that time the debt of the city of Philadelphia and perhaps other municipalities exceeded seven per centum. In such instances an arbitrary provision that there should be no further increase of the debt might have worked great injury by the stoppage of public works already commenced, and essential to the public convenience and welfare. It was therefore provided that as to

such municipalities the debt might be increased three per centum." This being true, the exceptional and temporary character of this provision is at once apparent. It is equally apparent from the whole tenor of the eighth section that, if a city whose indebtedness then exceeded the seven per cent. limit subsequently reduced her debt below that limit, she at once passed into the category of all the other cities of the commonwealth, and thereafter could only create or increase her indebtedness in the same manner that they could. According to the manifest meaning of section 8, no city which had reduced its debt below the 7 per cent. limit could ever again increase it above that limit; and therefore when, in such city, a subsequent creation or increase of debt was desired, it would have to be made in precise accordance with the provision of the second clause of section 8, which, of course, was the rule for all the municipalities of the commonwealth. By the terms of that clause, the limit of the created or increased debt was 2 per cent. upon the assessed value of the taxable property therein, and no more, unless by a vote of the people. The words are: "Nor shall any such municipality or district incur any new debt or increase its indebtedness to any amount exceeding two per centum upon such assessed valuation of property without the assent of the electors thereof at a public election in such manner as shall be provided by law." This is a grant of power by negative words, but the negation is prohibitive of everything beyond the designated limit. What, then, is the limit to which a city may go in creating or increasing its debt? Manifestly, two per cent. if done by the municipal authorities, and, if a greater amount than that is required, it must be done by a popular vote. That boundary mark is just as precise and definite as the seven per cent. ultimate limit prescribed by the preceding clause of the section. It may not be transcended, because no power to do so is conferred by the language of the section. The amount of the new debt or the increased debt shall not exceed two per centum of the valuation. What authority is there for saying that it may be seven per centum by successive increases? Manifestly, none. The 7 per cent. limit is a positive bar to all created or increased debt, and it is only interposed as a final barrier, and is in no sense a specific grant of authority to create indebtedness to that extent, either at once or by successive steps. If any debt in excess of 2 per cent. is required, it can only be obtained in one way, viz. by a vote of the people. But that mode is out of consideration here, because it was not adopted. It is argued here, and was held by the learned court below, that, so long as the 7 per cent. limit was not reached, there might be successive increases, which in the aggregate did not exceed that limit. But the vice of that contention is that no such method is authorized by the constitution. On the contrary, it is prohibited by the words of the eighth section above quoted. The amount of

the whole debt creation therein authorized is 2 per centum—and not any other per centum—upon the assessed value of the taxable property. If this were not so, the prohibition against a debt creation of more than 2 per cent. by municipal authority only would be easily and absolutely evaded; for, if such increase could be made by successive additions of 2 per cent. or less, the whole amount of 7 per cent. could be successfully reached, without any popular vote. Surely, this cannot be, because the language of the section prohibits it; and, when it is observed that the constitutional provision on this subject may be evaded in this way, that consideration alone is sufficient to condemn the construction and the reasoning upon which the contention is founded. Unless this is true, the constitutional prohibition might as well have been omitted. But no such conclusion as that can be sanctioned. It is enough to know that the language of the eighth section permits a debt to be created by municipal authority to the limited extent only of 2 per cent. on the assessed value of the taxable property. That permission is a unit. When once exercised, its object is fully accomplished, the express limit of the municipal debt, thus created or increased, is established, and it remains thus established simply because there is no further authority for its change. The question whether there may be a subsequent increase by a popular vote is not before us, and, of course, we do not decide it. But it is entirely clear that, after the 2 per cent. limit has been reached, there can be no further increase by municipal authority only.

Everything necessary to dispose of this case has already been decided in *City of Wilkes-barre's Appeal*, 109 Pa. St. 534, in which Mr. Chief Justice Mercur, speaking for the court, said: "The proposed increase of debt is in itself less than 2 per cent. of the assessed value of the taxable property, but, added to the previously existing debt, makes the aggregate indebtedness more than 2 per centum. The contention is whether this can be done without the previous assent of the electors in the manner prescribed by the constitution. As we have seen, one clause thereof declares the city shall not increase its indebtedness to an amount exceeding two per centum without such assent. There is no warrant in the constitution to sustain the proposition that the city may now, and from time to time, as it sees proper, within the maximum limit of seven per cent., increase the indebtedness by successive steps, if each increase is less than two per cent. Such action is not sanctioned by either the letter or the spirit of the constitution. * * * The argument that ignores the aggregate indebtedness, and considers the addition thereto, only proves too much. It would nullify the right of the electors to vote on the question of increase altogether. By successive increases, each less than two per centum, the city might have the aggregate indebtedness reach the seven per centum without a vote of

the electors. Up to that per centum, the city would deny the right of the electors to vote on the question of increase, and beyond that per centum the constitution itself prohibits any increase." In *Wheeler v. Philadelphia*, supra, it was said: "The main controversy, however, was as to the manner in which such increase should be accomplished. Here, again, the distinction is preserved between municipalities whose debt is under 7 per centum and those in which it exceeds seven per centum. In the former the municipal authorities may increase the debt from time to time until two per centum has been added, provided the original debt with the increase does not exceed the seven per centum. After the two per cent. has been added, there can be no further increase without the vote of the people." To the same effect is *Pike Co. v. Rowland*, 94 Pa. St. 238. In that case, Mr. Justice Trunkay said: "In strictness, the words may mean as contended by defendant, but the context seems to make it clear that the true sense of the clause is a prohibition of a new debt, exceeding two per centum of the assessed valuation, without a public vote." It is clear, therefore, that, in all the cases cited, we have adhered to the proposition that the increase of 2 per cent. authorized to be made by the second clause of the eighth section may not be transcended except by a popular vote; and this whether the increase has been made by successive additions, each less than 2 per cent., or at one time, and by one municipal act alone. We have not allowed this percentage of increase to be exceeded in any instance by mere municipal action. It follows, therefore, that as the 2 per cent. limit in the present case has been more than reached by previous additions, though by subsequent reductions the aggregate of the additions is now slightly below the 2 per cent. limit, the ordinances authorizing the two loans of \$8,000,000 and \$3,000,000, respectively, are both invalid, and the plaintiffs' bill must be sustained, and the injunction prayed for awarded. The decree of the court below is reversed, and bill reinstated; and it is now ordered, adjudged, and decreed that the demurrer be overruled, and that an injunction forthwith issue against the defendants, and each and every of them, restraining them from borrowing the two sums of \$8,000,000 and \$3,000,000, respectively, and from issuing certificates of indebtedness for either of said sums; and it is further ordered that the defendants pay all the costs of this proceeding.

MITCHELL, J., dissents.

In re DUTTON'S ESTATE.

Appeal of BEATTY.

(Supreme Court of Pennsylvania. May 27, 1897.)

EQUITABLE ASSIGNMENT—COMPETENCY OF WITNESS—CONSIDERATION—FINDING OF AUDITOR.

1. On partition, one of the heirs accepted the premises, and entered into a recognizance to

pay the others their shares on the widow's death. Subsequently, D., another heir, who had confirmed the partition, procured a loan from one S., through petitioner, and, to secure the same, executed a mortgage of all his interest in decedent's real estate, both D. and petitioner (to whom the mortgage was subsequently assigned) intending to mortgage D.'s interest in the recognizance. *Held*, that the mortgage operated as an equitable assignment of D.'s interest in the recognizance.

2. In a proceeding by petitioner against the executors of one to whom D. had assigned his share in the recognizance after the execution of said mortgage, to determine to whom such share was payable, petitioner was competent to testify as to matters occurring between himself and D. and S. during the lifetime of said assignee.

3. Where a debtor, to secure a pre-existing debt, assigned his interest in a recognizance given on partition, the fact that on the same day he gave a bond conditioned for the payment of the debt in one month from date does not per se show that the extension of time was the consideration for the assignment.

4. Whether such extension was consideration for the assignment is a question of fact on which the auditor's finding is as conclusive as the verdict of a jury.

Appeal from orphans' court, Delaware county.

Petition by Charles O. Larkin against George W. Beatty and Edward F. Beatty, executors of John Beatty, deceased, to determine conflicting claims to decedent's share in a certain recognizance given on partition of the lands of Jonathan Dutton, deceased. From a decree confirming the report of an auditor awarding said share to petitioner, George W. Beatty, surviving executor, appeals. Affirmed.

The following is the report of the auditor:

"Finding of Facts.

"(1) Jonathan Dutton died on the 17th day of September, 1880, intestate, leaving, to survive him, his widow, Lydia F. Dutton, and four children: Jane F. Clayton, Annie G. Dutton (now Annie D. Johnson), John Dutton, and George G. Dutton.

"(2) Proceedings in partition were begun in the orphans' court of Delaware county, in the estate of said Jonathan Dutton, which resulted in the said George G. Dutton accepting the premises, described as No. 1; and on April 8, 1881, the said George G. Dutton entered into a recognizance in the usual form, for the sum of fourteen thousand two hundred dollars (\$14,200), as fully shown in Recognizance Book No. 1, p. 243.

"(3) On July 11, 1881, a partial satisfaction was made upon this recognizance of the shares payable, prior to the death of the widow, and signed by Powell F. Clayton, Jane F. Clayton, and John Dutton.

"(4) On July 11, 1881, the heirs of Jonathan Dutton conveyed, by deed, premises described as 'No. 1,' in proceedings of partition to George G. Dutton, confirming partition conveying grantor's estate subject to the recognizance in partition. Said deed is recorded in Deed Book D, No. 5, p. 57, etc., on August 10, 1881.

"(5) That a short time prior to October 31, 1882, John Dutton made application to Charles

C. Larkin, a conveyancer, residing in the city of Chester, for a loan of one thousand dollars (\$1,000) upon his interest in his father's estate; and the said Charles C. Larkin procured from Robert Singleton the sum of one thousand dollars (\$1,000), and on October 31, 1882, loaned the said John Dutton the said sum of one thousand dollars (\$1,000), taking as security for the same a mortgage which is dated October 31, 1882, and recorded in Mortgage Book Z, No. 3, p. 321, etc., on November 3, 1882, the description in the mortgage being as follows: 'All my right, title, and interest in and to all that certain tract or piece of land situate partly in the township of Middletown, and partly in the township of Chester, in the county of Delaware, and state of Pennsylvania, bounded by Chester creek, by lands of Richard Berry, by lands of Joshua Habberset, by lands of James Hall, and lands of Elizabeth Sheppard, containing one hundred acres of land, more or less, being the same premises which Jonathan Dutton, late of the township of Middletown aforesaid, died, on or about the eighteenth day of September, A. D. 1880, intestate, seised in his demesne as of fee, leaving to survive him, as his heirs and next of kin, his widow, Lydia F. Dutton, and four children, to wit, Jane F. Clayton, Annie G. Dutton, and the said John Dutton, and George Dutton, to whom the same descended and came.' On January 21, 1884, the said John Dutton confessed by bond and warrant a judgment to John Beatty for the sum of fourteen hundred and thirty-six dollars and sixty-two cents (\$1,436.62), which was duly entered in the court of common pleas on January 21, 1884, in Judgment Docket P, p. 343, etc., and was payable in one month from the date thereof. The amount of said judgment was made up as follows:

Note of John Dutton to John Beatty, dated Sept. 8, '79.....	\$ 200 00
Interest on same from Sept. 8, '81, to Jan. 17, '84.....	28 30
Judgt. John Beatty vs. John Dutton, entered June 6, '81.....	1,000 00
Int. on same from Jan. 1, '79, to Jan. 17, '84.....	302 83
Note John Dutton to John Beatty, April 1, '76.....	66 56
Int. on same from April 1, '76, to Jan. 17, '84.....	31 13
	<hr/>
	\$1,628 82
Credit by labor, etc.....	192 00
	<hr/>
	\$1,436 82

—"And on the same day, by assignment recorded in Deed Book O, No. 5, p. 247, etc., on January 21, 1884, assigned to the said John Beatty all of his 'right, title, and interest, property, claim, and demand in the said recognizance as collateral security for the payment of a certain bond and warrant of attorney, bearing even date herewith, conditioned for the payment of the just sum of fourteen hundred and thirty-six dollars and eighty-two cents (\$1,436.82) in one month from the date thereof, together with lawful interest thereon at the rate of six per cent. per annum.' This assignment was made on January 21, 1884,

attached to the recognizance in the Recognizance Book. At the time of the taking of the assignment by John Beatty, the notes were surrendered to John Dutton. The judgment of one thousand dollars (\$1,000), entered June 6, 1881, was satisfied on February 28, 1884. At the time this last judgment was confessed, the said John Dutton was the owner of real estate in Nether Providence township, Delaware county, upon which the said judgment of one thousand dollars (\$1,000.00) was a lien. On February 6, 1886, the said John Beatty died; and on March 8, 1886, letters testamentary upon his estate were granted to George W. Beatty and Edward F. Beatty, the latter named having since died. On April 12, 1886, execution was issued on judgment entered January 21, 1884, being No. 27, June term, 1886, and personal property of the said John Dutton was sold, and there was realized from said sale, on account of said judgment, the sum of one hundred and forty-six dollars and forty-four cents (\$146.44). On August 24, 1896, Robert Singleton, by assignment recorded in Assignment of Mortgage Book, No. 8, p. 488, assigned to Charles C. Larkin the said mortgage of John Dutton, and also all the right, title, and interest, property, claim, and demand of the said Robert Singleton in and to the said recognizance given by George G. Dutton. Lydia F. Dutton, widow of Jonathan Dutton, died on the 16th day of February, 1896. The share of John Dutton in the recognizance of George G. Dutton is eleven hundred and seventy-seven dollars and seventy-seven cents (\$1,177.77), with interest from February 16, 1896. The amount of principal and interest due on said mortgage at the death of Lydia F. Dutton was sixteen hundred and seventy-seven dollars and sixty-seven cents (\$1,677.67). Notice of the assignment of the recognizance by John Dutton to John Beatty was given by the executors of John Beatty to George G. Dutton on April 24, 1886. John Dutton, at the time the mortgage was given to Singleton, had no interest in the land, formerly of Jonathan Dutton, and taken by George G. Dutton, but was entitled to a share in the recognizance, payable at the death of Lydia F. Dutton.

"Conclusions of Law.

"There are but two questions involved in the determination of this case: (1) Is the mortgage from John Dutton to Robert Singleton to be considered as an equitable assignment of John Dutton's interest in the recognizance given by George G. Dutton? (2) If the said mortgage is to be considered as an equitable assignment of said interest, who is entitled to payment, the estate of John Beatty, or Charles C. Larkin, the assignee of the mortgage given to Singleton?

"The determination of the first question depends mainly upon whether or not Charles C. Larkin is competent to testify in the case, notwithstanding the fact that John Beatty, the assignee of the recognizance, is dead. Under the ruling of the supreme court in *Re Kuhns'*

Estate, 163 Pa. St. 438, 30 Atl. 215, the auditor decides that Charles C. Larkin is a competent witness. There is no doubt that this mortgage of John Dutton to Robert Singleton, standing by itself, without any explanation, would bind nothing, as, at the time it was given, John Dutton's interest in his father's land had passed to George G. Dutton by a proceeding in partition, which had been confirmed by deed from John Dutton. If, therefore, it is to operate as an equitable assignment of John Dutton's interest in the recognizance, it must be because of the intentions of the parties at the time it was given, and this depends entirely upon the testimony of Charles C. Larkin, taken in connection with the description in the mortgage, and the fact that the only interest Dutton had in his father's estate was what would be due him out of the recognizance at the death of his stepmother, Lydia F. Dutton. Larkin says: 'I made the loan of one thousand dollars. John Dutton wanted a loan of one thousand dollars, and made an application to me for a loan on his interest in his father's estate coming to him on the death of his stepmother, Lydia F. Dutton. I prepared the mortgage. He said his interest at the death of his mother would be fifteen hundred to two thousand dollars, which I thought ample. I went to Media, and told H. T. Walter what I wanted to do. He got the book, opened it to the place, and said, "That is just what you want;" and I copied the same description as is in the mortgage to Singleton. It was something connected with or part of the same estate of Jonathan Dutton, deceased. Mr. Walter's assertion that it was all right made me think it was all right. Two years' interest has been paid on the mortgage by John Dutton. I paid it to Singleton. I paid the money I got from Singleton to Dutton. Mr. Singleton afterwards made demand for the amount of the mortgage, and then Mr. Broomall came, and I paid Singleton for the mortgage. I am owner to-day. Mr. Broomall drew the assignment. I did not examine the records to see if there were any mortgages or judgments given by John Dutton. He said he had not drawn anything on this dower interest; it was all clear. I made the loan, relying more on what John Dutton said he had than from an examination of the records. I hold no other security for the money.' In the case of *Hay v. Mayer*, 8 Watts, 203, where certain nephews of testator had made a conveyance of land, which it was presumed that they owed, when in fact they were only entitled to receive a certain proportion of the money that would arise from the sale of the land, Judge Kennedy held that their claim would be considered as assignable in equity for a valuable consideration, and their deeds as sufficient to bind and divest them, in equity at least, of their rights to any money that could be raised from the sale of the land.' Where there is a devise in fee, with an absolute direction to sell for the purpose of distribution, a conveyance of the land by a devisee passes his interest in

the proceeds, when sold under the trust in the will. *Costen's Appeal*, 13 Pa. St. 202. See, also, *Dunn's Estate*, 24 Pittsb. Leg. J. 109. In the case of *Bayler v. Com.*, 40 Pa. St. 37, a married woman gave a mortgage to a creditor of her husband of 'all the estate, right, title, and interest' to which she would be entitled in her father's estate, on his death. The mortgage was given for the sole purpose of securing a prior debt of the husband, and no consideration was received by her or given by the mortgagee. After the death of the father, the mortgagee claimed her share of the real estate. Held that he was not a purchaser for value, and that the mortgage did not enable him to hold against her; the court saying that, though a conveyance of an expectancy, as such, is impossible at law, yet it may be enforced as an executory agreement to convey, and it would be sustained by a sufficient consideration, in equity. In the case in hand there is no doubt but that a sufficient consideration was given by Singleton. In *Horner & Piles' Appeal* (*Erwin's Estate*) 56 Pa. St. 405, a testator devised land to his wife for life, and directed it to be sold at her death, and the proceeds divided amongst his children. One of the children died in the lifetime of the wife, and his administrator sold his interest in the land by order of the orphans' court for the payment of his debt. Held, that his interest passed to the purchaser, the court saying his deed was therefore an equitable, if not a legal, assignment of the interest of the intestate in the testator's realty. An heir or expectant devisee or legatee may, in the lifetime of the testate or intestate, sell or assign his expectant or contingent interest, and, if the contract be on a valuable consideration, equity will enforce it. *Power's Appeal*, 63 Pa. St. 443. See, also, *Tryon v. Munson*, 77 Pa. St. 250; *Manufacturing Co. v. Marsh*, 91 Pa. St. 96; and *Ruple v. Bindley*, Id. 296,—where it is held that the form of the assignment is immaterial, so that there is a clearly expressed intention of an immediate transfer of the right of the assignee. Where a testator directs conversion of his land, the proceeds to be divided among his children, the interest of the latter is personalty. A mortgage given under such circumstances by one child operates as an equitable assignment of the undivided interest. *Bailey v. Bank*, 104 Pa. St. 425. See, also, *In re McClellan's Estate*, 158 Pa. St. 639, 28 Atl. 151; *Moeser v. Schneider* (Pa. Sup.) 27 Atl. 1068; *Whelan v. Phillips*, 151 Pa. St. 312, 25 Atl. 44; *In re Kuhns' Estate*, 163 Pa. St. 438, 30 Atl. 215. In *Collins' Appeal*, 107 Pa. St. 590, it was held that in equity a valid or binding pledge could be made of the interest of the pledgor in a partnership to be subsequently created, so as to secure to the pledgee a priority of lien as against creditors of the pledgor. A mortgage is defined to be 'the conveyance of an estate or property by way of pledge for the security of the debt, and to become void upon payment of it.' Personal property may be mortgaged if the mortgagee

takes such possession of the thing pledged as its nature and the circumstances will admit. *Fry v. Miller*, 45 Pa. St. 441; *Association v. Bolster*, 92 Pa. St. 123. In *Campbell's Estate*, 13 Pa. Co. Ct. R. 35, a mortgage of a legacy was sustained. From the evidence submitted, the auditor is of opinion that it was the intention of Dutton and Larkin to mortgage Dutton's interest in this recognizance, and that, under the principles decided by the cases above cited, the said mortgage operated as an equitable assignment of Dutton's interest in said recognizance, and so decides.

"The remaining question to be decided is, did Beatty give any consideration for the assignment to him? For, if he did not, then there is no question but that the Singleton mortgage is entitled to be paid out of the recognizance before the judgment of Beatty. It is claimed on the part of Beatty's estate that their holding is for consideration, because the assignment of the collateral was part of a simultaneous transaction, by which a prior indebtedness of Dutton was extinguished, and a new obligation taken, payable in 30 days. Now, what are the facts? Dutton was indebted to Beatty on certain notes, and on a judgment which was entered on June 6, 1881, and which was a lien on Dutton's real estate. On January 17, 1884, they had a settlement of accounts, a balance was struck, and it was found that Dutton owed Beatty \$1,436.12, for which he gave him a new judgment, payable in 30 days, which was entered on January 21, 1884, and also assigned the recognizance to Beatty as collateral security for the payment of the judgment. The notes were surrendered, and the judgment of \$1,000 was satisfied on January 28, 1884. There is no evidence that the recognizance was assigned as collateral in consideration of the giving of time, or that it was contracted between them that said assignment should be made in consideration of the giving of additional time. Neither is there any evidence that Beatty was put in a worse position by the taking of the new judgment and the giving of additional time; and while it is true that it has been held that an extension of time upon the original obligation is sufficient consideration for a promissory note given as collateral security therefor (*Van Gorder v. Bank* [Pa. Sup.] 7 Atl. 144; *Jones v. Horner*, 60 Pa. St. 214; *Bell's Appeal*, 4 Montg. Co. Law Rep. 175; *Gross' Estate*, 6 Pa. Co. Ct. R. 478; *Heuser v. Steiner*, 5 Watts & S. 476; *Giles v. Ackles*, 9 Pa. St. 147; *Arnold v. Stedman*, 45 Pa. St. 186), still in all these cases the extension of time was contracted for. "Consideration, like every other part of a contract, must be the result of an agreement. The parties must understand and be influenced to the particular action by something of value, or convenience and inconvenience recognized by all of them as the moving cause. That which is a mere fortuitous result flowing accidentally from an agreement, but in no degree prompting the actors to it, is not to be esteemed a legal consideration." *Kirkpatrick v. Muirhead*, 16 Pa.

St. 126. In other words, in order that an extension of time shall be a good and valuable consideration, it must be contracted for. Pratt's Appeal, 77 Pa. St. 382; Depeau v. Waddington, 6 Whart. 220; Petrie v. Clark, 11 Serg. & R. 377. To constitute the party a purchaser without notice, he must prove, independently of the receipt of the deed, the payment of consideration before he had notice of the plaintiff's equity. Coxe v. Sartwell, 21 Pa. St. 480; Lloyd v. Lynch, 28 Pa. St. 419. A creditor taking a chose in action as collateral security for a pre-existing indebtedness is not a purchaser for value, and takes no more than the debtor owned and can honestly transfer. Ashton's Appeal, 73 Pa. St. 153; Pratt's Appeal, 77 Pa. St. 378; Hoopes v. Beale, 90 Pa. St. 82; Linnard's Appeal (Pa. Sup.) 3 Atl. 840. The auditor is therefore of opinion that, under the law, Beatty was not a purchaser for value of said recognizance, and therefore took the assignment subject to the equities existing between Dutton and Singleton, and must be postponed to the payment of the Singleton mortgage. As the amount due on the recognizance is not sufficient to pay the mortgage of Singleton, the auditor recommends that a decree of court be made, directing that the amount due upon the said recognizance be paid to Charles C. Larkin, the holder of the mortgage, and that the costs of the proceeding be paid out of the amount of the said recognizance."

Wm. B. Broomall, for appellant. George M. Booth, for appellee.

MCCOLLUM, J. Three questions are raised by the assignments of error. They are (1) whether Larkin was a competent witness to testify to matters occurring between himself and Dutton and Singleton in the lifetime of Beatty; (2) whether the mortgage from Dutton to Singleton on the 31st of October, 1882, operated as an equitable assignment of the former's interest in the recognizance; and (3) whether Dutton's assignment to Beatty on the 21st of January, 1884, was subject to the equity of Singleton founded upon the loan and mortgage.

Questions 1 and 2 were not discussed on the argument at bar, nor in the appellant's paper book. From this we might infer an abandonment of the assignments of error which raised them. The auditor held that Larkin was a competent witness; that the mortgage operated as an equitable assignment of Dutton's interest in the recognizance; and that Dutton's assignment to Beatty was subject to Singleton's equity. In so holding, he was sustained by the court below. He cited *In re Kuhns' Estate*, 163 Pa. St. 438, 30 Atl. 215, as authority for his ruling upon the first question. This case appears to sustain the ruling. As authority for his ruling upon the second question, he referred to a number of cases, among

which we note *Hay v. Mayer*, 8 Watts, 203; *Costen's Appeal*, 13 Pa. St. 292; *Horner's Appeal*, 56 Pa. St. 405; and *Bailey v. Bank*, 104 Pa. St. 425. These cases, together with the testimony concerning the transaction of October 31, 1882, make it clear that, as between Singleton and Dutton, the former was entitled to the latter's interest in the recognizance, as security for the loan. That Larkin now has Singleton's equity, with whatever rights he had to enforce it against Dutton or Beatty, is also clear.

The third question was the one to which the argument of the appellant was exclusively directed. In considering it, we must not lose sight of the fact that the assignment of the recognizance to Beatty was made as collateral security for a pre-existing debt, and that it was not shown that there was a consideration for it. The appellant, however, contends that, inasmuch as the assignment and the bond conditioned for the payment of the debt in one month from the date thereof were executed on the same day, the auditor should have found as a fact that there was an extension of the time for the payment of the debt, and that such extension was the consideration for the assignment. But this was not a necessary sequence from the facts. "Consideration, like every other part of a contract, must be the result of agreement. The parties must understand and be influenced to the particular action by something of value or convenience and inconvenience recognized by all of them as the moving cause. That which is a mere fortuitous result, flowing accidentally from an arrangement, but in no degree prompting the actors to it, is not to be esteemed a legal consideration." *Kirkpatrick v. Muirhead*, 16 Pa. St. 126. The cases cited by the auditor as bearing upon the question under consideration sustain his conclusion that, "in order that an extension of time shall be a good and valid consideration, it must be contracted for." Besides, whether the extension of time was the consideration of the assignment was a question of fact, in determining which the nature of the transaction and the circumstances surrounding it, as well as the extension itself, were to be taken into account. The cases cited by the appellant show that, where the question arises in an issue before a jury, the decision of it rests with them. In the case at bar, the auditor, as to questions of fact involved in it, was in place of the jury, and his findings in regard to them were as conclusive as a verdict. He virtually found that the extension of time was not the consideration of the assignment, and, as it was not claimed that there was any other consideration for it, he held that it was subject to the equities founded upon the prior assignment to Singleton. In this conclusion we concur. Decree affirmed, and appeal dismissed; the costs to be paid by the appellant.

In re HANDLEY'S ESTATE.

Appeal of PALMER et al.

(Supreme Court of Pennsylvania. May 24, 1897.)

COLLATERAL INHERITANCE TAX—DEVISE OF LAND IN ANOTHER STATE—CONVERSION—NOTICE TO LEGATEES—APPEAL.

1. Lands in another state are not subject to collateral inheritance tax, notwithstanding direction to the executors to sell the lands, where a time in the future is specified therefor.

2. The collateral inheritance tax on a legacy consisting of a direction to executors to pay the expenses of certain persons at school till they graduate, without restriction as to amount, must be borne by the estate; while that on the \$500 directed to be given each of such persons on graduation is to be borne by the legatees.

3. On appeal by executors and trustees from decree in proceedings merely to appraise the estate for collateral inheritance tax, the question of whether the tax is now due and payable is not involved.

4. Notice of appraisal for collateral inheritance tax should be given legatees, though the statute makes no express provision therefor, but merely gives them a right of appeal.

Appeal from orphans' court, Lackawanna county.

Appraisement of collateral inheritance tax on the estate of John Handley, deceased. From the decree, Henry W. Palmer and others, executors, appeal. Reversed.

H. W. Palmer and Lemuel Amerman, for appellants. L. A. Watres and Jas. H. Torrey, for appellee.

MITCHELL, J. The first and most important question in this case is the liability of testator's lands in Virginia to assessment for collateral inheritance tax. The effort of a state to impose a tax which must, in effect, come out of land beyond its boundaries, however indirect or ingenious the mode of exaction, has always been a matter of very questionable jurisdiction. It is universally conceded that the tax cannot be laid directly, and nowhere is this rule laid down more positively than in our own cases. See *Bittinger's Estate*, 129 Pa. St. 338, 18 Atl. 132; *Com. v. Coleman's Adm'r*, 52 Pa. St. 408; *Drayton's Appeal*, 61 Pa. St. 172. And the collateral inheritance tax being a tax on the property passing from the decedent, and not a mere succession duty imposed on the recipient (*Bittinger's Estate*, supra), is within the defect of power to impose it on land outside of the state. The border line, however, is reached when property which is in fact real estate is to be treated as personalty, under the doctrine of equitable conversion. On this subject two conflicting views have been entertained by different courts. In *Custance v. Bradshaw*, 4 Hare, 315, land was held by a partnership, and the interest of one partner who had died was sold to another partner. It was claimed that this interest was personalty, and liable to probate duty. But Vice Chancellor Wigram held that conversion, being an equitable fiction, would only be carried to the extent necessary to accomplish the equitable

result aimed at, and "would not alter the nature of the property for the purpose only of subjecting it to fiscal claims to which at law it was not liable in its existing state." More recent English cases have somewhat modified this decision so far as relates to land held by partners for partnership purposes. See *Dos P. Col. Inh. Taxes*, § 46b, and 32 Am. Law Reg. (N. S.) 474, note by Mr. Howard W. Page. But the court of appeals of New York adopted the same view as late as 1893. In *re Swift*, 137 N. Y. 77, 32 N. E. 1096,—and in *re Curtis*, 142 N. Y. 219, 36 N. E. 887, where it was said: "It was never intended by the law to tax a theory having no real substance behind it;" and quoting in *re Swift*, supra, "The question of taxation is one of fact, and cannot turn on theories or fictions." In Pennsylvania, however, the other view was taken in *Miller v. Com.*, 111 Pa. St. 321, 2 Atl. 492, where it was held that, as the testator had peremptorily directed a sale of the land and the distribution of the proceeds, the doctrine of conversion applied, and the actual situs of the land was immaterial, as what passed under the will was not the land, but the proceeds, which were personalty, and liable to the tax. The same rule was followed in *Williamson's Estate*, 153 Pa. St. 508, 26 Atl. 246. These cases rest on the basis that the testator intended and directed, not a merely nominal or limited conversion, but an actual conversion by sale, and the blending of the proceeds with his other personalty for purposes of administration under his will. The action of the court in dating such conversion from the instant of death was but the application of the general rule that what is to be done must be treated in equity as done already. Though this argument is severely technical, and therefore questionable in regard to jurisdiction to tax land in fact situated in another state, yet it has the merit of being unanswerably logical if the premise be once accepted. This court has followed the argument unswervingly to its logical conclusion, even when the result seemed contrary to the express legislative policy of the state. Thus, in *re Coleman's Estate*, 150 Pa. St. 231, 28 Atl. 137, where land in Pennsylvania was owned by a testator in New York, whose will made an equitable conversion, the logical corollary of *Miller v. Com.* was accepted, and the land was held to have become personalty, and to follow the owner's domicile, and therefore not to be taxable here.

All our cases agree that the status of the property at the instant of death must govern the question of tax, both as to liability and amount. *Drayton's Appeal*, 61 Pa. St. 172; *Appeal of Mellon*, 114 Pa. St. 564, 8 Atl. 183; *Williamson's Estate*, 153 Pa. St. 508, 26 Atl. 246. Where, therefore, the conversion is not imperative, but only permissive, and rests in the discretion of the executors or others, it does not become operative until the exercise of the discretion; and in the meantime the land retains its normal character. *Drayton's Appeal*, supra; *Miller v. Com.*, 111 Pa. St.

321, 2 Atl. 492. For the same reasons, where the conversion, though imperative, is not in present, but in futuro, it goes into effect only from the happening of the stipulated contingency. This brings us to the exact question now before us, and we find it expressly decided in the last case on the subject, *Hale's Estate*, 161 Pa. St. 181, 28 Atl. 1071. The testator left lands in Missouri to his wife for her life, and, upon her death, directed his executors to sell them, and invest the proceeds in mortgages in St. Louis, and pay the income therefrom to collateral. It was held by the orphans' court of Philadelphia that the proceeds were not taxable, and the decision was affirmed. The auditing judge put his conclusion directly on the postponement of the conversion, and, though the court in banc referred to the additional circumstance that the proceeds were to be invested in mortgages in St. Louis, yet it is clear that that was not a material point in the ratio decidendi. Mortgages, no matter what the situs of the land pledged, are personal property; and, if the conversion had been immediate, no direction as to the investment of the proceeds could have exempted them from the tax. The ground of the decision, which is the logical result of the principles adopted in all the preceding cases, is that the tax is assessable at the instant of death; and where the conversion is not referable to that same instant, as where it is to take place only in the discretion of the executors, or, a fortiori, where it is postponed by the express direction of the testator, the land in the meantime retains its real character, and, being outside the state, is not subject to taxation. In the present case the testator postponed the sale for 20 years, and there was therefore no conversion when the tax upon the estate accrued. The assignments of error to the tax on the lands in Virginia and West Virginia are therefore sustained.

The other assignments may be more briefly considered. It appears that the testator was educating a number of young persons at the time of his death, and provided in his will for the continuance of their education, and the payment to each, upon graduation, of \$500. We have not been convinced that there was any element of contract in these cases, or that the court committed any error in appraising the charges as legacies. The objection that the tax was directed to be paid by the executors out of the general funds of the estate, and not by the legatees, is, under the special provisions of this will, a merely formal and immaterial error. The present proceeding is not in any sense for distribution, but merely for appraisal to ascertain the amount of tax due. Ultimately, so far at least as relates to the \$500 gift at graduation, it will have to be paid by the legatees, or deducted by the trustees before distribution. But the expenses of schooling are directed by the will to be paid out of the testator's estate, and the present setting apart of a sum for that purpose has no effect beyond fixing

the amount of tax. If more money is required for such expenses, the executors will have to supply it; and, if the whole sum now fixed upon should not be needed, the surplus will remain part of the general fund, notwithstanding its present designation as a special fund for that purpose. So far, therefore, as the tax is assessed upon the expenses of education, it would seem that it must be borne by the estate, not only primarily, but altogether, as the education is directed to be given, not at a fixed sum, but without restriction as to cost, and the tax on the gift is a necessary and legitimate part of such cost.

The further question argued, whether the tax is now due and payable, is not raised by this record. This appeal is by the executors and trustees, and it does not appear that they have any interest in the question. The tax, whether due now or in future, is payable by the devisees and legatees, and they are not before us. The executors are nowhere made chargeable with the tax until the distribution, at which time, under section 5 of the act of May 6, 1887 (P. L. 79), they are required to deduct it from the payment to the legatees; and, in case of failure to do so, they and their sureties are chargeable with the amount. But it does not appear that any distribution has been made, or that the time for it has yet arrived. If distribution is unduly delayed, the commonwealth, under section 15 of the act of 1887, may have a citation to the executors to file an account, or to show cause why the tax should not be paid. By this section, the commonwealth, as to the tax, is put upon the same footing as a legatee or creditor, with a right to enforce distribution at the proper time. If legacies have been paid, and the tax deducted, but not paid over, the executors are immediately chargeable with it; and if legacies are due and properly payable, but not yet paid, it would seem that the commonwealth is entitled to insist on the immediate deduction of the tax by the executors, and its payment. But, except under such circumstances, the executors are not chargeable with the tax, and the commonwealth must look to the legatees for its payment.

As already said, the legatees are not before us, and it does not appear whether or not they have had any notice of the appraisal. The statute makes no express provision for notice to them, but it gives them a right of appeal, and it would therefore be proper, and not requisite, that the court should see that notice and a hearing are given. Without such notice and hearing, it is not consistent with the universal principles of law that the parties charged should be affected by the adjudication. But no such question arises in the present case; nor is any question on the construction of the will now determined. The appraisal is for the ascertainment of the value of the estate with reference to the amount of tax due the state. It has nothing to do with distribution. Where devises or legacies are given, some of which

are taxable, and some not, the construction of the will may come into question in a proceeding like the present, but only incidentally, in order to determine the limits and value of the taxable class. That is the meaning of the words, in section 12 of the act of 1887, that on appeal the courts "shall have jurisdiction to determine all questions of valuation, and of the liability of the appraised estate for such tax." In this respect the act of 1887 altered the previous law, as declared by this court in *Stinger v. Com.*, 28 Pa. St. 422. But none of these questions will be presented for adjudication until the proper parties are before us. The decree is reversed, and the appraisement directed to be readjusted on the principles herein stated.

In re MONEYPENNY'S ESTATE.

Appeal of LOCKWOOD.

(Supreme Court of Pennsylvania. May 24, 1897.)

COLLATERAL INHERITANCE TAX—SECOND APPRAISEMENT.

1. Where the appraiser of an estate, in levying the collateral inheritance tax, omitted certain property in another city, not by accident or fraud, but under his view of the law, the remedy of the commonwealth is by appeal, and not by a second appraisement.

2. Under Act April 10, 1849, § 12 (P. L. 571), in force in 1884, relating to collateral inheritance tax, and requiring the appraiser to put a fair valuation upon the real estate, and make an appraisement of the personalty, and providing for the appraisement of life estates, with remainder over, but one appraisement is contemplated, and a second appraisement of property omitted under the first appraisement is void.

Appeal from orphans' court, Wyoming county.

In the matter of the estate of William B. Moneypenny. From appraisement for collateral inheritance tax on such estate in behalf of the commonwealth, Luke A. Lockwood, executor of Jeanne W. McComb, appeals. Reversed.

W. E. & C. A. Little, for appellant. E. J. Jorden, for appellee.

MITCHELL, J. The decedent died in 1884, and in the same year an appraiser was appointed, and the collateral inheritance tax on personal property assessed and paid. Nearly 12 years afterwards a new appraiser was appointed by the register of wills, and made an appraisement of the proceeds of real estate in the city of New York, which had been sold by the executors under the directions of the will, upon the expiration of certain life estates. The ground of this second appraisement was that the New York land had been converted into personalty by the testator's direction to sell, and that the first appraiser had omitted it. The fact of such omission was conceded. The auditor found expressly that the omission was not induced by any fraud or concealment, and the undisputed evidence shows that it was not

the result of accident or of mistake in any proper legal sense, but was done intentionally by the appraiser, upon his view of the law. The error, if there was one, was due to the appraiser's erroneous judgment, deliberately reached upon knowledge of all the facts. The commonwealth seeks, and the court has sustained, a second appraisement to revise this judgment of the appraiser. Clearly, this cannot be done. The plain statutory remedy for such a case is not a second appraisement, but an appeal from the first. It does not admit of doubt that, if the commonwealth had appealed, the court would have reviewed the appraiser's action, and corrected any error. This fact alone is conclusive that an appeal was the proper and exclusive remedy. How strictly parties in such case are confined to the statutory procedure is shown by *Com. v. Coleman's Adm'r*, 52 Pa. St. 468, where the appeal was taken in time, but by the administrator, instead of the devisee; and, the court below having reduced the assessment, the judgment was reversed, this court saying: "The effect of this will be to confirm a valuation which we fear was excessive, and which, if we could enter into the question, we would be likely to reduce somewhat, if not as much as the court below. But, as the record is, our judgment must be a reversal."

But there is another reason why this proceeding cannot be sustained. The statutes do not contemplate or provide for more than one appraisement. On the contrary, the intent is that the first shall be complete and final. By the act of April 10, 1849, § 12 (P. L. 571), in force in 1884, "in order to fix the valuation of the real estate of persons whose estates are subject to the payment of a collateral inheritance tax," the appraiser is required not only to "put a fair valuation upon said real estate," and "make a fair and conscientious appraisement of the personal estate of the decedent," but also "to fix the then cash value of all annuities and life estates growing out of said estate, upon which annuities and life estates the collateral inheritance tax shall be immediately payable out of the estate, at the rate of said valuation." By the next section, where any life estate is left to a person not taxable, "and the remainder over to collateral heirs at their decease, immediately after the death of the testator, the estate so granted shall be appraised, * * * and the collateral inheritance tax on the remainder shall be immediately due and payable." It will thus be seen that nothing was allowed to escape or even to be postponed. Real estate, whether in possession or in remainder, in fee or for life, annuities and personal property, everything taxable at all, was to be included in the appraisement, which thus was not only to be exhaustive, but necessarily final. The commonwealth did not intend to wait and take its tax in installments as the annuities and profits of life estates accrued to their owners, or estates in remainder came into possession, but required everything to be appraised at the

standard of its present cash value, and then exacted payment of the whole tax at once. The hardship of this law upon remainder-men was so manifest that by the act of March 11, 1850, § 1 (P. L. 170), an exception was made in their favor, by which it was declared lawful for them "to elect to wait their coming into the actual possession," and to defer payment upon giving security for the tax, with interest from the time it accrued until paid. Even by this act, however, nothing was postponed but the date of payment. The tax was still left due upon the testator's death, and was still to be included in the appraisal, and was to bear interest until paid. To avoid misunderstanding, it may be well to note that the present case arose before the act of 1837, and any changes introduced by that act are not discussed.

The legislative intent that the appraisal should include everything, and be final, is further illustrated by the provision for the collateral inheritance record book. By section 15 of the act of 1840, the register of wills is required to enter in a book, to be kept for that purpose, the returns of appraisers, and to open an account in favor of the commonwealth against the decedent's estate, and the tax so ascertained is to be a lien until paid. The register is also to give certificates of search from this book. And by the act of May 4, 1855, § 3 (P. L. 425), the register is required "to keep and leave in his office, as a public record, the book containing the charges and credits for collateral inheritance tax." The account of the commonwealth against the present estate was opened in this book, and the entries showed the assessment and payment of the collateral inheritance tax "on personal property subject to tax." It was strenuously argued for appellant that the entry must be understood as an assessment of the whole personal estate, and that, being a record, it could not be contradicted by showing the appraiser's failure to include the proceeds of the New York land. It is not necessary, in the view we take, for us to consider how far a public record of this kind is invested with the attribute of unimpeachable verity that belongs to judicial records, and the subject is adverted to only as a further illustration of the legislative intent as to the completeness and finality of the first appraisal. The plain intent of the requirement of this book and searches to be given therefrom is to liquidate and give certainty to the tax, which is a lien, and to show, for the protection of all parties interested, the amount of the tax, the date of its assessment, the estate subject to it, the parties liable for its payment, and the fact whether paid or not. In thus making provision for information upon which parties interested, as purchasers or otherwise, could safely act, the legislature did not contemplate the destruction of the vital element of certainty, by the possibility of a second appraisal, as in this case, nearly 12 years after the apparent closing and satisfaction of the whole claim by

the payment of the tax formally and regularly assessed.

The collateral inheritance tax has been in force for nearly three-quarters of a century, but there is no case in our books sustaining a second appraisal. In *Re Bittinger's Estate*, 129 Pa. St. 338, 18 Atl. 132, the statement of the case calls the appraisal "a supplementary" one; but the facts in regard to it nowhere appear in the report, and the whole appraisal was declared void for want of jurisdiction over the property. In *Fosselman's Appeal*, 2 Penny. 238, the appraiser intentionally omitted a certain note, stating in his return that he did so because of litigation as to whether it had been given to the appellant by the decedent in her lifetime. The tax was assessed on the rest of the estate, and paid. After the ending of the litigation, he added the note to his appraisal, and the legatee appealed. It was argued there, as here, that the first return must be treated as conclusively covering the entire taxable estate. It is notable that the argument for the appellee there was not a defense of a second appraisal, but that there was only one. And so this court held, saying: "The original appraisal did not decide against the liability to tax, * * * but suspended a decision, because the matter was in dispute. When it was afterwards settled that the gift or assignment was a testament, he then decided that it was subject to the tax. The limitation only began to run from the last date." On the other hand, in *Com. v. Freedley's Ex'rs*, 21 Pa. St. 33, the tax was assessed, and paid shortly after decedent's death; but, upon sale by the executors, the value proved to be much greater than the appraisal, and the commonwealth claimed the tax on the excess, but this court held that the appraisal, unappealed from, was final. In the opinion it is said that "property subject to the tax may be fraudulently concealed, accidentally overlooked, or may not be known to the representatives of the decedent at the time of the appraisal"; and, "whenever portions of the estate come to light after the first appraisal, they are to be appraised in the same manner, but, as to such portions as were the subject of appraisal, the 'clear value' is fixed." This language, however, is intended to apply to the classes of fraud, accident, or mistake which, in equity, are sufficient to open all transactions to re-examination and correction. The exceptions that it makes are not founded on any provisions of the statutes, but on the general principles of law, and clearly do not include cases like the present, where there was no fraud, accident, or mistake, but, at most, an erroneous exercise of judgment by the appraiser. For that, the only remedy, under all our cases, was an appeal. We are therefore of opinion that the first appraisal exhausted the commonwealth's power, and the second and all the proceedings under it were void for want of authority. There are other objections to the second appraisal, but we do not

consider them, as they were not assigned for error, and our views are fully set forth in *Re Handley's Estate* (Pa.) 37 Atl. 587. Decree reversed, and proceedings set aside, at costs of appellee.

In re FREEMAN'S ESTATE.

(Supreme Court of Pennsylvania. May 27, 1897.)

TRUST PROPERTY—SALE—WITHHOLDING OF CONSENT—DECREE OF COURT.

Act April 18, 1853 (P. L. 503), authorizing the court to decree a sale where property is held in trust, and "one or more persons required to consent * * * unreasonably withholds consent," provided it "may be done without injury or prejudice to any trust, charity, or purpose for which it may be held," and provided that "nothing in this act shall * * * affect or impair any right or powers otherwise existing in any persons * * * to sell" or "lease," authorizes a decree for a lease of 50 years, under which the lessee is to erect buildings at his own expense, and the net income is doubled of land devised in trust to pay income to six persons, and, on the death of the last of them, to make "partition, allotment, and division" of the estate among certain others, one of the six persons having refused consent to such lease, though the will authorizes the trustee to lease the property "from time to time," and to sell, provided that "no such sale shall be made without the consent in writing of the several cestui que trusts having an interest therein who may be at the time of lawful age and accessible."

Sterrett, C. J., and Williams, J., dissenting.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of Henry G. Freeman, deceased. From a decree authorizing a lease by the Girard Life Insurance, Annuity & Trust Company, trustee under the will of deceased, S. Augusta Freeman appeals, on her own behalf and on behalf of her children. Affirmed.

The part of the will of deceased making the devise in trust is as follows: "And after the death of my said wife I do give, devise, and bequeath the said rest and residue of my estate, real and personal, and every part and parcel thereof, unto the Girard Life Insurance, Annuity and Trust Company of Philadelphia, to have and to hold the same upon the trusts, uses, and purposes, that is to say: In trust to make sales of all or any part of my real estate at their discretion, for the benefit of my estate, and either by public or private sale, and to make, execute, acknowledge, and deliver to the purchaser or purchasers thereof good and sufficient deeds and assurances in the law necessary to pass an estate in fee simple, or for any less estate as my said trustees may determine, and without any responsibility on the part of the said purchaser or purchasers to see to the proper application of the purchase money, or on any account or default whatever; provided always, nevertheless, that no such sale of any part of my real estate shall be made without the consent in writing of the several cestui que trusts having any interest therein, and who may, at the time being, be of lawful

age and accessible. In trust to make leases, from time to time, of the real estate, and to collect, demand, and receive the rents, income, and proceeds thereof, and to call in and reinvest the personal estate, and such parts as the said trustees may deem proper, as well as to invest the proceeds of the real estate when sold or leased, as the case may be, and as my said trustees may consider advantageous to my estate; provided always, nevertheless, that no part of my estate, or the proceeds thereof, shall ever be invested by my said trustees in railroad stocks or railroad bonds. In trust to pay all taxes and assessments lawfully levied and all repairs necessary on the real estate or otherwise, and all charges or commissions attendant on the execution of this trust; provided, that no commissions of the said trustees shall exceed three and one-half per cent. on all sums of money disbursed or paid by said trustees in the performance of this trust. Then, in trust to divide the net income and proceeds of said estate as received by said trustees into six equal parts, and to pay one of the said six parts to each of my four sons, William Henry, James B., Charles, and Chapman, and to each of my two daughters, Elizabeth, wife of T. A. Ashburner, and Caroline Sophia, the wife of Martin Schultz, during their several and respective natural lives, into their own hands and for their own use, without any power on the part of either of them, by order or otherwise, to change, transfer, assign, or in any manner anticipate, the same, so that the same shall not be liable for the debts of them or any of them, or to levy or attachment under or upon any writ or process whatever against them or any of them, and as to my said daughters for their several and respective separate use, and subject as aforesaid, free from the control, debts, or contracts of any husband they or either of them now have or may hereafter take. In trust, from and after the death of either of my sons or daughters, and until the death of all of them, to pay the income which he or she would, if living, have received to such person or persons of kin to such son or daughter as he or she may by will have appointed, and in default of such appointment to the child or children of such son or daughter that may then be living, or the issue of any child or children of such son or daughter that may then be dead, leaving issue, in equal shares equally, as, however, that such issue shall take per stirpes only a parent's share; and, if there be no children or issue of such son or daughter, then such person or persons as would take from, through, or under me had I lived until then and died intestate. In trust when and so soon as the longest liver of them, my said sons and daughters, shall be dead, to make partition, allotment, and division of my entire estate, real and personal, to and amongst the persons receiving or entitled to the income thereof immediately prior to such death, by virtue of the previous clauses of this my will, and the persons or person who under the said clauses

would be entitled to the income of the share of the said longest liver, at his or her death, according to their several and respective rights, shares, interests, and estates in said income, and they, my said trustees, shall, according to said parutions, allotment, and division, by good and sufficient deeds, conveyances, assurances, transfers, and assignments, vest in each of said persons absolutely in fee, to him or her, his or her heirs, executors, administrators, and assigns, the title to his or her purpart, share, or allotment in severalty; and to enable them, my said trustees, so to do, I hereby give them all necessary powers and authorities, interests and estates, in the premises."

Henry B. Freeman and I. Newton Brown, for appellants. Sharswood Brinton and George Tucker Bispham, for appellee Girard Life Insurance, Annuity & Trust Co. George P. Rich and Henry C. Boyer, for appellees Henry G. Freeman and others. Parker R. Freeman, for appellee Chapman Freeman. J. Edward Carpenter, for appellees James Black Freeman and others.

MITCHELL, J. The proposed lease is within the words of the testator's grant of power to the trustee to lease the property from time to time at its own discretion, but, considering the length of the proposed term in relation to the probabilities of life of the testator's children now living, the trustee and the court below preferred to treat the lease as practically amounting to a sale, and therefore coming within the testator's restriction requiring the consent of all the cestuis que trustent of age and accessible. In so doing the trustee and the court displayed commendable regard for the equitable rights of the heirs, as well as for the security of the title to be passed to the lessee. No reasonable objection can be made to such action. Treating the lease on the basis of a sale, the testamentary power of the trustee cannot be exercised for want of the unanimous consent of the heirs which the will required as a condition precedent, and resort was therefore had to the orphans' court, under the act of April 18, 1853 (P. L. 503). The case falls within the express words of section 2, authorizing the court to decree a sale where property is held in trust, and "one or more persons required to consent * * * unreasonably withhold consent." The constitutional objections to this statute raised by the appellants are not tenable. As applied to the case, the statute is not the divesting of estates of parties sui juris without their consent, but the regulation of joint rights, where the joint owners cannot agree in the control and disposition of the property. It defeats or interferes with the individual rights of property no differently and no further than any other mode of changing their rights to severalty or regulating the management until that is done. The right of a joint owner is to an undivided interest in every portion of the joint property, but this

right is accompanied with the ancient incident of partition. Each owner has the right to enlarge his estate to severalty, though in so doing he must reduce its corpus, so that the other owners may also have the like privilege. The mode of doing this has always been within legislative control, and this statute does no more. There is no question, even, of retroactive application of the law, as the act was in force for more than 20 years before the death of the testator, who, as an experienced member of the Philadelphia bar, must be assumed to have written his will with the knowledge that the powers of leasing and sale which he gave his trustee could be supplemented, if occasion arose, by the powers of the orphans' court.

The further argument that the testator only intended short leases, or, at most, those of ordinary length, would have much force if the trustee were acting on its own discretion under the testamentary authority to lease from time to time, but, as already said, the trustee and the court have treated the case as practically involving a sale, and, if the requisite steps for a valid sale have been taken, they must certainly include the lesser act of leasing, even for so long a term as 50 years. Such leasing does not contravene any express direction of the testator, but only supplements the authority he gave by a resort to the power of the court to meet circumstances not anticipated, and therefore not provided for by him.

The only remaining question, whether the court was right in deciding that the consent of appellants was unreasonably withheld, cannot be seriously contested. The main value of the property is in the land. The buildings are only a survival of the private residences to which the neighborhood was originally devoted, temporarily adapted for business, but falling far short of the kind of improvement that the present uses of the neighborhood demand. The rental of the property in its present condition is an inadequate percentage on its assessed value for taxation, and the latter is constantly increasing. It is admitted that the proposed lease will at once double the net revenue from the property, with an increase in the future in actual amount as well as in indemnity against the increase in taxation; and the property will revert at the end of the term improved by the erection of a building adapted to its most modern needs, at a cost entirely defrayed by the lessee, of more than one-half the amount of the highest present valuation of the whole property. This plan has the active support of the owners of five-sixths of the property, and has been approved by the judgment of the trustee and the court below. The decree is framed with great care, to secure every possible interest of the cestuis que trustent, and we are of opinion that it was not only within the jurisdiction of the court, but also that the power was properly exercised. Decree affirmed.

STERRETT, C. J. (dissenting). In the absence of any authority in the will itself, or in the act of 1853 in connection therewith, the orphans' court had no jurisdiction to make the decree authorizing the trustee to execute a 50-year lease of the premises in question. The jurisdiction conferred by the act "to decree the sale, mortgaging, leasing, or conveyance upon ground rent" of real estate is subject to the following express limitations, *inter alia*, viz.: That it "may be done without injury or prejudice to any trust, charity, or purpose for which it may be held." Laws 1853, p. 503, § 1. The proviso to the second section declares "that nothing in this act contained shall be taken to * * * affect or impair any right or powers otherwise existing in any persons or corporations to sell, mortgage, lease or let on ground rent any real estate." In this case, the authority given by the will to the trustee to sell in fee simple is coupled with the following positive prohibition, that "no such sale shall be made without the consent in writing of the several cestui que trusts having an interest therein who may be at the time of lawful age and accessible." As to the absolute want of authority under the will itself, without compliance with its provisions, there cannot be any question. The cardinal rule of construction which inheres in every grant of power is but a synonym of the rule that a trustee shall do only those acts, in the course of administration, which are essential to effectuate the purpose of his trust. The reason of the rule lies in the presumption of intent derived from the language used. It has accordingly been uniformly held that a trustee of real estate may make repairs, because necessary to prevent decay; but he may not make betterments without general or special authority. Thus in *Green v. Winter*, 1 Johns. Ch. 27, where the trustee's power was to sell land for the payment of incumbrances, Chancellor Kent said: "To tolerate such wide deviation from the nature and terms of the trust would be creating a most dangerous precedent. It would be placing trust property in the greatest jeopardy, and perhaps incur it with burdens too grievous to be borne. I cannot, therefore, admit of any allowance under this head but such as may justly be considered reasonable reparations or repairs. * * * It is the established doctrine that a trustee can only be allowed for necessary expenditures, and the cestui que trust has always his option to take or refuse the benefits or loss of the unauthorized act of his trustee." In *Wykoff v. Wykoff*, 3 Watts & S. 481, credit for improvement was refused because unnecessary, and because such allowance would afford an opportunity to "improve" the cestui que trust out of his land. Numerous authorities to the same effect might be cited, among which are *Bellinger v. Shafer*, 2 Sandf. Ch. 293; *Dickinson v. Conniff*, 65 Ala. 581; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; *Field v. Wilbur*, 49 Vt. 157; *L'Amoureux v. Van Rensselaer*, 1 Barb. 34.

That being the established principle, the question is whether the improvement contem-

plated here is such as, considering the nature of the trust, the quantity of the estates, and the character of the property, is needful to be made and ought to have the sanction of a court of equity. Certainly there is nothing in the nature of the trust itself which would justify it. No one will pretend that tenants for life, in whom are united the legal and equitable estate, can compel each other, or those in remainder, to unite in such improvements. Tied. Real Prop. §§ 67, 68. Even a tenant in common in fee cannot compel his fellow to make more than necessary repairs (*Kelsey's Appeal*, 113 Pa. St. 119, 5 Atl. 447); much less can tenants for life. The mere separation of legal from equitable life estate can have no effect in changing the relative rights of those in remainder. The incidents of these respective estates remain the same. It is claimed, however, that because the power to sell, given in this will, implied a power to mortgage, it also implied a power to make an improvement lease for 50 years,—a term which will admittedly extend far beyond the lives of these life tenants, and probably beyond the lives of a majority of the remainder-men. But such implications arise only so far as consistent with the donor's purpose. Thus where an absolute conversion is contemplated, as is clearly the fact in this case, power both to lease and mortgage is excluded. *Hill, Trustees*, 476; *Evans v. Jackson*, 8 Sim. 217; *Lewin, Trusts*, 425x, 426x, 563, 564. In any event, it is self-evident that partial execution must be in substantial harmony with and limited by the testator's purpose. It was an essential part of this purpose that, immediately on the death of the last cestui que vie, "partition, allotment, and division of his entire estate, real and personal," shall be made as directed by him, and thereupon the duties of the trustee will necessarily cease. Assume the lease made on the theory of a partial execution, its tender by the trustee on account would surely not answer a remainder-man's demand for his distributive share. No rule is better settled than that a donee of the proceeds of sale may refuse to receive securities and insist upon cash, for cash is what the testator gives him and that to which he is entitled. If he must take the lease, he is placed at great disadvantage in making disposition of his undivided interest. On the other hand, if the trustee sells subject to a lease which fixes the rental for a long period of years in advance, primarily for the benefit of the life tenants, those in remainder lose the chance of enhancement which is incidental to absolute estates. Surely, the simple scheme adopted by the testator—a trust for life to one class of beneficiaries, and "partition, allotment, and division" to another class—never contemplated any such contingencies. Such lease is absolutely in excess of the power. When the time should arrive which the testator has fixed for partition and distribution, there could be no subject for its support, so far as these donees are concerned. If there be room for doubt as to the correctness of this view, it is removed by the direction which the

testator gave in respect of the management of the trust for life. "To lease from time to time" necessarily means at intervals during the term of the trust, and excludes any longer term. The force of this is sought to be evaded by an implication drawn from the power given the trustee to anticipate, with the unanimous consent of the cestuis que vie, the time of partition and distribution. But this, on analysis, will be found rather to add strength to the view here taken. The purpose of that power was certainly not to change the quantity of the estates originally given. The destination of the corpus remained the same as before, and there is nothing to justify an inference of any intention to change the time or character of the final distribution as already fixed. In any event, the proceeds of sale must then be ready for distribution. If there is no change in this respect, the necessary implication is that this power was intended as an alternative provision relating to management pending life tenure. If leasing the real estate in the manner directed by the will in the first instance should prove unsatisfactory, then, with the unanimous consent of the cestuis que vie, the trustee might sell by way of anticipation, and invest the proceeds until the time already fixed for final distribution. The testator, having specified these alternative modes, must be presumed to have intended the exclusion of any other. Iteration shows that he had no other idea of conversion before the termination of the trust than that of sale. The proposed lease, unlike a mortgage which produces cash, will be in no sense a partial execution of the power given here. It will not only not make one step towards the purpose of conversion, but will be plainly an actual hindrance. It is of a nature entirely inconsistent with the testator's scheme of conversion. It will not produce one dollar of cash answerable to final distribution, but contemplates the continuance of the estate in land long beyond the time fixed by the will. It will therefore be a palpable breach of trust and subversion of testator's declared purpose.

But, conceding the want of testamentary power, it is insisted that the orphans' court has jurisdiction to grant relief under the act of 1853. That is not an enlarging, but an enabling, statute. Its declared purpose was to "unfetter" and make titles freely alienable. It enables parties who have vested rights to enjoy the benefit of them. It authorizes what, without restricted powers, the beneficial owners might themselves do. It makes no attempt to change relative rights of property, but, on the contrary, it expressly (section 2) provides that nothing contained in it shall be taken "to affect or impair any right or powers, otherwise existing," to sell, mortgage, or lease. Disability to discharge liens, bar contingent interests, make complete appointments, probate parol contracts,—these and the like parties interested are enabled to remedy; but search is vain for power to enlarge one vested right at the expense of another. *Keller v. Lees*, 176 Pa. St. 402, 35 Atl. 197. Many acts have been sus-

tained on the ground of disability of parties interested; but interference with the constitutional right of parties sui juris to exercise the powers incident to ownership has been uniformly condemned. *Ervine's Appeal*, 16 Pa. St. 256; *Kneass' Appeal*, 31 Pa. St. 87; *Palalret's Appeal*, 67 Pa. St. 493. In the last case Mr. Justice Sharswood, discussing the legislative power to authorize conversion, said: "But this power to authorize conversion has never been recognized as constitutional by this court, except in the case of the property of persons under disabilities, or where there were contingent interests whose owners had not come into existence, and that, too, with the consent of those standing in a fiduciary relation of trustee, guardian, or committee. The cases in which such conversion may be authorized seem well enumerated in Mr. Price's valuable act of April 18, 1853 (P. L. 503). But it has been expressly repudiated and denied in the case of owners sui juris, not consenting nor presumed from acquiescence to have consented." To the same effect is *Hegarty's Appeal*, 75 Pa. St. 517. There are, no doubt, apparent exceptions to the rule, but these, on closer view, will be found to be in entire harmony with it.

By the terms of the act of 1853, any party who is interested may invoke its aid, and the question now is whether the parties to the present proceeding are in that position. Certainly the testamentary trustee, as such, is not; for by the express terms of the will it can only act, if at all, by the consent of its cestuis que trustent, and they are under no disability which the act can remedy. It is only where, without the restriction of the trust, the owners could act, that the disability of the trustee may be removed. *Burton's Appeal*, 57 Pa. St. 213. If relief be sought by these tenants for life, as implied in the power of sale, the condition precedent of unanimity must also be implied, and such unanimity is wanting. If it be sought by them outside of the will, the answer is that the act does not authorize the court to impose burdens which parties competent to act could not themselves enforce. Suppose these appellees had in fact erected substantial improvements, such as are contemplated here on the property in question, would any one contend for a moment that they could enforce contribution as against the appellants and the remainder-men? Have tenants for life any higher right than tenants in fee in respect of improvements on the common property? Surely not. But there is the additional consideration that the proposed lease will, as has been shown, be utterly inconsistent with the testator's declared purpose, and is therefore expressly excluded by the terms of the act of 1853, quoted on first page, supra. The "power" to make, and the "right" to demand, a sale for the purpose of distribution, etc., cannot be "impaired" by any order of court. The duty to sell is made imperative, and the right to the proceeds is vested in absolute ownership.

The appellees insist that because the ap-

pellants "unreasonably withhold" consent to highly beneficial improvements the court has power to coerce them. If they owe a duty, this must be conceded; but they do not. It has been seen that neither by the terms of the will, nor by any rule of law or equity, is one tenant in common, whether for life or in fee, bound to contribute to the improvements at the mere instance of his fellow. The only security which one tenant has against "improvement out of his title" by another lies in total prohibition. The question of reason or unreason has no place. "Voluntas stat pro ratione." The right of refusal is absolute. The act gives no power to coerce in such cases. There are, moreover, no parties whose "consent" was "required" by the will to the execution of any lease, and the appellants are not, therefore, within the terms of the act. The concurrent action of the tenants for life is in no sense ministerial in character (for the "execution" was the peculiar function of the trustee), but a pure matter of personal judgment, beyond the reach of judicial action. The rule of law is well settled that, when the consent of a third person is required to the execution of a power, that, like every other condition precedent, must be strictly complied with. So far as the tenants for life were concerned, their relation to the sale is a mere right of election, pure and simple, whose exercise the court might, as in any other case, compel, but not control. The primary intent was that this property should be held during the lives of the children as it stood, and divided immediately on their death; and change in its form in the meantime is obviously a contingent matter, in which each has an individual interest that is as much exempt from divestiture without his consent as any other interest in land. However well satisfied the court may be of the advantageous character of the proposed action to all parties interested, it cannot substitute its own for the testamentary scheme, or "impair rights and powers" which the act of 1853 expressly saves. In whatever light the proceeding is reviewed, the court was without jurisdiction. The act gives no power to coerce in such case. All the parties for whose immediate benefit these improvements are proposed are tenants in common for life, competent to act for themselves, and have no power to impose any burdens, save those which are incidental to their estate, on unwilling shoulders, even though the result may be admittedly beneficial to all. There are no necessities of justice calling for aid. The parties are now in the enjoyment of every right which the testator intended and the law can assure them. I would therefore reverse the decree, dismiss the petition, and set aside all proceedings, at the costs of the appellees.

WILLIAMS, J. I freely concur in the foregoing opinion, both as to the character of the trust created by the will and as to the inapplicability of the statute to the facts of this case.

UNITED STATES CREDIT SYSTEM CO. v. ROSENBAUM.

(Supreme Court of New Jersey. June 9, 1897.)

CONTRACTS—LEGALITY—INTERPRETATION—BREAOK—RECEIVERS.

1. Under a contract that, during the first three years of its existence, the plaintiff will, during each consecutive three months thereof, procure new business to a specified amount, the contract running from December 1, 1892, it is not a good plea to aver that during three consecutive months, to-wit, the months of May, June, and July, in the year 1894, the plaintiff did not procure such new business. The contract is that in each consecutive three months during the first three years the amount of business agreed upon shall be procured. That is equivalent to saying during each consecutive quarter commencing December 1, 1892.

2. The defendant appointed the plaintiff its agent for the state of Massachusetts for the term of five years, for which he was to receive a specified percentage of the business he procured in that state. The company, on the 23d of August, 1894, was declared to be insolvent by a decree of the court of chancery of this state, a receiver appointed, and the charter of the company declared to be forfeited and void. *Held*, that an action cannot be maintained by the plaintiff to recover damages from the receiver, because the plaintiff was not continued after that date in such employment as agent under the contract.

3. A plea that the plaintiff was not authorized to transact business in which he was engaged, and that it was unlawful to engage in such business, is a good plea. No one can be constrained to do an act against the law, nor can he be cast in damages for the refusal or neglect to do such act or permit it to be done.

(Syllabus by the Court.)

Action by Martin Rosenbaum against the United States Credit System Company. On demurrer to pleas. Overruled in part.

Argued February term, 1897, before MAGIE, C. J., and DEPUE, VAN SYCKEL, and LIP-PINCOTT, JJ.

R. Wayne Parker, for plaintiff. Howard Hayes, for defendant.

VAN SYCKEL, J. The declaration in this case sets out a contract by which the plaintiff was appointed the defendant's agent for the state of Massachusetts for the period of five years from December 1, 1892, and alleges that on the 23d day of August, 1894, the defendant, without the fault of the plaintiff, ceased and refused further to employ him, and for this disregard of the contract damages are claimed. As appears from the declaration, the contract contains the following provision: "It is further agreed by the party of the second part (the plaintiff) that during the first three years of the existence of this contract he will, during each consecutive three months thereof, procure new business from parties who have never been guaranteed by this company prior to the procurement of said business, which said business shall be such as is accepted by said company, and shall be actually paid for, to an amount not less than one hundred and twenty-five thousand dollars (\$125,000) for each of said three months, and in case of his failure so to do the said company shall have

the right, which is hereby expressly reserved, to terminate this contract in its discretion." The third and fourth pleas are intended to meet this clause in the contract. They each allege that "during three consecutive months during the first three years of the existence of the said contract the plaintiff did not procure new business, from parties who had never been guaranteed by the defendant prior to the procurement of said business, to the amount of one hundred and twenty-five thousand dollars," and that the defendant therefore terminated the said contract. The third plea also names the three months during which the required amount of business was not procured, viz. May, June, and July, 1894. To each of these pleas, as well as to the fifth and sixth pleas, the plaintiff has filed a separate demurrer.

The allegation in the third plea, "that during three consecutive months during the first three years of the existence of said contract, to wit, the months of May, June, and July, in the year eighteen hundred and ninety-four, the said plaintiff did not procure new business," etc., if true, does not show a breach of the contract on the part of the plaintiff. The plaintiff did not stipulate that there should be no three consecutive months during the first three years of the contract during which the business procured by him should fall below the fixed standard. The engagement is that the minimum amount of new business shall be procured in each consecutive three months during the past three years. That is equivalent to saying during each consecutive quarter commencing December 1, 1892. The first quarter contemplated by the contract is December, January, and February; the second, March, April, and May; and the third, June, July, and August, and not May, June, and July, as in the plea set forth. The third plea is therefore faulty for failing to aver non-compliance with the terms of the contract. The fourth plea is fatally defective for the like reason.

The fifth plea alleges, in substance, that the defendant company became insolvent, and ceased to employ plaintiff, because it was declared to be insolvent, and enjoined from doing business by the court of chancery, and put in the hands of a receiver, and that its charter was declared to be forfeited and void except for the purpose of the collection and distribution of its assets. The contract alleged in the declaration to which this plea is interposed is that the defendant company appointed the plaintiff its agent in and for the state of Massachusetts to procure applications for insurance, which appointment was to continue for the period of five years, and that the company agreed to pay the plaintiff, as compensation for his services as such agent, the sum of \$5 for every \$1,000 of guaranty issued by it upon applications procured and presented by the plaintiff and the renewals thereof on all regular business, and \$7 per \$1,000 of guaranty on inferior business, so long as he shall remain

the agent of said company, such sum to be paid only upon receipt by the company of all fees or premiums due for each certificate of guaranty or renewal thereof issued by it as aforesaid. What the effect of insolvency and forfeiture of the company's charter will be upon a claim for damages for breach of a contract made with one who has no connection with the conduct of the business of the company need not be considered. The discussion in this case is limited to the effect of such insolvency and forfeiture upon a claim for damages for breach of a contract to continue the plaintiff in the service of the company after the time when the receiver was appointed. It is well settled that contracts for personal services are made upon the implied agreement that both contracting parties will continue to live, and they are terminated by the death of either party. *Farrow v. Wilson*, L. R. 4 C. P. 744; *Spalding v. Rosa*, 71 N. Y. 40, and cases cited. The distinction between contracts for personal service and contracts with policy holders was applied in *People v. Globe Mut. Life Ins. Co.*, 64 How. Prac. 240, which was a case involving the question now presented, and where, as in this case, the life of the company was extinguished by the act of the state. There the New York supreme court held that a general agent, whose compensation depended upon his success in procuring insurance for the company, upon which he was to receive a percentage, could not maintain an action for damages against the receiver, because, before the expiration of the period for which he was engaged, he was prevented by the insolvency, receivership, and dissolution of the company from continuing his employment. This view was unanimously concurred in by the New York court of appeals. The views of the court are presented in a clear and forcible opinion by Mr. Justice Finch. *People v. Globe Mut. Life Ins. Co.*, 91 N. Y. 174. The rule adopted in that case will be accepted here, and the demurrer to the fifth plea overruled. The decree declaring insolvency and forfeiture of the charter and the appointment of a receiver operated alike upon the company and its agents, so that neither could perform and put the other in the wrong. "There being no right to continue the service, there can be no future earnings; and, as the prohibition to continue the corporate business must prevent the obtainment of other policies of insurance, there cannot possibly be an allowance of damages based upon the possibilities of future earnings, which it is plain can never be made." *People v. Globe Mut. Life Ins. Co.*, 64 How. Prac. 240. In the language of the contract declared upon, "the plaintiff, so long as he remained the agent of the company, was to be paid his stipulated percentage only upon receipt by the company of all fees or premiums due for each certificate of guaranty or renewal thereof issued by it." After the receiver was appointed, and the charter of the company declared to be void, it is manifest that the plaintiff could not ob-

tain any business for the company upon which his right to a percentage would arise.

The sixth plea sets up a Massachusetts statute, providing that only certain classes of risks shall be the subject of insurance in that state, and that no foreign insurance company shall be allowed to do business in that state without license from the insurance commission. The plea further alleges that the defendant company was not authorized to transact its business in Massachusetts, that the plaintiff was not authorized to transact the business as agent, and that it was unlawful to engage in the business of indemnifying any person against excess losses from credit in said commonwealth, and that therefore the said alleged contract was void. The objection to this plea for duplicity cannot be considered on general demurrer. It must be taken advantage of on motion to strike out. To maintain this plea as a substantial defense to the action, the defendant cited and relied upon the case of *Clafin v. Credit System Co. (Mass.)* 43 N. E. 293; but it is not necessary to criticise that case. On demurrer the allegations of the plea must be taken to be true. Assuming it to be true, as alleged in this plea, that the plaintiff was not authorized to transact the business which he engaged to do, and that it was unlawful to engage in such business, it is obvious that no action can be maintained for failure to employ the plaintiff to transact it. No one can be constrained to do an act against the law, nor can he be cast in damages for the refusal or neglect to do such act or permit it to be done. The demurrer to this plea must be overruled.

The demurrers being separate to each plea, costs will be allowed to the party prevailing in each case.

DUFFY v. KELLY et al.

(Court of Chancery of New Jersey. June 4, 1897.)

SPECIFIC PERFORMANCE.

A lease provided that the tenant should have the option of extending the same for another term, "unless the landlord shall pay a fair price for the building," to be erected by the tenant, provided three months' notice be given by either party before the expiration of the lease. Held, that a suit by the landlord, who had elected to purchase the building and had given the required notice, to enforce such provision, was in effect a suit for specific performance, which equity, after fixing the fair value of the property, would enforce.

Bill by William Duffy against John Kelly and another for specific performance. Decree for complainant.

The suit is in the nature of one for specific performance. The complainant, by his bill, sets out that he is the owner of a lot of land in Hoboken, known as "No. 165 Newark Street," and that on the 2d of October, 1891, he demised the same unto one Adolph Horn for the term of five years from that day, and the lease contained a clause in these words:

"And it is further agreed that the tenant shall have the option of extending this lease for the further period of five years for the same rent, unless the landlord shall pay a fair price for the building that is to be put on the premises by the tenant, provided three months' notice in writing is given by either party before the expiration of this lease." The bill further sets out that a building was erected on the premises by Horn, who occupied the same, and in the year 1894 assigned the leasehold interest to the defendant John Kelly, who took possession and has occupied as assignee; that subsequently Kelly executed a chattel mortgage on the premises to the defendant the Bavarian Star Brewing Company to secure \$700; that on the 30th of June, 1896, and more than three months before the end of the term created by the lease in question, the complainant gave written notice to Horn and Kelly that he had elected that the lease should not be extended for the further term of five years, but that the same should terminate and come to an end on the 2d day of October then next, and that the complainant was willing to pay a fair price for the building erected thereon by Horn; and that Kelly was notified to quit and surrender the premises at the end of the term. The bill further alleges that a fair price on the building was \$250, and that complainant tendered that amount to Kelly, but that Kelly refused to accept it. Complainant tenders himself ready and willing to pay to Kelly, or to the mortgagee, as the court may decree, such sum as the court shall deem a fair price for the building, and he alleges that he cannot safely pay to either without the consent of the other, except by the direction of this court. The defendants have answered separately. Kelly admits the material allegations of the bill, except the cost of the building and the value of the property. He alleges that the building originally cost \$1,000, and that it is worth that now. He admits the mortgage, and that the full amount of \$700 is due upon it. Finally he takes the point in his answer that this court has no jurisdiction, and that the complainant has full remedy at law. The answer of the brewing company admits simply that it had notice of the clause of renewal in the lease; sets up that the whole amount is due, with interest, on the mortgage; and prays such relief as the court may deem equitable and just. There is no allegation in the pleadings that Kelly ever gave complainant notice, as required by the lease, that he elected to renew the term for five years, and no evidence of any such notice was produced. Evidence was gone into as to the value of the building. The witnesses for the complainant placed it at about \$250, or a little more, and those for the defendant placed it at upward of \$600. Horn, the lessee, called by complainant, stated the original cost of the building, with sewer and water connections, to have been \$611. A witness for defendant went into a detailed statement of its present

value, and fixed it at \$635; that being the amount it would cost to replace it.

Collins & Corbin, for complainant. Huds-peth & Puster, for defendants.

PITNEY, V. C. (after stating the facts). First, with regard to the jurisdiction of the court. The clause in question is, in effect, a contract on the part of the lessee to convey the building to the complainant, lessor, at his option, at a fair price. This is a necessary implication from the scope and purpose of the contract. If the building was, in fact, so annexed to the land as to be incapable of removal as a trade fixture, then the legal title was in the lessor, and no actual conveyance is necessary. If, on the other hand, the lessee has the right to remove it, a formal release of that right is proper. The clause was evidently framed upon the idea that it was not removable, and the provision for compensation was manifestly introduced for the benefit of the lessee by way of protecting him against the loss of the amount invested in the building. It follows that the suit is, in effect, one for specific performance. The circumstance that the interest here in question may be properly classed as a chattel interest is no objection to the jurisdiction of the court. The power and propriety of the court in proper cases to deal with specific performance of contracts for the sale of chattels is established by a series of authorities in New Jersey, the leader being *Cutting v. Dana*, 25 N. J. Eq. 285, followed by *Rothholz v. Schwartz*, 46 N. J. Eq. 477, 19 Atl. 312, and by the later case of *Gannon v. Toole* (N. J. Ch.) 32 Atl. 702. In the last case the interest dealt with was much like that now before the court. But, in essence, the subject-matter here is real estate. It involves the right to the possession of the land itself, as well as of the building which has been erected upon it. Then I am unable to see how the complainant can have his remedy at law. By his notice, given to Kelly, he bound himself to purchase the building at a fair price, and barred himself from declaring the term ended except upon terms of paying for the building. In order to maintain an action at law, it is necessary for him to make a tender of a fair price in advance of his action. And there are two difficulties in the way of that: First, that he has no mode of ascertaining in advance what a jury will consider to be a fair price; and, second, he might not be quite safe in tendering it to either of the two,—Kelly, the assignee of the lease, or to the Bavarian Brewing Company, as mortgagee. The real position of the complainant is that of a person holding a contract to purchase a right of possession of land upon paying a fair price for a building situate upon it. In that respect the case is the converse of *Berry v. Van Winkle*, 2 N. J. Eq. 269, where the aid of the court was asked by the lessee, who had a contract from the lessor to pay him at the

end of the term the value of improvements to be put upon the premises. Viewed in the light of a suit for specific performance, the power and duty of the court, where, as here, it is necessary, in order to do justice, to ascertain the fair value of the subject of the sale, must be considered as settled in this court. The subject was considered by Chancellor Green in *Van Doren v. Robinson*, 16 N. J. Eq. 256, at page 260, where that learned judge collected the authorities and stated the result thus: "But, where the contract is that the land shall be reconveyed, not at a price to be agreed upon by the parties, but at a fair price, or at a fair valuation, the court would direct the valuation to be made by a master, and will enforce the execution of the contract." It is manifest that, unless the court will undertake to ascertain the fair value of the building, the complainant will be in great danger of losing the benefit of the terms of his contract; and that consideration has influenced the courts in the direction of assuming that duty whenever practicable. This abundantly appears from an examination of the later English authorities. *Pom. Spec. Perf. Cont.* § 151; *Fry, Spec. Perf.* (3d Am. Ed.) § 346; *Hopcraft v. Hickman*, 2 Sim. & S. 130; *Gaskarth v. Lord Lowther*, 12 Ves. 107; *Jackson v. Jackson*, 1 Smale & G. 184; *Id.*, 22 Law J. Ch. 873; *Milnes v. Gery*, 14 Ves. 400. The latter was an action for specific performance of a contract to sell an estate at a price to be fixed by two indifferent persons, one to be named by one party and the other by the other party, and, if the persons so named should happen to disagree, then these two to choose a third person, whose determination should be final. Two persons were chosen, but were unable to agree, and were unable to agree upon a third person. Complainant filed a bill for specific performance, asking the court to appoint a proper person to make the valuation, or that the valuation should be ascertained in such other manner as the court should direct. Sir William Grant, master of the rolls, held that the court had no power to fix the price in any other manner except in that mode fixed by the parties, but at page 407 he adds: "The case of an agreement to sell at a fair valuation is essentially different. In that case no particular means of ascertaining the value were pointed out. There is nothing, therefore, precluding the court from adopting any means adapted to that purpose." With regard to the value of the building here in question, I think a fair valuation will be arrived at by taking the actual cost of the building, and water and service connection, which was \$611, and make a moderate allowance for five years' wear and tear. This I fix at \$61, and fix the valuation at \$550. As the complainant made his offer too small, and the defendant his demand too large, I think it right that each party should pay his own costs. The decree will be that, upon tender of that sum, the defendant must release all

right, title, and interest in the premises, without prejudice to the right of the complainant to recover for use and occupation.

CLARK THREAD CO. v. WILLIAM CLARK CO.

(Court of Chancery of New Jersey. May 29, 1897.)

TRADE-MARKS—INFRINGEMENT—INJUNCTION—ACCOUNTING.

1. In a suit against a corporation to enjoin its use of the trade-marks of the complainant, and to obtain an accounting of profits, the fact that a previous suit had been brought by the same complainant against the selling agent of the defendant for the same purpose, and that there had been a decree for an injunction, but no decree for an accounting, in that suit, does not estop the complainant from obtaining an accounting in the second suit; it appearing that the selling agent had been employed upon a salary, and received no profits, and it appearing that upon that ground no decree for an accounting was made against him.

2. A decree for an accounting in a suit for the infringement of trade-marks can only be made where an injunction is, or could have been, granted in the course of the suit.

3. An injunction will be granted where it appears that at the time the suit was begun the defendant was infringing the right of the complainant to the exclusive use of trade-marks, although at the time of final hearing such practices had ceased, and although the defendant had promised a perpetual cessation of the infringement.

(Syllabus by the Court.)

Bill by the Clark Thread Company against the William Clark Company. Decree for complainant.

Randolph, Condict & Black, R. V. Lindabury, and Charles D. Meyer, for complainant. Edward Q. Keasbey and Henry D. Donnolly, for defendant.

REED, V. C. This bill is filed to enjoin the defendant from using certain trade-marks which are alleged to be the property of the complainant, and also for an accounting for the profits diverted from the complainant to the defendant by reason of the previous illegal use by the defendant of such trade-marks. Both complainant and defendant are manufacturers of spool cotton thread. The complainant insists that, long before the organization of the William Clark Company (the defendant), the Clark Thread Company (the complainant) had, by use, acquired an exclusive right to employ in the sale of its goods, certain words and letters upon the labels upon its spools and boxes. It insists that the defendant has, by the use of the same or similar words and letters printed upon its labels upon its spools and boxes, infringed upon the property right of the complainant in its trade-marks. The questions presented are: First, whether the Clark Thread Company had acquired an exclusive right to use a trade-mark; second, whether this right has been infringed by the defendant; and, third, whether there should be an injunction against the further use of such trade-marks by the de-

fendant, and for an accounting for profits arising from the illegal use by the defendant of such trade-marks. An original examination of these questions in this case is excluded, because of a previous adjudication made in the federal courts. This judgment is set up by both complainant and defendant as an estoppel against a relitigation of the points in issue, so far as the former decree circumscribed and defined the extent of the exclusive right of the complainant to use certain words and letters, and as an estoppel so far as the judgment enjoined the use of these words and letters by the defendant. This previous adjudication is also set up by the defendant as a final determination against the right of the complainant to an account for profits in this case. The points to be decided are resolved into an inquiry whether the decree in the former suit has put at rest all the questions raised by the pleadings in the present suit. To understand the manner in which the suits are related, it is essential that the purposes of the first suit, the parties to it, and the several decrees made in it, shall be set out. It is equally essential that the pleadings in and the progress of the present suit, in relation to the former suit, shall also be exhibited. The bill in the first suit was filed in the United States circuit court for the Southern district of New York in January, 1893. That suit was brought by the Clark Thread Company, the present complainant, against one Herbert G. Armitage. Armitage had been, and then was, the general manager of the sales department of the William Clark Company. The William Clark Company openly defended the suit against Armitage. The bill in that suit was filed upon the same facts as is the bill in the present suit. It specifically prayed for an injunction, restraining the defendant from selling thread under the name or designation of "Clarks," or the "William Clark Co.," or under a designation of which the word "Clark" or "Clarks" should be a part, or from using in connection with the thread the collocation of the three letters "N. E. W.," horizontally arranged across a circular spool label or otherwise. The bill also prayed for an accounting for profits. In May, 1895, a decree was made in that case by Judge Coxe in the district court. 67 Fed. 896. By that decree the defendant was restrained from using the words "Clark" or "Clarks" except when those words occurred in the name of the corporation, viz. "The William Clark Co.," and when so used in good faith. The word "Clark" was not to be printed in Gothic type or otherwise so as to be in violation of the injunction. The decree was silent as to the right of Armitage to use the letters "N. E. W.," the court refusing to restrain their use. After this decree by Judge Coxe was made, the bill in the present case was filed, on July 17, 1895, against the William Clark Company, a New Jersey corporation. This bill, as I have already observed, is grounded upon the same facts as the previous bill, and prays for the same relief against

the William Clark Company as the former bill had asked against Armitage. To this bill an answer was filed by the William Clark Company on November 14, 1895, in which answer it was set up that the decree made by Judge Coxe in the former suit had established the right of the defendant to use the corporate name of the William Clark Company upon the thread sold by that company. On November 27, 1895, the complainant filed a petition of appeal from a part of the decree made in the circuit court of the United States to the United States court of appeals for the Second circuit, and on the same day the defendant Armitage filed a similar petition appealing from parts of the same decree. These appeals were decided on May 23, 1896. 21 C. C. A. 173, 74 Fed. 936. The court of appeals affirmed the decree below in respect to its order restraining the defendant Armitage from using the words "Clark" or "Clarks," but the court also decreed that the defendant was not entitled to use the collated letters "N. E. W." upon its labels and circulars, and directed an injunction against Armitage accordingly. In the meantime nothing had been done in the present suit subsequent to the filing of the answer. After the adjudication in the court of appeals in the preceding suit, a supplemental bill was filed in this suit on August 1, 1896. This bill set up the decree in the appellate court as conclusively determining between the parties in this suit the effect of, and the extent of, the infringement by the defendant of the trademarks of the complainant. To this supplemental bill an answer was filed on March 3, 1897. The answer admitted that the preceding decree was conclusive upon all matters litigated in that suit, and claimed that inasmuch as the bill in the former case prayed for an accounting for profits, and as the decree in that case was silent upon that point, the matter of accounting was thereby conclusively settled against the right of the defendant to an accounting, and so estopped the Clark Thread Company from now insisting upon a decree for an accounting. It is therefore perceived that by the pleadings in this suit it is assumed and admitted by both parties that in so far as the decree in the federal court fixes the rights of the parties in relation to the use of the words "Clark" or "Clarks," and the use of the letters "N. E. W.," the judgment is to be regarded as a final determination. The mooted point is whether the decree in the preceding case concludes the complainant from a decree for an accounting for profits in this case.

Assuming that the William Clark Company, by openly appearing and defending Armitage, its servant, for acts done within the line of his employment, are estopped from litigating anew any point in issue and decided in that cause (*Lyon v. Stanford*, 42 N. J. Eq. 411-414, 7 Atl. 869, and cases cited), and assuming that, by the doctrine of mutuality of estoppels, the complainant was also concluded from again litigating in a suit against the master any question so settled in a suit against the

servant, the question remains, does the estoppel reach this matter of accounting? The effect of an estoppel by judgment may present two aspects: One, where a second suit between the same parties is brought for the same cause of action; the second, where a second suit between the same parties is brought, not for the same cause of action, but for a cause of action so related to the cause in the preceding suit that some matter the establishment of which is essential to the recovery by the complainant in the last suit was in issue and determined in the preceding suit. In respect to the first phase in which the question of estoppel presents itself, it is entirely settled that, after one judicial determination by a court of competent jurisdiction, a second suit for the same matter, between the same parties or their privies, cannot be relitigated in the same or any other court. Nor does it matter that in the first suit evidence existed which was withheld or undiscovered, or that the law was misconceived by the court or left uncited by counsel, or that no defense was made and judgment went by default, or that only one of several defenses was interposed by the defendant. In spite of any of these defects in the prosecution or defense of the action, the judgment stands as an absolute bar against a second litigation of the same cause of action. When, however, a second suit is brought, not for the same demand, but for a cause which was a part of the same matter, but was not included in the first action, the estoppel is not so sweeping. In such instance, only those issues which are common to both suits, and which had to be or were actually decided in the first suit are regarded as *res adjudicata* in the second. This distinction between the two kinds of estoppel is lucidly stated by Mr. Justice Field in *Cromwell v. Sac Co.*, 94 U. S. 351. In that case there had been an action upon certain county bonds, in which action the county succeeded. In a subsequent action, by substantially the same parties, upon other coupons on the same bonds, the previous judgment was set up as an estoppel. Mr. Justice Field, after speaking of the absolute estoppel as to every ground which might have been presented in the preceding case when a second action is brought for the same cause, goes on to say: "When a second action is upon a different claim, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding of the verdict was rendered. In all cases, therefore, when it is sought to apply the estoppel of a judgment in one case to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been litigated or determined." In accordance with this view, it had been held in *Steam-Packet Co. v. Sickles*, 24 How. 333, that, where the record of the first

suit does not show that the point involved was actually decided, parol evidence is admissible to show the state of affairs that existed at the trial, with a view to ascertain what was decided. The point so decided, namely, that in the second class of estoppels it must appear that the point set up by way of estoppel was, or must have been, determined in the original suit, was re-affirmed in the case of *Milne v. Deen*, 121 U. S. 525, 7 Sup. Ct. 1004; was recognized in *Doolley v. Porter*, 140 Mass. 49, 2 N. E. 935; *Daggett v. Daggett*, 143 Mass. 516, 10 N. E. 311; *Kilander v. Hoover*, 111 Ind. 10, 11 N. E. 796; *People v. Hall*, 104 N. Y. 170, 10 N. E. 135; *Bigley v. Jones*, 114 Pa. St. 510, 7 Atl. 54; *Russell v. Place*, 94 U. S. 606. The strictness with which this rule has been applied is illustrated in the case of *Burien v. Shannon*, 99 Mass. 200. This was an action brought to charge the defendant for board furnished by the plaintiff to defendant's wife. The defense set up was: First. That the defendant had been divorced by a decree of divorce granted by an Indiana court. Second. That the wife had later, herself, sued for divorce on the ground of cruelty and desertion, to which suit the husband had set up two defenses—First, a denial of the cruelty and desertion; and, second, that he had already obtained a divorce in Indiana,—and that in the suit of the wife against him the cause was dismissed. The judgment in this case was relied upon in the subsequent action for board as conclusively establishing the divorce, and so operated as a complete defense to the action brought against him for the wife's board. But the court held otherwise, because the judgment which dismissed the wife's suit for divorce might have gone upon either of two grounds, namely, that the husband was not guilty of cruelty and desertion, or that he had been previously divorced. It not appearing, therefore, that the question of divorce must have been the ground upon which the case was decided, or was the ground upon which it was decided, the court refused to recognize the judgment of dismissal as an estoppel. In the opinion in this case by Judge Foster, all the cases in the Massachusetts court are collected in support of the doctrine that it must appear that the point involved was necessary to the judgment in the preceding cause, or was a fact in issue, and was decided. In the language of Mr. Smith in his learned note to the leading case of the *Duchess of Kingston*, 2 Smith, Lead. Cas. marg. p. 590: "It is not necessary that the point on which it is sought to estop should have been the only one in issue on the previous occasion. It is enough if it be one which must have been decided." The strictness in which this rule should logically be, and has been, enforced, is illustrated by that leading case itself. In that case the house of lords had propounded to the judges the question whether a sentence by a spiritual court against a marriage in a suit for jactitation of

marriage is conclusive evidence, so as to estop the counsel of the crown from proving the marriage in an indictment for polygamy. The answer of the judges was that, apart from the fact that the parties in the two proceedings were not the same, there was no estoppel, because in the ecclesiastical court the sentence had only a qualified effect, viz. that the parties had failed in the proof, and that the libellant was free from all matrimonial contract, so far as yet appears, leaving it open to new proof of marriage, so that the sentence only proved that it did not yet appear that they were married, and not that they were not married. "The sentence, and this judgment," said Chief Justice De Gray, "may stand well together, and both propositions be true." Now, the obvious rule controlling estoppels, as stated and illustrated by this case, is, in my judgment, applicable to the point involved in the present case. The test, as stated by Chief Justice De Gray, is whether the decree in the former suit refusing an accounting, and a decree in this suit awarding an accounting can stand together. The condition calling for the application of the rule, it is true, is in this case novel, but the applicability of the rule seems to be logically certain.

In the present case the estoppel against the master rests upon the identity of himself and his servant as defendants in the previous suit. It is apparent that if the identity of the two defendants in the two suits was not perfect, in respect to their several responsibilities for the matters involved in the two suits, the causes of action would not be identical. The cause of action against the servant would not be the same cause of action for which the suit against the principal is prosecuted. As to those matters decided in the previous case as to which there was perfect identification (i. e. matters done by direction of the master, and which could not have been decided for or against the servant without deciding that the power of the master to so direct his servant was with or without legal warrant), there was a complete estoppel against the latter. In respect to such conduct of the agent, an adjudication that it was or was not legal was an adjudication that the direction of the master was or was not legal. If, however, the decision in favor of the agent had been put upon the ground that the agent had done none of the acts charged, while it would be conclusive in a subsequent suit against the principal for the result of any of those acts of that agent, it would clearly afford no immunity to the principal for any act done by another agent. So of any act of the agent aside from the scope of his agency, either by original authorization or subsequent ratification, it seems entirely clear that a judgment for or against the former could not affect the latter. There would be no identification of parties in regard to such matters, and so the latter suit would have been brought for a different cause—indeed, against different parties. For instance,

If the former suit in the federal court could have been and had been brought for a simple accounting, and had failed because the agent had not sold any goods, it would have settled nothing in a suit against the principal for goods sold by any other agent. So if, by the terms of the agency, there was no right of the agent to receive profits, or he had received none, it is equally apparent that a judgment on that ground in favor of the agent would decide nothing as to the principal who had actually received profits. Now, the latter condition of affairs seems to be the present posture of the litigation before me. In the former suit brought by this complainant against the selling agent of the present defendant, the selling of the goods by the servant was admitted, and it was conceded that the use of the labels by the servant was by direction of the master. The right of the agent depended upon the right of the master to use the interdicted labels. If the agent had no right, the master had none, and vice versa. The same evidence which supported or destroyed the right of one equally supported or refuted the right of the other. It was impossible to grant or refuse an injunction against the agent which did not rest upon the right of both master and servant to employ the questioned devices in the defendant's absence. Conceding, then, that the defendant company had so identified itself with the servant in the preceding suit as to be bound by the decision of the court in regard to the right of the agent to use the labels, it is entirely clear that so far the issue in the two cases is precisely the same.

But when we leave the ground upon which the injunction went, and reach the matter of an accounting for profits, the two cases present quite different aspects. It is apparent at once that, assuming that both principal and agent were guilty of violating the property rights of the complainant by an illegal use of its trade-marks, nevertheless the question of the liability of each to account for profits must depend upon entirely different considerations. A decree for an accounting could go only if it appeared that there was something for which the defendant was liable to render an account. If the court is satisfied that nothing is due to the complainant from the defendant, no further proceedings will be permitted, and the bill will be dismissed. *Campbell v. Campbell*, 8 N. J. Eq. 738; *Stout v. Seabrook's Ex'rs*, 30 N. J. Eq. 187. The same obvious course in refusing an accounting in a patent case was taken in *Bergman v. McMillan*, 17 Ch. Div. 423; *Fry, J.*, saying that he could not direct an accounting for profits which were non-existent. It is entirely clear from the record in the preceding case and the testimony in this that this was the reason why the decree in the former case was silent upon the question of accounting. It appeared in the evidence of the preceding case, without contradiction, and was stated in the brief of counsel for the defendant in that case, that Armitage was an employé of the William Clark Company, upon

a stated salary, beyond which he received nothing. All the profits received from sales made through his agency went to the present defendant. If the agent received no profits, it did not follow that the principal received none. Therefore the decree in the first case, based upon the fact that the agent had received no profits, could not conclude the complainant from an accounting against the principal for profits which it had received. The two decrees can stand together. In my judgment, there exists no estoppel against a decree in favor of the complainant for an accounting.

But the defendant interposed another objection against the award of an accounting for profits. This objection is based upon the insistence that a court of equity has no jurisdiction to entertain a suit simpliciter for an accounting for profits; that such an accounting can only be awarded as incidental to an injunction; that the complainant is not, in this suit, entitled to an injunction. The first and second of these propositions are entirely settled. The only way a court of equity can acquire jurisdiction to order an accounting for profits in this class of suits is by obtaining jurisdiction over some equitable matter, with which the matter of accounting is so interwoven as to justify the court in settling all questions in one suit. The query remains, then, is the complainant entitled to an injunction? At the date when this bill was filed, in July, 1895, it is entirely clear that the defendant was violating the right of the complainant, by selling goods under labels having upon them the letters "N. E. W." It is undenied that this conduct continued until after the decree in the United States court of appeals on May 28, 1896. Since then the words and letters, the use of which was interdicted by that decree, have not been employed by the defendant. The defendant insists, for this reason, that no decree enjoining it from such infringement should now be signed against it. It may be remarked that the property right which a party has in a trade-mark is of the same quality as a copyright or the right to a patent, and the remedies accorded to the owner of either of these kinds of property are, except as they may be controlled by statutory regulations, analogous. The rule which prevails in the federal court in respect to the granting of an accounting in patent cases is that the right does not depend upon the question whether there is need for the injunction at the time of the hearing. The rule as stated in *Bragg Manuf'g Co. v. City of Hartford*, 56 Fed. 292, is this: "The test of jurisdiction [to decree an accounting] applied in the later cases is whether the bill is filed in season to enable the complainant, under the rules and practice of the court, to move for and obtain an injunction before the expiration of the patent." If so, although there may be nothing for the injunction to restrain at the time of the hearing (the patent having expired), yet, jurisdiction having existed to grant an injunc-

tion upon the bill filed, the account will be decreed. *Singer Manuf'g Co. v. Wilson Sewing-Mach. Co.*, 38 Fed. 586. The condition of affairs which existed at the time of the filing of the bill, and continued to exist thereafter for 10 months, was such as to entitle the complainant to a preliminary injunction. And conceding that the defendant has ceased to infringe since May 28, 1896, that cessation will not defeat the complainant's right to a decree. Even if there is coupled with the fact of past cessation a promise of a perpetual discontinuance of the infringement, this will not defeat the injunction. Where, upon a bill to enjoin infringements of patent rights, the defendant admits the infringement, and asserts that after the bill was filed he refrained from the use of the thing patented, and asserts that he will not afterwards infringe, this is no reason why the injunction should not issue or be made perpetual. *Chemical Works v. Vice*, 14 Blatchf. 179, Fed. Case. No. 12,136; *Wollensak v. Reiher*, 28 Fed. 427; *Iron Works v. Flske*, 30 Fed. 622; *Celluloid Manuf'g Co. v. Arlington Manuf'g Co.*, 34 Fed. 324; *Facer v. Steel-Work Co.*, 38 Fed. 231; 1 Spell. Extr. Relief, par. 829, and other cases there cited. The principle upon which the injunction goes is that the defendant was a wrongdoer when the bill was filed, and, having been a wrongdoer once, he may be so again, in spite of his asseveration that he will not repeat the infringement; and, further, that if the defendant intends, in good faith, to keep his promise, the injunction will not harm him; otherwise it will be a security for the plaintiff that his right will not be again invaded. Although these were cases where the bill was filed to enjoin the infringement of patent rights, yet, as already observed, they stand upon the same principle as bills to restrain infringement of copyrights or trade-marks. The rule controlling the allowance of a final injunction in respect to one of these rights logically applies to cases of violation of all. Mr. Kerr lays it down as the rule in regard to bills to restrain the violation of trade-marks that the owner of a trade-mark, where the mark has been illegally taken by another, is not bound to rely upon his assurance or promises not to repeat the illegal appropriation of the mark, but is entitled to the protection of the court by injunction. *Kerr*, Inf. p. 422; *Millington v. Fox*, 3 Myne & C. 338; *Edelsten v. Edelsten*, 1 De Gex, J. & S. 185; *Geary v. Norton*, 1 De Gex, J. & S. 11. I will advise a decree enjoining the defendants, and for an accounting for profits, in accordance with the prayer of the bill.

CHANDLER v. MILLS et al.

(Prerogative Court of New Jersey. June 10, 1897.)

WILLS—CUSTODY OF FUNDS.

Testator gave all his property, real and personal, to his son, and directed the executor to

invest same, and use the income for the son's support during minority. Testator had taken under a will a fund having the quality of realty, being obtained by a conversion of realty in excess of a testamentary direction. *Held*, that testator's executor, and not the guardian of the minor, was entitled to the custody of such fund.

Appeal from orphans' court, Morris county; Outler, Judge.

Proceeding between Frank R. Chandler and Alfred Mills, surviving executor of George Pomeroy, deceased, and others. From a decree said Chandler appeals. *Reversed*.

Guild & Lum, for appellant. Alfred Mills, pro se.

REED, Vice Ordinary. The facts upon which the decision of the appeal depends are these: Mr. Alfred Mills, as surviving executor of the last will of George Pomeroy, deceased, filed a final account, by which it appeared that there was in his hands the sum of \$2,290.76, derived from the proceeds of the sale of real estate which belonged to Mr. Pomeroy, the deceased. Edward Pomeroy was one of the three residuary legatees under the will of the testator. Edward Pomeroy had died testate in 1887. By his will he gave all his real and personal property to his brother, George P. Pomeroy, who survived him. Frank A. Chandler, of Chicago, was his administrator with the will annexed. Later in the same year, George P. Pomeroy died testate, by his will leaving all his property to his son, Eugene C. Pomeroy, who is still a minor. The orphans' court ordered a sum, being the one-third of the amount of \$2,290.76, after expenses were deducted, to be paid to the guardian of the minor, Eugene C. Pomeroy. This sum of \$2,290.76, the one-third of which was ordered to be paid to the guardian of Eugene C., was an amount in excess of the sum of \$50,000, received by the executors of George Pomeroy from a sale of real estate made by them under a direction in the will of George Pomeroy to raise the sum of \$50,000 by sale of a part of the realty for the purpose of investment for a purpose set out in that will. A detailed statement of the provision from which the sale arose is unnecessary, for it is not denied that this sum of \$2,290.76 is to be regarded as realty. This is very properly admitted by all parties, inasmuch as the direction to convert was exhausted when the \$50,000 was realized. This sum therefore belonged to Edward Pomeroy as realty, as such passed by his will to George P. Pomeroy. The question now is whether, under the will of George P. Pomeroy, this sum goes to the executor, or to the guardian of the minor child, Eugene C. Pomeroy. His will, as already observed, gives all his estate and property of every description, real and personal, to his son, Eugene C. Pomeroy, not to be delivered over to him until he shall have attained his majority, and until that time to be held and managed by his executor. The will proceeds, after naming the executors, as follows: "I do hereby direct that all the estate and property herein be-

queathed to my son, Eugene C. Pomeroy, shall be held and managed during his minority by my executrix hereinabove named, and shall be kept safely invested in United States, state, or municipal bonds, or in mortgages upon unincumbered real estate, worth, exclusive of buildings, at least one-third more than the amount loaned thereon; and the income from my estate to be used and applied to the support and education of my said son until he attains the age of twenty-one years, when the whole estate, both principal and accrued and unexpended interest, shall be paid over to him. I hereby empower and authorize my executrix, in case she shall deem it necessary, to use a part of the principal of my estate for the support and education of my said son, and the remainder of such cause, together with all accrued and unexpended interest, to be paid over to him at his majority. In case of the death of my said son before attaining his majority, and without issue surviving, my said estate, or such remainder thereof, to be, by such executrix, paid over to certain parties named." It is clear under the language of this will that all the property of the testator should be held and managed during the minority of Eugene C., by the executor or executrix. The personal property of the testator of course went to Chandler, as executor. That he is empowered to hold the residue of such property for the payment of debts and expenses during the minority of Eugene C. is entirely clear. It has been already decided by Vice Chancellor Stevens that the will confers upon an executor a power to convert the real estate of a testator by sale. The proceeds of such sale he is, of course, to invest during the minority of Eugene. In what respect does the power of the executor over the sum in question differ from his right in the other real and personal property of the testator? It differs from land only in the fact that it is actually converted. The executor could not convert it again by sale, but he could do all that was necessary to reduce it to possession, so that he could invest it under direction of the will. He demanded it, and so perfected his right to it as a part of the estate of the testator. In my judgment, the control which the will of George P. Pomeroy gives to the executor over his property, real as well as personal, confers upon him the right to the possession of the sum of money which possesses the quality of realty. The decree below must be reversed.

BRAY et al. v. OCEAN CITY R. CO.

OCEAN CITY R. CO. v. BRAY et al.

(Court of Chancery of New Jersey. May 3, 1897.)

INJUNCTIONS—WHEN ISSUED—MOTIVE.

The chancellor refused to enjoin a railroad company from constructing its line across complainant's land, before condemning his interest in same, where the value of the land was nominal, and defendant had made every effort to get

title thereto, and complainant had purchased it at the instance of a rival road of defendant, and with its money, and for the sole purpose of baffling defendant in the completion of its line, since an injunction does not issue as of right, and the rule that courts take no notice of the purpose in the mind of the parties in asserting or defending their rights had no application.

Separate bills by the Ocean City Railroad Company against Thomas Bray and others, and by Thomas Bray and others against the Ocean City Railroad Company, for injunction. The suits were consolidated and heard together. Bills dismissed.

Robert H. McCarter, for Ocean City R. Co. H. M. Snyder and Samuel H. Grey, for Thomas Bray and others.

REED, V. C. These are two suits, instituted practically simultaneously,—one, by Thomas Bray and others for the purpose of enjoining the Ocean City Railroad Company from crossing his land, before condemning his interest in the same, for the proposed route of the defendants across his premises; and the other suit by the Ocean City Railroad Company, for the purpose of enjoining Mr. Bray from resisting the company's agents from constructing its road along the located route across Mr. Bray's land. By an order made at the hearing, the two suits were consolidated, and evidence taken, and arguments heard at the same time in both. Mr. Logan Bullitt and Mr. Henry Day projected a railroad to run from a point on the South Jersey Railroad, a little east of Petersburg, to Ocean City. On June 8, 1896, the company was incorporated, by filing a certificate under the general railroad act. As I understand, most of the right of way had already been bargained for, and about three miles of the road had been built when the articles of incorporation had been filed. The agents of the promoters of the Ocean City Railroad Company were under the impression that the land now the subject of contention belonged to one Mr. Bridgewater, and they procured from him a contract to convey said land to the railroad company. Acting under their supposed rights, the agents of the railroad company entered upon the ground, placed some stakes therein, and drove pilings across the thoroughfare (for the land was partly submerged), and, as Mr. Day says, placed coal and oil, for construction purposes, upon the premises. This work began about the 1st of May, and continued until the bill in the suit by Mr. Bray was filed, and the company was enjoined. The history of the title to this land now claimed by Mr. Bray seems to be this: Mr. Fowler is the engineer who, with Mr. Loomis, located the route of the Ocean City Railroad, and he is also a deputy surveyor of the board of proprietors of West Jersey. He had negotiated the contract with Mr. Bridgewater for the purchase of the locus in quo. Mr. Fowler became doubtful as to Bridgewater's title to the land, and concluded that the land had never been located. He says he put in a stake on June 25th, and

supposed that by that act he had, by the rules of the board of proprietors, three months to finish a survey. When he got ready to make the survey, he started from Philadelphia for that purpose. On the same train was Mr. Haines, the surveyor general of the board of proprietors of West Jersey, who had been employed in the interests of the West Jersey & Sea Shore Railroad Company, to make a survey of the same land for them. Mr. Haines went upon the ground the same night, and came back the next morning, leaving others to complete the work which he had initiated. The result of the labor of those whom he had left behind was communicated to Mr. Haines by telegraph, and from these dispatches Mr. Haines prepared a return and map, and filed the same about 7 o'clock in the evening of that day. Later in the same evening, Mr. Fowler filed his return. The survey of Mr. Haines was adopted by the board because of the priority of its filing. The return was made to one Mr. Wright, and Mr. Wright's title was conveyed to Mr. Bray. It is not denied that the return was made at the instance of the West Jersey & Sea Shore Railroad Company, which company had already a railroad running from Ocean City, with which the Ocean City Railroad Company would be a competing line. Indeed, it is not denied that Mr. Bray holds the title to the locus in quo solely as a means for baffling the Ocean City Railroad Company in completing its road. It also appears that the value of the land (about five acres) included within the right of way over the tract is merely nominal.

Counsel for Mr. Bray insist that it does not matter what his motive was in getting title to this land; that he, as owner, is entitled to the same protection against the occupation of the same by the railroad company, as any other owner would be against similar aggression. As regards the enforcement of legal and equitable rights by an ordinary action or suit, this proposition is undoubtedly true. In respect to those actions at law wherein malice is not an essential element in the plaintiff's case, or in those suits in equity where intent does not lie at the bottom of the right to relief, the courts will take no notice of the purpose in the mind of the parties in asserting or defending such legal or equitable rights. The right of a party to redress, in such instances, is *ex debito justitiæ*, and a court has no discretionary power to determine whether it will or will not award to a party his legal or equitable remedy, according to whether the party may or may not be actuated by a malicious or impolitic motive. But an injunction is an extraordinary proceeding, the propriety of the allowance of which depends upon a variety of circumstances, aside from the strictly defined rights of the complainant. In this respect writs of injunction are akin to those other extraordinary remedies, namely, certiorari and quo warranto. Neither of these writs is allowed as a matter of strict right. Whenever public interests may suffer, a writ

of certiorari may be refused. Stew. Dig. p. 119, § 18. The same rule applies to writs of quo warranto, where the motive of the defendant or the effect upon public or private interests will be considered in granting or refusing the writ. *Mitchell v. Tolan*, 33 N. J. Law, 195. The allowance of an injunction is a matter of discretion, and an injunction will not be granted if it will cause great injury to the defendants, without corresponding advantage to the complainant. Stew. Dig. p. 620, §§ 7-10. So it is perceived that whether writs of this class will be allowed depends not upon the strict right of the parties to some redress, nor upon the question whether the defendants have violated some legal right; but it depends upon whether, under the circumstances, this extraordinary process should go in the particular instance. In the case before me the writ of injunction is asked for to aid the complainant in protecting his lands against invasion, or until an award of damages may be made and tendered. That he has a remedy at law for such trespass is entirely clear. He can bring his action for damages, and I have no doubt he can compel the railroad, by mandamus, to condemn. Under ordinary circumstances, these remedies would be regarded as entirely adequate. It is upon the ground that the defendant is a corporation, and, as such, threatens a trespass by an *extra vires* act, that such an injury is regarded as irreparable. Under ordinary conditions it may be admitted that the fact that the defendants have made every effort to get title to the land, but have been baffled, would not be an answer to the bill. When, however, the position of the complainant is regarded in connection with those efforts, it seems to me that it would be perverting the use of the injunction power to award to him the use of this writ. In the first place, the ground upon which the writ is sought is illusory. The real purpose is not to protect the complainant's land against an illegal trespass, nor to compel compensation as a condition precedent to the taking. The land is in reality without intrinsic value. The placing of the railroad track upon it would produce no appreciable injury to it. The complainant is not concerned about the injury which the placing of the road and roadbed upon the soil to which he has title would occasion. The writ is not asked for the purpose of protecting that land against such a construction. The real purpose is to protect another railroad against the building of this road, as a rival. The bill is as manifestly filed for that purpose as if it had been filed by the West Jersey & Sea Shore Railroad to restrain the building of defendant's road. Further than this, it is not denied, as I have already observed, that the property which stands in the name of the complainant was bought by Mr. Bray, with the money of the West Jersey & Sea Shore Railroad Company. If this company was empowered to take title to this property, it would now be the equitable owner of the land. For the purposes of

this suit, they are the owners of the land, for Bray is a mere figure, whose movements are directed by the West Jersey & Sea Shore Railroad Company. The granting of this writ would concede to this company all the rights of an ownership which they have no power to acquire. This court would lend itself to a scheme condemned by public policy, and inequitable in every phase in which it can be regarded.

The facts in this case, in view of the questions here presented, are identical with those in the case of *Railway Co. v. Speelman*, 67 Md. 260, 10 Atl. 77, 293. In that case a lease of lands had been assigned to a president of a railroad company, to be used by him for the purpose of throwing obstacles in the way of the completion of a rival railroad. On a bill filed by the assignee of the lease, the court refused to enjoin the new road from entering upon the land to lay its track, but left him to his remedy at law. The refusal of the court was put upon the ground that the president had no other motive or purpose in obtaining the assignment of the lease than that of defeating the construction of defendant's road, and that a court of equity would give no aid to such a transaction. The opinion of Chief Justice Alvey contains a full and satisfactory discussion of the grounds for this judicial action. But the question now mooted is settled in this court. Upon a motion to dissolve the preliminary injunction in this suit, Vice Chancellor Pitney decreed such dissolution, on the grounds: First, that the value of the land was so insignificant that a court of equity would not take cognizance of the suit; and, second, that Mr. Bray had bought the land at the instance of the competing road; that his object in asking for an injunction was merely to obstruct the construction of defendant's road for the benefit of the existing road. Now, the facts appearing upon final hearing in these respects are substantially the same as those appearing upon the bill and affidavits, upon which the decision of Vice Chancellor Pitney was made. His decision is therefore, in my judgment, a direct precedent, by which I am guided in the decision of this case upon final hearing; for it is impossible to distinguish between the posture of the parties in the application for a preliminary injunction, and their present posture, so far as the construction then placed upon these two phases of the case is involved. I will advise a decree dismissing the bill of Bray.

In respect to the bill of the Ocean City Railroad Company against Bray, Vice Chancellor Pitney refused a preliminary injunction, upon facts which were in no substantial respect variant from the facts appearing upon final hearing. The grounds upon which the injunction was then refused are, in my judgment, obstacles in the way of advising an injunction upon final hearing. In addition to the facts then appearing, it was stated upon the argument in this case, and not denied, although not strictly within the case, that the

proceedings taken by the Ocean City Railroad Company for the condemnation of its right of way across this land have, since the hearing, been vacated upon certiorari by the supreme court. The conclusion thus reached is also in accordance with the opinion in *Railroad Co. v. Speelman*, supra.

A word in conclusion in regard to the insistence on the part of the West Jersey & Sea Shore Railroad Company that the route filed by the Ocean Railroad Company is so indefinite as not to conform to the statutory requirements. Any indefiniteness which originally inhered in the route and map as filed has been cured by an amended route. But, even conceding that the filed map delineating the route was in other respects indefinite, it must be assumed that it was sufficiently definite for all the purposes of the case of Bray against the Ocean City Railroad Company. In that case the bill charges that the Ocean City Railroad Company filed a map of its route or location of its road, passing through the lands of complainant, and crossing the Crookhorn Thoroughfare, and that certain contractors were engaged in driving piles in the meadow opposite complainant's land, and within the lines of said surveyed route, for the purpose of making a roadbed, and building therein the said railroad; that the said work of piling is being done within about 300 feet of Crookhorn Thoroughfare, and will shortly be completed; and that the said work is within the lines of the railroad, as surveyed and intended to be laid out and built upon. In this case it is perceived, therefore, that the definiteness of the filed route, so far as respects its location in the locus in quo, is not merely admitted, but charged as part of the complainant's case. In the other case, that of the West Jersey & Sea Shore Railroad against Bray, the alleged defect is set up in the answer of Bray; but, inasmuch as the injunction is refused upon other grounds, this point becomes of no importance.

FISHELL v. GRAY.

(Supreme Court of New Jersey. Feb. 27, 1897.)

CONTRACTS—CONSIDERATION ILLEGAL IN PART.

Where there are several considerations, and one of them is an illegal promise to refrain from a particular business, the presence of such illegal stipulation will not illegalize the entire contract. Such stipulation will be treated as unenforceable, and not as immoral or criminal.

(Syllabus by the Court.)

Action by one Fishell against Gray, receiver of the United States Credit System Company. Rule to show cause why a new trial should not be granted. Rule discharged.

Argued November term, 1896, before BEASLEY, C. J., and VAN SYCKEL, GARRISON, and LIPPINCOTT, JJ.

Guild & Lum, for plaintiff. Hayes & Lambert, for defendant.

BEASLEY, C. J. A sealed agreement is the basis of this suit. The parties to the deed were the plaintiff, Fishell, and the United States Credit System Company, a corporation, that has become insolvent, and is now represented by Gray, as receiver. By this instrument the plaintiff assigned to the company just designated the good will of a large and valuable business of the insurance of merchants against losses which he had carried on and established, together with certain personal property, and in addition stipulated as follows, viz.: "Fourth. That the said party of the second part, for the consideration aforesaid, hereby agrees not to interest himself, or engage in, or have others interest themselves for his benefit or in his behalf in any manner, in any company, corporation, or firm whose business is that of guarantying merchants or others against loss in business; and, should the said party of the second part violate his agreement in this paragraph contained, the payments agreed to be made to him in the third paragraph of this contract are to thereupon cease, and to be forfeited forever thereafter." The action is brought to recover the moneys agreed to be paid by the company in return for the transfer above mentioned, and the covenants contained in the agreement on the part of the plaintiff. The jury, under the instruction of the court, found for the plaintiff, and the motion now is to set aside that verdict.

The principal contention against a recovery on the deed in question argued and discussed in the brief of the counsel of the defendant is that the agreement in suit is illegal and void by reason of the stipulation above recited to the effect that the plaintiff would not in any wise engage in the insurance business whose good will was transferred to the credit system company. The proposition posited is that, as this part of the consideration for the defendant's promise is illegal, the entire contract falls, and that no part of it can be enforced. In support of this position a number of authorities are cited, some of which sustain it. The rule is generally laid down by the text writers in treating of the effect of an illegal element in the consideration of contracts in terms so general that it embraces the class of stipulations which provide in too broad a form against competition in a given business. According to it, a contract not to compete in a certain business within reasonable bounds as to place is permissible, but, if it possesses too wide a scope, it becomes an unnecessary restraint of trade, and it vitiates all promises that rest upon it, in whole or in part, as a consideration. As a consideration, it was, in the earlier cases, treated as devoid of legal force, but it was deemed to vitiate all other considerations with which it was blended. On this theory an agreement to abstain generally from carrying on a certain business, as in the present case, was treated as though it were an

agreement to commit a crime, and, as a consequence, it illegalized everything that it touched. But this view, it has since been perceived, is unnecessarily stringent, and is, in fact, quite unreasonable. There is nothing immoral or criminal in a stipulation not to engage in a certain business. A man may bind himself to such an abstinence without incurring any legal penalty. The only effect is that such an engagement cannot be enforced, either at law or in equity. And this is the aspect in which it is regarded by the modern authorities. This modification of judicial opinion is very pointedly stated in one of the cases cited in the brief of the counsel of the plaintiff. The authority thus vouched is that of *Green v. Price*, 13 Mees. & W. 695, and in it, Pollock, C. B., referring to the sort of agreement now in question, said: "It is not like a contract to do an illegal act. It is merely a covenant, which the law will not enforce, but the party may perform it if he chooses." And upon the citation by counsel of cases holding a contrary doctrine the reply of the chief baron was: "The policy of the law has been altered since that time. It has been found to be beneficial to commerce that there should be such restraints to some extent, and the courts thereupon retrace their steps." This distinction between a merely unenforceable promise in a matter of this kind and one that is criminal is illustrated in the decision of the case of *Erie Ry. Co. ads. Union Locomotive & Express Co.*, the principle being maintained that a stipulation that was not immoral would not vitiate or avoid the entire agreement. And if we regard the dictates of justice alone, no other doctrine is possible. This is obvious from the present case. If it be true that by reason of the promise of the plaintiff to abstain from this business being blended with the residue of the consideration that consisted of valuable interests transferred to the company, will prevent a recovery of the price agreed to be paid for such property, and will enable the company to retain it without giving the equivalent agreed upon, a result certainly obtains that would be both wholly unconscionable and impolitic. According to the principle forming the basis of the decision in the *Erie Railway Case*, just cited, that the presence in a contract of one of these inhibited undertakings does not in any degree whatever either add to or deprive it of its legal efficacy, standing alone it will not constitute a legal consideration, nor will it, to any extent, be executed. The later decisions upon the subject appear to regard this as the true principle. *Mallan v. May*, 11 Mees. & W. 853; *Wallis v. Day*, 2 Mees. & W. 273; 16 Mees. & W. 346. The other points raised in the brief have been considered, but none of them, as it is deemed, are possessed of sufficient substance to require judicial exposition. They were properly disposed of by the trial judge. Let the rule be discharged.

In re CARLE.

(Supreme Court of New Jersey. Feb. 18, 1897.)

MANDAMUS TO JUDGE — EXERCISE OF DISCRETION.

An order, made by a court of criminal jurisdiction, limiting the time of defendant's counsel in addressing the jury, is an order made in the exercise of its discretion; and a judge of such court will not be compelled by mandamus to allow an exception to such an order unless it is made to appear that there is reasonable ground to contend that by such order the defendant was practically deprived of the assistance of counsel which the constitution secures to him.

(Syllabus by the Court.)

Application by William Carle for writ of mandamus against James B. Hoagland. Denied.

Argued November term, 1896, before DEPUÉ, GUMMERE, and MAGIE, JJ.

J. J. Crandall, for the application.

MAGIE, J. Application is made on behalf of William Carle for a rule requiring James B. Hoagland, judge of Cumberland county, to show cause why a mandamus should not issue requiring him to allow, sign, and seal an exception taken upon the trial of an indictment against Carle in the court of quarter sessions. The affidavits presented in support of the application show that after the evidence was closed the judge announced that counsel would be limited to 15 minutes to sum up the case to the jury; that Carle's counsel protested that the time was too short, but proceeded to sum up until he was stopped by the court at the close of the time limited; that he then prayed an exception (not in writing), "for the reason that he had not had proper time to discuss the evidence," which the judge declined to allow; that, two days after, the exception was presented to the judge in writing; and that he again refused to allow it. The allowance of a bill of exceptions on the trial of indictments is not governed by the provisions of section 242 of the practice act, as counsel have suggested, but by those of section 91 of the criminal procedure act, as amended by a supplement approved March 9, 1877 (1 Gen. St. p. 1144, § 121). By section 91 a judge is required to settle and sign and seal an exception to any decision made on the trial of any indictment to the prejudice or injury of the defendant. It does not require the exception to be "instantly" written, as is required by section 242 of the practice act, nor provide for a subsequent settlement of the bill of exception when time has been allowed for its preparation, as is done by the supplement to the practice act of March 23, 1888 (2 Gen. St. p. 2589, § 333). But the practice in this respect is substantially alike in both civil and criminal trials. If an exception is taken to any adverse decision, and is plainly presented to and allowed by the court, a bill showing the exception may be afterwards written out and sealed. *State v. Holmes*, 36 N. J. Law, 62. So, if the court refuse to allow such an exception, the mandatory

writ of this court may be used to require such allowance, although the bill showing the exception was not presented for the signature and seal of the judge immediately at the trial, provided that it was done within a reasonable time. The fact, therefore, that the bill of exceptions in this case was not presented to the judge until the second day after the trial will not prevent relator from obtaining the rule he applies for, if the judge ought to have allowed and sealed the bill. As it was presented to him within a reasonable time, we are required to consider whether an exception to the court's order limiting the time of counsel will lie.

It is settled in this state that a court of criminal jurisdiction may limit the time of counsel to address the jury on the trial of an indictment, and that its order fixing the limit of time is made in the exercise of its discretion. In this court it is held that such an order is not reviewable on error. *Sullivan v. State*, 46 N. J. Law, 446. If this decision remains unshaken, it is obvious that the judge was right in refusing to allow an exception in this case. But it is contended that the court of errors, although it affirmed the judgment in the case last cited, did so upon grounds inconsistent with the decision in this court, the authority of which is thus shaken, and upon grounds which justified relator in asking, and required the judge to grant, the exception in question. In the opinion of the chancellor it is declared that "it must necessarily rest in the discretion of the court in which the trial takes place to limit the time to be occupied by counsel in addressing the jury, and, unless that discretion is so exercised as practically to deny to the accused his constitutional right to have the assistance of counsel in his defense, it is not error." *Sullivan v. State*, 47 N. J. Law, 151. From this it is argued that the court of errors has recognized that there may be a limiting of the time of counsel which would "practically" deprive a defendant of the assistance of counsel, and be erroneous, and that, when a defendant conceives that such an erroneous order has been made, he may ask and require an exception. Whether the interpretation thus put on the decision of the court of errors is correct or not, it is not necessary to inquire. Assuming its correctness, it does not follow that exception will lie to any order limiting the time of counsel because the defendant asserts that its effect is practically to abridge his constitutional right to the assistance of counsel. If so, every order limiting the time of counsel would be open to exception, which clearly was not intended by the chancellor's opinion. If that opinion is properly construed in this contention of counsel, in my judgment the right to except to an order limiting the time of counsel is confined to such cases as exhibit debatable ground for contention that the accused was by the order practically deprived of his counsel's assistance. It follows that a judge ought not to be compelled by mandamus to seal

such an exception unless the case shows reasonable ground for such a contention. The case before us shows no such ground. The indictment is not before us, but it may be assumed to have charged Carle with some crime connected with the sale of intoxicating liquors. Four witnesses were examined by the state, and six by Carle. Their evidence occupies a little over seven pages of broadly-spaced type-writing. Looking at the purport of their evidence, I cannot discover any ground for contention that by the limit imposed upon Carle's counsel he was practically deprived of the assistance of counsel. For these reasons the rule applied for must be denied.

WILLITTS MANUF'G CO. v. BOARD OF CHOSEN FREEHOLDERS OF MERCER COUNTY.

(Supreme Court of New Jersey. Feb. 18, 1897.)

PLEA IN AVOIDANCE.

A plea in avoidance of a fact that the plea does not admit is bad.

(Syllabus by the Court.)

Action by the Willitts Manufacturing Company against the board of chosen freeholders of Mercer county. Demurrer to plea sustained.

Argued November term, 1896, before BEASLEY, C. J., and VAN SYKEL, LIPPINCOTT, and GARRISON, JJ.

F. C. Lowthorp, for demurrant. S. B. Hutchinson and James Buchanan, for defendant.

GARRISON, J. In an action of trespass *quare clausum fregit*, the plaintiff has demurred to one of the defendant's special pleas. The defense sought to be interposed by this plea was that the county was not responsible for injuries to the plaintiff's land resulting from the change of grade of a public street. The difficulty is that such a controversy has no foundation in this record. The gist of the plaintiff's declaration is the entry upon his close. A plea that seeks to justify such an entry must admit it, either expressly or tacitly. *Trustees v. Fisher*, 18 N. J. Law, 256.

If a plea do not, by fair intendment, confess the doing of the acts complained of, it is bad as a justification. Gould, Pl. p. 340. For, in the language of Judge Gould, "It is absurd to plead in avoidance of a fact which the plea does not admit."

In the case before us the defendant is charged with a tortious entry upon plaintiff's close, to which he replies by alleging certain facts with respect to a highway. That the facts thus set forth constitute an entry upon the plaintiff's close is not only not confessed, but is, on the contrary, expressly excluded by the plea itself, which sets forth that the locus to which it has reference is "situated near the close of the plaintiff." The plea is therefore bad as a justification, and, unless it amounts

to that, it paves the way for no evidence that is not admissible under the general issue.

In this state of the record, it is impossible for the court to apply the argument of the briefs to the pleadings, or to inject into the issue circumstances that would raise the question that has been argued. Judgment must be entered for the plaintiff.

TRENTON PASS. R. CO. v. GUARANTORS' LIABILITY INDEMNITY CO.

(Supreme Court of New Jersey. June 3, 1897.)

CONTRACT OF INDEMNITY—VALIDITY—PUBLIC POLICY.

A contract to indemnify a common carrier of passengers against losses occurring from injuries to passengers carried by it is not invalid as against public policy, because it covers losses resulting from its negligence or the negligence of its servants.

(Syllabus by the Court.)

Case certified from circuit court, Mercer county; Gummere, Judge.

Action by the Trenton Passenger Railroad Company against the Guarantors' Liability Indemnity Company. Case reserved. Judgment for plaintiff.

The declaration in this case is founded upon a written contract, whereby the Guarantors' Liability Indemnity Company indemnifies the Trenton Passenger Railroad Company against legal liability for injury to or death of persons arising by reason of casualty occurring in, upon, about, or by reason of the street railroad of the Trenton Passenger Railroad Company or its equipment, to an amount not exceeding \$5,000, for the injury to or death of any one employé, not to exceed \$5,000 for the injury to or death of any person other than an employé, and not to exceed \$20,000 in respect to any one casualty whereby several may be injured or killed. It further sets out various actions against the Trenton Passenger Railroad Company for injuries which it claims fell within the contract of indemnity of the Guarantors' Liability Indemnity Company, and that those actions had been prosecuted to judgment, but that the Guarantors' Liability Indemnity Company, although requested, had not paid them in accordance with the terms of their contract. The plea was the general issue. The issue joined was tried by the court, a jury being waived. The trial judge found that the Guarantors' Liability Indemnity Company had made the contract declared upon, and that, while such contract was in force, two judgments were obtained against the Trenton Passenger Railroad Company for casualties and injuries falling within the terms of that contract, which judgments the latter company had paid. Thereupon the trial judge reserved for the determination of the supreme court the following question of law, namely: Whether the said contract of indemnity is a valid contract, or is void as against public policy, as being a contract to indemnify the

said the Trenton Passenger Railroad Company, Consolidated, against losses resulting from its negligence, or from the negligence of its agents and employes.

Argued February term, 1897, before **MAGIE, C. J.**, and **DEPUE, VAN SYCKEL, and LIPPINCOTT, JJ.**

Robert S. Woodruff, for plaintiff.

MAGIE, C. J. (after stating the facts). The question reserved in this case is one of great interest, and is presented for determination for the first time in this court. The proof of the execution by the defendant company of the instrument on which the action is brought, which instrument contains plain stipulations for indemnifying the plaintiff company for losses arising from injuries done by it to its employes or the passengers carried by it, and the proof that such losses had occurred as were thus intended to be indemnified against, sufficiently established plaintiff's right to recover the stipulated indemnity, unless the instrument is not, in the eye of the law, a valid contract. It is obvious that the trial judge entertained doubts of the validity of the instrument in question, for, although no objection appears to have been made on the part of the defendant upon that point, he has deemed it necessary to submit it for determination to the full bench. The attitude of the defendant at the trial has been maintained in this court, for its counsel has presented no argument and made no claim that the instrument is not a binding and enforceable contract. The result is that our examination of the question has not been aided by the researches of counsel maintaining its negative, but only of counsel supporting its affirmative. For this reason, I have given the question as close an examination as time would permit, lest something bearing thereon might be overlooked.

The proposition which one would assert who contested the validity of such a contract would obviously be this, namely: that a contract whereby a common carrier of passengers is to be indemnified against damages which he was required to pay for personal injuries occasioned by his negligence, or by the negligence of his agent, is contrary to public policy, and therefore unenforceable. It is admittedly difficult, if not impossible, to formulate a satisfactory statement of what is meant by the words "public policy." Mr. Justice Kekewich declared that it does not admit of definition, and cannot be easily explained. *Davies v. Davies*, 38 Ch. Div. 359. That the law has recognized one sort of public policy as a foundation for its judgment at one period, and another sort at another period, is undoubted. It is amusingly shown by Lord St. Leonards in *Egerton v. Brownlow*, 4 H. L. Cas. 1. Speaking of a case from the Year Books, he says (on page 238): "It was on an obligation with a condition that, if a man did not exercise his craft of a dyer within a cer-

tain town—that is, where he carried on his business—for six months, then the obligation was to be void, and it was averred that he had used his art there within the time limited, upon which Mr. Justice Hull, being uncommonly angry at such a violation of all law, said, according to the book: 'Per Dieu, if he were here, to prison he should go until he made fine to the king, because he had dared to restrain the liberty of a subject.' Angry as the learned judge was at that infraction of the law, what has been the result of that very rule without any statute intervening? That the 'common law,' as it is called, has adapted itself upon grounds of public policy to a totally different and limited rule that would guide us at this day, and the condition that was then so strongly denounced is just as good a condition now as any that was ever inserted in a contract, because a partial restraint created in that way with a particular object is now perfectly legal." Another illustration occurs with respect to the obligations imposed by law founded on public policy, on common carriers of goods. Originally, they were insurers of the safety of the goods against every loss, except such as occurred by the act of God or the public enemy, and any contract relieving them of any part of that obligation was held to be void. Gradually they have been permitted to contract for exemption from some of their liability, and public policy seems now effective only to the extent of prohibiting their exemption by contract from any losses occurring by reason of their negligence and the negligence of their servants. For such losses the law founded on public policy still holds them bound. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 449.

From these varying applications of the principle called "public policy," I think it obvious that no accurate definition of that phrase can be devised in respect to any particular matter. In my judgment, the best that can be done is to say that, since the law abhors conduct injurious to the public interest or antagonistic to the public good, the courts will decline to enforce contracts which, at the time they are presented for consideration, require or involve conduct against public interest and public good. Such is the result of my consideration of the matter after examining many cases which exhibit the variant views taken by courts upon this subject, which variance is no more strikingly indicated than in the case of *Egerton v. Brownlow*, before cited. My researches have not been rewarded with the discovery of many expressions of judicial opinion or by many adjudications on the question reserved in this case. Obvious reasons exist why the judicial consideration of such a question would be infrequent. In actions upon contracts of indemnity, such as that on which this action is founded, the insured raises no question as to the validity of the contract. The insurer, if, as usually it is, a company engaged

in seeking profit by making such contracts of insurance, is equally adverse to setting up or maintaining that the contracts by which its profits are made are, in the eye of the law, void. Adjudications and judicial opinions upon a class of contracts which seem to me to bear a strict analogy to those contracts, one of which is before us, are not infrequent. As before stated, common carriers of goods may, by contract with their employers, limit their liability for losses from all peril except those arising from their negligence or the negligence of their servants. When the liability is so limited, the common carrier of goods stands answerable only for his negligence and that of his servants. The common carrier of passengers has never been deemed an insurer of their safety during carriage, but the law has imposed upon him a duty to take the highest care for the safety of the passengers. He is therefore liable for injuries done to the passengers only where they result from his negligence; that is, the failure to take the care for the safety of the passengers which the law enjoins. Both classes of carriers are therefore liable under such circumstances upon precisely the same grounds. Their liability arises from negligence which is a failure to bestow the care and skill which the situation of the parties and the subject-matter require. The negligence which will render them respectively liable may possibly differ in degree, although the distinction between what has been called gross negligence and ordinary negligence is now generally and with great reason repudiated. *Railroad Co. v. Lockwood*, *supra*. It is identical in kind.

The only reason which I find possible to conceive to be capable of being urged in support of the proposition that the contract before us in this cause is contrary to public policy is that the indemnity thereby provided for a common carrier of passengers may tend to render him less careful in the performance of his duty to his passengers than he otherwise would be. It is obvious that such is not the purpose of the contract for indemnity. The insurer does not contemplate the relaxation of the carrier's vigilance, which would tend to throw additional liability upon him. The insured is held to the performance of his duty of vigilance both by his liability notwithstanding the indemnity, and by the fact that the vigilant carrier would obtain better terms in making the contracts of insurance. It is further obvious that, if a contract indemnifying the common carrier of passengers against liability arising from his negligence tends to a relaxation of vigilance inimical to the public interest, so a contract indemnifying a common carrier of goods against the consequences of his negligence must have the same effect, and be obnoxious to the rule avoiding contracts contrary to public policy. Yet it now seems well settled that a common carrier of goods may enforce contracts of insurance on goods carried against all losses other than those occasioned by his negligence or the negligence

of his servants. In an action upon such a contract of insurance which came before the supreme court of the United States, Mr. Justice Gray thus dealt with the claim that such contracts were void. He said: "No rule of law or of public policy is violated by allowing the common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants. By obtaining insurance, he does not diminish his own responsibility to the owners of the goods, but rather increases his means of meeting that responsibility. If it were true that a shipowner, obtaining insurance by general description upon his ship and the goods carried by her, could, in case of the loss of both ship and goods by perils insured against, and through the negligence of the master and crew, recover of the insurers for the loss of the ship only, and not for the loss of the goods, some trace of the distinction would be found in the books; but the learning and research of counsel have failed to furnish any such precedent." *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 1176. The doctrine in that case was referred to with approval in *Insurance Co. v. Adams*, 123 U. S. 67, 8 Sup. Ct. 68, and *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 9 Sup. Ct. 469. Afterwards the court was urged to review the doctrine of Mr. Justice Gray, and to declare that the insurance was an insurance against negligence, and contrary to public policy, and void; but the court, speaking by Mr. Justice Blatchford, reaffirmed the doctrine, on the grounds stated in the opinion of Mr. Justice Gray. *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. 365.

Various kinds of insurance against loss by fire or loss by perils of the sea would seem to be open to a like charge of a tendency to encourage negligence, which, at least when the policies are held (as they so frequently are) as collateral security for obligations of the insured, may be well argued to be against the public interest, and therefore void as against public policy. But no trace of any such claim can be found in text-books or adjudications. With respect to such contracts of insurance as that with which we are dealing, I have found but two expressions of judicial opinion in the books and reports. In the case of *Delancy v. Robson*, 5 Taunt. 603, upon a motion to settle the venue, it incidentally appeared that the action was upon a contract of somewhat such character, and the reporter states a quære as to whether an insurance against damages that a shipowner might be liable to pay in consequence of his ship running down another be not illegal; and it is said *per curiam*: "It would be an illegal insurance to insure against what might be the consequence of the wrongful acts of the accused." This case affords no aid in the solution of the ques-

tion, both because the question was not directly presented, but only incidentally considered, and because what the court said may well be deemed limited to acts of the insured which were actively wrongful in distinction from being merely negligent. There is, however, an adjudication precisely in point in which the question thus arose: An incorporated company, authorized, among other things, to issue contracts of indemnity of the same character as that before us, became insolvent. Its business had not been confined to making such contracts, but had extended to other contracts of indemnity; and the court, in distributing the assets, had before it creditors whose claims arose from other forms of contracts than those arising upon such contracts of insurance. In behalf of the other creditors, the court was urged to declare that the creditors who claimed upon such contracts of insurance should not be admitted to partake in the distribution of the assets, upon the ground that such contracts of insurance were obnoxious to public policy, and unenforceable and void. The opinion of the court was written by Chief Justice McSherry, and contains an admirable discussion of the question, reaching the conclusion that public policy does not avoid these contracts. In respect to the claim that the possession of such indemnity tends to beget negligence, he says: "Nor can we assume as an unvarying rule, of which judicial notice will be taken, that a carrier of passengers, who has secured an indemnity to reimburse himself for losses which his own negligence may produce, will, merely because and solely in consequence of having such indemnity (which, at best, is but limited and partial), necessarily disregard the duty to exercise the highest degree of care. And, unless it be assumed as a postulate that the mere possession of an indemnity will of itself necessarily and invariably produce negligence, it does not logically follow that such a policy or indemnity is even incidentally or indirectly repugnant to public policy. The indemnity in no way affects the liability of the carrier to the person injured. The utmost that it does, precisely as in the case of a carrier of goods, is to afford him a fund out of which he may be reimbursed, and that, too, perhaps, but partially; for in all these policies the liability of the insured is always limited and confined to a specifically designated sum." *Boston & A. R. Co. v. Mercantile Trust & Deposit Co. (Md.)* 34 Atl. 778.

The result is that the reserved question must be answered in favor of the validity of the contract upon which this action is founded, and, as the special finding of the trial judge shows that he had assessed the damages of the plaintiff at the sum of \$978.36, judgment should be ordered for the plaintiff for that sum. It is proper to observe that the decisions of this court in *Kinney v. Railroad Co.*, 32 N. J. Law, 407, and of the court of errors in the same case (34 N. J. Law, 513), are not at all antagonistic to the views above expressed. It

was held in both courts that, when a common carrier of passengers agreed to carry a passenger gratuitously, a valid contract might be made between the carrier and such a passenger, exempting the carrier from all liability even for injuries resulting from its negligence or the negligence of its servants. But this was distinctly put upon the ground that in such case the ordinary relation of a passenger and common carrier did not arise, but rather a relation (as the learned chief justice pointed out) analogous to that of a bailor and a gratuitous bailee. Assuming that it may be inferred from those decisions that, when the ordinary relation of common carrier and passenger has arisen, a contract exempting the former from liability to the latter for injuries resulting from its negligence or the negligence of its servants would be invalid, it only results that the common carrier of passengers is left invariably liable for the consequences of its negligence, precisely as is above shown the common carrier of goods is liable.

STATE ex rel. MAYOR, etc., OF BOROUGH OF CARLSTADT v. COMMITTEE OF TOWNSHIP OF BERGEN.

(Supreme Court of New Jersey. June 3, 1897.)

ORGANIZATION OF BOROUGH—DIVISION OF ASSETS.

Under the act of April 16, 1896 (P. L. 1896, p. 270), it is the duty of a township committee to proceed in the dividing of assets and apportioning of debts between the township and a borough organized out of its territory, although such organization was effected before the passage of that act, and although, after the organization, other boroughs were organized out of the remaining territory of the township.

(Syllabus by the Court.)

Application by the state on the relation of the mayor and council of the borough of Carlstadt for a writ of mandamus to the township committee of the township of Bergen. Granted.

Argued February term, 1897, before LUDLOW, COLLINS, and DIXON, JJ.

Demarest & De Baun, for relators. Hart & Koester, for defendants.

DIXON, J. The borough of Carlstadt was organized out of the territory of the township of Bergen on June 28, 1894, and now prays a mandamus directing the township committee to meet with the borough authorities in order to make a division of the assets and apportionment of the indebtedness then existing. That such division and apportionment should be made in the manner indicated is expressly required by the act of April 16, 1896 (P. L. 1896, p. 270). The power of the legislature to provide that the property and liabilities of a municipality shall be shared with a new municipality created out of its territory is beyond question. 1 Dill. Mun. Corp. § 189; 15 Am. & Eng. Enc. Law, 1023; *Neillson v. Newark*, 49 N. J. Law, 246, 8 Atl. 292. We are unable to discover any reason why that power

cannot be exercised after the creation of the new corporation as well as before, and the terms of this statute are plainly retrospective. Nor does the fact that since the organization of the borough of Carlstadt two other boroughs have been formed out of the remaining territory of the township prevent this distribution. To comply with the statute, the present township committee must be deemed the representative of these later boroughs in discharging this statutory duty. Let a peremptory mandamus issue in pursuance of the rule to show cause.

STATE ex rel. BROWNING v. O'DONNELL,
City Clerk.

(Supreme Court of New Jersey. June 3, 1897.)

APPOINTMENT OF CITY CLERK.

Under section 24 of the supplement to the charter of Jersey City, passed March 27, 1874 (P. L. 1874, p. 504), the board of finance and taxation may, by resolution, appoint an additional clerk beyond three in the city clerk's office. (Syllabus by the Court.)

Application by the state on the relation of Michael J. O'Donnell, city clerk of Jersey City. Writ ordered.

Argued February term, 1897, before MAGIE, LUDLOW, and DIXON, JJ.

C. L. Corbin, for relator. W. D. Edwards, for defendant.

DIXON, J. Section 19 of the supplement to the Jersey City charter (P. L. 1874, p. 504) provides that the number of clerks and assistants in the city clerk's office shall not exceed three, and section 24 of the same supplement enacts that no additional clerk shall be appointed in the city clerk's office except by resolution of the board of finance and taxation. At that time there were three clerks in the office under the city clerk. The twenty-fourth section clearly implies that by resolution of the board of finance and taxation an additional clerk might be appointed, and accordingly on May 28, 1884, the board so appointed Jarvis P. Wanser as such clerk. He retained the position until his death, in August, 1896, and on August 25, 1896, the board appointed the relator to fill the vacancy caused by Wanser's death. We see no reason to doubt the legality of such appointment, and, the defendant having refused to assign the relator to duty in his office, a peremptory mandamus should issue commanding him to do so. The relator also asks for a mandamus requiring the defendant to draw and sign warrants for his past and future salary. It is at best doubtful whether the relator is entitled to salary for the time past during which he has not performed duty (*Stuhr v. Curran*, 44 N. J. Law, 181), and we cannot assume that the defendant will refuse to sign proper warrants for the future time, while the relator is performing his official duties. The prayer for this direction should therefore be refused.

BELL v. SAMUELS.

(Supreme Court of New Jersey. June 3, 1897.)

WITNESS—COMPETENCY—COSTS.

1. It is sufficient, for reversal of a judgment, that an error complained of may have done harm to the plaintiff in error.

2. Where both parties appear on the record in a representative capacity, each is qualified as a witness in his own behalf, and may testify to any fact provable in the cause.

3. Costs are not recoverable against an administrator prosecuting in the right of his intestate. (Syllabus by the Court.)

Certiorari to court of common pleas, Passaic county; Hopper, Judge.

Action by Henry F. Bell, administrator, against Charlotte E. Samuels, executrix. Judgment for defendant. Plaintiff alleges error. Reversed.

Argued February term, 1897, before DIXON, LUDLOW, and COLLINS, JJ.

Leonard J. Tynan, for plaintiff. Eugene Emley, for defendant.

COLLINS, J. The errors complained of in this case arose on the trial of an appeal from a district court. The judgment of the common pleas in favor of the defendant is brought up, by certiorari.

Under a rule of this court the judges have certified, among other things, as follows: "We refused to allow Henry F. Bell, who was sworn as a witness for the plaintiff, to testify to conversations between himself and his father, the intestate, in regard to the judgment of Bell against Creighton, on the ground that such testimony would be illegal; and we did not permit the said Henry F. Bell to give testimony as to any transactions with or statements by the said Henry E. Samuels, the testator of the said Charlotte E. Samuels, executrix; but as to other matters the said Henry F. Bell was allowed to be examined as a witness in the said cause." Whether or not the conversations of the witness with his father would be legal evidence in the cause depends upon matters not before us; but the refusal to permit him to testify as to any transactions with or statements by Henry E. Samuels was a clear error; and must work a reversal of the judgment. Where both parties appear on the record in a representative capacity, each is qualified as a witness in his own behalf, and can testify to any fact provable in the cause. *Haines v. Watts*, 55 N. J. Law, 149, 26 Atl. 572.

It is urged that, as the exact nature of the excluded evidence is not shown by the record, it does not appear that its exclusion did the plaintiff harm. It suffices for reversal that the court can see that the exclusion may have harmed the plaintiff. As was said in *Ruckman v. Bergholz*, 37 N. J. Law, 437, 441: "It is true that a judgment will not be reversed for an error, however manifest, which has done no injustice. But it should be clear that the party complaining has not been injured by

the error, and, if there is reasonable doubt on that point, it is the duty of the court to give him the benefit of it." In the case in hand the court excluded the witness' testimony as to any transaction with or statement by the decedent. It is difficult to conceive a situation where, in an action against his estate, some transaction with or statement by him would not be pertinent.

Another error in the judgment under review consists in the award of costs. These are not recoverable against an administrator prosecuting in the right of his intestate. Gen. St. p. 2578, § 206.

DERBY v. STATE.

(Supreme Court of New Jersey. June 3, 1897.)

DISORDERLY HOUSE — INDICTMENT — EVIDENCE — INSTRUCTIONS.

1. Upon the trial of a common-law indictment for keeping a disorderly house, evidence of the habitual illegal sales of intoxicating liquors is admissible. The supplement to the crimes act, approved March 10, 1893 (1 Gen. St. p. 1101), forbids the indictment of any person for the offense of keeping a disorderly house only when the offense sought to be punished consists wholly in the unlawful sale of such liquors.

2. It was not improper to charge that, if the jury believed the evidence adduced by the state, it was their duty to convict, if in fact the evidence established defendant's guilt beyond a reasonable doubt, and the jury were properly instructed on the subject of reasonable doubt.

(Syllabus by the Court.)

Error to court of quarter sessions, Atlantic county; Thompson, Judge.

Clarence W. Derby was convicted of keeping and maintaining a disorderly house, and brings error. Affirmed.

Argued February term, 1897, before MAGIE, C. J., and DEPUE, VAN STOCKEL, and LIP-PINCOTT, JJ.

C. L. Cole, for plaintiff in error. Samuel E. Perry, for the State.

MAGIE, C. J. The indictment in this case charged plaintiff in error with the offense of keeping a disorderly house in the mode in which that crime was charged in indictments at common law. The entire proceedings on the trial have been brought before us, and it thereby appears that the evidence discloses that the house was frequented by dissolute and disorderly persons; that the quiet of the neighborhood was disturbed by the noise and boisterous conduct of those who frequented the house; and that intoxicating drinks were habitually sold in violation of law.

One of the assignments of error complains of the admission of evidence respecting the illegal sales of liquor. The contention is that by virtue of the supplement to the crimes act, approved March 10, 1893 (1 Gen. St. p. 1101), it has been made unlawful to indict any person for the offense of keeping a disorderly house where the offense consists in the unlawful sale of intoxicating liquors. That supplement, upon examination, does not justify

the construction put upon it in the argument. It does render it unlawful to indict any person for keeping a disorderly house where the offense sought to be punished consists wholly in the unlawful sale of spirituous, vinous, malt, or brewed liquors. This legislation doubtless grew out of the fact that, by the Werts law, the mere sale of intoxicating liquors in quantities less than a quart, without a license for that purpose, made the seller guilty of the offense of keeping a disorderly house. But where the indictment charges a person with the common-law offense of maintaining a common nuisance, by keeping a disorderly house, and the evidence shows that the house is maintained as a bawdy house and a common place of disorder, evidence of the illegal sale of intoxicating liquors habitually made is obviously germane to the charge of the indictment, and not forbidden by the legislation on which the argument of counsel for plaintiff in error was grounded.

It is further claimed on behalf of plaintiff in error that the court erred in charging the jury that, if they believed the testimony adduced on the part of the state, it was their duty to convict. The jury were, however, further instructed as to the duty to give to plaintiff in error the benefit of any reasonable doubt arising from the evidence. Taking the whole charge together, the evidence contained in the bill of exceptions justifies it; for, if that evidence be believed, the plaintiff in error was plainly guilty beyond any doubt. If believed, it established that plaintiff in error permitted his house to be used as a place of assignation, to be frequented by dissolute men and women, and to offend the neighborhood by noise and disorder.

None of the other objections made in behalf of the plaintiff in error seem to require consideration. The judgment must be affirmed.

STATE (GLAZIER, Prosecutor) v. NEW JERSEY & N. Y. R. CO.

(Supreme Court of New Jersey. June 3, 1897.)

CONDEMNATION PROCEEDINGS — COMPENSATION — BENEFITS.

1. If a petition for the condemnation of lands misstates the facts, so that one statute would be applicable to the facts as stated, and a different statute to the real facts, the petition is erroneous, and will be set aside on certiorari.

2. When a private corporation is condemning land for the construction of a railroad, the benefits to be derived by the landowner "from or in consequence of the railroad" cannot constitutionally be considered in awarding him just compensation.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Thomas Glazier, against the New Jersey & New York Railroad Company, to review an order appointing commissioners to appraise certain lands of prosecutor. Proceedings set aside.

Argued February term, 1897, before MAGIE, LUDLOW, and DIXON, JJ.

Dickinson, Thompson & McMaster, for prosecutor. C. & R. W. Parker, for defendant.

DIXON, J. On the petition of the New Jersey & New York Railroad Company, the judge of the Bergen county common pleas, on December 11, 1896, made an order appointing commissioners to appraise certain lands of the prosecutor and assess his damages, to the end that the company, on paying the sum awarded, might take the land for railroad purposes. This order the prosecutor now seeks to have set aside.

So far as we have been able to discover, the powers of condemnation granted by special statutes to this company and its predecessors by name have been exhausted or have expired, and its right now to exercise the right of eminent domain must be found in general laws. Of statutes intended to be general, there are two which may be deemed pertinent to the present conditions,—one, "An act concerning railroad corporations," approved March 6, 1877 (Gen. St. p. 2694); the other, a supplement to "An act respecting railroads and canals," approved March 25, 1881 (Gen. St. p. 2685). The former act is designed to enable railroad companies to acquire additional land adjoining their roads as constructed on their right of way, and the latter to enable them to acquire a perfect title to land in which they have only a defeasible title, or their original title has been extinguished. According to the testimony taken in this cause, the present proceeding was intended to combine these objects,—to remedy a defect in the company's title to its roadbed, and to acquire lands adjoining the roadbed. It is not now necessary to go into a critical examination of the statutes just cited in order to determine whether they accord with the constitutional edict that only by general laws shall corporate powers be conferred, nor to decide whether under peculiar circumstances their diverse objects may be united in one proceeding. Conceding the affirmative of each of these queries, it is plain that the petition presented to the judge must be consistent with the application of these different statutory provisions to the real circumstances of the case. This petition is not so. It alleges that the land described therein is already occupied by the company, and that the design is to perfect its title thereto, while the truth is that part of the land has never been so occupied, and the company never had any right in or to the same. Because of this incongruity between the petition and the facts, the proceeding should be set aside.

There is also an incurable fault in the order appointing the commissioners. It directs that the commissioners, in making their award, must "take into consideration all the benefits to be derived from or in consequence of the railroad." The constitution (article 4, § 7, par. 9) declares that "Individuals or private corporations shall not be authorized to take private property for public use, without just compensation first made to the owners."

The petitioner is a private corporation, and hence the compensation which it is to give for the prosecutor's land must be made before the land is taken. It cannot, therefore, consist in part of benefits to be derived after the land has been taken and the contemplated railroad has been constructed thereon. Let the proceedings be set aside, with costs.

STATE (WATSON, Prosecutor) v. TREASURER OF CITY OF PLAINFIELD.

(Supreme Court of New Jersey. June 3, 1897.)

CRIMINAL LAW — PLEA OF GUILTY — CONVICTION — CERTIORARI — WHEN LIES.

1. The city judge of Plainfield, having, upon a complaint against prosecutor for the violation of an ordinance of that city, issued his warrant for the prosecutor's arrest, and upon the return of the warrant and a plea of not guilty having held prosecutor under bond for appearance for trial at a specified day at the city court room, was without power to enter in the record a confession made to the judge by prosecutor, in the privacy of the judge's office, and to make such confession the sole ground of prosecutor's conviction.

2. Under the laws relating to Plainfield, a conviction so rendered is reviewable by certiorari. (Syllabus by the Court.)

Certiorari to city court of Plainfield.

Michael F. Watson was convicted of a violation of an ordinance of the city of Plainfield, and sentenced by the city judge to pay a fine of \$100, and to be confined in the county jail for a period of 60 days, and prosecutes certiorari. Conviction set aside.

Argued February term, 1897, before DIXON, LUDLOW, and MAGIE, JJ.

James J. Meehan and James J. Bergen, for prosecutor. Craig A. Marsh, for defendant.

MAGIE, J. By section 21 of the charter of Plainfield the city judge is given authority, upon oath or affirmation that any person has been guilty of a violation of any of the ordinances of the city, to issue process against such person in the nature of either a summons or a warrant, which process shall state what ordinance the defendant has violated, and in what manner the same has been violated. Upon the return of such process the city judge may proceed to hear testimony and to determine and give judgment in the matter without the filing of any pleadings. Laws 1872, p. 1142. By section 8 of an act amending that charter, approved April 2, 1873 (Laws 1873, p. 482), the court of the city judge was made a court of record, the proceedings in which shall be the same as in courts for the trial of small causes, and subject to the same laws as far as applicable, and that judgments rendered in that court might be appealed from in all cases in which appeals were allowed in courts for the trial of small causes, and in the same manner. By a clause in section 2 of another supplement to the charter, approved March 18, 1874 (Laws 1874, p. 302), it was enacted that every

conviction had before the city judge should be reviewable only by certiorari allowed, heard, and determined by the presiding judge of the Union county circuit. This court has adjudged that the clause last cited was not within the power of the legislature to enact, and that the provisions of section 8 of the act of 1873, above referred to, were not repealed, but remained in force. It was also held that one who had been convicted by the city judge of a violation of a city ordinance, and desired a review of the judgment, was entitled to an appeal in the same manner that an appeal could be taken from the judgment of a justice's court. *Flanagan v. Plainfield*, 44 N. J. Law, 118. It is contended that the writ in this case should be dismissed as improvidently issued, on the ground that prosecutor's sole remedy was by appeal to the common pleas of Union county. But this argument rests upon a misconception of the decision in the case last cited. It is true that in the opinion then delivered Mr. Justice Van Syckel stated that the remedy by appeal by virtue of section 8 of the act of 1873 became exclusive. But it is evident that the learned judge was speaking of judgments of the city judge, of such a character as, if rendered in a court for the trial of small causes, were appealable. As to such judgments the remedy by appeal, upon his theory, was plainly exclusive, because by the then existing justice court act no certiorari would lie to bring up a judgment which could be appealed. But by the provisions of that act there were judgments in the court for the trial of small causes which were not capable of being appealed from, such as judgments given by default or by confession or in the absence of defendant. *Nixon's Dig.* (N. J.) p. 453, §§ 43, 67. Judgments so excluded from relief by appeal were left reviewable by certiorari. The revised justice court act extended the remedy by appeal to all judgments in that court except such as are given by confession. Section 79, as amended, 2 Gen. St. p. 1891. It restricted the review by certiorari so that it applies in only two classes of cases, one class comprising judgments from which no appeal would lie, which are only those given by confession, and the other class comprising judgments which the justice had no jurisdiction to render. Section 96, 2 Gen. St. p. 1882. The first class is reviewable by certiorari only. In the other class the remedies provided by appeal and by certiorari are concurrent. *Ritter v. Kunkle*, 39 N. J. Law, 259; *Drake v. Berry*, 42 N. J. Law, 60; *Hillman v. Stranger*, 49 N. J. Law, 191, 6 Atl. 434; *Barclay v. Brabston*, 49 N. J. Law, 629, 9 Atl. 769. The decision in *Flanagan v. Plainfield*, that judgments of the city judge of Plainfield for convictions for the violation of ordinances are reviewable in precisely the same mode as judgments rendered in the court for the trial of small causes, leads to this conclusion, viz. that if any such judgments rendered by the city judge are judgments given by confession,

they are reviewable by certiorari only, while, if any such judgments are rendered without jurisdiction, they may be reviewed on appeal or by certiorari. The proceeding in this case, like in the *Flanagan Case*, was instituted by the treasurer of the city of Plainfield. The result of a conviction is a judgment for pecuniary penalty, which goes to the treasury of the city. Although such a judgment may also inflict punishment by imprisonment, the fact that it also benefits the city peculiarly leads to the conclusion that, if it is entered on an acknowledgment of a violation of an ordinance, it is a judgment given by confession, and may be reviewable by certiorari. Judgments by confession in courts for the trial of small causes are reviewable by certiorari on the prosecution of the person who confessed the judgment, and in the early history of those courts this court heard, and not infrequently gave judgment upon, such writs. *Parker v. Griggs*, 4 N. J. Law, 182; *Ferguson v. Earl*, 14 N. J. Law, 124; *Young v. Stout*, 10 N. J. Law, 302; *English v. Sharpe*, 15 N. J. Law, 457. The result is that, in my judgment, we are bound on the demand of the prosecutor to review and pronounce upon this judgment against him.

An examination of the record returned with this writ discloses two fatal errors. The first appears from the following facts: The sworn complaint on which the city judge acted charged prosecutor with the violation of one ordinance; the process issued thereon (which was a warrant) declared that he was charged with the violation of another ordinance; and the conviction fails to disclose whether the prosecutor was found guilty of the violation of the ordinance set out in the complaint or of that set out in the warrant. It is impossible to discover how this judgment could be set up against a further prosecution for the violation of either ordinance. The record further discloses this curious state of facts. It appears therefrom that prosecutor was arrested, and pleaded not guilty, and was held under \$200 bonds for his appearance for trial on August 3, 1896, at 10 o'clock a. m., at the city court room. Then follows the entry: "July 25, 1896. The above person appeared at my office and entered a plea of guilty, which I accepted. I thereupon deferred sentence to July 27, 1896." Then follow the other entries of appearances and adjournments, at which prosecutor's counsel sought without success for leave for his client to enter a plea of not guilty, and to be given a trial, until September 21, 1896, when the conviction was entered "on his own confession and plea of guilty." No session of the court was held on August 3, 1896, to which day prosecutor had been held for trial. The proceeding thus disclosed is wholly indefensible. When the city judge held prosecutor under bond for his appearance for trial on August 3d, the cause was adjourned to that day. During the intervening period no power existed in the city judge to take any step in the proceed-

ing, at least without the consent of prosecutor. Such a consent must be public and formal, so as to bind prosecutor. If, therefore, prosecutor had appeared before the city judge during a public session of his court, and proffered himself ready to retract his plea of not guilty, and to acknowledge the violation of the ordinance with which he stood charged, perhaps the judge would have been warranted in entering the plea upon the record, and proceeding to pronounce judgment. But a magistrate authorized in such matters to deal with the property and liberty of the citizen ought not to have admitted an accused person to a private interview on the subject of his accusation, and grossly erred when he used an acknowledgment made by the accused in the privacy of the judge's office, and not established by proof when the cause was before him in open court, as the sole basis of a judgment of conviction. For these reasons the conviction must be vacated and set aside.

McCORMACK v. STANDARD OIL CO.

(Supreme Court of New Jersey. June 3, 1897.)

TRIAL—TAKING CASE FROM JURY.

The evidence shows no disputed fact. At the close of plaintiff's testimony, it was possible to infer the liability of defendant; at the close of all the testimony, no such inference was possible. *Held*, that a verdict for defendant was rightly directed.

(Syllabus by the Court.)

Action by Peter McCormack against the Standard Oil Company, in which a verdict was directed for defendant. On rule to show cause why a new trial should not be granted. Discharged.

Argued June term, 1896, before BEASLEY, C. J., and GARRISON, LIPPINCOTT, and MAGIE, JJ.

Warren Dixon, for rule. Charles W. Fuller, opposed.

MAGIE, J. The state of the case shows that the plaintiff claimed that he had sustained an injury on the night of November 8, 1895, by falling from a seat of a truck which he was driving through a public highway, and that his fall was occasioned by the wheel of his truck suddenly dropping into an excavation in the highway, which was left without guard or light to indicate its danger. To charge the defendant with liability for his injury, it was necessary for plaintiff to establish by proof that the excavation which was the cause of his injury was made by defendant. On this subject the plaintiff's case was this: He testified that he observed, at the time of his fall, that there were pipes laid in the excavation. It was admitted that defendant owned the land on both sides the highway where plaintiff claims to have fallen. A witness called for plaintiff testified that he had been employed by defendant from June 22, 1895, up to about

January 1, 1896, as a civil engineer in laying out an extension of defendant's plant, and that extension included stills and condensers on the east side of the highway. The plant on that side of the highway was, as part of the plan, to be connected with the defendant's plant on the opposite side of the highway, by pipes to be laid under the highway. The witness was not clear as to any particular time, but he had at some time during his employment seen trenches in the highway; whether any were there on November 8th he could not testify. Upon this evidence, the trial judge was asked to nonsuit plaintiff, on the ground that it was insufficient to establish the fact that defendant had made the excavation in question. This request was refused, and, I think, rightfully; for, although it did not directly evince the excavation to have been made by defendant, yet it justified an inference that in carrying out its plan, which included the laying of pipes in excavations in the highway, the excavation therein, which plaintiff claimed had pipes laid in it, was made by defendant. Defendant thereupon called witnesses in its defense, who were in its employ during the execution of its plan for extending its plant, of which the civil engineer called by plaintiff had testified. These witnesses declared that they had charge of the execution of the plan, and of laying the pipes across the highway. All of them united in testifying that the first excavation made for that purpose was on November 14, 1895. Their recollection was fortified by reference to time slips and work reports made by them at the time. There was no contradiction of their testimony, and they stood unimpeached. The case before the court, then, stood thus: The inference that defendant had opened the excavation into which plaintiff said he fell on November 8, 1895, which was possibly justifiable from the fact that between June, 1895, and January, 1896, defendant was executing a plan which contemplated such excavations, was not merely rendered doubtful, but was made impossible from the further fact proved that the excavations under that place were not commenced until November 14, 1895. It should be said also that plaintiff's fall became known to policemen in the neighborhood, and the fact was reported to headquarters. That it occurred on November 8th was undisputed, and seems to have been regarded as indisputable.

Upon the whole case, the trial judge thereupon directed a verdict for defendant, and allowed the plaintiff this rule to show cause. In support of this rule, it is now urged that there was error in the direction to find such a verdict, and that the case should have been permitted to go to the jury. If the material facts were in substantial dispute, this contention must doubtless prevail. *Hartman v. Alden*, 34 N. J. Law 518; *Crue v. Caldwell*, 52 N. J. Law, 215, 19 Atl. 188; *Railway Co. v. Block*, 53 N. J. Law, 605, 27 Atl. 1067; *Meyers v. Birch*, 59 N. J. Law, 238, 36 Atl. 95.

When, upon the uncontroverted facts, a plaintiff is not entitled to recover, and a verdict in his favor would be set aside, it is the duty of the court to nonsuit. *Railroad Co. v. Moore*, 24 N. J. Law, 824; *Ayrcligg's Ex'rs v. Railroad Co.*, 30 N. J. Law, 460. This court sustained a verdict directed for plaintiff, although the defendant had put in evidence in support of a defense, upon the ground that, upon that evidence, the jury could not reasonably have concluded that the defense had been established. *Baldwin v. Shannon*, 43 N. J. Law, 596. But, on the case before us, there was no dispute of facts upon the point of defendant's liability for the excavation into which the plaintiff fell. The testimony of the civil engineer called by plaintiff in respect to defendant's plan contemplating excavations in the highway somewhere between June and January is not contradicted by defendant's evidence that the first excavations in execution of the plan were after the plaintiff's injury. The inference possible to be drawn from the former is only rendered impossible by the latter. It is not easy, after a review of all the evidence, to feel entire confidence in the testimony of plaintiff in his own behalf. But it must be assumed that a jury might have found his story credible. But if, on November 8th, he fell into an excavation in the highway, and saw pipes laid in it, he has not advanced his right to recover, for the only excavations his proof shows defendant made in the highway were those made in pursuance of its plan for the extension of its plant, and the first of them was not made until November 14th. If plaintiff's excavation of November 8th was real, it is not shown to have been made by defendant. Upon the uncontroverted facts, a verdict for plaintiff could not be sustained, and in such case the verdict was properly directed for defendant. Let the rule to show cause be discharged.

STATE (MEYERS et al., Prosecutors) v. HUDSON COUNTY ELECTRIC CO. et al.

(Supreme Court of New Jersey. June 3, 1897.)

ELECTRIC LIGHT COMPANIES—FRANCHISE.

Because of the act of April 21, 1896 (P. L. 1896, p. 322), electric light companies cannot lawfully erect poles in any street of a city, for either public or private lighting, without first obtaining from the city a particular designation of the streets in which the same are to be placed. (Syllabus by the Court.)

Certiorari by the state, on the prosecution of Samuel J. Meyers and others against the Hudson County Electric Company and the City of Bayonne, to review a resolution of the city council of said city. Resolution set aside.

Argued February term, 1897, before LUDLOW, COLLINS, and DIXON, JJ.

Van Buskirk & Parker and C. L. Corbin, for prosecutors. T. N. McCarter, Jr., for defendant Hudson County Electric Co. T. F. Noonan, Jr., for defendant city of Bayonne.

DIXON, J. The object in suing out this writ of certiorari is to test the right of the Hudson County Electric Company to place poles along Thirty-Third street and Avenue C, on the land of the prosecutors, for the purpose of supplying electricity to three electric lights on the northeasterly corners of Avenue C and Thirty-Second, Thirty-Third, and Thirty-Fourth streets, in the city of Bayonne, pursuant to a resolution of the city council passed November 8, 1896. The prosecutors insist that these poles cannot lawfully be erected, because the city has never designated Thirty-Third street and Avenue C as streets in which such poles might be placed, as required by the act relating to electric light, heat, and power companies, approved April 21, 1896 (P. L. 1896, p. 322). That no such designation has ever been obtained is clear. The control of the streets is vested in the city council, and the only act of that body which, it is suggested, might be deemed a designation under the statute cited or its predecessors (P. L. 1884, p. 331, and P. L. 1893, p. 412), is an ordinance approved January 15, 1895, purporting to authorize the Hudson County Electric Company to erect poles "in all the public roads, public places, highways, streets, avenues and alleys of the city" for electric light, heat, and power purposes. If circumstances should exist in which an electric company proposed to erect poles at once throughout every public street in a city for the purposes stated, such an ordinance as this might be considered a sufficient compliance with this statutory prerequisite. But when, as in the case before us, neither the city nor the company intended the immediate prosecution of so general a work, an ordinance of this character was a mere evasion of the law. To give it effect would be to authorize the company, instead of the city, to designate the streets in which poles were to be placed, whenever, in the judgment of the company, a proper occasion should arise. If, then, a designation of streets by the city under this law was a necessary preliminary to the erection of these poles by the company, we must conclude that this resolution, which leaves the whole plan of construction to the discretion of the city surveyor, is illegal.

The defendants contend that the law only requires a designation of streets by the city when poles are to be erected for private lighting, and that when, as here, the purpose is to light the public streets, this statute does not apply. We cannot concur in this view. It presupposes an expectation on the part of the legislature that these companies would generally erect one line of poles for public lighting, and another for private lighting. Such an expectation would be antagonized by common experience, and we find no adequate reason for believing it was entertained. The language of the statute on this point is unambiguous, and in its plain meaning leads to no absurd or even unreasonable result, and, therefore, that meaning should be enforced. *Rex v. Commissioners*, 6 Adol. & E. 7; *Commis-*

sioners v. Brewster, 42 N. J. Law, 125, and cases there cited; Earle v. Willets & Co., 56 N. J. Law, 334, 29 Atl. 198. Our opinion is that no company of the class mentioned in this statute has any lawful power to erect its electric poles in any public highway, except in accordance with the terms of this act.

But the defendants further urge that the resolution can be supported on the "Act authorizing the lighting of public streets and places in the cities, towns, townships, boroughs, and villages of the state, and to erect and maintain the proper appliances," approved May 22, 1894 (P. L. 1894, p. 477). This statute relates wholly to municipal corporations, and it is manifest that the authority granted by it cannot be curtailed by the act of April 21, 1896, which, both in its title and in its enacting clauses, is confined to electric light, heat, and power companies. But this statute is not applicable to the present question. The power which it delegates is conferred only on the municipal bodies described in it. If the city of Bayonne, by its own agents, were erecting its own poles in these streets, for the purpose of lighting streets, the statute of 1894 would be in point; but it cannot be invoked as legal sanction for any attempt on the part of the city to authorize an electric light company to erect its poles in the streets, without complying with the act of 1896. The poles to be erected under the act of 1894 are public property, to be used only for public purposes. The poles to be erected under the act of 1896 are private property, to be used for public or private purposes. The ordinance of January 15, 1895, is illegal, and must be set aside, except so far as it has been acted upon by the Hudson County Electric Company, with the acquiescence of the city and the owners of the soil affected. The resolution of November 8, 1896, is also illegal, and must be set aside.

The prosecutors attack a contract made January 8, 1895, between the city and the United Gas Improvement Company, which was executed also by the Hudson County Electric Company and others. It is doubtful whether the certiorari brings this contract under review, but, even if it does, some of the parties interested in it are not before us; and, as it imposes no obligation on the city in the matter now complained of, its legality need not and should not be considered. The prosecutors are entitled to costs.

ESSEX COUNTY ELECTRIC CO. v. KELLY.

(Supreme Court of New Jersey. June 7, 1897.)

MASTER AND SERVANT—INSPECTION OF APPLIANCES.

The plaintiff below was injured in 1890 by the breaking of a defective pole which he was directed by the superintendent of the company to ascend. There being some evidence to show that a proper inspection of the pole would have disclosed the defect, and that it had not been inspected since 1888, it was properly submitted to the jury to determine whether the defendant company had exercised due care in the discharge

of the duty it owed to the plaintiff to provide poles reasonably safe for the work in which he was employed.

(Syllabus by the Court.)

Error to circuit court, Essex county; Child, Judge.

Action by Andrew Kelly against the Essex County Electric Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Argued February term, 1897, before DEPUE, VAN SYCKEL, and LIPPINCOTT, JJ.

Edward A. & W. T. Day, for plaintiff in error. Samuel Kallsch, for defendant in error.

VAN SYCKEL, J. Kelly, the plaintiff below, was injured in November, 1890, by the breaking of a pole which was shown to be defective. There was evidence that he was directed by the superintendent of the defendant company to ascend the pole. There was also some evidence to show that a proper inspection of the pole would have disclosed the defect which caused the injury to the plaintiff, that it had not been inspected since 1888; and that it should, in the exercise of reasonable care, have been inspected once in each year. There was a previous trial of this case, in which the judgment was brought into this court for review. The court recognized the duty of the master to take reasonable care to furnish tools and appliances with which, and places on or about which, the servant is employed to work, reasonably safe for the work; but reversed the judgment because it appeared that the defect in the pole was latent, and there was no evidence to show a want of proper inspection or that the defect could have been discovered by such inspection. *Electric Co. v. Kelly*, 57 N. J. Law, 100, 29 Atl. 427. That evidence was supplied on the trial of the case now under review, and it was submitted to the jury with proper instructions, as was also the evidence with respect to obvious damages and contributory negligence. No error in law appears, and the judgment should be affirmed.

BINDERNAGLE v. STATE.

(Supreme Court of New Jersey. June 7, 1897.)

CRIMINAL LAW—EXCEPTIONS TO INSTRUCTIONS—DISORDERLY HOUSE—EVIDENCE—QUESTION FOR JURY.

1. Error cannot be assigned upon an exception taken to the mere refusal of the court, in the trial of a criminal indictment, at the close of the evidence for the state, or on the part of the defendant, to instruct the jury to acquit.

2. The acts and conduct of the persons who are the inmates of a house charged to be disorderly, and their language, in relation to their acts and conduct and in connection therewith, at the same time, are admissible and competent evidence to establish the character of the house, whether the person alleged in the indictment as the keeper thereof be present at the time or not. This evidence can only be of use and effect upon the question whether the place is disorderly in a legal sense, and not to implicate the defendant charged with the offense of keeping it; and, before he can be convicted of such offense, evidence suffi-

cient to establish his connection, management, or control of such a place must be adduced.

3. It is the duty of the trial court to define the elements of fact necessary to constitute a disorderly house, but whether the proof is sufficient to establish that conclusion, as well as whether, by such proof and the other evidence, the person charged in the indictment is responsible as matter of fact for the management and control of the same, are questions which must be submitted to the jury, and which are entirely within the province of the jury to determine.

(Syllabus by the Court.)

Error to court of quarter sessions, Hudson county; Hudspeth, Judge.

Philip Bindernagle was convicted of keeping a disorderly house, and brings error. Affirmed.

Argued February term, 1897, before DE-PUE, VAN SYCKEL, and LIPPINCOTT, JJ.

Allan L. McDermott, for plaintiff in error.
Charles H. Winfield, for the State.

LIPPINCOTT, J. The plaintiff in error, defendant below, was indicted for keeping a disorderly house in the township of Union in the county of Hudson. The indictment charged that the defendant kept a place in that township in which he permitted people to engage in betting and wagering on the events of races of horses, mares, or geldings. The indictment was presented at the April term, 1896, and the offense was charged to have been committed between March 1, 1895, and the time the indictment was presented. No objections were taken to the form of the indictment before the trial, and no errors have been assigned drawing in question its validity.

The evidence introduced, and, as it stands, undisputed, shows at this place there are three buildings. One is a brick building in which the defendant kept a saloon. The main floor contained a barroom; and to the north of the barroom, and connected with it, was a restaurant; still to the north of the restaurant, and immediately adjoining it, was a long, frame building; and from the building a piazza ran along the front of the saloon and restaurant. There does not appear to have been any door leading from the piazza into the long, frame building. In front of this frame building there were steps leading up to a door, which the evidence shows to have been closed during the time laid in the indictment. Access to this building was gained by steps and a door in what may be called the rear of the building. Access to it, also, could be gained by going into the saloon in front thereof, and passing out the rear, and along a pathway to this door. On the south side of the barroom, close to it, but not directly connected therewith, was another frame building. Access to this building was gained by a door opposite the end of, but not connected with, the piazza, and also by another door on the southerly side of the building. All these buildings stood in a row directly opposite the ferry landing of the ferry from the city of New York. There was no fence or obstruction between the rear of the barroom and the rear of the other build-

ings. The evidence is conclusive that in the northerly of these buildings, it being the long, frame building, gambling, betting, bookmaking, and wagering on horse races, during the time mentioned in the indictment, were carried on. The evidence is just as conclusive that in the southerly building, during the time laid in the indictment, poker, faro, and roulette games were being played for money, and other gambling games were there engaged in. There is evidence showing that the usual way of getting into the building to the north was by going into the front of the saloon kept by the defendant, passing out of the rear thereof, and entering the building by the rear door thereof. Gambling games were carried on, also, in this building, at which money was won and lost. The evidence is that large crowds of men were often seen in and about this place, going in and coming out of the saloon of the defendant, and out of these places. The mother of the defendant testified that the defendant conducted the business of the saloon and restaurant, which was licensed in his name, as an inn and tavern, and which was known as the "Hoffman House," with which the frame building on the north is connected. Reference is made to so much of the evidence to show that the question who it was that kept and maintained this disorderly place was one which must be taken by the jury to determine.

At the close of the case defendant requested that the trial court instruct the jury to acquit. Upon the refusal of the court to so instruct, the defendant prayed an exception, which was allowed and sealed, and error is assigned upon such refusal. This exception and assignment of error has no place in the criminal practice in this state. Error cannot be assigned, on a trial of an indictment, upon the refusal of the court to direct an acquittal. Besides, the evidence was amply sufficient, at this point, to go to the jury, to pass upon the question whether the defendant had control of either of the buildings in which betting on horse races and other forms of gambling had been carried on. The defendant was called as a witness in his own behalf. He was the only witness called for the defense. He denied that he had anything to do with the buildings north or south of his saloon or tavern and restaurant. He testified that his mother owned the building to the north, and that it was and had been under her control. He admitted that he had frequently seen and had knowledge of crowds of people gathered about the building. His mother was recalled by the state, and in rebuttal testified that she owned the building to the north, but exercised no control whatever over that or the saloon and restaurant, and that she had never given any one permission to occupy, or had rented to any one, the building to the north for any purpose, and that she had never received anything for its use, and had nothing to do with it, and that her son, the defendant, took charge and control of the building for her. Her evidence was not denied by the defendant. The evi-

dence fully sustains the conviction unless it be that the case in some respects in point of law was improperly submitted to the jury.

It is hardly necessary to take up the assignments of error ad seriatim. The trial court refused, upon request, to charge that the building to the south of the saloon was "owned and controlled entirely beyond the ownership and control of the defendant"; that there was not "any evidence that the defendant had control of the building not owned by his mother, or that he was ever in that building"; that "there is not any evidence in this case showing that the defendant had any control over the building to the south of his hotel"; and, further, that "the defendant's testimony that he did not have any control over the building [which building the request does not state], was never in it, and had no ownership in it, must be taken as true by the jury,—it not having been shown that he was ever in the building, or did any act concerning its control." In this latter request is included the desire of the defendant to have the testimony of the defendant in this respect characterized as "uncontradicted." It is sufficient to say that, if the trial court had charged these propositions of fact, it would have done violence to the evidence, and the probative force and effect thereof. The trial court had no right to pass its opinion as conclusions of fact on these questions. They were questions for the jury under all the proof in the case.

Two other assignments of error have to deal with the admission of the evidence of the witness Tuttle. One is founded upon the objection to the admission of his evidence, and the other is upon the refusal to strike out the whole of it after it had been given. The only question raised is whether it was admissible at the time it was given. The evidence of this witness describes the different buildings, inside and outside; the manner in which he gained access to them, and the manner in which access could be gained to them; what he found on the inside, the character of betting going on therein, and the different games being played there at which money was won and lost, and what the persons assembled there were doing; that those assembled there, many of them, were engaged in betting and playing the gambling games; and what was said by those managing the betting and gaming, and those engaged in betting therein. The whole point of the objection to this evidence was that the defendant was not present at this time, nor was the evidence preceded by proof that the defendant was connected with the place. So far as the contention is concerned that he was not shown to be connected with what was going on, the facts and circumstances afterwards in proof must be taken by the jury to say whether the defendant was implicated or not. The mere order of proof was not material, and this class of evidence is admissible, whether in the presence or absence of the defendant, for it was evidence of acts and words characterizing the

acts, not implicating the defendant at all, but connected with and explanatory of the conduct of the inmates of the place. Whether done and said in a place or building over which he had control is another question. It is not often, in this class of cases, that proof can be made that the illegal practices are carried on in the presence of the defendant or party responsible for such practices. He is generally absent, but that fact does not prevent proof of the acts and doings of those assembled in the place. The character of the place is one of the essential elements of proof without which no responsibility could be established. The acts and sayings of the persons in these buildings congregated were alike competent evidence to prove the character of the place. The acts of betting and gaming were admissible, and what was said at the time was a part of the acts. The *res gestæ* included the words, and were such part of the acts, and so connected with them, as to illustrate their character. The acts and words stand together, forming one transaction. 21 Am. & Eng. Enc. Law, p. 111. It is a common thing, in cases of disorderly houses, to prove the misbehavior of the inmates, and then to supplement with proof as to the persons who control and permit such disorderly conduct. After such evidence is admitted, it then becomes a question of fact for the jury to determine whether satisfactory evidence has been produced to show that the defendant keeps, maintains, and controls, or has the power to control, the place, or permits and suffers it to be so kept and maintained, having power to prevent it. *Brown v. State*, 49 N. J. Law, 61, 7 Atl. 340. Whether the acts are illegal, and constitute a disorderly house, is a question of law for the court; the question of control or permission, as affecting the guilt of the person charged, is a question for the jury. The cases are so numerous authorizing proof of the conduct and language of those who resort to a place of this kind, in order to determine its character, that it is not deemed necessary to refer to them. 5 Am. & Eng. Enc. Law, pp. 693-702. Words in connection with and explanatory of acts are admissible. *Hunter v. State*, 40 N. J. Law, 495. There was no error in the admission of this evidence or the refusal to strike it out.

There is another class of assignments of error, based upon refusals upon requests to charge further than the court had already charged. These requests are "that the jury cannot convict unless it be shown that the defendant was in some way connected with or controlled the building charged to be a disorderly house"; and "that the defendant could not be held liable for anything he could not have prevented, and that he could not prevent anything in the building that he did not have charge or control of"; and "that the jury cannot convict the defendant unless he had control of the premises or participated in their management." These requests have been fully covered in the charge. The trial court

said to the jury that the place or places where these practices were carried on, if they found such practices were carried on, in order to convict the defendant, must be established to be under his control and supervision. The jury were distinctly told, as to any of these buildings in which it was alleged that these practices were carried on, that it must be found by them as established by the evidence, before conviction could follow, that the defendant was in control and supervision of them; that he kept or caused to be kept the same, or rented the same to some person knowing that the same should and was to be so kept; and that the state must satisfy the jury of the guilt of the defendant beyond reasonable doubt, and that if, upon the whole case, there existed in their minds a reasonable doubt as to the guilt of the defendant, he was entitled to the benefit of that doubt, and the jury should then acquit him.

There does not seem to be any other assignment of error which needs consideration. The law to be applied by the jury to the evidence was favorably stated in behalf of the defendant by the court, and upon an examination none of the exceptions to the charge of the court appear to be sustainable. The entire record of the proceedings of the trial has been returned into this court by the plaintiff in error with the writ of error, and we have examined it; and, applying the principles laid down by the court of errors and appeals in the case of *Kohl v. State*, 36 Atl. 104, it does not appear, from such record, that the plaintiff in error, on the trial below, suffered any manifest wrong or injury, in the rejection of evidence, or in the charge of the trial court to the jury, or in the denial of matter by the trial court which was a matter of discretion, or upon the evidence adduced at the trial. Judgment of the Hudson quarter sessions must be affirmed.

BURNETT v. STATE.

(Supreme Court of New Jersey. June 8, 1897.)

FRAUDULENT CONVERSION BY AGENT — INSTRUCTIONS.

Upon the trial of an indictment framed under the supplement to the crimes act, approved March 10, 1893 (1 Gen. St. p. 1100, § 272), charging a fraudulent conversion of money by an agent to whom it had been intrusted, it appeared a principal had placed in the hands of the defendant a sum of money to be applied to the purchase of certain real estate, the title to which was to be taken in the name of a person nominated by the principal. It further appeared that defendant had only applied a part of the money according to his instructions, but that, upon demand of the principal, he had failed to repay the rest of it. *Held*, that:

1. It was error to instruct the jury that a refusal to pay over the unapplied money to the principal, if the principal was justified in demanding it, amounted, in law, to a fraudulent conversion of it.

2. That such error was not cured by a subsequent statement that the jury should be satisfied that the refusal was with intent to convert.

(Syllabus by the Court.)

Error to court of general quarter sessions. Essex county; Kirkpatrick, Judge.

John M. Burnett was convicted under an indictment charging him with fraudulently taking and converting to his own use certain money which was intrusted to him as agent, bailee, and servant, and brings error. Reversed.

Argued February term, 1897, before MAGIE, C. J., and DEPUE, VAN SYCKEL, and LIPPINCOTT, JJ.

F. Bradner, for plaintiff in error. L. Hood, for the State

MAGIE, C. J. It is first contended that the plaintiff in error received manifest wrong by reason of the refusal of the trial court to continue the cause when moved for trial by the prosecutor. The application for continuance was made upon the ground of the illness of plaintiff in error. This objection cannot be considered, for it does not appear that the entire proceedings at the trial are before us, so that we can review them under the act of 1894 (1 Gen. St. p. 1154), and the ruling of the court thereon is not otherwise reviewable.

In the brief of the prosecutor the indictment is said to have been drawn under section 296 of the crimes act (1 Gen. St. p. 1104). That section, however, seems to cover the embezzlement only of personal property other than money. But the amendment to the crimes act approved March 10, 1893 (1 Gen. St. p. 1100), supports the indictment; for it provides, among other things, that if any agent or servant intrusted with the care of any money shall fraudulently take and convert the same, or any part thereof, to his own use, he shall be deemed guilty of a misdemeanor. In order to convict a defendant upon such an indictment, it is obvious that the fraudulent conversion of money intrusted to his care must be made out. The bill of exceptions discloses that plaintiff in error had received from Mrs. Campfield \$3,000, to be applied to the purchase of some real estate, the title to which was to be taken in the name of a person nominated by Mrs. Campfield. It further appears that plaintiff in error had paid out upon the price of the real estate \$1,700, and \$1,300 remained unpaid, and that Mrs. Campfield had asked him for the money, but that he had not paid it to her. On the subject of the necessary proof the learned presiding judge charged as follows: "Now, if, after waiting fourteen or sixteen months, the sale had not gone through, if you think that the complaining witness was justified at that time, five months after the title had been passed, if she was justified in going and demanding the return of this money, the refusal to pay that money over to her on demand when due was, in law, a fraudulent conversion." An exception was sealed to this part of the charge. In a subsequent part of the charge the judge added, "I ought to have said that the jury ought to be satisfied that the refusal to pay

over the money was with the intent to convert it to his own use." The portion of the charge excepted to is obviously erroneous. A refusal to pay over money of another, intrusted to one as agent or servant, is doubtless evidence of a fraudulent conversion, or fraudulent intent to convert, but it will not justify the statement that it establishes, in law, a fraudulent conversion. *Fitzgerald v. State*, 50 N. J. Law, 475, 14 Atl. 746. This error, I think, was not cured by the subsequent explanation to which I have alluded, for the jury were still left to find that the refusal, if they believed it, established, in law, a fraudulent conversion; and it was useless to tell the jury that they must be satisfied that the refusal was with the intent to convert the money to his own use, if the refusal did, in law, make a fraudulent conversion. Upon this ground, I think this judgment must be reversed.

EISERMAN v. SCHNEIDER.

(Supreme Court of New Jersey. June 7, 1897.)

STATUTE OF FRAUDS—CONTRACT NOT TO BE PERFORMED IN A YEAR.

The defendant made an oral agreement, 20 years ago, that, in consideration of certain domestic services to be performed by the plaintiff, he would support and maintain her during her lifetime. *Held*, that this contract was not within the statute of frauds, because it might have been fully performed and terminated by her death within a year.

(Syllabus by the Court.)

Suit by Caroline Eiserman against Ferdinand Schneider. Verdict for plaintiff. Rule to show cause why a new trial should not be granted. Granted on condition.

Argued February term, 1897, before DEPUE, VAN SYCKEL, and LIPPINCOTT, JJ.

Herbert W. Knight, for plaintiff. Samuel Kalisch, for defendant.

VAN SYCKEL, J. This suit was brought by the plaintiff against the defendant, who is her son-in-law, to recover damages for the breach of an alleged oral agreement, made 20 years ago, that, in consideration of certain domestic services to be performed by her, he would support and maintain her during her lifetime. There was sufficient evidence to establish the parol contract. The defense was set up that the plaintiff, four or five years ago, abandoned the contract by going to Europe and remaining there some time, and that there was no renewal of the contract on her return to this country. Her absence in Europe was admitted, but she testified that she went abroad with the consent of defendant, who paid her passage, and that she returned with his consent on a ticket furnished by him, and upon her return resumed her former duties in his house. This evidence was properly submitted to the jury, and, if it was accepted as true, the original contract was not abrogated,

and the plaintiff was entitled to a verdict for the breach of the agreement, if it was not within the statute of frauds. As early as the case of *Peter v. Compton*, Skin. 353, the great majority of the judges declared "that where the agreement was to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, there a note in writing is not necessary, for the contingent might happen within a year; but where it appears by the whole tenor of the agreement that it is to be performed after a year, there a note is necessary; otherwise, not." This has been the generally accepted rule since that case was decided. Parol agreements to do something for an indefinite period, which may be terminated within a year, are valid. To be within the statute, it must be such an agreement as does not admit of performance according to its language and intention within a year from the time it is made. The following contracts by parol have been held to be enforceable, and not within the statute of frauds: To pay upon the death of a third person; to pay upon the termination of a suit; to pay on the day of the promisor's marriage, which was the case in *Skin. 353*; to marry upon restoration to health; to pay out of one's estate after death; to pay during life of promisee; to pay during coverture. *King v. Hanna*, 9 B. Mon. 369; *Sword v. Keith*, 31 Mich. 247; *McConahey v. Griffey*, 82 Iowa, 564, 48 N. W. 983; *Hutchinson v. Hutchinson*, 46 Me. 154; *Blanchard v. Weeks*, 34 Vt. 589; *Burney v. Ball*, 24 Ga. 505; *Houghton v. Houghton*, 14 Ind. 505; *Blake v. Voigt*, 134 N. Y. 69, 31 N. E. 256; *Bull v. McCrea*, 8 B. Mon. 423; *Browne, Frauds* (5th Ed.) §§ 272-276, and cases cited; *Peter v. Compton*, 1 Smith, Lead. Cas. *143; *Howard v. Burgen*, 4 Dana, 137. In *Berry v. Doremus*, 30 N. J. Law, 399, Mr. Justice Vredenburgh, in delivering the opinion of the court, said that the statute applies only to cases where neither side is to perform within one year, although the case did not necessarily turn upon that point. The contract must, therefore, be regarded as obligatory, and not within the statute. The plaintiff at the time of the breach of the contract was 74 years old. The jury rendered a verdict for the plaintiff for \$1,700. This, in the opinion of the court, is clearly excessive, and the verdict will be set aside, and a new trial granted, unless the plaintiff will elect to accept the sum of \$1,000.

STATE (BOARD OF CHOSEN FREEHOLDERS OF COUNTY OF CAMDEN, Prosecutor) v. COLLINS, Collector.

(Supreme Court of New Jersey. June 3, 1897.)

TAXATION—EXEMPTION.

Property of a county, held for public use outside the county territory, although acquired without specific authority of law, is nevertheless by the statute exempted from taxation.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of the board of chosen freeholders of the county of Camden, against William Collins, collector of the township of Washington. Tax set aside.

Argued February term, 1897, before DIXON, LUDLOW, and COLLINS, JJ.

Henry S. Scovel, for prosecutor. A. H. Swackhammer, for defendant.

COLLINS, J. In 1890 the poor farm of the county of Camden, lying along the boundary line of the county of Gloucester, was enlarged by the purchase of 159 acres of adjoining land in the township of Washington in the county last named. At that time farms were taxable only where the owner resided, and no attempt was made to tax this land. On March 28, 1895, the legislature enacted that each part of a farm divided by a county line should be taxed where situate (Gen. St. p. 3455, pl. 818), and thereupon the assessor of Washington township assessed said 159 acres. The tax levied thereon is now before this court for review. The prosecutor resists the tax, claiming exemption under the general tax law. Gen. St. p. 3320, pl. 200. That statute provides that "the following * * * property shall be exempt from taxation, namely, * * * the property of the counties, townships, cities and boroughs of this state." The defendant contends that this broad language must be limited by conditioning the exemption upon lawful ownership and public use.

As to the first of these supposed conditions, the prosecutor points to the general power of counties to hold real and personal estate conferred by law. Gen. St. p. 410, § 2. This, too, is general in terms; but the defendant contends that an extraterritorial holding, to be lawful, must have a specific warrant. Such is the opinion of most text writers, with reservations based on necessity. The adjudged cases are collected in 15 Am. & Eng. Enc. Law, p. 1060. On the other hand, it is well settled that only the state, in a direct proceeding, can attack a title alleged to be unlawfully held by one of its municipalities. 2 Dill. Mun. Corp. (4th Ed.) § 574 (44), and cases cited; *Chambers v. City of St. Louis*, 29 Mo. 543, 577. Hence the statutes, to which we have been referred, authorizing a poorhouse at such place in the county as the chosen freeholders shall appoint (Gen. St. p. 413, § 30), and restricting an addition to a county farm to 30 acres, however useful they might be in a direct proceeding instituted by the state, have no applicability to the present controversy. It surely cannot be that the right to tax property, otherwise exempt, can depend upon such a defeasibility of title. In the case in hand the property would not become taxable if the state should defeat the county's title. Neither the right to defeat the title, nor the land itself when escheated, would be taxable, for the property of the

state is not subject to taxation. *Trustees for the Support of Public Schools v. Inhabitants of City of Trenton*, 30 N. J. Eq. 687. Decisions limiting general words of exemption in charters of private corporations to such property as may lawfully be held for charter purposes are not authority for the defendant's contention. In such cases the legal implication is in favor of the power to tax, while, as against municipal corporations, the legal implication is the other way. As to individuals or private corporations, there must be express words to exempt; as to public corporations, there must be express words to tax. The argument for limitation by lawful ownership is of force only against a public corporation, where the exemption itself is implied; here it is express. I see no reason why the plain language of the statute exempting from taxation the property of counties should by a forced construction be read so as to authorize taxation, upon a determination, reached by collateral inquiry, that the particular land sought to be taxed is held *ultra vires*. It may be unjust to exempt this property from the burdens of a government whose advantages it shares. That objection applies in a greater or less degree to every exemption, and is one that should be addressed to the legislature, not to the courts.

Upon the other assumed condition of exemption, viz. public use, the defendant strives to sustain the tax levied in this case upon the ground that the land taxed is not all needed for a poor farm, and to that end has taken affidavits to show sales of farm products. Except for some inferences deducible from decisions of this court, I should say that, under the exempting statute quoted, there can no more be an inquiry into this subject than there can be into the validity of title. But it is not necessary to consider the case from this point of view, as those decisions themselves would exempt the property in question. In *Jersey City Water Com'rs v. Gaffney*, 34 N. J. Law, 131, land purchased by Jersey City for a reservoir five years before the assessment, but never used, was held to be exempt; there being no indication of abandonment of the purpose to ultimately use it. Mr. Justice Bedle thought it possible that the general law now under consideration would in any case exempt the property, but found it unnecessary to so decide, as certain special acts referring to the Jersey City Water Works sufficed for the purpose, on the principle laid down. In *City of Newark v. Verona Tp.*, 59 N. J. Law, 494, 34 Atl. 1060, the general law was directly involved. *Jersey City Water Com'rs v. Gaffney*, supra, was followed, and it was held that excess of production from a city's land, above its needs, and the sale of the produce for profit, were merely incidental, and would not impair the exemption from taxation given by the statute, even if limited to property devoted to public use. The only case that seems to assert, or rather to assume, the limitation urged, is *Newark v. Clinton Tp.*, 49

N. J. Law, 370, 8 Atl. 296; but, as remarked by Mr. Justice Van Syckel in *Newark v. Verona Tp.*, supra, the case really turned on the exemption of graveyards contained in the act. The question now being discussed was not decided. The tax under review must be set aside, with costs.

STATE (LANDIS, Prosecutor) v. BOROUGH OF VINELAND.

(Supreme Court of New Jersey. June 3, 1897.)

BOROUGH—SIDEWALKS—CONSTRUCTION—NOTICE.

1. If there has been conferred upon boroughs organized under the borough act of April 5, 1878, power to provide by ordinance for the construction of sidewalks on streets at the expense of the owners of the adjoining lands, such power is judicial in character, and can only be exercised upon notice to the owners and giving them an opportunity to be heard.

2. In the absence of any provision for constructive notice, reasonable actual notice must be given to the owners of a time and place when and where they may be heard in respect to the proposed passage of such an ordinance.

3. If the proceedings of the borough council show no notice or hearing, and none is proved to have been given, such an ordinance cannot be supported.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of Charles K. Landis, against the borough of Vineland, to review ordinances. Certain ordinances set aside.

The writ of certiorari has brought up the following ordinances of the borough of Vineland:

"An ordinance for the construction and repair of sidewalks and for the trimming of shade trees within the borough of Vineland.

"Section 1. Be it ordained by the mayor and council of the borough of Vineland, that sidewalks upon all accepted streets, roads, avenues and public places in said borough, shall be constructed, repaired and kept in repair by the owner or owners of lands along which sidewalks are or may be located, as hereinafter provided.

"Sec. 2. And be it ordained and enacted, that the mayor shall appoint a committee of three, being members of the board of councilmen, to be known as a committee on sidewalks and shade trees, which committee shall have the general supervision and control, in locating, grading, constructing and repairing all sidewalks within said borough, but shall act under the advice and instruction of the mayor and council, who shall designate by resolution or otherwise the kind, quality, grade and location of any sidewalk to be constructed or repaired, when it shall be the duty of said committee to serve upon the owners of lots or lands in front of or by the side of which any sidewalk is to be constructed or repaired, a notice in writing, which notice shall specify the location, grade and quality, and the time within which such walk is to be constructed, altered in grade or repaired as may have been determined or required by the said mayor and

council and shall be served personally upon the owner of such lots or lands, his or their agent or tenant, at least twenty days previous to the time designated therein for the construction or repairing of sidewalks.

"Sec. 3. And be it ordained and enacted that if any owner or owners of lots shall neglect or refuse to construct or repair and keep in repair, sidewalks as specified in said notice within twenty days after the service thereof, then the mayor and council shall cause the work to be done and the money so expended with costs, interest and expenses thereof, shall be by the said mayor and council assessed upon the lot or lots of land in front of or by the side of which said sidewalk shall have been so graded, constructed or repaired, by resolution setting forth the name of the owner, description of lot or lots owned, and the amount assessed thereon, and entered at length on their minutes and a copy thereof certified by the mayor and borough clerk, shall within ten days thereafter be delivered to the collector of taxes for the said borough, who shall at once enter the same in a book provided for that purpose, to be called 'Sidewalk Assessment,' and such assessment shall become and remain a lien on such lot or lots until paid, and if paid within six months from the passage of aforesaid assessment resolution, the mayor and council shall proceed to collect the same by enforcing such lien in the same manner and to the like effect as prescribed in a certain act entitled 'A further act concerning taxes, making the same a first lien on real estate, and to authorize sales for the payment of same,' approved March fourteenth, one thousand eight hundred and seventy-nine.

"Sec. 5. And be it further ordained and enacted that this shall be known as 'Ordinance No. 12,' and shall take effect on the tenth day of September, 1883."

Passed July 13, 1883.

"Supplement to Ordinance No. 12.

"A supplement to an ordinance entitled 'An ordinance for the construction and repairing of sidewalks in the borough of Vineland,' designated as 'Ordinance No. 12.'

"Section 1. Be it ordained by the mayor and council of the borough of Vineland that sidewalks to be laid and constructed on Plum street between Third and East Ave., on East Ave., from Park Ave. to Landis Ave. on the east and west boulevard, from Chestnut Ave. to Park avenue, and on Fourth street from Plum to Montrose street, of either brick, stone or cement, a width of six feet, on either side of the said streets, at the cost and expense of the owner or owners of the lands in front of which the same shall be laid or constructed.

"Sec. 2. And be it further ordained, that the said sidewalks shall be laid according to the grade thereof established by the profile of said street made by Nathan L. Fowler, civil engineer, and now in possession of the said mayor and council, and that the owner or

owners of said lands abutting thereon shall have thirty days' time within which to perform the work required by this ordinance, after written notice of the required work be sent to such owner or owners by mail, if their post-office address be known, and if not then by posting such notices on the premises affected thereby or leaving the same with any occupant thereof, or by personal service if such owner or owners be resident of the borough.

"Sec. 3. And be it further ordained that this ordinance shall take effect on the twenty-sixth day of June, A. D. eighteen hundred and ninety three."

Passed and approved 13th day of June, A. D. 1893.

"Supplement to Ordinance No. 12.

"Section 1. Be it ordained by the mayor and council of the borough of Vineland, that sidewalks be laid and constructed on Grape street, from Third street to East avenue, and on Montrose street from Third street to East avenue, of either brick, stone or cement, a width of six feet on either side of the said street, at the cost and expense of the owner or owners of the lands in front of which the same shall be laid or constructed.

"Sec. 2. And be it further ordained that the said sidewalks shall be laid according to the grades thereof established by the profiles of said streets made by Nathan I. Fowler, civil engineer, and now in possession of said mayor and council that the owner or owners of said land abutting thereon shall have thirty days' time within which to perform the work enjoined by this ordinance after written notice of the required work to be sent to such owner or owners by mail, if their post-office address be known, and if not known, then by posting such notices on the premises affected thereby, or by leaving the same with any occupant thereof or by personal service if such owner or owners be resident of the borough.

"Sec. 3. And be it further ordained, that this ordinance shall take effect on the twentieth day of September, one thousand eight hundred and ninety three."

Argued February term, 1897, before DIXON and MAGIE, JJ.

Charles K. Landis, Jr., for prosecutor. Roy-
al P. Tuller, for borough of Vineland.

MAGIE, J. (after stating the facts). A stipulation of the attorneys of the parties admits that the prosecutor is the owner of lands affected by the two supplements to the ordinance of the borough of Vineland called "Ordinance No. 12," which ordinance, with said supplements, appears in the statement prefacing this opinion. It is unnecessary to consider prosecutor's objections to Ordinance No. 12, because its provisions in no respect particularly affect him. The supplements, one of which was passed June 13, 1893, and the other of which was passed September 20, 1893, do af-

fect prosecutor directly, because they provide for the laying of sidewalks in front of his lands at his expense. If this borough, which, it appears by stipulations in the case, was organized under the borough act of April 5, 1878, possesses power to pass these supplementary acts, it has been conferred by two legislative acts. The first was approved March 13, 1883. It was no doubt intended to be a supplement to that borough act, but by a singular error in its title it was declared to be a supplement to an act of the same name approved April 3, 1878. There was no act of that description approved April 3, 1878. This error was attempted to be corrected by an act approved April 8, 1887. Laws 1887, p. 142. The supplement will be found in 1 Gen. St. p. 184. The other act was a supplement to the borough act of April 5, 1878, and it was approved March 11, 1885. It will be found in 1 Gen. St. p. 185. Its title is not defective, and, while it purports to amend the act of March 13, 1883, its provisions are probably unobjectionable, whatever was then the status of the act which it purported to amend. If these two acts are valid expressions of the legislative will, it is obvious that there has been conferred upon boroughs organized under the borough act of April 5, 1878, the power to provide by ordinance for constructing sidewalks on any of the streets of the borough at the expense of the owner of the lands in front of which the same are constructed. Nor is the power, if any, so conferred, affected, as contended by prosecutor, by the subsequent supplement to the borough act in question, approved April 1, 1887 (Gen. St. p. 193), as amended by a further supplement approved March 20, 1888 (Gen. St. p. 196). The provisions of those supplements plainly relate to the improvements of the roadway of streets, and not to the sidewalks thereof.

But, if it be presumed that power to pass these supplementary ordinances existed, a further objection is made by the prosecutor, which is that, since the ordinances direct the doing of the work, the cost of which is to be defrayed by him, the action of the borough in passing them was judicial in its character, and could not be lawfully taken except on notice to him, and giving him an opportunity to be heard. Such is the settled doctrine of our courts, and it is plainly applicable to these ordinances, which require the construction of sidewalks at prosecutor's expense. *West Jersey Traction Co. v. Board of Public Works of City of Camden*, 56 N. J. Law, 431, 29 Atl. 163; *Vanatta v. Mayor*, etc., 34 N. J. Law, 445; *Treasurer of Camden v. Mulford*, 26 N. J. Law, 49. It is not contended that the laws governing this borough provide for constructive notice of the intention to pass such ordinances. In the absence of any provision for constructive notice, it is well settled that reasonable actual notice must be given to the person to be affected of a time and place when and where he may be heard. *Mann v. Mayor*, etc., 24 N. J. Law, 662; *Chosen Free*

holders of *Hudson Co. v. New Jersey Road & Transportation Co.*, Id. 718; *Vanatta v. Mayor*, etc., supra; *Treasurer of Camden v. Mulford*, supra; *Bolce v. City of Plainfield*, 38 N. J. Law, 95; *Stretch v. Mayor*, etc., 47 N. J. Law, 268; *West Jersey Traction Co. v. Board of Public Works of City of Camden*, supra; *Camden Horse R. R. Co. v. West Jersey Traction Co.*, 57 N. J. Law, 710, 30 Atl. 581.

But it is contended in behalf of the borough that it does not appear that prosecutor did not have notice and an opportunity to be heard in respect to the adoption of these ordinances. But no such burden is imposed on prosecutor. Special tribunals, exercising a special power conferred on them to be exercised in certain modes, must make it appear that all that was essential to their jurisdiction had been done. *Woodruff v. County of Elizabeth*, 30 N. J. Law, 176. Here it was essential, to empower the borough authorities to adopt those ordinances, that prosecutor had notice or an opportunity to be heard, and that should appear in their proceedings. Those proceedings are before us, and it nowhere appears that prosecutor was notified, or had an opportunity to be heard. The borough has not shown that such was the fact, as perhaps might have been done. For these reasons the two supplementary ordinances must be set aside and vacated as to prosecutor.

NEW YORK & G. L. RY. CO. v. NEW JERSEY ELECTRIC RY. CO.

(Supreme Court of New Jersey. June 7, 1897.)

COLLISION AT RAILROAD CROSSING — ELECTRIC STREET CAR — CARE REQUIRED — SIGNALS — QUESTION FOR JURY.

1. The same character or degree of care to avoid collision must be exercised by those operating an electric car along a public highway, in approaching and going over a steam railroad crossing of such highway, as is required to be exercised by one driving or operating any ordinary vehicles along and over such railroad crossing; and they must look and listen for the approaching train, and, if such care be not exercised, the electric railway company will be liable to the steam railroad company for injuries arising thereby by reason of collision, unless the negligence of the servants of the railroad company contributed to the accident.

2. The steam railroad has the right of way over such crossing, to run at such high rate of speed as it chooses, and ordinarily it exercises all the care required when the whistle of the locomotive is sounded or its bell rung at the distance required by the statute from the crossing, and the sound of the bell or whistle continued until the crossing is passed; but this it is bound to do, and, if the neglect to so sound such whistle or ring such bell contributes to the collision and injury, the railroad company will be prevented from a recovery for injuries arising thereto by reason of the collision.

3. The fact that the electric company and the railroad company have an agreement between each other providing for a derailing switch on the tracks of the electric railway, as a precaution against collision at such crossing, and providing also, in addition thereto, that before an electric car shall be permitted to pass over such crossing the conductor of the electric car who shall be operating such derailing switch shall look in both

directions, and listen for the approach of the railroad train, will not excuse the railroad company from giving the statutory signals as a warning of such approach; and where the neglect to give such signal, in an action on the part of the railroad company against the electric company, appears as contributing to the collision, the railroad company cannot recover, notwithstanding the negligence of the conductor of the electric car in operating the derailing switch, and his neglect to look in both directions, and to listen for the approach of the train.

4. Questions of dispute of matters of fact relating to the negligence of the one party and the contributory negligence of the other are properly submitted to the jury.

(Syllabus by the Court.)

Action by the New York & Greenwood Lake Railway Company against the New Jersey Electric Railway Company. Verdict for defendant. Rule to show cause why new trial should not be granted. Discharged.

Argued November term, 1896, before BEASLEY, C. J., and VAN SYCKEL, GARRISON, and LIPPINCOTT, JJ.

Cortlandt Parker, for plaintiff. William B. Gourley, for defendant.

LIPPINCOTT, J. The defendant is the operator of an electric street railway running from Patterson to Passaic and Rutherford, and along the Little Falls road in the county of Passaic, in this state. The railroad of the plaintiff crosses the Little Falls road, which is a public highway, at a place called "Singac," in the county of Passaic, and also crosses the electric street railway of the defendant, which runs along said road at this point. On the 2d day of September, 1895, a locomotive, hired from another railroad company, and a train of cars, both operated by the plaintiff, and an electric car of the defendant company, came into collision at this crossing. The track of the plaintiff at or about this point was torn up and injured, and the plaintiff was compelled to redeem the tickets of its passengers on such train. It now sues the defendant for the costs of the repairs to the track, such of its cars as were injured, and the money lost in the redemption of the tickets of its passengers, on the ground that the collision was caused by the negligence of the motorman and conductor of the electric car in driving upon the crossing. The evidence shows that there was at the time of this accident, on the track of the electric railway, about 50 feet from the rails of the steam railway, what is called a "derailing switch." If the electric car passes that switch while it is in its usual condition, the car is derailed. In order that the car can proceed beyond this point and pass over the tracks of the steam railroad, the switch must be closed, and in order to close it the conductor of the electric car is required to go forward, cross over the tracks of the steam railroad to a lever placed in the ground there, and by raising the lever close the switch, so that the motorman can run his car along and over the tracks of the steam railroad. The proof shows that the conductor in charge of the electric car

on the day in question, at a point beyond the derailing switch, left the car, and walked across the tracks of the railroad, stooped down, and raised the lever which closed the switch, and when that was done the motorman moved his car past the derailing switch, and up to the tracks of the steam railroad, and in attempting to get across the car was struck by the locomotive. This derailing switch and its operation is provided for by agreement in writing between the plaintiff and defendant, but it is not perceived in what manner the case can at all be controlled by such agreement, and these particular facts are stated as a part of the evidence and circumstances in the case as bearing upon the question of whether the conductor and motorman, or either of them, were negligent in their duty in approaching and going over the railroad tracks with the car, and, if so, whether the accident arose from such negligence. The plaintiff contended that such negligence existed, and that recovery should be had. The contentions of the defendant were: First, that all the care required by law was exercised by the conductor and motorman in approaching the crossing; and, second, that the plaintiff company itself was in default of its duty in approaching this crossing by reason of the negligence of the engineer in failing to sound the whistle or ring the bell on the locomotive, 900 feet from the crossing, and to continue such whistling or ringing until the crossing is passed. These contentions of the plaintiff and the defendant gave rise to much disputed evidence on both sides. There was evidence tending to show that the only precaution on the part of the motorman and conductor to avoid collision was the operation of the machinery of the derailing switch, and, outside of the exercise of that precaution, those in charge did not look or listen, or use other proper precautions to avoid danger from the approach of the locomotive. Some of the evidence shows that an approaching train can be seen from the derailing switch, and from the lever thereof, over 2,000 feet away. At least the facts were such on this point that it was proper to leave them to the jury for their determination. There was also evidence of such a character as required the trial justice to submit to the jury the question whether contributory negligence had been established on the part of the plaintiff; that is, whether the whistle of the locomotive was sounded, or the bell rung, as required by the statute, as the train approached the crossing. 2 Gen. St. p. 2069, §§ 6, 17; Railroad Co. v. Leaman, 54 N. J. Law, 202, 23 Atl. 691. From the record it appears that the jury found that the accident resulted from the negligence of the conductor and motorman in charge of the electric car, and also that the negligence of the engineer in charge of the locomotive contributed to the accident, and a verdict, therefore, was returned in favor of the defendant.

It is needless to go into a discussion of the evidence in this cause, as it is such as to lead the court to the conclusion that the verdict of

the jury is not contrary to the evidence, nor against the weight of it, and the court will not determine the comparative negligence of which the parties were respectively guilty. Wilds v. Railroad Co., 24 N. Y. 430; Express Co. v. Nichols, 33 N. J. Law, 439; Railroad Co. v. Righter, 42 N. J. Law, 180. A question of fact fairly arises upon the plaintiff's negligence, and it was necessary to submit it to the jury. Railroad Co. v. Shelton, 55 N. J. Law, 342, 26 Atl. 937; Railroad Co. v. Hefferan, 57 N. J. Law, 149, 30 Atl. 578. No error of the trial justice in the admission or rejection of evidence has been pointed out, and an examination of the case reveals none. Neither was the verdict against the charge of the court to the jury. The plaintiff selects an excerpt from the charge in respect to contributory negligence, and insists that it was erroneous. The trial justice, in speaking to the jury of the responsibility placed upon the railroad company to ring the bell or sound the whistle of the locomotive continuously for 300 yards from the crossing of the highway, said: "If the jury believe that the conductor or motorman of the electric car did not see the approaching train, and they would have seen it, or heard such a signal, if it were given, and avoided the accident in case the bell was rung or the whistle blown for that distance, the Greenwood Lake Road (the plaintiff) cannot recover." This was, in effect, charging that the plaintiff, in approaching this crossing, was bound to give the statutory signals, and a failure to do so, if it caused or contributed to the accident, was contributory negligence, and would prevent a recovery. It is not perceived that this excerpt of the charge was erroneous. The court had already fully charged the duties devolving upon the conductor and motorman of the electric car, that they were bound to look, and bound to listen for the approaching train, and take other precautions in order to avoid collision, in addition to the duty of exercising the protection of the derailing switch; and that if they saw it, or heard it, or under the circumstances ought to have seen it or ought to have heard it, and did not avoid its danger, they were negligent and responsible, and by the part of the charge to which this exception is taken the responsibility of giving the signals required by the statute is imposed upon the plaintiff, and if the failure to give such contributed to the injury, the plaintiff could not recover. The duty to give this signal was imposed upon the plaintiff company in approaching and crossing this highway as a warning to all persons—pedestrians or those operating vehicles—about to cross, to avoid the dangers. The crossing was in fact a highway, and the duty of the railroad was an imperative one in view of that fact. It could not disregard this duty because an electric car was one of the vehicles of carriage using the highway, any more than it could avoid its duty towards a coach or carriage in the use of the highway. If the prescribed signal had been given, then the fact that it was not heard would be of no

materiality, for the whole duty of the plaintiff would have been performed, and it would not be responsible for any of the results, whatever they might be. The statute imposes the duty, and the omission is negligence. Whenever the statute is obeyed, the duty is absolutely performed, and it would be abnormal to permit the railroad company to select any class of persons or vehicles in the use of the highway towards whom it could neglect its statutory duty. There can be no contention here that the defendant was not in the lawful use of the highway in running its electric cars thereon, under the same principles of law which govern the use of the highway by natural persons for kindred purposes. *The Citizens' Coach Co. v. Camden Horse R. Co.*, 33 N. J. Eq. 267; *Newark Pass. Ry. Co. v. Block*, 55 N. J. Law, 605, 27 Atl. 1067. The trial court committed no error in treating the case, in matters of legal principle, as if it was the ordinary case of a traveler or a driver of a vehicle in the lawful use of the highway.

But the plaintiff further contends against the legality of this instruction of the trial court to the jury on the ground that its responsibility is limited by an express agreement in writing between the parties as to the operation of electric cars over the crossing. The facts appear to be, as shown in the case, that provision was made in the contract dated May 24, 1894, for the operation of the derailing switch in the manner described, and that, if any train approached within such distance as would render it unsafe for the electric car to proceed, then no such car should pass or attempt to pass such crossing until such approaching train, car, or engine, had passed over such crossing, or come to a full stop before reaching it. This agreement is itself a full answer to the plaintiff's contention, as between the electric car and the approaching train, that the statutory signals should not be given. The statute provided they should be given, and this agreement in no wise provides for any default in this duty, which at all times and under all circumstances was an obligatory one. The agreement does provide that the conductor of the electric car should look in both directions for an approaching train. This imposes no greater duty upon the conductor than the general principles of law had already imposed upon him. Neither did the agreement provide that the plaintiff should be free from liability to the defendant for neglect to exercise the care required by the statutes of this state; and even by the terms of the agreement, reasonably interpreted, they were bound to exercise all the precautions required by law for the safe passage of the defendant's car over the crossing. Although this agreement did provide that the train of the plaintiff should have the right of way, still this agreement goes for little in this respect, for all steam railroads have this same right upon their own private way and roadbed over highways in respect to all travelers thereon,

and to run at such high rate of speed as may be consistent with the safety of the passenger. This right of way does not excuse a violation of the statute prescribing signals, nor furnish any reason against such default being used as evidence of negligence. The conclusion is, as a matter of law, that the plaintiff company were bound to give the statutory signals at this crossing as a warning, as well to those operating the electric cars, as to ordinary travelers, irrespective of this agreement between the parties, and that there was no error in the trial court in submitting the dispute of fact whether they had been given to the jury as bearing upon the question of whether the contributory negligence of the plaintiff contributed to the accident. It will be noticed that the declaration in this cause does not aver any neglect on the part of the defendant company to comply with the express agreement as a basis of recovery, and therefore the question whether the agreement is one forbidden by the statute or public policy is not here at all discussed or determined, and it is not perceived in what manner that question can have any bearing upon the determination of this cause. The rule to show cause is discharged.

DELAWARE, L. & W. R. CO. v. MAYOR, ETC., OF CITY OF NEWARK.

(Supreme Court of New Jersey. June 7, 1897.)

TAXATION—EXEMPTIONS—RAILROAD PROPERTY.

1. The actual uses to which lands owned by a railroad company are devoted are the tests by which it can be determined whether the same is exempt from local taxation, as lands used for railroad purposes; and it is the main uses to which it is actually devoted which are to be considered in order to determine this question.

2. If property owned by a railroad is not retained, appropriated, or used for purposes incident to the proper construction, maintenance, or management of the railroad, or for use by the corporation as a carrier of goods and passengers, then it cannot be said to be used for railroad purposes, and will be the subject of local taxation.

3. Where a railroad company uses a freight yard for the purpose of carrying on a private coal business upon its own account, with coal from its own mines, transported in its own cars to such yard, and then from such yard by the railroad company, through its own agents, sold to others in its own name and upon its own account, such yard so used is not property retained or used for railroad purposes, and is locally taxable. In order to determine whether such yard is locally taxable, the main actual use to which it is devoted is considered.

(Syllabus by the Court.)

Petition by the Delaware, Lackawanna & Western Railroad Company against the mayor and city council of the city of Newark, for summary determination of the character of certain property assessed by the local assessors of said city, and also by the state board of assessors for the year 1895.

Argued November term, 1896, before LIP-PINCOTT, LUDLOW, and GUMMERE, JJ.

Flavel McGee, for Delaware, L. & W. R. Co. John P. Stockton, Atty. Gen., for state board of assessors. Frederick T. Johnson, for city of Newark.

LIPPINCOTT, J. This is a proceeding taken under the 239th section of the statute concerning taxes (Gen. St. p. 3332). It is taken upon a petition of the Delaware, Lackawanna & Western Railroad Company, alleging that certain property belonging to that company, in the city of Newark, used for railroad purposes, was, by the local assessors of that city, assessed for local taxation for the year 1895. For that year the railroad company returned the same property, with the exception of a small dwelling house thereon, to the state board of assessors for taxation, under an act entitled "An act for the taxation of railroad and canal property," approved April 10, 1884, and the supplements thereto. Gen. St. p. 3322. The valuation placed on these lands by the local assessors for the purposes of local taxation was the sum of \$60,000, and the tax thereon claimed to be payable to the city of Newark amounts to the sum of \$1,168. Upon the return made by the railroad company to the state board of assessors, a valuation of \$58,000 has been placed thereon. In both assessments, the property, after excepting the dwelling house, is assessed as a whole, instead of being divided into different parcels. As to the house and the inclosure in which it stands, being Nos. 217 and 219 Orange street, no question whatever exists. It is conceded to be locally taxable, and is not returned by the company to the state board of assessors. As to the remaining property, some portions would appear to be taxable locally, while other portions can only be taxed by the state, through the board of assessors appointed for that purpose. This depends upon the use to which it was devoted during the year 1895. The act (Gen. St. p. 3332, § 212) provides "that all property of any railroad or canal company not used for railroad or canal purposes shall be assessed and taxed by the same assessors and in the same manner, and at the same time as the taxable property of other owners in the same municipal division or assessing district." The act also provides that "all other property of any railroad or canal company shall be assessed and taxed as hereinafter directed." The subsequent direction of the act is that such last-named property shall be returned to the state board of assessors as "property used for railroad and canal purposes," and so assessed by them.

The whole question to be determined is whether the whole or any portion of this property was used for railroad purposes during the year 1895. The whole of the property is evidently designed as a coal and freight yard. The plot contains railroad tracks, platforms, embankments, retaining walls, trestles, coal shutes, and coal pockets beneath the trestles, weighing scales, and coal offices, with entranc-

ces for carts and wagons from the public street. The character of the use of lands for railroad purposes under the statutes has been very clearly determined in this state. The actual uses to which it is devoted are as good tests as can be established, in order to settle the question whether it is taxable in one direction or the other, under the statutes. In the case of *Banking Co. v. Betts*, 24 N. J. Law, 559, it was decided that the piers and basins of the canal company in Jersey City were the appendages of the canal, and were exempt from local taxation. The court held that it was of no importance that boats not navigating the canal, and merchandise not transported on it, occasionally, when the pier and basin were not otherwise occupied, were permitted to use them, and that a compensation for such use was charged, and laid down the rule that "the actual purpose for which these works were constructed, the use to which they are primarily dedicated, and the necessity that exists for them, furnish the tests by which this question should be governed." In the case of *United New Jersey Railroad & Canal Co. v. City of Jersey City*, 55 N. J. Law, 132, 26 Atl. 135, the question was whether the authorized right of way of a railroad company, on which the railroad had been constructed and in good faith operated, is used for railroad purposes, within the meaning of the act of April 10, 1884, although it may not for the time being be wholly occupied by tracks or other railroad appliances. The court held that it was so used, and that the part of it which awaited railroad occupation upon the demand of necessity is in use, like the curtilage of a dwelling house, or the side of a country highway. But the court, in its opinion, added that "we are also of opinion that when any part of the lands which lie within such right of way are used or appropriated to purposes not incident to the proper construction, maintenance, and management of the railroad, or to its use by the corporation as a carrier of goods and passengers, it cannot then be said to be used for railroad purposes, and will be the subject of local tax." A railroad purpose was well defined by some of the earlier cases. *Transportation Co. v. Hancock*, 35 N. J. Law, 537; *Railroad Co. v. Jersey City*, 49 N. J. Law, 540, 9 Atl. 782. If the property be actually used for other than railroad purposes, it is subject to local taxation. *United New Jersey Railroad & Canal Co. v. City of Jersey City*, 57 N. J. Law, 563, 31 Atl. 1029, and cases there cited; *Camden & A. R. Co. v. City of Atlantic City*, 58 N. J. Law, 317, 33 Atl. 198. The learned chancellor in the case of *United New Jersey Railroad & Canal Co. v. City of Jersey City*, 55 N. J. Law, 129-132, 26 Atl. 135, 136, speaking of the property exempt from local taxation, said: "It is the land which the legislature, in its wisdom, has deemed to be reasonably necessary to answer the ordinary and emergent uses of a railroad, and insure the continued convenient

and safe accommodation of the public. Its dimensions are limited by the law which devotes it to a special purpose." But the exemption does not remain when it becomes actually devoted to some other purpose. The fact that property is owned by a railroad company is not at all conclusive as to the character. The test is the use or purpose for which it is held, or the use to which it is actually devoted.

Applying these principles to the evidence taken in this proceeding, it is clear that the portion of this property, shown upon the maps exhibited in this case, and described in the evidence, which extends from the southerly side of Morris & Essex Railroad avenue, at its intersection with Sheffield street, and thence along Sheffield street, about 142 feet, to property of private owners; then westerly, along private property, about 100 feet; then, along a line between the two portions of the railroad property, along what is called a fence on the Exhibit D 1, in the case, and as it is on the property, to the easterly side of a stone wall which runs along the westerly end of the coal shute and trestle on the property; then along and on the line of the wall to the south side of the Morris & Essex Railroad avenue; and then, along said avenue, to the intersection of Sheffield street,—is neither held nor used for railroad purposes. Most of the evidence upon both sides is devoted to the question of the use to which this portion of the property is actually devoted. The evidence shows that it is used by the railroad as a coal yard, and in which the railroad company carries on a coal business upon their own account. The whole of this yard is used for their own private purposes. This portion of the yard contains an elevated structure, upon which the coal cars are run. Upon the structure are coal shutes, and beneath are the coal pockets into which the coal is discharged from the cars. In another portion of the yard is another trestle used for the same purposes. The other parts of this portion of the yard are used in connection with this business, including the two offices and weighing scales therein fronting on Sheffield street. The coal which is carried and delivered to this yard is taken from the mines belonging to the railroad company, and transported, in its own cars, to these trestles and coal shutes. The coal is consigned to and received by William Horre & Co., who are not doing any business there on their own account, but act solely and exclusively in the receipt and sale of the coal, as the agents of the railroad company. The coal is sold by Horre & Co. exclusively upon the account of the railroad company. No other coal is carried or delivered at this yard, consigned to any other persons. No coal is delivered by the railroad company at this yard to any other persons, and the company carries no other freight to this yard for storage or delivery there, and no freight whatever is received at this yard for shipment on the cars of the company. The railroad company, there-

fore, is not a common carrier of freight to this yard, but carries and delivers its own goods there, for sale on its own account, and conducts a private business of its own in this yard. Occasionally a car of coal or other freight consigned to some person at some other point gets mixed in a train, and is taken to this yard, and from thence sent to its proper destination, but this, under the evidence, is a rare occurrence. The public has no accommodations at this yard except it be the privilege of purchasing at this point coal from the railroad company. It is clearly evident that the main, if not the only, uses and purposes of this property, are such as are not incident to the proper construction, maintenance, and management of the railroad, or to the use of it, by the railroad company, as a carrier of goods and passengers. It is clear that this portion of the property is used by the railroad company for its own private coal business. It is not retained or used for any railroad purposes whatever, and is therefore locally taxable.

Further applying the same principles, the conclusion reached is that the frame ice house in which the Mt. Pocono Ice Company engages in the ice business is taxable to that company locally. The land upon which it stands is rented by the railroad company to the Mt. Pocono Ice Company, to be used by it in its private business, and, therefore, that precise quantity of land fronting on Orange street with the ice storehouse thereon is taxable locally. It is conceded that this land is rented to the Mt. Pocono Ice Company, but it is contended that the rent is a nominal one, and simply for the purposes of preserving title and avoiding the contention of adverse possession; but, in our view of the law, these circumstances are immaterial. The land upon which the ice storehouse stands is not property retained for or devoted to railroad uses, nor incident thereto; but, under the circumstances, no more space than is occupied by the icehouse can be locally taxed. One Canniff also rents an office of the railroad company 20x12 feet on Orange street, in which he carries on a private coal business upon his own private account. This office and the land upon which it stands are locally taxable. All the other portions of the property, consisting of that portion of the yard on Nesbit street, with the approaches to the coal shute up to the stone wall running crosswise of the coal shute, and also that portion of the yard lying on or near Orange street south of that heretofore described as locally taxable, and south of what is known as the fence, including the platform alongside the icehouse, and the other platforms and tracks thereon, are only assessable and taxable by the state board of assessors. These parts of this yard are held and retained for or used for railroad purposes. The evidence taken shows that the yard was assessed as one tract of land, and the valuations so made thereon, by both the local assessors and the state board; and there-

fore the court is unable to adjudge a division of the valuations and assessments, in order that the taxes may be paid accordingly. If this cannot be made the matter of agreement between the parties, a further application may be made to the court in the matter.

DYER et al. v. CRANSTON PRINT WORKS CO.

(Supreme Court of Rhode Island. June 15, 1897.)

EQUITY—AMENDMENT OF BILL—NEW DEFENSES.

Where, on the death of one of the complainants, a bill is amended to obviate the necessity of a bill of revivor, respondent is not entitled to set up defenses not contained in his original answer, except such as relate to the matters set forth in the amendment.

Action by Rodney F. Dyer and others against the Cranston Print Works Company. Exceptions to amended answer. Sustained.

C. Frank Parkhurst, for complainants. Joseph C. Ely and Herbert Almy, for respondent.

PER CURIAM. The amendment of the bill was rendered necessary by the death of Rodney F. Dyer, one of the complainants, and the conveyance by his devisee to the other complainants of the interest which he had in the land and water rights involved in the suit, and was made by virtue of equity rule 37 to obviate the necessity of a bill in the nature of a bill of revivor. This being so, the respondent is not entitled to set up defenses not contained in its original answer, except such as relate to the matters set forth in the amendment. Story, Eq. Pl. §§ 377-380; 2 Daniell, Ch. Prac. *1546, *1547. The exceptions to the amended answer are therefore sustained.

KEENAN v. KEENAN.

(Supreme Court of Rhode Island. May 25, 1897.)

LIMITATIONS—QUALIFIED NEW PROMISE.

Where plaintiff relies on a promise by the debtor to pay when he sold his house, to avoid the bar of limitations he must show that the house was sold.

Action by Michael Keenan against Bernard Keenan, administrator. Judgment for defendant.

Thomas F. Vance, for plaintiff. Hugh J. Carroll, Edward W. Blodgett, and James E. Banigan, for defendant.

MATTESON, C. J. The words relied on to take the case out of the statute of limitations are: "I have no money at present, and won't have any until I sell the house, and then it will be all right with you and me." If this be regarded as an acknowledgment of an existing debt, which the defendant's intestate was ready and willing to pay, the implied promise is nevertheless a qualified promise to pay when

he had sold his house. The debt had long been barred by the statute. In such case the rule is that the creditor takes the promise with the qualification annexed to it, and cannot maintain an action without showing the fulfillment of the qualification. Shaw v. Newell, 1 R. I. 488; Sweet v. Franklin, 7 R. I. 355; Willey v. Brown, 18 R. I. 615, 30 Atl. 464; In re Bethell, Bethell v. Bethell, 34 Ch. Div. 561, 565, 566; Boynton v. Moulton, 159 Mass. 248, 34 N. E. 361; 1 Wood, Lim. Act. (2d Ed.) § 77. The testimony fails to show a sale of the house which was to put the intestate in funds with which to pay the plaintiff's claim. We are of the opinion, therefore, that the claim must be regarded as barred by the statute of limitations, and that judgment must be for the defendant for costs.

EAST GREENWICH INST. FOR SAVINGS v. KENYON.

(Supreme Court of Rhode Island. June 7, 1897.)

MORTGAGES—TITLES TO LAND—ESTOPPEL.

One who induces a person to make a loan to another and take as security a mortgage from such other person on land, the description of which he furnishes, is estopped to claim that part of the land within the description is his own, and not bound by the mortgage of the other.

Action by the East Greenwich Institution for Savings. Verdict for plaintiff. Defendant petitions for a new trial. Denied.

Samuel W. K. Allen, for plaintiff. Charles J. Arms, for defendant.

MATTESON, C. J. This is an action of trespass and ejectment to recover possession of a tract of land in East Greenwich, containing about 40 acres, purchased by the plaintiff at a mortgagee's sale. The case is before us on the defendant's petition for a new trial. At the trial in the common pleas division the defendant claimed title to two parcels of the tract for the possession of which the suit is brought, but, at the hearing of the petition for new trial, waived the grounds on which the petition was based, except in so far as they related to the parcel conveyed to him by deed from Abel C. Kenyon, Jr., dated November 18, 1888. As to this parcel the defendant contends (1) that the verdict is against the law and the evidence; (2) that the presiding justice at the trial erred in his statements of law in his charge to the jury; (3) that he misstated the evidence in his charge. The entire tract which is the subject of suit was owned in 1872 by Abel C. Kenyon, Sr. By deed dated April 9th of that year, he conveyed to his son Abel C. Kenyon, Jr., a portion of the tract, the exact location and dimensions of which do not clearly appear from the description in the deed, and were in dispute at the trial. In November, 1888, he executed a mortgage bearing date on the 9th of that month, to the plaintiff, of the entire tract, including the parcel previously conveyed to his son Abel as stated. It was at the sale un-

der this mortgage that the plaintiff became the purchaser of the tract in suit. Five days subsequently to the date of this mortgage, on, to-wit, November 14, 1888, Abel C. Kenyon, Jr., conveyed to his brother, the defendant, the parcel of the tract which had been conveyed to the former by his father prior to the execution of the mortgage as above stated, and as to which the defendant is seeking to obtain a new trial. At the trial in the common pleas division the plaintiff's treasurer testified, in substance, that Abel C. Kenyon, Jr., made the application to the plaintiff for the loan which the mortgage was given to secure; that, after the application had been accepted by the plaintiff, he gave to its treasurer, by whom the mortgage was written, the boundaries of the tract as described in the mortgage; that, when the mortgage had been executed, it was left at the town clerk's office, and that the plaintiff's treasurer and Abel C. Kenyon, Jr., met there to complete the transaction; that Abel C. Kenyon, Sr., the mortgagor, was not present, but was represented there by Abel C. Kenyon, Jr., and that, upon the leaving of the mortgage with the town clerk for record, the plaintiff's treasurer gave checks, for the amount of the loan, to creditors of the mortgagor and Abel C. Kenyon, Jr., for the settlement of their claims, for which purpose the loan was made, and the claims were released; that though the plaintiff's treasurer knew at the time the boundaries of the tract were given to him by Abel C. Kenyon, Jr., about how the land lay, he could not have described it, because a lot had been sold out of it; that he did not then know of the deed of April 9, 1872, from Abel C. Kenyon, Sr., to Abel C. Kenyon, Jr. The testimony of the plaintiff's treasurer as to the instrumentality of Abel C. Kenyon, Jr., in making the application to the plaintiff for the loan, and furnishing the boundaries for the description of the land in the mortgage, was denied by the latter, who testified that he had no talk with the plaintiff's treasurer prior to the making of the mortgage. The defendant claimed title to the parcel of the tract now in question under the two deeds referred to, viz. that from Abel C. Kenyon, Sr., to Abel C. Kenyon, Jr., dated April 9, 1872, and that from Abel C. Kenyon, Jr., to the defendant, dated November 14, 1888. The plaintiff, on the other hand, contended that the parcel passed under the mortgage, because Abel C. Kenyon, Jr., procured the making of the mortgage, and caused the parcel to be included in the description of the land which it conveyed.

As two of the grounds urged in support of the petition are that the justice who presided at the trial misstated the testimony and erred in his instructions to the jury, and as the defendant's counsel has quoted and criticized detached portions of the charge in his brief, perhaps we cannot do better than to transcribe that part of the charge which relates to the lot in question, so that the charge may speak for itself. It is as follows: "The first piece of land is described in a deed from Abel C.

Kenyon to Abel C. Kenyon, Jr., which was dated April 9, 1872, and which was subsequently conveyed from Abel C. Kenyon, Jr., to Oliver P. Kenyon, the defendant in this case, on the 14th of November, 1888, after the time that this mortgage was made. In regard to that piece of land, he says it belongs to him because he bought it of his brother, and his brother had it conveyed to him from the father. So far as the record shows, that piece of land belonged at the date of the mortgage to Abel C. Kenyon, Jr. But the plaintiff contends that it passed under this mortgage, nevertheless, because Abel C. Kenyon, Jr., procured this mortgage to be made, which included in its description that piece of land, with the rest. Now, the law upon that point is this, gentlemen: If I own a piece of property, and permit somebody else to sell it and receive money for it,—if I permit them to sell, and by my actions assure the purchaser that the title is in the other person,—then I am bound by that conveyance as if I had joined in it. I am not permitted to perpetrate fraud upon my neighbor by inducing him to pay money for a thing which belongs to me, under the impression conveyed by me that it belongs to a third person. And, if that is the state of things shown by the testimony here, then Abel C. Kenyon and those who claim under him cannot claim adversely to the mortgage which covered this same piece of property. Upon this point there is a direct conflict of testimony. Abel C. Kenyon himself says that he had nothing whatever to do with the making of the mortgage. The treasurer of the bank says that Abel C. Kenyon was the efficient instrument in the making of this mortgage; that Abel C. Kenyon furnished him with the description of the property, including Abel C. Kenyon, Jr.'s own lot among the rest, which was written in the mortgage; that Abel C. Kenyon, Jr., was at the town clerk's office at the time the mortgage was delivered; that the note accompanying the mortgage was delivered; and that the money which was borrowed on this mortgage went to pay Abel C. Kenyon, Jr.'s debts. Now, if these facts are so, then it would be fraudulent for Abel C. Kenyon to contend that the mortgage did not contain, and did not cover, and did not convey title to whatever it purported to convey title to; and it is a fraud which the law does not allow a man to take advantage of, and does not allow him to set up in a court of justice. The principle is one which is called 'estoppel.' A person is estopped to set up the truth in contradiction to his conduct, so as to make the truth an instrument of fraud. If Abel C. Kenyon, Jr., could sell a mortgage made by his father for a certain sum of money, representing it to be a good, a valid, mortgage, and then afterwards could be allowed to show, whether truthfully or not, that that mortgage was not good, it would be to perpetrate iniquity, and the law does not allow it. So that upon this first issue, whether the land described in the deed from Abel C. Kenyon to

Abel C. Kenyon, Jr., dated November 9, 1872, was included in the mortgage by which the plaintiffs claim title, you will find that in the affirmative or negative as you may find that Abel C. Kenyon, Jr., was the efficient instrument in promoting the loan by this mortgage, or that he was not,—that he knew nothing about it.” We think that the charge fairly stated the testimony, and correctly applied the law to the case in hand. The authorities relied on by the defendant in support of his petition are not inconsistent with the instructions so given, but are clearly distinguishable on their facts from the case at bar.

As to the ground that the verdict is against the evidence, the testimony, as we have seen, was directly in conflict. It was the province of the jury to determine the credibility of the witnesses. They have found for the plaintiff, and we see no reason to think that they erred in so finding. Defendant's petition for new trial denied and dismissed, and case remitted to the common pleas division, with direction to enter judgment on the verdict.

In re WILBOR et al.

(Supreme Court of Rhode Island. June 8, 1897.)

DEATH—PRESUMPTION—CONSTRUCTION OF WILL.

1. Where three sisters perish in the same disaster, and there is no way to determine which died first, the rights of succession to their estates are to be determined as if death occurred to all at the same moment.

2. Where three testatrices die simultaneously, a bequest or devise from one to the other does not take effect.

3. Three sisters perished in the same disaster, leaving it impossible to determine which died first. Each left a will devising all her estate to her two sisters, and directed that, after the decease of the last sister, of the proceeds after the payment of debts \$500 each should be paid to two nieces, and \$200 to one S. One of the nieces died before the sisters. *Held*, that the surviving niece was entitled to \$500, and S. to \$200, out of the personal estate of each of the three sisters, and that their heirs were entitled to the residue of the personal property and the real estate, as though no will were made.

Opinion on the construction of three wills, on the application of Maria H. Wilbor and others.

Warren R. Perce and Daniel W. Fink, for parties in interest.

MATTESON, C. J. This is a case stated for an opinion of the court, as follows: Three sisters, Charlotte Wilbor, Martha T. Wilbor, and Eliza Ann Wilbor, late of Newport, deceased, all perished in the same calamity,—the burning of their house in Newport. They left instruments in writing, purporting to be their last wills and testaments, which have been duly admitted to probate. By these wills each testatrix gave and devised all her real and personal estate to her two sisters, or to either of the survivors, and to their heirs and assigns forever, and then, having first directed that, after the decease of the last sister, the necessary debts should be paid, proceeded to give to her two nieces, Emily N. Wilbor and

Maria H. Wilbor, \$500 each, and to Thomas W. Smith \$200. The legatee Emily N. Wilbor died before the testatrices. The only heirs at law of the testatrices are Abble R. Richards, Ann Elizabeth Clarke, Mary H. Adams, Sarah T. Bliven, and Maria H. Wilbor. Upon these facts, the questions propounded are: (1) What is the amount of the legacies to which Maria H. Wilbor and Thomas W. Smith are respectively entitled under the wills? (2) What portion of the estate of the testatrices passed to their heirs at law? As all three of the testatrices lost their lives in the same disaster, and no fact or circumstance appears from which it can be inferred that either survived the others, the question of survivorship must be regarded as unascertainable, and hence the rights of succession to their estates are to be determined as if death occurred to all at the same moment. *Underwood v. Wing*, 19 Beav. 459, 4 De Gex, M. & G. 633; *Wing v. Anggrave*, 8 H. L. Cas. 183; *Wollaston v. Berkeley*, 2 Ch. Div. 213; *In re Walnwright*, 1 Swab. & T. 257; *Scrutton v. Pattillo*, L. R. 19 Eq. 369; *Coye v. Leach*, 8 Metc. (Mass.) 371; *Johnson v. Merithew*, 80 Me. 111, 13 Atl. 132; *Newell v. Nichols*, 12 Hun, 604; *Id.*, 75 N. Y. 78; *In re Hall*, 9 Cent. Law J. 381; *Russell v. Hallett*, 23 Kan. 276; *Estate of Ehle*, 73 Wis. 445, 41 N. W. 627; 24 Am. & Eng. Enc. Law, 1027-1032. If all three of the testatrices are to be regarded as having died at the same moment, it follows that the bequest and devise in each of their wills to the two sisters, or either of the survivors, did not take effect, there being no interval of time, as between the deaths of the three, during which titles to property could vest; and the wills therefore stand as if they contained only the bequests to the legatees subsequently named, to wit, Maria H. Wilbor and Thomas W. Smith,—the other legatee, Emily N. Wilbor, having deceased without issue before the deaths of the testatrices. We are therefore of the opinion (1) that, after the payment of the debts of each testatrix, Maria H. Wilbor and Thomas W. Smith are entitled to the legacies of \$500 and \$200 respectively bequeathed to them in each will, to be paid out of the personal estate of each testatrix, if the personal estate is sufficient, and, if insufficient, that such legacies shall abate proportionately; (2) that the residue of the personal estate, if any, and the real estate, of each testatrix, if any, passes, as intestate estate, to her next of kin and heirs at law.

O'CONNOR v. O'CONNOR.

(Supreme Court of Rhode Island. June 8, 1897.)

GUARDIAN AND WARD—SETTING ASIDE RELEASE—COURTS.

The mere fact that a court of probate has received and recorded a release obtained by a guardian from her ward on his arrival at full age does not conclude the ward from maintaining a bill in equity to set aside the release for fraud.

Bill by Michael F. O'Connor against Bridget O'Connor. Defendant demurs. Overruled.

James A. Williams and Patrick H. Mulholland, for complainant. Patrick J. McCarthy, for respondent.

MATTESON, C. J. The purpose of the bill is to set aside a release alleged to have been obtained from the complainant by fraud on his arriving at full age, and to compel the payment of money claimed to be due to him from the respondent, who was his guardian. The respondent has incorporated in her answer a demurrer to the bill, and has assigned as ground of demurrer that the municipal court of Providence, as a court of probate, had acquired jurisdiction of the subject-matter of the suit before the filing of the bill, and that, having so acquired jurisdiction, is entitled to adjudicate it exclusively. No affidavit of the respondent that the demurrer was not interposed for delay accompanies it, as required by equity rule 21, and the demurrer is therefore irregular. But, assuming that it is properly before us, we think it should be overruled. The action of the municipal court, disclosed in the bill, was simply the receiving of the release presented to it by the respondent, and ordering it to be recorded. Such reception and recording were not an adjudication of the validity of the release; and, even if the probate court had authority to take the action, it would not conclude the complainant from questioning the validity of the release on the ground of fraud. *McGinly v. McGinly* (R. I.) 34 Atl. 1114. A court of probate is not adapted to the investigation and determination of questions of fraud, and its jurisdiction in receiving and recording a release, if it exists, is merely for the perpetuation of the release as evidence; and consequently, when the order of the municipal court receiving the release, and ordering it to be recorded, had been made, its jurisdiction of the release had ended. Demurrer overruled.

GOLDRICK v. UNION R. CO.

(Supreme Court of Rhode Island. June 8, 1897.)

STREET RAILROADS—NEGLIGENCE—PLEADING.

A declaration against a street-railroad company alleging that it so carelessly operated one of its cars that, without plaintiff's fault, it ran against his wagon, injuring him, is sufficient on demurrer, though it does not state in what particular defendant was negligent.

Action of trespass on the case for negligence by James Goldrick against the Union Railroad Company, a street-railroad company. Defendant demurs to the declaration. Overruled.

Van Slyck & Mumford, for plaintiffs. David S. Baker, for defendant.

MATTESON, C. J. This is an action of trespass on the case for negligence. The declaration, in its several counts, avers in tech-

nical form that the defendant, by its servant, so carelessly and improperly drove, governed, and directed one of its cars, and so carelessly and improperly managed the machinery by which it was operated, that, by and through the carelessness, negligence, and improper conduct of the defendant, by its servant in that behalf, and without fault or negligence on the part of the plaintiff, the car ran and struck with great force and violence upon and against a wagon in which the plaintiff was riding, and thereby the plaintiff was cast out, and thrown with great force and violence off the wagon, to and upon the ground. The defendant has demurred to the declaration on the ground that it does not set forth in what particular the defendant was negligent.

We think the averment is sufficient. It is the usual averment in cases of injury by collision on a highway. *Chase v. Steamboat Co.*, 10 R. I. 79; *Parker v. Steamboat Co.*, 17 R. I. 376, 22 Atl. 284, and 23 Atl. 102; *Wilson v. Railroad Co.*, 18 R. I. 491, 29 Atl. 258. We do not see that the fact that the cars of the defendant move on fixed rails, and within a prescribed tract, so that they are unable to get out of the way by turning to the right or left, takes the case out of the ordinary rule. If it be conceded that the railroad company has a paramount right to use that portion of the street occupied by its track, since its cars are necessarily confined to its rails, and cannot turn to the right or left, the public, nevertheless, also have the right to use the street, including the portion occupied by the track; and it is incumbent on the railroad company, notwithstanding its paramount right, to exercise due care in the operation of its cars not to injure those who may be traveling on the street. The allegation contains the averment that the plaintiff was without fault or negligence, which is equivalent to saying that he was in the exercise of due care. If so, the fact that the accident happened raises a presumption that the defendant was negligent, nothing appearing to the contrary, because of its control of the agent causing the injury, and because such accidents do not ordinarily happen without negligence. *Parker v. Steamboat Co.*, 17 R. I. 377, 22 Atl. 284, and 23 Atl. 102. Demurrer overruled, and case remitted to the common pleas division for further proceedings.

PROVIDENCE STEAM CARPET BEATING CO. et al. v. HAZARD.

(Supreme Court of Rhode Island. June 10, 1897.)

DEBTS OF DECEDENT—REPORT OF COMMISSION.

The report of a commission to examine claims against the insolvent estate of a decedent is not rendered void by failure to make it within the time limited in the order of appointment, as required by Pub. St. c. 186, § 7; section 8 providing that on such failure the court "may" appoint a new commission.

Appeal from probate court.

Petition by the Providence Steam Carpet Beating Company and others for the appointment of a new commission to examine claims against the estate of Thomas W. Hedley, deceased (Frank B. Hazard, administrator). The petition was denied, and petitioners appeal. Affirmed.

Amasa M. Eaton and Dennis H. Sheahan, for appellants. S. S. Lapham and James Harris, for appellee.

MATTESON, C. J. On October 7, 1895, Frank B. Hazard, administrator on the estate of Thomas W. Hedley, deceased, represented to the court of probate of North Providence, by which he was appointed, that the estate was insolvent. Thereupon the court, on October 9, 1895, appointed commissioners to receive and examine the claims of creditors against the estate, and allowed six months to creditors to bring in their claims and prove their debts. The commissioners filed their report May 21, 1896, which was duly allowed by the court. Subsequently, on June 17, 1896, the court extended the time for the presentation and proof of the claims till June 24, 1896; but the commissioners did not file their second report until September 9, 1896, more than 30 days after the extended time allowed to creditors to bring in and prove their claims had expired. The appellants are creditors of the estate, but, through accident and mistake, failed to present their claims to the commission within the time allowed by the original decree of the court, or within the extended time. On September 16, 1896, they presented their petition to the court for the appointment of a new commission, on the ground that the commissioners had failed or neglected to make their second report within the space of 30 days after the time allowed to creditors to bring in and prove their claims. The court denied the petition, and thereupon the petitioners appealed.

The question presented for decision is whether the court was required, on the facts stated, to appoint a new commission. We think not. Pub. St. R. I. c. 186, § 7, provides that the commissioners, or the major part of them, at the end of the time limited for the bringing in and proof of claims, shall report unto the court a list of the claims allowed. This is to be construed simply as a direction to the commissioners to make their report as soon as they can reasonably consider the evidence and make up their report. Their failure or neglect to do so within the space of 30 days does not render their report void. Pub. St. R. I. c. 186, § 8, merely provides that, in case of such failure or neglect, the court may—not shall—appoint a new commission. The remedy of the appellants, if they had failed or neglected, through accident or mistake, to present their claims to the commissioners within the time limited (18 months not having elapsed since the appointment of the commission), was

to have applied to the court to extend the time for the presentation of claims, as provided in Pub. St. R. I. c. 186, § 6, and not for the appointment of a new commission.

NEW YORK, N. H. & H. R. CO. v. SMITH.
(Supreme Court of Rhode Island. June 11, 1897.)

CORPORATIONS—AUTHORITY OF OFFICERS.

A by-law of a railroad corporation that the officers thereof shall perform such duties as are required by the rules, "and as may be assigned to them by the president," authorizes the president to appoint a person to represent the corporation before the board of assessors, and to verify and present an account of its ratable estate for taxation as provided by statute.

Action by the New York, New Haven & Hartford Railroad Company against John S. Smith. Defendant demurs to the petition. Overruled.

J. M. Ripley and John Henshaw, for plaintiff. David S. Baker and Wm. C. Baker, for respondent.

MATTESON, C. J. We are of the opinion that section 19 of the by-laws of the New York, New Haven & Hartford Railroad Company, as follows: "The several officials of the company shall perform such duties as are required by the rules and regulations of the company, and as may be assigned to them from time to time by the president,"—is broad enough to authorize the appointment by the president of George W. Hobbs to represent the company before the board of assessors of North Kingstown, and to carry into that board and make oath to the account of the company's ratable estate, required by Pub. St. R. I. c. 43, §§ 6, 7. Though the appointment of Hobbs was by the vice president of the company, it was approved and confirmed by the president prior to the carrying in and making oath to the account, so that, in legal effect, it was the same as if the appointment had originally been made by the president.

The second ground of demurrer specified is that the petition shows that the account carried in is not a true and exact account of all the ratable estate of the company, and does not specify the value of every parcel of its real and personal estate, as required by section 6. We think that the account is sufficient. It purports to be a true and correct statement of the estate owned by the company located in and liable to taxation in North Kingstown for the year 1894, and specifies it as:

Land for 8.04 miles of double track and sidings and station grounds, 75 acres, at not exceeding \$100.00 per acre	\$ 7,500
Improvements, including roadbed, rails, ties, switches, bridges, fences, towers, and station buildings for 8.04 miles of double track and sidings....	346,000
Wood lot	300
Total	\$353,800

So far as the petition shows, the company has no other real estate, and it is not taxed for personal estate. If the company has other real estate not included in the account, it may be shown at the hearing on the petition; but, not appearing in the petition, it constitutes no ground of demurrer. Demurrer overruled, and case remitted to the common pleas division for further proceedings.

REID et al. v. PROVIDENCE JOURNAL CO.
(Supreme Court of Rhode Island. June 8, 1897.)

LIBEL—WHAT CONSTITUTES—SPECIAL DAMAGES—HARMLESS ERROR.

1. A publication that describes a fire in plaintiff's building, and also refers to two previous fires in the same building, and closes with words as follows: "Every fire in this building has started on the upper floor, and twice in Reid's printing establishment,"—contains no defamatory language, and is not capable of meaning to charge plaintiff, Reid, the owner of the printing office suing for libel, with incendiarism.

2. One is not liable for the publication of words not in their nature defamatory, though special damages result from their publication.

3. Where it appears that the declaration states no cause of action, it would avail the plaintiffs nothing for the court to hold that the defendant had no standing on his demurrer, because he had filed a plea therewith.

Action by J. A. and R. A. Reid against the Providence Journal Company for libel. A demurrer to the petition was sustained.

Charles J. Arms and P. Henry Quinn, for plaintiffs. Comstock & Gardner, for defendant.

TILLINGHAST, J. This is an action of trespass on the case for libel, and is based upon the publication by the defendant of the following item or article, viz.: "Thrice Burned. The Daniels & Cornell Block Again Visited by Fire. Damage Largely by Water, and Estimated at \$70,000, Covered by Insurance. At 10:15 o'clock last night R. A. Reid, of the printer's firm of J. A. & R. A. Reid, while working at his desk on the top floor of the tall Daniels & Cornell Building on Custom-house street, discovered smoke and flame issuing from the composing room in the rear of the office, and which was raging near the boiler. He immediately descended to the street, and notified Patrolman Hartwell, who sounded an alarm from box 146 on the pole located at Turk's Head. The fiery element completely invaded the entire fifth floor, which was all occupied by the Messrs. Reid, who claim complete loss from fire and water. They were insured for \$55,000. The fire extended from this room to the roof, the northwest portion of which was destroyed. The fire is the third to have occurred in this building in the past thirteen years. It was completely destroyed in the great fire of September, 1877, and all but ruined on Sunday evening, February 19, 1888. Every fire in this building has started on the upper floor, and twice in Reid's printing establishment." By way of

explanation of this publication, the plaintiffs add the following innuendo: "Meaning and intending to convey the impression and belief that said plaintiffs intended to injure and defraud their insurers of \$55,000, claimed by them in consequence of the fire aforesaid; and also meaning to cause it to be suspected and believed that the said plaintiffs knew of the origin of said fire of May 22, 1890, and were criminally responsible for it; and also to cause it to be suspected and believed that the other fires above mentioned were of incendiary origin, and that the fire of May 22, 1890, was also incendiary, and that said fires were set or procured to be set by the said plaintiffs." The defendant demurs to the declaration on the grounds (1) that the article, unexplained by the innuendo, is not libelous; and (2) that the innuendo attributes to the article a meaning which it is incapable of bearing.

We think the demurrer should be sustained. The article in question contains no defamatory language, nor do we think it is capable of the meaning attributed to it in the innuendo. It is simply a statement of an occurrence which was a proper subject of public notice and comment, and does not in any way reflect upon the character of the plaintiffs. It not only fails to charge or even insinuate that the fire was of incendiary origin, but, on the contrary, by alleging that one of the plaintiffs, while working at his desk, first discovered smoke and flame issuing from the composing room in the rear of the office, and that the fire was raging near the boiler, and also that he immediately caused an alarm to be sounded, the natural inference to be drawn therefrom is that the fire was accidental, and originated in the boiler room. The only portion of the article which by any possibility could be tortured into a charge that the plaintiffs were in some way criminally responsible for the fire referred to is the last sentence thereof. But language is not to be forced or tortured in libel cases in order to make it actionable. It is to be taken in its plain and ordinary sense. And, although greater liberality is exercised in the case of words when they are spoken than when they are contained in written or printed articles (Cooley, Torts [2d. Ed.] 239), yet in both cases the person must be presumed to have used them in their ordinary import in the community in which they are uttered or published (Edsall v. Brooks, 3 Rob. [N. Y.] 295). In Roberts v. Camden, 9 East, 93, the court say: "Words are now construed by courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them." See Townsh. Sland. & L. (3d Ed.) 178, and cases cited; Demarest v. Haring, 6 Cow. 76-87; Fitzgerald v. Robinson, 112 Mass. 371. The fact that supersensitive persons, with morbid imaginations, may be able, by reading between the lines of an article, to discover some defamatory meaning therein, is not sufficient to make it libelous. In other words, if the language is not reasonably capable of

conveying to the ordinary mind the defamatory meaning alleged in the innuendo, it is the province and duty of the court to so declare, and to deny the right to maintain an action thereon. *Carter v. Andrews*, 16 Pick. 1.

But plaintiffs' counsel contends that, even though the language complained of is not actionable per se, and is not made so by the innuendoes, yet it becomes actionable by reason of the allegation of special damage. We do not agree to so broad a statement of the law as pertaining to libel and slander; for, while it is undoubtedly true that all words in their nature defamatory are actionable if a special damage follows, yet this is not true with regard to words which are not in their nature defamatory. In *Fanning v. Chace*, 17 R. I. 388, 22 Atl. 275, it was contended by the plaintiff that language charging him with the intention of starting a house of ill fame, by reason of which he sustained special damage, was actionable. But this court held that, as the words relied on were not defamatory, they were not actionable. In *Terwilliger v. Wands*, 17 N. Y. 57, Strong, J., states the law as follows: "It would be highly impolitic to hold all language wounding the feelings and affecting unfavorably the health and ability to labor of another a ground of action, for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise, his strength of mind to disregard abusive, insulting remarks concerning him, and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of ability to attend to their ordinary avocations. There must be some limit to liability for words not actionable per se, both as to the words and the kind of damages, and a clear and wise one has been fixed by the law. The words must be defamatory in their nature, and must in fact disparage the character; and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result. In this view of the law words which do not degrade the character do not injure it, and cannot occasion loss. In *Cooke's Law of Defamation* (page 24) it is said: "In order to render the consequence of words spoken special damage, the words must be in themselves disparaging; for, if they be innocent, the consequence does not follow naturally from the cause." In *Kelley v. Partington*, 5 Barn. & Adol. 650, which was an action of slander wherein special damage was alleged, *Littledale, J.*, said: "I cannot agree that words laudatory of a party's conduct would be the subject of an action if they were followed by special damage. They must be defamatory or injurious in their nature. In 2 Com. Dig. tit. 'Action on the Case for Defamation,' D, 30, it is said generally that any

words are actionable by which the party has a special damage; but all the examples given in illustration of that rule are of words defamatory in themselves, but not actionable, because they do not subject the party to a temporal punishment. In all the instances put the words are injurious to the reputation of the person of whom they are spoken." *Taunton and Patteson, JJ.*, were of the same opinion. This decision was subsequently approved and adopted in *Sheahan v. Ahearne*, 9 Ir. R. O. L. 412. The conflict of authority which has arisen as to whether the words must be in their nature defamatory, in order to be actionable, when a special damage is alleged, is more seeming than real, and has mainly arisen from a difference of understanding as to what constitutes defamatory words; and a careful examination of the cases which hold in general terms that any words by which a person suffers a special damage are actionable will show that the words were in fact defamatory. See *Moore v. Meagher*, 1 Taunt. 39. "No general rule can be laid down," as said by Mr. Odgers in his valuable work on *Libel and Slander*, "stating absolutely and beforehand what words are defamatory and what are not." "Words which would seriously injure A's reputation might do B's no harm." "Each case must be decided on its own facts." We think it may be safely said that any words, if false and malicious, imputing conduct which injuriously affects a man's reputation, or which tends to degrade him in society, or bring him into public hatred and contempt, are in their nature defamatory, and either actionable per se or may be made actionable by proper innuendoes, or by alleging and proving special damage, and that words which are not in their nature defamatory, while, perhaps, if false and malicious, and if used by a person who knows, or ought to know, that special damage will follow, and such damage does in fact follow, an action on the case may be maintained, whatever the nature of the words (*Odgers, supra*, 88-91; *Young v. McKae*, 3 Best & S. 204; *Lynch v. Knight*, 9 H. L. Cas. 589), yet cannot be made the basis of an action for libel or slander.

Plaintiffs' counsel takes the point that defendant ought not to be allowed to demur and plead at the same time, and that, having done so in this case, the demurrer has no standing. It is doubtless true that a defendant cannot both demur and plead to the same count at the same time, as the filing of the plea without first obtaining a decision upon his demurrer is a practical abandonment of the demurrer. *Moore v. Glover*, 115 Ind. 272, 16 N. E. 163; *Miller v. Maxwell*, 16 Wend. 23. But, as the practice almost universally is to allow a defendant to plead over after an adverse decision is rendered on his demurrer (*Hancock v. Vawter*, *Hardin*, 511; *Miller v. Heath*, 7 Cow. 101), we do not think that so technical an objection should avail. And, moreover, as the practice in this state has long been

for the defendant at the time of filing his demurrer to add the following, viz.: "Saving which, and if overruled, the defendant, by leave of court first had and obtained, comes and defends," etc.,—and then follows with his pleas to the merits, we are inclined to hold the defendant to the strict rules of common-law pleading. See *Bruce v. Mathers*, 2 Blbb, 296; *State v. Edgerton*, 12 R. I. 108. And, moreover, as the declaration states no cause of action, it could not avail the plaintiffs anything for us to hold that, by reason of its error in pleading, the defendant has no standing on the demurrer, as a motion in arrest of judgment, in case a judgment should ever be reached, would accomplish the same purpose. Demurrer sustained, and case remitted to the common pleas division with direction to enter judgment for the defendant.

REAL ESTATE TITLE INSURANCE &
TRUST CO. OF PHILADELPHIA v.
AETNA LIFE INS. CO.

(Supreme Court of Pennsylvania. April 10,
1897.)

INSURANCE—CONTRACTS—PAROL EVIDENCE.

At the expiration of a life policy issued on the renewable term plan, insured became entitled to two-thirds of the cash accumulation on the policy. This sum, however, he did not draw out, but took out another policy and received receipts for three advance annual premiums thereon, aggregating the full amount of said accumulation. A few days after he died, and his administrator sued the company for the amount of the last two of the three premiums as for premiums unearned. *Held*, that a defense that a special agreement had been made with insured, whereby the whole amount of said accumulation was to be applied at once, at the date of the new policy, to payment of the additional insurance, pursuant to which the new policy was issued and accepted, was not defective as attempting to vary by parol the written contract evidenced by the new policy and the receipts.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by the Real Estate Title Insurance & Trust Company of Philadelphia, executor of the last will and testament of Ralph C. Smith, deceased, against the Aetna Life Insurance Company. Plaintiff took a rule for judgment for want of a sufficient affidavit of defense, on the theory that the defense interposed by the affidavit was an attempt to vary written instruments by parol evidence, and from a judgment discharging the same it appeals. Affirmed.

The plaintiff's decedent, Ralph C. Smith, was insured in the Aetna Life Insurance Company for \$5,000, under a policy issued February 10, 1896. He had been before insured in that company, and when his policy expired, viz. on the date of the issuing of the new policy now in suit, he was entitled to a certain portion of the "accumulated reserve," which amounted to \$983.25. Instead of drawing this

amount in cash, he allowed it to remain with the company, to be applied to the payment of premiums on his new policy, and took the company's receipts on account of the premiums, which would have become payable on February 10, 1898, February 10, 1899, and February 10, 1900. The annual premium was \$324.30. One premium was paid out of the fund so held by the defendant company, and the plaintiff's decedent died February 20, 1896, just 10 days after the new policy was issued. This action was brought to recover the sum of \$5,000, the face value of the policy, and the sum of \$658.95, the balance of the fund, which plaintiff's decedent had allowed to remain with the company. The defendant filed an affidavit of defense, and plaintiff took a rule for judgment for want of a sufficient affidavit of defense, which rule was discharged by the court, without any opinion.

Following is the body of the affidavit of defense: "Ralph C. Smith, on the 10th of February, 1876, took out a policy in the company defendant, No. 113,293, in the sum of five thousand dollars, on the renewable term plan, the terms being ten years each. At the expiration of the first term, in February, 1886, he took a second renewable term policy, numbered 153,009. The only provision in that policy looking towards a cash payment was the seventh clause, which provided that if default should be made in the payment of any premium during the running of the policy the holder should be entitled to receive in cash two-thirds of the accumulations of reserve and surplus. He did not default on the payments, but in 1896, instead of taking out a third term policy, he decided to surrender the policy then held, and to take one of another kind, to wit, the ordinary terminal endowment plan, which was issued the 10th of February, 1896, and which is the policy sued on in this case. The question of the payment of the first premium arose when this new policy was issued, and a special agreement was made with the insured, to the effect that, in consideration of his taking new insurance, and applying the surrender value of the old policy towards payment of the premium on the new, the full cash accumulation, which was \$983.25, should be allowed to him, instead of the two-thirds accumulation, the only cash payment contemplated by the policy then just expiring. Mr. Smith agreed to this proposition and signed a receipt which reads as follows: 'Dated, Philadelphia, Feb. 1, 1896. I hereby certify that renewable term policy No. 152,009, issued by the Aetna Life Insurance Company on my life, has not been assigned or transferred to any person or party; and in consideration of an allowance of nine hundred and eighty-three 25-100 dollars cash, to be applied in part payment of new insurance now to be taken on the same life, I hereby acknowledge payment and satisfaction in full of said policy No. 152,009, and surrender the same to said company to be canceled. Ralph C. Smith. [Seal.] Witness: I.

J. Taylor.' This payment, which he receipted for, was made up of the \$324.30 which is recited in the policy itself, \$324.30 which is recited in Exhibit B of plaintiff's statement, \$324.30 recited in Exhibit C of plaintiff's statement, and \$10.35 recited in Exhibit D of the said statement. Had he accepted the cash surrender value of two-thirds, he would have been paid \$655.50 in cash; but he expressly stipulated that he would waive the cash payment, and allow \$983.25, the full accumulation, to be applied in the way of premium on the new policy, and only in this way, no portion of it to be paid in cash under any circumstances. The insured had at this time the option to take two-thirds of the accumulations in cash, or to use the total accumulations for new insurance, none of the money to be returned to him. The insured exercised the option, and chose to take the entire accumulation, and apply the same to the payment of premium. This made a contract between the company and himself, and limited any recovery on the new policy to the amount of the said policy. When the death of the insured occurred, and proofs of loss were furnished, the company promptly offered to pay the claimant the full sum of \$5,000 named in the said policy, which it refused to accept, claiming that it was entitled not only to the sum insured but to the payments which were made in advance by the applications of the surrender value of \$983.25 above named. The company has been ready, is now ready, and tenders itself ready to pay the sum of \$5,000 in full of all claims and demands in connection with this insurance, or tenders to pay the said sum into court in full discharge of its obligation under the said policy; but it submits that it is not liable for \$5,658.95, the sum sued for by the plaintiff, and the amount claimed in its statement of claim as filed, nor is the company liable for \$5,000 as a sum separate and apart from the said sum of \$658.95, so that \$5,000 should be spoken of as admitted to be due. The company either owes \$5,000, or \$5,658.95, as one sum."

Frederick J. Lambert, for appellant. Samuel B. Huey, for appellee.

PER CURIAM. The affidavit of defense contains a positive averment of a special agreement for a particular kind of policy, by which the whole amount of accumulated insurance was to be applied at once, at the date of the policy, to the payment of additional insurance. Such a policy was accordingly issued to the assured and accepted by him. As this would absorb the whole of the sum of \$983.25, the plaintiff, as executor, etc., of the assured, cannot claim any part of the premiums thus paid. The question whether this defense can be established by competent proof on the trial does not now arise. It will be time enough to meet it when it does arise. Judgment affirmed.

BERINGER v. LUTZ et al.

(Supreme Court of Pennsylvania. Jan. 4, 1897.)
RESULTING TRUST—EVIDENCE—APPEAL—RECORD.

1. A purchaser at sheriff's sale brought ejectment, and the wife of defendant in execution claimed an interest under an alleged trust on payment of the purchase money. The wife's father, several years prior, gave a deed for certain land to the husband, and took his note for the price, and charged the same to his daughter's share in his estate, under the impression that a married woman could not legally take title to land. The husband and wife improved the land, and sold it, together with land belonging to the husband, and divided the proceeds. This money, together with other received from her father, made up the sum furnished by the wife towards the purchase of the land in controversy. The evidence showed that it was furnished on an express agreement with the husband that she should have an interest corresponding to the amount of money furnished. *Held* that, if the testimony of the wife was believed, the money paid by her for the land established a resulting trust in her favor.

2. Where an instruction appears in the record, certified by the judge who delivered it, a memorandum, signed by the stenographer, and handed up with the argument in the supreme court, expressing an opinion that it had been incorrectly transcribed by him, will not be considered.

Appeal from court of common pleas, Venango county; Charles E. Taylor, Judge.

Ejectment by George Beringer against Henrietta Lutz and Daniel Lutz, her husband, commenced in justice's court, and certified by the justice of the peace to the court of common pleas. From a judgment in favor of plaintiff, defendants appeal. Reversed.

The sixth and seventh assignments of error are as follows: "(6) The court erred in its answer to plaintiff's sixth point, which point and answer are as follows: '(6) The fact that Caleb Pyle took first a written agreement, and afterwards a note, from Daniel Lutz, which in terms covered the price of the land in Lawrence county conveyed to him, raises in law a presumption against an advancement to Henrietta Lutz. Answer. Affirmed.' (7) The court erred in its answer to plaintiff's eighth point, which point and answer are as follows: '(8) If, as claimed by defendants, Caleb Pyle, deceased, by his will intended to direct that the note of Daniel Lutz should be taken from the share of Henrietta Lutz, then such will raises a presumption against a gift or advancement to Henrietta Lutz. Answer. Affirmed.'"

Dunn & Carmichael, for appellants. T. J. McKean, for appellee.

WILLIAMS, J. The questions raised by the several assignments of error will be readily comprehended after a glance at the facts out of which they grow. The plaintiff is a purchaser at sheriff's sale of a farm sold as the property of Daniel Lutz. This proceeding was instituted by the purchaser for the purpose of obtaining possession. The defendant in the judgment concedes that such title as he had has passed by the sheriff's sale to

the purchaser, but alleges that, as to about 20/25 of the title, he held for the use of his wife, Henrietta Lutz, under a trust resulting from the payment of \$2,000 of the purchase money by her upon a parol agreement that she should be an owner in proportion to the purchase money paid by her. To establish this trust, it was incumbent on Mrs. Lutz to show, by evidence that was clear and satisfactory, first, that she did pay a portion of the purchase money for the farm in controversy, as alleged; second, that it was paid upon an agreement that she was to have the title to the land, or such portion of it as she paid for; and, third, that the money so paid belonged to her as her separate estate. Upon the trial of the cause, Mrs. Lutz gave evidence tending to prove the payment of \$2,000 of the purchase money, and that it was paid upon the agreement alleged. To show that the money was her own, and received from her father's estate, she proved by the testimony of several witnesses that, not long after her marriage, her father proposed to advance to her the sum of \$400 in land, if she and her husband would move upon the land and improve it. To this they both agreed. Her father had, however, the opinion that, because the note of a married woman was not valid as an obligation against her, so neither could she lawfully take title to land. He proposed, therefore, to give a deed for the land to her husband, take his note for \$400, the price of the land, and charge the note to her share in his estate by his will. This was done. Lutz and his wife went upon the land, lived upon it for more than 20 years, improved it, and at length sold it, with an adjoining piece of land which her husband had purchased, and divided the money received according to their respective interests, she receiving \$1,400 as her share. This, together with the moneys received from her father's estate, made up the sum she alleged was paid by her. If believed, the testimony of the witnesses by whom these facts were shown was sufficient to justify the jury in finding in favor of Mrs. Lutz. The plaintiff alleged that this testimony was unworthy of credit, because it was in apparent contradiction of the written documents,—the deed and note given at the time. The question for the jury was whether these papers were so explained and accounted for by the testimony as to overcome the presumption arising, *prima facie*, upon them, and establish the title of Mrs. Lutz, in the 13 acres conveyed by her father to her husband, but admittedly paid for out of her share in her father's estate.

The first assignment of error complains that the learned judge erred in affirming the plaintiff's first point. In this point he was asked to say that if Caleb Pyle, the father of Mrs. Lutz, had passed the title to the 13 acres to Daniel Lutz in 1865, he could not several years later advance the same land to his daughter, so as to impress it with a trust in her favor. As an abstract proposition, this

might be unobjectionable, but as applicable to the facts of this case the point was misleading. No such question was presented on the evidence. There was no attempt to show any such effort on the part of Caleb Pyle as the point assumed. The allegation of the defendant was that the conveyance to Lutz, and the taking of his note as a memorandum, was the method by which Pyle sought to secure the land to his daughter, and charge its value to her, to be paid out of her distributive share of his estate. If this was believed, it would not matter when the deed was made or the note taken. It was a gift to Mrs. Lutz.

The answer of the learned judge to the plaintiff's third point is also clear error. It affirms that a resulting trust can only be raised by payment of purchase money at the time the deed is made; if paid before or after the act of delivering the deed by the vendor, it is ineffectual. *Nixon's Appeal*, 63 Pa. St. 279, cited as authority for this doctrine, does not support it. What was then held was that the mere advance of money to a purchaser after the purchase is complete will not raise a resulting trust. There was no pretense that the person who advanced money in that case to the purchaser was to take, or to hold an interest in, the title to the land purchased. It was advanced to the purchaser under a promise that, if he would buy the property, she "would help him pay for it." "Agreeing to help a person buy a farm is something entirely different," said Justice Sharswood in that case, "from agreeing to join him in the purchase." The rule, as we understand it, is that the trust must be impressed on the title when it passes to the alleged trustee. It cannot be ingrafted upon it afterwards. It must result from facts then existing, which in equity turn the taker of a title into a trustee. In other words, the agreement to advance the purchase money, or a portion of it, and take title to the land, or to so much of it as the money advanced shall pay for, must precede or be contemporaneous with the purchase; and money subsequently paid in pursuance of such an agreement, under which the title was obtained, should be considered in determining the interest of him who advanced it. *Gilchrist v. Brown*, 165 Pa. St. 275, 30 Atl. 839. By way of illustration, let us suppose that A. and B. agree with each other to purchase a given piece of real estate. The price asked is \$10,000, payable one-half in hand and one-half at the end of one year. A. undertakes to pay the first or advance payment, and B. the other, and they agree that the title shall be made to both in common. Subsequently A. makes the advance payment, and directs the deed to be made to himself. Without knowledge of this fraud, B. at the end of the year pays the remaining \$5,000. Does it admit of doubt that he could call upon A. for a conveyance of the equal one-half part of the land to himself? His money was not paid until after the title passed to A., but it was paid under an agreement which antedated the conveyance

to A., and which made it the duty of A., when the title came to him, to convey an undivided half to B. The facts which made it a fraud in A. to take the whole title without the knowledge of B. existed when the conveyance was made to A., and the trust resulted from them, and fastened upon the title the instant it rested in him. In this case the defendant alleged that she furnished the \$100 paid upon the preliminary contract, and the \$1,000 paid at the delivery of the deed, upon the express agreement with her husband that she was to have an interest in the title corresponding to the amount of purchase money she should furnish, and that she subsequently furnished \$900 more in pursuance of this agreement. If this was believed, the money was paid in time. There was not a scintilla of testimony tending to show that the money paid prior to and at the delivery of the deed was paid by Lutz, except as alleged by the defendant.

The fifth assignment must also be sustained. The point to which it relates was argumentative, and seems to have been drawn for the purpose of securing from the court an indorsement of the line of argument the plaintiff was about to present to the jury upon the facts, and the credibility of the witnesses, and it contained an assumption of the truth of the plaintiff's contention upon questions that were properly for the jury.

The sixth and seventh assignments are sustained. The affirmance of these points should have been qualified, and the jury told that the presumption arising from the form of the deed from Pyle to Lutz for the 13 acres, and the note for \$400 signed by Lutz, was a presumption *prima facie* only, and capable of being rebutted; and if the testimony given by the defendant's witnesses explaining these instruments, and the reason given by old Mr. Pyle for putting them in the form in which they were found, is believed, then the presumption is rebutted, and thereafter to be left out of the account.

The twelfth assignment of error points out a clear mistake in regard to the measure of proof required. According to the official copy of the stenographer's notes of the trial, certified to by him and by the learned judge who tried the case, it appears that the jury was told that, under the circumstances enumerated by the learned judge in his charge as those surrounding this case, a party could not complain if held to such a uniform measure of proof as would "secure double protection against the effects of frauds and perjuries to men who have purchased upon the faith of legal titles." A slip of paper signed by the stenographer was handed up at the argument, expressing an opinion that this instruction had been incorrectly transcribed by him. We cannot regard such a paper as of any value. The charge has been examined, and its correctness, as it appears in the official copy of the stenographer sent up with the record, certified to by the judge who delivered it. The record is that to which we look, to which we

must look, and we know of no reason that would justify us in disregarding it in this case. The slip of paper handed up to us is no part of the record which it attempts feebly to qualify. Such a method of amending the record cannot be encouraged. It may be that the jury reached a correct conclusion upon the questions of fact in this case. Upon that subject we express no opinion. What we undertake to say is that the answers and charge of the learned judge were of a character that might have misled them, and induced a verdict that would not have been rendered if the questions of fact on which the case depended had been distinctly and adequately presented to them, as they should have been. The judgment is reversed, and a *venire facias de novo* awarded.

PRESIDENT, ETC., OF BALTIMORE & Y. TURNPIKE ROAD v. GREEN.

(Court of Appeals of Maryland. June 23, 1897.)

MALICIOUS PROSECUTION—LIABILITY OF CORPORATION—TORTS OF OFFICERS.

1. A turnpike company is not liable for false arrest and malicious prosecution of an individual on a charge of defrauding such company of tolls, preferred by a gate keeper, where it appears that such gate keeper was not expressly authorized to cause the arrest, and that the company had not adopted or ratified such act.

2. In an action against a corporation for damages for false arrest and malicious prosecution, it was error to refuse to direct a verdict in favor of defendant, where there was no evidence legally sufficient to prove that any officer or agent was authorized to cause such arrest, or that defendant had subsequently adopted or ratified such act.

Appeal from circuit court, Harford county.

Action by Fletcher Green against the President, Managers & Company of the Baltimore & Yorktown Turnpike Road. From a judgment on verdict for plaintiff, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, and BOYD, JJ.

G. L. Van Bibber, for appellant. S. A. Williams, for appellee.

BRISCOE, J. This is a suit for false arrest and malicious prosecution, brought by the appellee, Fletcher Green, against the appellant, the President, Managers & Company of the Baltimore & Yorktown Turnpike Road, a corporation duly incorporated under the laws of the state of Maryland. The declaration states that the defendant, on the 17th day of September, 1894, falsely, maliciously, and without probable cause procured or caused to be procured a warrant to be issued by Albert W. Perrie, a justice of the peace of the state of Maryland in and for Baltimore county, under the act of 1890 (chapter 442), for the arrest of the plaintiff, charging him with defrauding the Baltimore & Yorktown Turnpike Road of tolls: that the justice of the peace required him to

enter into a recognizance for his appearance at the circuit court of Baltimore county to answer the charge; that the charge was afterwards dismissed and the plaintiff discharged. It is also alleged that the charge contained in the warrant was in fact false, malicious, and without probable cause. At the trial there were two exceptions taken,—one to the admissibility of certain testimony, and the other to the refusal of the court to grant the defendant's first, second, third, fourth, sixth, and seventh prayers. The judgment being for the plaintiff, the defendant has appealed.

There were but two witnesses examined at the trial. They were the plaintiff, Fletcher Green, and Charles E. Bowen, employé of the defendant corporation, and its toll gatherer. The material facts are: The appellant owns and operates a turnpike road which extends from Baltimore city through Towson to the Pennsylvania line. That on September 17, 1894, the plaintiff drove his wagon partly through what is known as the "Towson Gate." That Bowen, the gate keeper, came out, and said he wanted the toll, etc. "I told him I would not pay. He said, 'You can't go down the road,' and he took one of my mules by the bridle, and backed the wagon out of the gate, and across the pike, and stood in the middle of the gateway. I told him I would not pay eight cents. 'If I give you anything, I will give you ten cents,' and with that I drove up, and pulled around him and went down to the other gate, where I paid ten cents." The witness Bowen testified that: "On September 17th I had trouble with Mr. Green about his toll. He was going to Baltimore, and was driving a two-horse narrow-tread wagon. I demanded the toll. He said he did not intend to pay it. I said, 'You can't go through this gate,' and caught his horse by the bridle, and backed the team away from the gate. He said, 'Let me go, and I won't go through your gate.' He then drove around the gate over the railroad tracks, and went on down the pike to Baltimore. He did not tell me he was going to drive around the gate. He did not tell me why he refused to pay." He further testified as to the arrest: "I remember I went to Col. Offut's office, and explained to him the whole circumstance of my trouble with Green, and he got a book, and showed me the law. He did not advise me to have Green arrested. He just told me in a general way what the law was; that anybody who evaded the payment of toll was liable to be arrested. I went to the squire's office, who told me he knew of no such law. I then went to Col. Offut, and he went with me to the squire, and pointed out the law to him, and left without making any suggestion to the squire. I then made the affidavit for Green's arrest."

In the view we take of this case, it will not be necessary for us to decide all the questions raised on this appeal. The questions of law

involved are well settled by numerous decisions of this court. To hold a corporation liable for a tortious act committed by its agent the act must be done by the express precedent authority, or ratified and adopted by the corporation, or the act must be done bona fide in pursuance of a general authority in relation to the subject of it. In the case of *Carter v. Machine Co.*, 51 Md. 298, after reviewing the authorities upon this subject, the court decides that in a case like the present, where the corporation is sought to be held liable for the wrongful and malicious act of its agent or servant in putting the criminal law in operation against a party upon a charge of having fraudulently embezzled the money and goods of the company, in order to sustain the right to recover, it should be made to appear that the agent was expressly authorized to act as he did by the corporation. The doing of such an act could not, in the nature of things, be in the exercise of the ordinary duties of the agent or servant intrusted with the custody of the company's money or goods; and before the corporation can be made liable for such an act it must be shown either that there was express precedent authority for doing the act, or that the act has been ratified and adopted by the corporation. And to the same effect are the more recent cases of *Improvement Co. v. Steinmeier*, 72 Md. 313, 20 Atl. 188; *Railway Co. v. Brewer*, 78 Md. 406, 28 Atl. 615; *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089. Now, there is no evidence in this case that Bowen, the toll gatherer, was authorized by the corporation to make the arrest, nor that he was acting within the scope of his employment. On the contrary, his positive testimony is that he was not advised by Mr. Offut, the attorney, to make the arrest, or to swear out the warrant. There was no legally sufficient evidence from which the jury could have inferred express precedent authority, nor to establish the adoption or ratification by the defendant of the act of the agent in making the arrest. For these reasons we are of opinion that there was no legally sufficient evidence in this case to have authorized the court in submitting this case to the jury. The defendant's first prayer should have been granted. It is as follows: "That there is no evidence in this case legally sufficient to prove that any of the officers or agents of the defendant corporation were authorized by the company to have the arrest made which is complained of in the plaintiff's declaration, or that the company subsequently adopted and ratified the acts of said officer or agent, and that, therefore, the plaintiff is not entitled to recover in this action, and the verdict of the jury must be in favor of the defendant." For these reasons, the judgment will be reversed, and, as there can be no recovery in the case, a new trial will not be awarded. Reversed, without awarding a new trial, with costs.

WOOLLEY et al. v. PRICE et al.

(Court of Appeals of Maryland. June 22, 1807.)

EXECUTORS—LIABILITY OF BONDSMEN.

Where testator bequeaths half of his estate to his wife, and half to K., in trust for P., half thereof passes, by operation of law, to P., in trust, at the expiration of the time appointed by law for settlement of the estate; so that bondsmen of the executors are not liable for devastavit thereafter committed.

Appeal from circuit court, Queen Anne's county, in equity.

Bill by William Busted, trustee, against William J. Price and another, executors of William K. Sparks, deceased. Demurrer to bill was sustained, and Florence Woolley and others, by leave of court, became parties plaintiff, and appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, ROBERTS, BOYD, and PAGE, JJ.

John B. Brown, Edwin H. Brown, and Hope H. Barroll, for appellants. Olin Bryan, for appellees.

BRYAN, J. James B. Palmer, of Queen Anne's county, died in the year 1835, possessed of a considerable amount of personalty. He left a last will and testament, which was duly admitted to probate. By his will, he left one-half of the residue of his estate to his widow, and the other half to B. Palmer Keating, in trust for his brother George S. Palmer, for life, with remainders over upon certain contingencies, and he appointed the widow and Keating executors. The executors received letters testamentary, and gave bond in the usual form. Mrs. Palmer, the widow, died in March, 1894. Before her death no inventory of the estate had been returned to the orphans' court, and there were no proceedings in the court to show how the duties of the executors had been discharged. After the death of Mrs. Palmer, the surviving executor, B. Palmer Keating, returned an administration account, which showed a sum of more than \$12,000 as the moiety of the residue bequeathed to him in trust. After the passage of this administration account, Keating was, by the decree of a court of equity, removed from the trusteeship, it being proved that he was insolvent, and William W. Busted was appointed trustee in his place, with authority to take such legal and equitable proceedings against the executors of James B. Palmer and the sureties on their official bond as might be necessary and proper for the recovery of the funds belonging to the trust. William K. Sparks was one of the sureties on the testamentary bond of the executors of James B. Palmer. He died in the year 1890, leaving real and personal estate, which he disposed of by last will and testament. It is alleged that all the other sureties are insolvent. A bill in equity was filed by Busted, trustee, against the executors of Sparks, his devisees and legatees, for the purpose of enforcing against them the alleged liability of the exec-

utors of Palmer for the legacy to B. Palmer Keating, in trust for the persons named in his will. A demurrer was filed to the bill, and it was dismissed. After the dismissal of the bill, the appellants, by leave of the court, became parties plaintiff, for the purpose of prosecuting this appeal.

The cardinal question in the case is whether the executors of Palmer continued responsible for the legacy to Keating, as trustee, or whether it is to be considered as paid to Keating, in his capacity as trustee, at the expiration of the time appointed by law for the settlement of the estate, or afterwards. It is well settled that, if the legacy had been to both of the executors as trustees, there would have been, by operation of law, a transfer of the fund to them as trustees, and, as they would have ceased to hold it as executors, their testamentary bond would have been discharged. *State v. Cheston*, 51 Md. 352. The principle is stated that, as they would represent different characters, they could not pay the money to themselves, and that, in case of refusal, there was no person who could enforce payment, and that, therefore, the law would, by implication, consider the money in their hands in that representative character which ought to receive it. It was also said that, where an executor "sustains the twofold character of executor and guardian, the law will adjudge the ward's proportion of the property then in his hands to be in his hands in the capacity of guardian, after the time limited by law for the settlement of the estate, whether a final account has been passed by the orphans' court or not, upon the principle that what the law has enjoined upon him to do shall be considered as done, and from that time he holds the ward's proportion of the property, by operation of law, in that character in which he would be entitled to receive it upon a final completion of his trust as executor." So, in *Flickinger v. Hull*, 5 Gill. 60, we find the principle stated thus: "Where a person in one character is debtor, and the same person in another character is creditor, the law regards the debt as paid by the debtor capacity to the creditor; and this on the same principle which governs in the case where a man has several capacities, and is found in possession of property,—the law will attach the possession to the capacity in which, of right, it ought to be held." The will of Palmer left one-half of his personal estate to his wife, and the other half to Keating in trust. When the time for the settlement of the estate had elapsed, they, by operation of law, held the whole of the residue of the personal estate by operation of law, in their character as legatees. There was no visible change of possession, but there was a change in the nature of the title by which they held. The trusts of the executorship eo instanti ceased. They held thereafter the whole of the residue as tenants in common, and not jointly as executors. Their visible possession was the same, but they held in a different character. After this

change in the character in which they held, of course they could divide the residue, and each one would hold one-half in severalty, the widow for her own use, and Palmer in trust. The fact that, as executors, they held jointly, and afterwards they held as tenants in common, suggests a technicality of too refined and subtle a nature to be accepted as the basis of a legal doctrine, which is to determine valuable rights, and to settle serious responsibilities. If they had executed a deed conveying the residue from themselves as executors to themselves as tenants in common, it would certainly have terminated their responsibility as executors. And yet this would have been an idle formality, which would accomplish nothing more than would take place by implication of law, without any act on their part. It is significant that in *State v. Cheston*, 51 Md. 352, which is regarded as a leading case, where the court held that the assets passed by operation of law from the executors to the trustees, who were the same individuals, their titles were different. The executors, of course, held jointly, but the estate of the trustees was "to them and the survivors or survivor of them." This was an estate to them for life, with a contingent remainder to the survivors or survivor. But the visible possession was the same, and it was the change in the character of the possessors which released the executors from responsibility. We therefore conclude that one-half of the residue passed to Palmer in trust for the purposes mentioned in the will, and that the executors were discharged from responsibility.

The bill charges that the sum bequeathed to Keating, as trustee, was never paid over to him as trustee by the executors, but that said money, during the lifetime of Mrs. Palmer, was wasted and squandered by the executors or one of them. The bill also charges that Mrs. Palmer lived nearly nine years after the grant of letters testamentary, and nearly eight years after the expiration of the time for settling the personal estate. If the bill had alleged a devastavit before the time for the settlement of the estate, it would have shown that the legacy never came to the hands of Keating as trustee. But, unless a devastavit was committed within this time, the law conclusively presumes that the legacies in the will passed out of the hands of the executors in their representative capacity; and this presumption is not overcome by the charge that the money was wasted and squandered by the executors, or one of them, during the lifetime of Mrs. Palmer. The charge ought to be specific and definite that it was squandered during the time that they could properly hold it as executors. The learned judge who decided this case in the circuit court called attention to this point in his opinion, and gave leave to the complainant to amend the bill in this particular, but he declined to make the amendment. It will be seen that we think that the bill cannot be maintained. Decree affirmed, with costs in this court and the circuit court.

STOCKBRIDGE et al. v. FRANKLIN BANK OF BALTIMORE.

(Court of Appeals of Maryland. June 23, 1897.)

INSOLVENCY—ASSIGNMENT IN FRAUD OF CREDITORS—GARNISHMENT—PLEADING AND PROOF.

1. An assignment by an insolvent of his interest as legatee, the proceeds to be paid to satisfy certain debts, balance to be paid as directed by the assignor, is not fraudulent as against creditors.

2. A garnishee under plea of nulla bona may show assignment of the assets by defendant before the garnishment.

Appeal from court of common pleas.

Proceedings by the Franklin Bank of Baltimore against Henry Stockbridge, Jr., and another, executors of Isaac Albertson, as garnishees of Hopper & Co. Judgment against garnishees, and they appeal. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, and BOYD, JJ.

Frederick O. Cook and A. F. Musselman, for appellants. Wm. H. Brune and E. J. Farber, for appellee.

BRYAN, J. The Franklin Bank of Baltimore obtained a judgment against Harrison Hopper, and caused an attachment to be issued thereon. The attachment was laid in the hands of Stockbridge and Musselman, executors of Albertson, deceased, and also in the hands of Henry W. Fox. This appeal does not concern the attachment against Fox. The executors of Albertson pleaded nulla bona. Issue was joined, and verdict and judgment rendered against the garnishees. The garnishees have appealed.

It appeared that Harrison Hopper was entitled to a distributive share of the real and personal estate of Isaac Albertson, deceased, under his will, and that since the attachment was laid the executors had passed administration accounts in the orphans' court which showed that they retained in their hands as part of Hopper's distributive share a sum of money more than sufficient to pay the judgment in favor of the Franklin Bank. It also appeared that nearly a year before the issuing of the attachment Hopper executed and delivered to Fox the following paper: "Baltimore, March 28, '95. For value received, I hereby assign to Henry W. Fox all my right, title, and interest under the will of Isaac Albertson, late of the city of Baltimore, and in and to the estate of said deceased, Harrison Hopper. [Seal.] Witness: Chas. J. Fox." It was acknowledged and recorded among the land records of Baltimore city within four days after its date. A certified copy of the paper under the seal of the clerk of the superior court was offered in evidence, and the original paper was also produced and proved. One of the executors and garnishees testified that he and his co-executor were informed of this paper before it was recorded, and that they had acted upon it, and had

paid out large sums of money to Mr. Fox, and that they considered it to be a good and valid assignment. It was also in evidence that at the time the above paper was executed and delivered to Fox he executed and delivered to Hopper a receipt in the following terms: "Received of Harrison Hopper an assignment of his interest in the will of Isaac Albertson, late of Baltimore city; the proceeds of the same to be paid as follows, viz.: [Here follow a list of debts amounting to more than \$16,000.] Balance to be paid as may be directed by Harrison Hopper." And also that by written agreement under seal among themselves the creditors changed the order in which the debts were to be paid; and also that Fox had paid more than \$6,000 in discharge of these debts; and also that the debts mentioned in the receipt were really and in good faith due by Hopper to the creditors therein named. The court instructed the jury that the assignment from Hopper to Fox was fraudulent in law, and invalid as against the plaintiff, and that the garnishees could not rely upon it to prevent a judgment against them. It was not necessary to record the assignment from Hopper to Fox to make it operative to convey the money in the hands of the executors. No real estate is in question in this case; and we have, therefore, no concern with it, nor with the effect of the recording respecting it. In *Glenn v. Grover*, 3 Md. 225, it was said to be well settled that a debtor in falling circumstances might prefer one creditor to another by a transfer of his property made in good faith; and that it was equally clear that, if such a transaction should be assailed on the ground of fraud, the onus of proof would be on the party impeaching the assignment. This was a statement of a doctrine which had been declared in *Hickley v. Bank*, 5 Gill & J. 378, and which has been stated to be the law of Maryland in a great number of other cases. It has been settled ever since *Sangston v. Gaither*, 3 Md. 40, that an assignment for the benefit of creditors, exacting releases, must transfer all the debtor's estate; and that consequently a reservation to the debtor of the surplus after paying preferred creditors will avoid the deed. It is the exaction of releases which is fatal to the deed. This is necessarily implied from the decided cases, even where it is not declared in express terms. It has been expressly held that a deed of trust which does not exact releases is not void merely because it does not convey all the grantor's property. *Hoopes v. Knell*, 31 Md. 550; *Price v. De Ford*, 18 Md. 489. And in *Fouke v. Fleming*, 13 Md. 392, it was held that a deed which conveyed certain specified articles of personal property to a trustee with power to sell the same, and to pay certain specified debts from the proceeds, and to pay the residue to the grantor, was not impeachable because of the reservation of the surplus.

There was no evidence tending to show that the assignment to Fox was fraudulent in fact. The judgment must be reversed without a

new trial, unless there is some question upon which the appellee might recover if the case should be tried a second time. An exception taken by the plaintiff appears in the transcript of the record. As the plaintiff took no appeal, the exception is not properly before us. There are special provisions in the local laws which require us to entertain and decide such exceptions. These are applicable only to the counties named in them; for instance, Baltimore and Frederick counties. As the question, however, appears in the case, we will consider it for the purpose of deciding whether there ought to be a new trial. It is insisted that the assignment to Fox was not admissible in the evidence under the pleadings in the case. The plea was *nulla bona*, on which issue was joined. Under this issue it was competent for the garnishees to prove that they had no property of the defendant in their hands at the time of the laying of the attachment, or at the time of the trial, or at any intervening time. And they had a right to offer the assignment in evidence for the purpose of showing that before the attachment was laid the title to the assets in their hands had been validly conveyed to Fox, and that, therefore, they did not belong to the defendant. The evidence was admitted in accordance with the well-established practice. Judgment reversed without a new trial.

ABRAHAM et al. v. MERCANTILE TRUST & DEPOSIT CO. OF BALTIMORE et al

(Court of Appeals of Maryland. June 23, 1897.)

INSOLVENT CORPORATION—PROOF OF CLAIMS.

1. In a proceeding for the settlement of the affairs of an insolvent corporation, wherein, in pursuance of a decree of the court of appeals, an order was passed prescribing that all claims be proven before a certain date therein specified, or otherwise be barred, and requiring the receivers to give notice of such order by publication thereof, which publication was duly made, a petition of certain creditors, who had failed to present their claims within the prescribed time, for a special order permitting them to file the same, notwithstanding the expiration of the time so prescribed, is without merit, where it is conceded in such petition that it is impossible for the lower court to afford such relief, and the order limiting the time to prove claims was given due consideration.

2. The fact that such petitioners are nonresidents confers on them no rights or privileges not enjoyed by citizens of the state.

3. A decree of the court of appeals, in such proceeding, providing that the fund in question is applicable solely to the payment of the claims of those who shall have duly filed and proven their claims on or before the date prescribed, operates as a bar to those who did not comply with such requirement.

4. Such decree becomes the law of the case, conclusive on all parties in the subsequent stages of the proceeding.

Appeal from circuit court of Baltimore city.

Petition of Abraham & Straus and others against the Mercantile Trust & Deposit Company of Baltimore and another, as receivers

of the Casualty Insurance Company, for permission to file their claims in a proceeding pending for the settlement of the affairs of said insurance company. From an order denying relief, petitioners appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, ROBERTS, PAGE, and BOYD, JJ.

Miller & Bonsal, for appellants. W. Cabell Bruce and S. H. Lauchheimer, for appellees.

PAGE, J. In 1893 the circuit court for Baltimore city, upon a bill of complaint filed by Isaac R. Trumble and others, passed an order appointing receivers to administer the assets of the Casualty Insurance Company. Many claims were filed, and in the distribution many questions arose. The case came before this court, and is now reported in 82 Md. 535, 34 Atl. 778, et seq. In the course of the opinion delivered in that case, the court uses these words: "There must of necessity be many outstanding and unascertained claims pending against holders of the company's policies, which claims may require some time for adjustment; but it is of great importance that the company's assets should be distributed at as early a date as practicable, and hence the settlement of its affairs ought not to be postponed to await the determination of every contingency on which its policy engagements are suspended. To obviate all unreasonable delay, and yet to afford an opportunity to each policy holder who may be entitled to prove against the company's assets, it will be the duty of the circuit court to prescribe by an order that all claims be filed on or before the second Monday of June next, or otherwise be barred from participation in the distribution. This may result in cutting out some claims, but that will be unavoidable, unless distribution be postponed for a considerable space of time; and such a course would occasion unnecessary loss to those whose claims are in a condition to be proved. If by that date there should be outstanding claims not reduced to a certain basis, it will be the misfortune of the assured; but there is no way of obviating that misfortune." In the decree passed in the same case, it was, among other things, ordered that the special fund, after the proper deductions, "is applicable solely to the payment of the lawful claims of policy holders who shall have duly proven and filed their claims in this cause on or before June 8, 1896." The case having been remanded to the circuit court, the learned judge of that court, in pursuance of the opinion and order of the court of appeals on the 14th of April, 1896, ordered that all claims against the company might be filed on or before the 8th of June, 1896, and that claims not filed on or before the said date shall be barred from participation in the distribution of the company's assets, and further ordered the receivers to give notice of

the order by publication of a copy thereof in two daily newspapers published in Baltimore city, once in each of four successive weeks, before the 1st day of June, 1896, which order was duly published in compliance with the terms thereof. Notwithstanding these clear and specific orders, and the views expressed in the opinion of this court, the appellants, who are nonresidents, and who have failed to file their claims within the prescribed time, have filed a petition in the lower court, with the view of obtaining a special order permitting them now to file their claims. It is conceded in the petition that, "under the order of the court of appeals, it will be impossible for the lower court to do this," and alleged that their only remedy is "by this proceeding to appeal to the court of appeals from an order dismissing their petition, so that the matter may be brought before the said court of appeals in the manner provided by law." The petitioners pray that such order may be passed upon their petition "as may be proper, and that they may have such relief as their case may require."

While we do not think the case is properly before us, for the reasons hereinafter to be given, yet we will say the grounds upon which the petitioners base their claim to have the period extended for their benefit do not impress us favorably. It cannot be safely affirmed that a condition of affairs has arisen "wholly beyond the contemplation of the court in passing its order." The court had under consideration the method of distributing the assets of the company. It decided that if the liability of the company became fixed before the 23d November, 1893, the insolvency on that date did not extinguish the assured's claim; and it recognized the fact that many outstanding claims were pending against holders of the company's policies, and these would require time for adjustment; but, notwithstanding, it held it to be important that the assets should be distributed at as early a date as practicable, and accordingly, after full consideration, fixed upon a date on or before which the claims could be filed, "or otherwise be barred from participation in the distribution." It thus appears the position reached by the court was the result of a thoughtful consideration of the whole subject, made with a full knowledge of the existence of many claims, and fully realizing at the time that the order might result in "cutting out some claims," but was necessary to avoid unreasonable delay, and to protect the great majority of creditors who would have their claims on file within the prescribed time. The wisdom of these views, we think, is emphasized by the present application. If the petitioners are to be now allowed to come in, it will be a precedent for all other creditors who, for any reason whatever, have been tardy with their claims. If the time be extended, it is not unreasonable to suppose there will even

then be those who will require still more time; and if they are nonresidents, and for that reason were not informed of the order, or if, for reasons over which they had no control, they were unable to have their claims sooner adjusted, so as to be in a condition to file, why would not their equity for a further extension of time be quite as strong as that of the petitioners? In fact, an extension of the time now would compel the court to do away with all requirement as to the time within which claims could be filed, or else, if another date were named, deprive some other creditor, equally meritorious as the appellants, of the very right which had been accorded the petitioners.

2. That the petitioners are nonresidents confers upon them no greater rights or privileges than those enjoyed by citizens of our own state. The notice having been published in compliance with the order, all persons, whether nonresidents or not, must be charged with being affected with notice.

3. The order of the court of appeals was not merely a requirement upon creditors to file their claims by the day named; it operated as a bar to those who did not do so. The opinion distinctly states that persons must file their claims by the second Monday in June, or otherwise be barred from participation. The order, however, is still more explicit. It provides that the special fund "is applicable solely" to the payment of claims of policy holders "who shall have duly proven and filed their claims in this court on or before June 8, 1896." The decree of the court of appeals is therefore that the special fund is applicable only to the payment of a particular class of claims; that is, claims proven by the day named. This case, therefore, is wholly unlike those cases where it is held that creditors may come in at any time before final distribution, and have a new account at their own expense. But, apart from all these considerations, we are of opinion there is no authority in this court to change or modify the order of the 24th of March. The appellants concede it is conclusive on the lower court. That it is also binding on this court we deem equally clear. In *Waters v. Waters*, 28 Md. 22, this court thus stated the principle: "No principle," they said, "is better established than that a decision of the court of appeals once pronounced in any case is binding upon the court below, and upon this court in the subsequent proceedings in the same case, and cannot be disregarded or called in question. It is the law of the case binding and conclusive upon all parties, not open to question or examination afterwards in the same case." *Young v. Frost*, 1 Md. 895; *McClellan v. Crook*, 7 Gill, 383; *Hammond's Lessee v. Inloes*, 4 Md. 164; *Winn v. Albert*, 15 Md. 282. These authorities dispose of the case, and would require us to affirm the order of the circuit court if there were no other reasons for so doing. Order affirmed.

MAYOR, ETC., OF CITY OF BALTIMORE v. BROUMEL.

(Court of Appeals of Maryland. June 23, 1897.)

STREETS—DEDICATION—ACCEPTANCE.

A street dedicated within territory of a county afterwards annexed to a city, but never accepted by the county, does not become property of the city by an act merely extending jurisdiction of the city over such streets in the annexed territory as had been conveyed, condemned, or dedicated.

Appeal from circuit court of Baltimore city.

Suit by Louise M. Broumel against the mayor and city council of Baltimore. Decree for complainant. Defendants appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, PAGE, BOYD, and FOWLER, JJ.

Thos. Ireland Elliott and Wm. S. Bryan, Jr., for appellants. Isidor Rayner and Wm. B. Rayner, for appellee.

McSHERRY, C. J. The appeal in this case is from a decree of the circuit court of Baltimore city perpetually enjoining and restraining the mayor and city council of Baltimore from tearing down and removing the dwelling house and other buildings of the appellee. The house and buildings are situated, it is claimed, on the bed of Chestnut Avenue, which the appellant insists was dedicated to the public in 1874, while the locality formed part of Baltimore county, and before it was brought within the limits of the city by the act of 1888 (chapter 98). A considerable tract of land belonging to the Chesapeake Mutual Land & Building Association was in 1874 or thereabouts decreed to be sold at the suit of creditors of the association, and receivers were appointed to make the sale. They had an extensive plat prepared, upon which streets and avenues were drawn or projected and named, and this plat was filed in the equity case in Baltimore city, along with the report of sales. The land was suburban property lying in one body, beyond the limits of the city, without any streets, lanes, or avenues actually laid out through or upon it. Adjoining this tract on the east was other arable land owned by other persons. Chestnut avenue appears from the plat to be a short cul de sac, running at right angles from what is called "Tenth Street," eastwardly, until it reaches the boundary line between the building association property and the contiguous property owned by other parties, where it abruptly terminates. Even as projected on the plat, it had but one open terminus. Two of the lots into which the whole tract had been subdivided were sold by the receivers to James Broumel in 1878, and he subsequently leased them to one Lewis Robinson, who proceeded to construct a dwelling house thereon in 1884. There were no stakes, furrows, or marks of any description to indicate where this so-called "Chestnut Avenue" and this alleged "Tenth Street" were located; nor was there anything on the

ground to suggest that any streets were established or designated to be opened there at all. Mr. Robinson was entirely ignorant of the existence of these or any other contemplated streets in the vicinity of the lots leased by him. These lots, including what is now said to be the bed of Chestnut avenue, were surrounded by a fence. He selected within this inclosure a site for his house, partially built it, and then surrendered the lease to Broumel, who completed the buildings afterwards. Broumel then died, and this house and the other buildings were allotted to his widow, as her dower, and she has lived in and occupied them ever since. It now turns out, or at least it is now contended in behalf of the city, that this dwelling house and these other buildings are located in part upon the bed of this Chestnut avenue. The lots and the bed of the avenue continued to be inclosed during the whole period of time that the land formed part of Baltimore county, as well as after its annexation to the city. From 1884 down to 1896 the house has been occupied by the appellee without molestation, and it was not until August 17, 1896, that any claim was ever made that such an avenue existed, nor was it pretended till then that the appellee's house stood upon the bed of that avenue. On the day of the date just named, the city commissioner gave the appellee notice to remove her dwelling house and other buildings from the bed of Chestnut avenue "as promptly as possible, as the bed of Chestnut or Elgin avenue at this point is the property of the city." The notice informed the appellee further that, unless she promptly complied, her buildings would be taken down at her expense by the city commissioner.

There is no pretense that Baltimore county or the city of Baltimore ever acquired title to Chestnut avenue by condemnation proceedings or by purchase. If the city owns the bed of this avenue at all, it owns it by virtue of a dedication made in 1874 to Baltimore county by the receivers who sold the building association's property while that property was still within the limits of Baltimore county. If a dedication was really made in 1874, it was not a dedication to Baltimore city; and if there was no acceptance by the Baltimore county authorities, and if, before the annexation of the territory to Baltimore city, the dedication was revoked, or the dedicated street was actually abandoned, and adverse private rights intervened, then the subsequent extension of the city's limits beyond this particular locality gave to the city no right to assert an ownership by the antecedent dedication. It is not even suggested that the Baltimore county authorities ever accepted the alleged dedication so as to fix the right of the public in this avenue; and it is difficult to see why there should have been an acceptance of a dedication when the thing dedicated was a mere *cul de sac*. Assuming, though it is by no means conceded, that this plat filed in an equity case in Baltimore city worked, under

the circumstances stated, a dedication of public streets, which would have been situated in Baltimore county had they been opened prior to 1888 (*Lippincott v. Harvey*, 72 Md. 572, 19 Atl. 1041), still, so long as the jurisdiction of the county authorities extended over the property, there is not only not the slightest intimation that there was an acceptance of the dedication, but all the surroundings strongly indicate a refusal to accept. It is perfectly well settled in this state that a mere dedication is not of itself sufficient to establish a highway which the local authorities are bound to deal with as a thoroughfare. The owner of land cannot, by merely making a plat of it, and designating streets thereon, force the public authorities to assume control over it as a highway. If he could do so, he might subject the county or the city to intolerable burdens, and compel the construction and maintenance of expensive roads which the public convenience did not require. In addition to a dedication, there must be an acceptance by competent authority, and such an acceptance may ordinarily be evidenced in one of three ways, viz. by deed or other record, by acts in pais, such as opening, grading, or keeping the road in repair at the public expense, or by long-continued user on the part of the public. *State v. Kent Co. Com'rs*, 83 Md. 377, 35 Atl. 62. The local law of Baltimore county (Act 1882, c. 49, § 211; Code Pub. Loc. Laws, art. 3) restricts the county authorities to the first mode of acceptance, and this statute was in force for six years prior to the city's acquisition of jurisdiction over the territory which includes this Chestnut avenue. No deed to the county commissioners for this *cul de sac* has been exhibited, or is alleged to exist. Neither Chestnut avenue nor Tenth street was actually opened or even located or staked off on the ground, and the former has been continuously inclosed by a fence. There are no acts in pais shown to have been done by the county commissioners prior to the adoption of the act of 1882, from which an acceptance by them can be inferred; and not only has there not been a long and continuous user by the public, but in fact there has been no user by the public at all. There is consequently not a shred of evidence to show that, while the land formed part of Baltimore county, there ever was an acceptance of this Chestnut avenue as a highway. But more than that, during the whole of the 14 years which elapsed between the alleged dedication and the annexation in 1888, acts were done by the owners of these lots now owned by the appellee, and were suffered by the county authorities, which, if not wholly incompatible with the theory of acceptance, are at least strongly indicative of an unconditional abandonment of any claim by the public to this *cul de sac* as a highway.

There being, then, no acceptance by the Baltimore county authorities, did the city, by the annexation act of 1888 or the supplement of 1890 (chapter 628), acquire any right to the

avenue, or did the avenue become "the property of the city," as the city commissioner claims? If these acts of assembly do not amount to or constitute legislative acceptances on behalf of the city, then there has, confessedly, been no acceptance by the city of the alleged dedication, unless the city commissioner is clothed with power to accept for the city, and has validly exercised that power in this instance. The acts of 1888 and 1890 merely extended the jurisdiction of the city over such streets in the annexed territory as had been conveyed, condemned, or dedicated. Those acts did not convert, nor were they designed to convert, unaccepted dedications into accepted dedications; nor did they sweep away or abrogate private rights acquired by means of an abandonment of a mere street on paper, unopened, unlocated, and undesignated. The city took the annexed territory just as it found it. If there were dedicated streets unaccepted in any way, they did not become public thoroughfares merely by being brought within the city limits. No ordinance has been adopted by the city council accepting Chestnut avenue, nor has any other act been done by the municipality from which an acceptance can be implied. The city commissioner possessed no authority to bind the city by an acceptance, and, even if he undertook to formally accept, his act would be a mere usurpation of power, and would be utterly nugatory and ineffective.

It is perfectly true, as decided in *Frick's Case*, 82 Md. 83, 33 Atl. 435, that a dedication may be complete without acceptance, and that, in the absence of any condition, there need be no user within a particular period; but, however complete the dedication may be as against the party making it, the road or street so dedicated does not become a public thoroughfare, over which the public authorities may exert ownership or control, or which they can be compelled to keep in repair, until they have seen fit to accept it. Nor will mere lapse of time, without more, be sufficient evidence of abandonment. A street once dedicated may be abandoned, or it may never be accepted. If there ever was a dedication of this cul de sac, it most certainly never has been accepted. The city of Baltimore does not therefore own this alleged avenue, and the city commissioner was entirely without authority to interfere with the buildings of the appellee. His threat to remove those buildings was a threat to do, in the name and on behalf of the municipality, an unlawful and ultra vires act, which a court of equity had the undoubted right to prevent. If the public convenience requires that this Chestnut avenue should be opened, it must be opened pursuant to, and not in defiance of, law. Most assuredly, private property cannot be ruthlessly taken from its owner by the strong hand of force, under a pretext that the buildings are located on a dedicated highway, without an opportunity being given to the owner to be heard in some duly constituted legal tribunal. Satisfied as we are by

the record that the city commissioner's contemplated proceedings were utterly unlawful and without a shadow of justification, we shall affirm the decree appealed from. Decree affirmed with costs above and below.

LAKE ROLAND EL. RY. CO. v. FRICK et al.
(Court of Appeals of Maryland. June 23, 1897.)
ELEVATED RAILROAD ON STREET—DAMAGES—BENEFITS—EVIDENCE—RECITAL IN DEED—ACTION BY EXECUTORS.

1. Executors may sue for injuries done to real estate in the life of the testator.

2. As between persons not parties to a deed, it is not admissible to show for what the property was sold.

3. The effect on lots theretofore suitable for dwelling houses, of the construction in a street of an elevated railroad, cannot be shown by its effect on business property several blocks distant.

4. General benefits from construction of a railroad cannot be set off against damages to property from such construction, but only such benefits as are peculiar to the property.

Appeal from superior court of Baltimore city.

Action by William F. Frick and another, executors of Robert Garrett, against the Lake Roland Elevated Railway Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, PAGE, and BOYD, JJ.

I. N. Steele, J. E. Semmes, and Francis K. Carey, for appellant. Arthur G. Brown, Fred. W. Brune, and Arthur W. Machen, for appellees.

BRYAN, J. The present is one of the many actions which have been brought to recover damages caused by the construction of the elevated railway structure belonging to the appellant. Robert Garrett brought the action in his lifetime, and after his death his executors became parties plaintiff. The judgment having been rendered in favor of the plaintiffs, an appeal was taken by the defendant.

Garrett was the owner of a lot of ground fronting on the west side of North street. The elevated structure of the defendant was in front of a portion of this lot, and was alleged to injure the property, and diminish its value. A particular description of the lot and the structure is not considered necessary, as they are fully described in the opinions delivered in the equity suit brought by Garrett against the defendant, and reported in 79 Md. 277, 29 Atl. 830. At the trial a demurrer was filed to the declaration as it was amended after the executors were made parties. It was contended that the executors had no right of action for injuries done to the real estate in the lifetime of the testator. We think that, if this question were ever debatable, it must be considered as settled in this state. *Kennerly's Case*, 1 Md. 107, 2 Md. 245; *Barton Coal Co.'s Case*, 30 Md. 1. Testimony was

offered by the plaintiffs tending to show that the lot was damaged by the construction of the elevated crossing. Albert L. Gorter testified that he knew the market value of the lot before the railroad was built, and its market value after it was built; and that before the building of the road it was worth more than \$52,000, and that after it was built the value was \$15,000 less; that the lot was damaged to this extent by the railroad. He was then asked the following question: "Q. Assuming the value of the lot after the construction of the railway—the value of the property—to have been \$37,086.67, what, in your opinion, would have been its value in 1894, if there were no elevated structure in front of it? A. \$15,000 more." Defendant objected, and, its objection being overruled, took an exception. The evidence seems to be merely the statement in another form of the estimate which the witness had already made. The plaintiffs offered other evidence tending to show that the lot had been greatly injured by the construction of the elevated crossing in front of it, and that a general rise in the value of property in the neighborhood had taken place since the building of the road; that it was not owing to the existence of the road, but to other causes operating at the same time. The defendant produced certified copies of certain deeds, and tendered them in evidence for the purpose of showing for what price the property was sold which was therein described. On objection by the plaintiffs the court rejected the evidence, and the defendant excepted. These certified copies are evidence that the grantors validly conveyed to the grantees the property therein described. In other words, they are evidence of every circumstance necessary to make the deeds valid conveyances. As between the parties, the acknowledgments of the payment of the considerations are evidence that they were actually paid. And if the deeds should be attacked for fraud in a suit at law or in equity, we may concede, for the sake of the argument, that the party alleging that the considerations were not paid would be obliged to sustain the charge by proof, and that the presumption of innocence would apply in favor of the party charged with fraud, and that the onus of proof would rest upon his assailant. But as between parties in no way connected with the deed, the statement by the grantor that he had received so much money would be *res inter alios acta*; it would be hearsay pure and simple. A statement made by a stranger that he had concluded a transaction with another stranger can have no binding effect upon third persons. It is certainly not entitled to be received as evidence without the sanction of an oath made by some witness acquainted with the fact. In *Lloyd v. Lynch*, 28 Pa. St. 424, the court, speaking of an acknowledgment of the payment of the consideration contained in a deed, as it affected strangers to the instrument, said: "Against them it is nothing but hearsay. It is a mere *ex parte* declaration

not under oath, taken without any opportunity to cross-examine. It has long been settled that such declarations are not evidence against strangers."

Mr. A. R. White was called by defendant as a witness to prove the character and condition of the neighborhood and property on North street between Centre and Saratoga, now facing the main structure of the defendant, as they existed before the structure was built, and its present character and condition; and also to show the character and condition of the improvements between Saratoga and Lexington streets opposite the southern inclined approach to the elevated structure. The defendant offering to follow up this testimony by proof that the southern inclined approach is practically a counterpart of the northern approach. The testimony was rejected, and the defendant took an exception. We will consider these questions, although the exception is not taken in such manner as to present both of them. We presume that it was the intention of the defendant to follow the evidence by testimony showing the effect of the building of the elevated road. The distances are not shown in feet, but Saratoga street is distant four blocks from Centre; and Centre is distant four blocks from Eager. The witness testified that in the space between Saratoga and Eager there was but one lot which was not occupied by buildings, and that one was used as a marble yard; that there were only two houses used as dwellings, and their occupants kept barrooms; that most of the property was used for business purposes and large warehouses, and that the streets were "honeycombed" with the tracks of steam railroads; that there was no vacant land between Saratoga and Lexington, and that opposite the structure there is a church, and the Hibernian schoolhouse, and that there are stables, the express company, and a paint shop. Evidence had been given that the Garrett property was vacant land, and before the construction of the railroad was suitable for dwelling houses. As the property in regard to which the evidence was proposed was extremely different from the Garrett lot, we think that the effect upon its value caused by the construction of the railroad would furnish no aid in ascertaining the effect on the Garrett lot. The defendant offered evidence that the value of the Garrett property had not been diminished by the building of the road, and also evidence that it had been increased by it. Both parties offered prayers for the instruction of the jury. The question to be decided was whether the lot had been diminished in value by reason of the elevated structure in front of it, and, if so, what was the extent of the injury. Ordinarily, the questions would be settled by a comparison of values before and after the erection of the structure; but, in case there were a general advance in the value of property in the neighborhood from the growth and progress of the city or from any other cause, this test would

not be sufficient. To state a hypothetical case: Suppose that a lot is worth \$30,000, and that it is injured by the railroad to the extent of \$10,000, thus reducing its value to \$20,000; and that after the building of the railroad there is a general rise in the value of property in the neighborhood, and that, participating in this improvement, the value of the lot at the time of the trial reaches \$40,000, which is more than it was worth before the road was built. The railroad cannot be exempted from liability for the damage which it has done by the circumstance that the injured property has received the benefit of the general prosperity. The railroad has inflicted an injury, and the property still suffers from the effect of it. If the damage had not been done, the value of the lot would have been greater, and this increase in reasonable probability would be at least equal to the extent of the injury.

It has been argued for the appellant that "the building and use of the structure" has increased the value of the lot. We do not suppose that he means obstructing access to the lot, and reducing the width of the open street in front of it, has increased its value, but that the existence of the railroad by increasing and improving the facilities of travel, and in other ways, has conferred benefits upon the property. It is insisted that these should be taken into consideration by the jury, and, if they are found to equal the injury, that the verdict ought to be for the defendant. There has been some conflict of opinion in the courts on this question. We cannot do better than to quote a passage from a recent work of great value, where the result of the weight of authority is stated. We refer to Elliott on Railroads, and we make an extract from volume 3, § 989: "Where the construction of a railroad adds increased value to the land of an individual different in its nature from the benefit to the general community, he receives a special benefit which lessens his injury or loss, so that he really sustains no injury or loss except that which is above and beyond the amount of the peculiar benefit which the construction of the railroad confers upon him by enhancing the value of that part of his land which is not appropriated. But where the landowner reaps no advantage peculiar to himself, but only such as is shared by the community at large, there is reason for excluding the benefits from consideration. Special benefits may be said to be such as are direct, and peculiar to the land; general benefits, such as are bestowed upon other lands of similar character and situation in the same vicinity." This is the doctrine in this state. *Shipley v. Railroad Co.*, 34 Md. 343; *Friedenwald v. City of Baltimore*, 74 Md. 126, 21 Atl. 555. We suppose that we have shown our approval of the ruling of the trial court on the prayers. We think, however, the court might properly have rejected the defendant's third prayer. It seems to have been drawn on the theory that

the running of the passenger cars conferred benefits on the lot. There was no evidence of any special benefits, and we have already given our opinion in reference to general benefits. Judgment affirmed.

FARRINGTON et al. v. PUTNAM et al.
(Supreme Judicial Court of Maine. June 4, 1897.)

CHARITIES—RESTRICTIONS—WILLS—RIGHTS OF HEIRS.

The Maine Eye and Ear Infirmary is a charitable association, organized under a general statute which allows it to take and hold, by purchase, gift, devise, or bequest, personal or real estate, in all not exceeding \$100,000 in value owned at any one time. The institution already has that full amount of property as capital, and, if it receives the personal and real estate bequeathed and devised to it in trust for charitable purposes by the late Ira P. Farrington, it will then possess the property so bequeathed and devised in excess of the amount authorized by its act of organization. The next of kin of the testator, by a bill in equity instituted after the probate of the will, against the corporation and the executors, seek, for this cause, to have such provisions of the will declared to be inoperative and void.

Held, that the will is valid on its face, there being no statute in this state limiting the testamentary capacity of the testator; that the limitation, in the charter of the corporation, of the amount of property it may hold, was mainly intended as a regulative and directory provision, and is only impliedly, and not expressly, prohibitory, no penalties being attached thereto; that the charter is a contract or compact between the corporation and the state, the limitation being for the benefit of the general public represented by the state, and not for the heirs of the testator or any particular persons; that any transgression of the compact by the corporation in accepting excessive devises or bequests is an offense only against the state, and in no sense an offense against the heirs of the testator or his next of kin; that the contested devises and bequests are voidable only, and not void, and must be treated as valid until declared void; that whether they shall be declared void or be permitted to remain as valid is a question of policy or expediency, which the state must determine for itself,—a governmental, and not a judicial, question; that such question can only be determined in a direct proceeding originated by the state through its representative officers, and not by any collateral proceeding brought by or for the benefit of any individuals to set such provisions aside; and, finally, that the state has not hitherto, in the present condition of its charitable institutions, felt any motive to enforce strict exactions upon them, nor has the legislature yet seen cause for placing restraint upon the power of testators to bequeath property to such institutions, a step easily taken when deemed necessary or wise to do so.

(Official.)

Bill by Ira K. Farrington and others against William L. Putnam and Thomas H. Haskell, executors of the last will of Ira P. Farrington, deceased, and others. On exceptions and final decree in favor of respondents. Exceptions overruled, and decree affirmed.

Orville D. Baker and Clarence Hale, for plaintiffs. Symonds, Snow & Cook, C. L. Hutchinson, Libby, Robinson & Turner, and Edward Woodman, for defendants.

PETERS, C. J. Ira P. Farrington, the testator, whose will is called in question by this bill in equity, died at his home in Portland, December 17, 1894, leaving a will dated July 9, 1891, and a codicil dated January 4, 1893. The will was probated in January, 1895, in the probate court below, and approved by this court in the next April afterwards. The will, after a most generous provision for his widow, and numerous bequests to his relatives, besides several large bequests to certain local charities other than those to be herein named, contains the following residuary clause:

"Fifth. All the rest and residue of estate, real and personal or mixed, wherever situate, which I may own at my decease, or which I may then have the right to dispose by will, including all and any of the foregoing legacies, devises, and other provisions which may in whole or in part lapse or for any reason fail, I give the Maine Eye and Ear Infirmary in the city of Portland, incorporated according to the statutes of Maine, the Maine General Hospital, and the Portland Public Library, share and share alike, upon trusts nevertheless, as follows:

"The one-third given said Eye and Ear Infirmary shall be maintained as a separate fund, designated as the 'Farrington Fund,' held, invested, and reinvested, and the net income thereof applied forever, annually or oftener, to the charitable purposes of the corporation.

"Likewise, the one-third given the Maine General Hospital shall be in the same manner maintained as a separate fund, designated as the 'Farrington Fund,' held, invested, and reinvested, and the net income thereof applied forever, annually or oftener, one half for the support of free beds in its hospital, to be known as the 'Farrington Free Beds,' and the other half to the general charitable purposes and the maintenance of the corporation.

"And, likewise, the one-third given the Portland Public Library shall be in the same manner maintained forever as a separate fund, designated as the 'Farrington Fund,' held, invested, and reinvested, and the net income thereof applied forever, annually or oftener, to the support of the library of said corporation.

"Provided, nevertheless, that whatever principal sum or sums may come hereunder to the Portland Public Library shall be paid to the city of Portland on the following trusts, namely:

"To pay thereon perpetually interest semi-annually, at the rate of four (4) per cent. per annum, to the Portland Public Library, said interest to be applied as aforesaid by said Portland Public Library to the support of its library.

"Said fund shall be entered on the books of the city as the 'Farrington Fund for the Benefit of the Portland Public Library,' and

the interest so paid by the city shall be entered on the books of the Portland Public Library as interest from such 'Farrington Fund.'

"If the city shall decline to accept the same on the trust aforesaid, or if, for two years after request in writing by my executors to accept the same as aforesaid, the city shall neglect so to accept, I direct that said principal sum or sums be paid to said Portland Public Library, to be held, invested, and reinvested, and the net income thereof applied as hereinbefore set out."

The testator names Hon. William L. Putnam and Hon. Thomas H. Haskell as executors, and confers certain authority over his estate on them as such executors, as follows: "I give the executors full possession, management, and control of all my real estate, wherever situate, subject to the devise of my beloved wife; and I authorize them from time to time to lease, sell, or exchange the same, or any part thereof, and to receive the proceeds of such leases and sales, and all other incomes or other proceeds thereof, for the purpose of fully executing this will, reminding them, however, that their authority over my estate, whether real or personal, is given solely for the purpose of closing and distributing the same as heretofore mentioned directed, with a prudent regard for obtaining fair prices within a reasonable time to be taken therefor."

The codicil is as follows:

"I hereby republish and reaffirm said will, except as herein modified.

"The gift of the one-third part of the rest and residue of my estate to the Maine General Hospital, by the fifth clause of said will, and all gifts and devises in any part of said will to said Maine General Hospital, I hereby revoke; and I hereby give, devise, and bequeath all the same one-third and all other said gifts and devises to the Maine Eye and Ear Infirmary, to hold to the use of it and its successors and assigns forever; the same to be in addition to, and not to affect or change, the gifts and devises to said Maine Eye and Ear Infirmary in said will contained. I double the gift of \$20,000 to the Home for Aged Men of Portland."

The Eye and Ear Infirmary is a charitable association, organized under the general statute which authorizes the formation of such corporations (Rev. St. c. 55, § 1). Numerous kinds and classes of persons and associations are permitted by this section to be organized into corporations, including all social, military, literary, scientific, temperance, moral, musical, agricultural, and many other societies and organizations. Section 4 of the chapter prescribes as follows: "Such corporations may take and hold by purchase, gift, devise or bequest, personal or real estate, in all not exceeding one hundred thousand dollars in value, owned at any one time, and may use and dispose thereof only for the

purposes for which the corporation was organized." The constitution of the infirmity, a public record, declares the purpose of the institution as follows: "The object of the corporation shall be the establishment and maintenance of an infirmity in Portland, Maine, where a daily clinic may be held for the treatment, free of charge, of poor persons throughout the state, suffering from diseases of the eye and ear."

The bill alleges that the infirmity had, at the death of the testator, property to the full amount of \$100,000 in value, and that any additional amounts to be received through this will would be in excess of the limit allowed by its charter, and in disregard of the statutes of the state; and so it further alleges "that the said Maine Eye and Ear Infirmity is incompetent to receive and incapable of holding any property beyond the amount which it now possesses, and that the bequests and devises made to it under item 5th of the said will, and under the codicil to said will of said Ira P. Farrington, are invalid and void, and revert to the heirs of Ira P. Farrington." The bill includes the infirmity and the executors as respondents, the prayer of the same being that the parties be enjoined, the one against paying over, and the other against receiving, the devises and bequests in execution of the intention of the testator.

Both of these respondents, the executors and the corporation, filed general demurrers to the bill, which were sustained by the justice before whom the case was heard below, and the case comes to us on exceptions and a final decree in favor of the respondents. Mr. Justice Strout, of this court, by whom the issues were decided, filed a written judgment in the case, from which we reproduce that portion of the same which bears upon the questions we propose now to discuss, reading as follows:

"This is a bill in equity, and comes before the court on demurrers. The will of Ira P. Farrington contains a bequest to the Maine Eye and Ear Infirmity. The complainants allege that that corporation is authorized to hold property to the amount of \$100,000, and no more; and that it now holds property to that amount, and therefore cannot take the legacy given to it by the will. As the demurrer admits the facts, it must be assumed that the legatee now holds the full amount of property which it is entitled to hold. It is admitted to be a public charitable institution. Can it take the legacy or devise? The gift is from the residue of the estate, after payment of legacies, and may include both real and personal property.

"At common law, corporations were entitled to take and hold real or personal property to any amount, if it was reasonably useful and convenient in attaining its legitimate ends. In England, so large an amount had been acquired and held by its corporations,

particularly the ecclesiastical, that, as a measure of purely public policy, the statute of mortmain was enacted to prevent the accumulation of real estate in ecclesiastical corporations. That statute has not been generally adopted in this country; but it has been deemed wise in many instances to limit in the charter, or by general law, the amount of property to be held by corporations. In this state, by statute, corporations are entitled to hold and convey lands and other property. Rev. St. c. 68, § 2. This authority is unlimited, unless the charter or general law under which the corporation is created, or some statute, imposes a limit. A limit of \$100,000 is imposed by the statute under which this corporation was created. Taken in connection with the common law and the general statute upon the subject, it is apparent that the limitation upon this class of corporations, not applicable to many others, was a matter of public policy. As such, it is for the state alone to take advantage of its breach, if it chooses, or it may waive it; and, consequently, private parties cannot be permitted to assert against the corporation a violation of the limitation. The decided weight of authority is to this effect, and the principle is deemed sound.

"A devise of lands operates a conveyance upon probate of the will. The devisee takes by purchase. The title may be defeated if the subject of the devise is required for the payment of debts. A bequest of personalty also is perfected in the legatee, at the date of the probate of the will, subject to the same contingency, although the time of payment may be deferred by the provisions of the will or the contingencies of administration.

"The will in this case gave to the infirmity one third of the residue of the estate, after payment of legacies, in trust, to be invested and kept invested, the income only to be applied to the charitable purposes for which the institution was organized. The codicil added another third of the residue to the gift, but said nothing about trust; but the fair construction of the codicil, taken in connection with the trust created by the will, is that the trust attaches to the entire two thirds. The effect of the codicil was to increase the one third in the original will to two thirds. No other change was intended by the testator. The whole scheme in his mind was charity. The gift was to a public charity, administered by the corporation created for that purpose.

"The infirmity can take the gift upon the trusts specified, and hold it against all, except the state, although the amount is in excess of the limitation in the statute.

"If, however, the infirmity should be regarded as incompetent to take the property in trust, it being devoted by the testator to a public charitable use, the court would appoint a trustee to carry into effect the testator's bounty. A public charity, definite in its

objects as this is, is never allowed to fail for want of a trustee; and if the trustee originally appointed is incapable, from any cause, to take the property and execute the trust, a competent trustee will be appointed."

The question on the first branch of the case, therefore, is whether these devises and bequests are absolutely void, as the complainants contend, or whether they are merely voidable, according to the view of the question taken by the respondents. After very much examination of the authorities pro and con, and careful consideration of the principles which affect the respective positions of the parties, we feel forced to the conclusion that the position advocated by the complainants ought not to be sustained. We feel very much impressed with the theory, stated in many of the cases, that a charter is a contract between the state and the corporation; and that, for any misuse or abuse of its privileges or powers, the corporation is amenable to the state only, no individual having anything to do with the question. As applicable to the present case, the principle is that if the infirmity, by accepting these bequests and devises, increases its property ever so much in excess of the amount in value which the statute allows it to possess, it would be a transgression of the law, which the state can prosecute or not as it pleases, and the heirs of the testator have no interest therein. As long as the state does not interfere for the violation, it waives it, and permits the infirmity to retain the property.

The general statute under which this infirmity was organized is not expressly prohibitory, but rather regulative and directory. No penalties are attached, and none intended, more than a possible forfeiture of the excessive property received, or of the charter, or of one or both. This interpretation of the statute cannot by any possibility be harmful to the community, as the state can make it as stringent as it pleases at any time. But thus far the state has had no motive either to amend the statute, or to enforce forfeitures for violation of its provisions. And in one section of the chapter, relating to general organizations, the legislature allows devises, bequests, and gifts to towns for the establishment or increase of public libraries, without imposing any limitation whatever. Rev. St. c. 55, § 10. There cannot be an objection that such absorption of property excludes capital from taxation, because that is a matter wholly within the control of the legislature.

An overstrict construction of the law, and of the rights of parties under the law in the case before us, is neither expedient nor reasonable. Here is an institution, and the only one of the kind in the state, and virtually a state charitable institution of the most beneficent and humane kind, seeking money for supporting its very life and existence, and to enable it to render assistance free of charge to the poor of the state suffering from diseases of the eye and ear. This testator, who

had been always a director in the institution, and finally its president, knowing and fully appreciating its condition and necessities, after making provisions for other local charities, and giving to his next of kin preferred bequests according to his own judgment as to what they should have out of his estate, made, not while in the extremities of sickness, but nearly five years before his death, these legacies and devises for the use of the infirmity. Presumably, he and those whose assistance he obtained to aid him in executing his purposes never dreamed that there was any obstacle in the way of his giving, or the infirmity receiving, the bounties which he so strongly desired to be charitably expended. And now what a spectacle is presented if equity be successfully invoked to take advantage of this accident or mistake,—equity, whose boasted vocation is to relieve against accident and mistake,—in order to wrest from this institution these donations for the benefit of distant relatives and heirs! What a public misfortune it would have been if, on account of the limited amount of capital it is by its charter privileged to hold, it had turned out that our oldest college in this state was prevented from receiving the munificent bequests lately tendered to it by deceased citizens of the states of California and New York, such donations not having as yet been actually received, and the state itself powerless to allow the college to take the gifts merely on account of such limitation!

It will be noticed that most of the authorities on which the complainants rely concede that the rule which we would apply to devises is, at all events, applicable to gifts by deed, the argument being that in such a case as this a deed would be valid, and a devise void. It seems inconsistent that such potential consequences should attach to the mere form of transmitting the property. We do not appreciate the justice of saying that a deed of property delivered by a donor on the day of his death to a corporation would be good, and a devise of the same property made on the same day would be bad. But the argument by the complainants is that in the one case the transaction is executed, and in the other case that it cannot be considered as executed without a resort to the forms and assistance of the courts. We think the whole thing involves a distinction without a difference,—a formal, but not substantial, distinction. Each mode of transfer needs the protection and aid of the law to render it operative. In the first place, the will must be probated, it is said. But on that question no inquiry can be instituted to see if there be any impropriety in any particular devise or bequest. The residuary bequest in this will is fair and proper on its face, and that is all that is required. The act of probating the will is the probating of all its parts. A devise of real estate vests such estate at once in the devisee, the title of such devisee being liable to be defeated if the estate be necessary for

the payment of debts, or the expenses of administration. Section 15, c. 74, Rev. St., reads as follows: "No will is effectual to pass real or personal estate unless proved and allowed in the probate court." This will has been approved by the probate courts below and above, with no questions or exceptions thereto pending. But it is said the bequest of the personal estate cannot be carried into effect until a distribution has been ordered, and the executors' accounts have been approved. We think that even this fine technicality may be avoided by the executors, if need be. They would be justified in paying all the property left in their hands as residuary estate without any order therefor, should the devisees be willing to accept it, and discharge the executors from their responsibilities. A good many estates are settled by the parties interested, without any aid or order from the probate court.

The foregoing reasoning only serves to illustrate the unsubstantial foundation upon which it is endeavored to raise a technical excuse for pronouncing a deed voidable, and a devise absolutely void. The true and conclusive answer, however, to this indefensible position of the complainants, is that it is utter assumption on their part in declaring a devise like this to be void, when it is voidable merely, and can be rendered void in no way other than by the act of the government itself. No wrongful act by a corporation renders its charter void, or creates any forfeiture, without proceeding by which such forfeiture shall be established. A cause for forfeiture is not itself forfeiture. The same section which prescribes the amount of property which this corporation may hold, also declares that it may use and dispose of the same for the purposes for which it was organized. Suppose the corporation wrongfully uses or disposes of its property; could any party but the state intervene to punish the corporation for such transgression?

Now, what is there illegal, let us ask, in this court, or in the probate court below, acting in the furtherance of bequests that are simply voidable, and consequently valid until they have been declared to be otherwise upon the intervention of the state? If the state has the exclusive privilege, as it has, of rendering the voidable bequest void, what is there wrongful in our regarding it as sound and sufficient while the question of its validity is not acted upon by the state, or the error is waived or permitted by the state? What right has the judicial branch of the government to dictate what the state should do against its will or its policy, and decide a question for the state which the state can better decide for itself? What right has the court to deprive the state of all opportunity to determine whether it will thus severely punish this corporation for the mistake of the testator, or will waive or overlook it? Certainly, the state should not be prevented from making such election. If courts, at the instigation of heirs, can refuse to act upon void-

able bequests as valid until avoided by the state, then, as a matter of course, the state can practically never have any opportunity to exercise its discretion in such a case, any more than as if such right never existed, and the court would be assuming the prerogative of really acting in opposition to the state. The court could not exercise any broad discretion in the solution of the question, while the state could. It certainly is an excellent policy to refer such questions to the discretionary power of the state, which can determine them, according to the circumstances, upon the great principles of justice and generosity, and in conformity with the wishes and welfare of the whole community. Among so many societies and associations as are organized under the general statute, there will always be exceptional cases where, from their amount of business or other causes, they have come to exceed the limitation of capital allowed them; and it is reasonable that the state should have the privilege, if it pleases, of relaxing the statutory restraints in such exceptional cases. And the circumstances of the present case make the strongest appeal for the protection of this devise against the loss of the generous gifts to it from one who loved the institution as he would have loved his child, and who devoted to its interests his time and services, and, as he supposed, a goodly share of his estate which had been earned by his industry and economy for a long lifetime. And it may not be amiss to state the fact that the legislature has lately increased the limitation of capital which the infirmary may hold from \$100,000 to \$1,000,000.

There is but little authority, either English or American, favoring the conclusion that bequests or devises not strictly authorized by law are to be considered void, instead of voidable. This will be seen in the examination of cases in this country to be made in the progress of this discussion. But it may also be worth the while to notice what application has been made of the principle by the English courts in view of the statutes of mortmain, as existing in that country. In *Grant on Corporations* (a reputable English work on the subject), at star page. 101, the author states the doctrine as follows: "The meaning of the term 'unlicensed corporation' is this: As was observed above, the conveyance of lands to a corporation was not made void to all intents and purposes by the statutes of mortmain, but only voidable at the option of the lords and the crown. Consequently, if the mesne lords and the crown all consented to waive the escheat, each in their respective rights, the corporation to whom the land was granted enjoyed the property unmolested. In process of time, the rights of the lords becoming difficult to trace, a license from the crown was generally considered sufficient to ascertain the right of property to the corporation; and this license it became usual for corporations to obtain from the crown, enabling them

to take lands to such a value, notwithstanding the statutes of mortmain. In strictness, however, the license to hold in mortmain was only a waiver of the right of the crown to enter on the lands alienated; for as no royal charter can per se take away the property, or prejudice the interest of the subject, such license did not abrogate the right of the meane lords to enter, and therefore with respect to them, the corporation was not secure until the lapse of the periods respectively limited for the assertion of their rights. In fact, the king's license had only the effect of waiving the crown's right to the escheat," etc. The author further says: "The question is of the more importance, as there is no doubt that many corporations have greatly exceeded the limits of their license, and hold such surplus lands without any right derived from it for their doing so. It is clear, however, that, if a corporation have exhausted their license to hold in mortmain, the fact does not make a devise or conveyance to them void. The only result is that they may take, though, unless they can obtain an extension by the crown of their license, they cannot hold, the lands, unless the meane lords and the crown choose to sleep upon their respective titles."

The cases in this country, most of them which favor the principle that an estate in the condition this is goes to the heirs of a testator rather than to the devisee, seem to inculcate the idea that the heirs may waive their right so as to allow the estate to pass to the devisee. And we have not the slightest doubt that, but for the interference of the heirs in the present case by this bill in equity, no obstacle would have stood in the way of a complete administration of the testator's estate, according to his clearly-expressed intention. No court would have had the least hesitation in following the ordinary course of procedure, or would have entertained the thought, *suo moto*, of instituting inquiry to see whether the bequests in question were valid or not. But why should a bequest, invalid when not consented to by the heirs, become unobjectionable when such consent is obtained? If illegal as coming from the testator, why not just as illegal when coming from the testator and his heirs? Such considerations as these go to show how illogical and untenable a position it is to denominate the devises and bequests in the present will absolutely void.

Each side relies on certain authorities in defense of its position, and between the two sides many have been referred to. The first one relied on by the complainants, and probably one of the earliest decisions on the question in this country, is *Trustees v. Chambers' Ex'rs* (reported in 1857) 3 Jones, Eq. 251. The same question arose there that exists here, and the case was decided according to the contention of the complainants in this case. It went on the theory that, as the college was seeking to obtain an illegal bequest, the law could not assist it to do so, and that the be-

quest was absolutely void. It was a severe and technical decision, reasoned out without the aid of authorities, as few in this country existed to throw light on the subject at that time. But the opinion admits that its severe doctrine did not apply to real estate, and only to personal property. Should that be the law in this state,—and we do not see why not if the law of that case is to prevail here,—it may turn out that the residuary clause here is valid as operative only on real estate. But, in our judgment, the dissenting opinion in that case by Nash, C. J., is more satisfactory than the prevailing opinions delivered by the two associate justices. The argument of the chief justice is more in consonance with the doctrine which has grown up since that day. The chief justice, after declaring that the restriction as to amount of corporate property is merely directory, and that the bequest was not void, but at the most voidable, goes on to say: "If the restriction is a condition, it is a condition subsequent, for a breach of which no action can be taken against a corporation but by the sovereign, and with the latter and its officials it is a matter of discretion whether a forfeiture will be enforced or not. To work a forfeiture of chartered privileges, there must be something more than accidental negligence, excess of power, or mistake; there must be something wrong arising from willful abuse or neglect. There is here no judicial forfeiture, for none has been judicially pronounced. Granting that, by taking the whole of the property devised, the total amount would exceed in value what the corporation was entitled to possess, and thereby its charter might be forfeited, can the defendants (executors) or next of kin take advantage of the condition in these proceedings? A charter is a contract between the corporation and the sovereign. It is well settled that none but the parties and their privies can take advantage of a breach of a condition. Now, neither Mr. Chambers (donor) nor his executors, nor his next of kin, are any parties or privies to this contract. Upon what principle, then, is it that the executor can refuse his assent to this legacy to the college, or upon what principle can the next of kin claim it or any portion of it?" And the chief justice considers many English cases in support of his plain propositions, and we are only prevented from quoting more at length from his opinion by the want of space.

The next case cited by the complainants is that of *Cromie's Heirs v. Society* (decided in 1867) 3 Bush, 365. And this case we consider more favorable to the party against whom it is cited than to the party citing it. It appears that a citizen of Kentucky made different bequests in his will, and among them one to an incorporated society in the state or New York, which already possessed all the property that the laws of New York allowed it to have for its capital. The testator's heirs contested the validity of the bequest on that account. The opinion of the court is peculiar,

and savors a little of judicial sectionalism. While it was admitted that the remedy for taking an excess of capital would be in a forfeiture of some kind, and that the forfeiture would belong to the state of New York, still it was thought inexpedient to send it there, because that state might apply the proceeds of any forfeiture for purposes different from the objects to which the same would be applied in Kentucky; and so it was held that as Kentucky could not avail itself of any forfeiture for the fault of a foreign corporation, and as New York should not have it under the circumstances, the heirs of the testator living in Kentucky better have the benefit of the same. But the court speaks significantly on the legal question as follows: "The question of title is between the corporation and the owner of the forfeited right. * * * The limitation in this case is a mere matter of state policy, and the state of New York can alone take advantage of its violation." And then the court goes on to justify its withholding from New York what it admits belongs to that state, and its giving the same to the heirs, in the manner following: "But, notwithstanding this legal conclusion, should a court of equity enforce the devise against the heirs when, if the limitation has been transcended, the state of New York may take from the devisee the excess over the maximum of the prescribed value, and their court might thus give it, whatever it may be, to an object never contemplated by the testator, and to which he never would have devised it? The answer is, clearly not." The opinion concedes the point precisely as the defense in the present case claims it to be, but avoids its enforcement on account of the peculiar situation of the parties to be affected by the result.

The case of *Chamberlain v. Chamberlain*, 43 N. Y. 424, is cited by the complainants as an authority favoring the position espoused by them. The opinion on this point is not fortified by any authorities, is quite brief as far as relates to the present question, and gives as a reason for its conclusion that "unlimited trusts of this character might become an unmitigated evil." But, let us ask, is that a question for the courts to determine, or is it for the state,—a judicial, or is it a governmental, power or policy? Cannot the state, by its representative officers, regulate the tendency of the so-called evil, with their power of instituting proceedings for forfeitures and escheats, or cannot the state, by its legislative power, entirely prevent it by penalties or provisions to that end whenever it sees fit to do so?

But the opinion in the case cited admits as much when it goes on to say: "Doubtless the restriction on corporations is a governmental regulation, and one of policy, to be enforced by the government." That is precisely what the respondents are contending for. Then the opinion adds: "But an individual whose interests are affected may also insist on the legislation as a restriction." There is precisely the difference between that case and this.

The effect of the reasoning in that case is that such an excessive bequest is voidable only, and not void, but that it may be avoided by the government or by the heirs of the testator. On the other hand, the present respondents admit that such a bequest is voidable, and contend that it can be avoided only by the state; that the bequest is not of itself a forfeiture, but, at most, a cause for forfeiture. It seems to us inconsistent to declare that the heir has the same right as the state, for in such case, as we have said before, the heir would practically have the exclusive right of repudiation, and the state have none. Should not the state control its own policy and action on the question? Nor do we see how the apprehended evil of trusts is going to be prevented by regarding deeds of trust voidable, and devises void.

The complainants also rely very much on the *Cornell University Case*, reported, in 1888, under the title of *In re McGraw's Estate*, 111 N. Y. 66, 19 N. E. 233, a strongly stated case, and in point here, excepting as the New York policy differs from the policy maintained elsewhere, and as the municipal law there differs from the statutes of other states, and especially from the statutory system of our own state. It is there held that such devises and bequests as these are absolutely and irrevocably void, and in this respect the case is not wholly consistent with the views expressed by the same court in the *Chamberlain Case*, already commented on, and is in great advance of any doctrine expressed in any previous case in that state. The result is reached by an interpretation "of the general statutes of the state relating to the organization and holding of property by corporations of the class of Cornell University, as the same have been affected by the terms of the special charter granted to it." While in our own state we have no statute affecting the question outside of the terms of the corporate charter itself, or of the general law authorizing the charter, the New York Code contains clauses touching the ability of corporations to acquire property which her court construes to be expressly and utterly prohibitory. The provisions are of themselves severe, and they are also strictly and severely construed by the New York court. This same case came before the supreme court of the United States afterwards, and that court declined to review the decision of the New York court of appeals, upon the ground that no federal question was presented, inasmuch as the decision sought to be reviewed was based upon the charter of the university and the municipal law of the state of New York. *Cornell University v. Fiske*, 136 U. S. 152, 10 Sup. Ct. 775. The statute of wills in New York is disabling and restraining in its character, and prohibits a devise to a corporation unless specially permitted by its charter or by some statute to take property by devise. Her statutes on analogous subjects have been restrictive, and her decisions have been accordingly. Its Code forbade a charitable trust

to be created upon real estate. Its decisions decline to uphold a trust when a trust exists without a trustee, differing therein from the decisions of other states. Mr. Schouler (Schouler, Wills, § 28, note) says: "Under the policy of the New York Code, an unincorporated association appears to be treated with little favor as the beneficiary of a devise." The same restrictive policy led its highest court to hold that a mortgage to a national bank to secure future advances, as well as past indebtedness, was void (*Crocker v. Whitney*, 71 N. Y. 161); and this doctrine was overruled by the more liberal policy of the United States supreme court in *Bank v. Whitney*, 103 U. S. 99. In *Rainey v. Laing*, 58 Barb. 453, the supreme court of New York, in a carefully argued and considered case, precisely like the present, decided that the devise was valid as against all parties but the state; and the difference between that opinion and the one rendered by the court of appeals is that the one proceeds upon the liberal policy more generally entertained by courts, and the other was governed by the more restricted and peculiar policy of the Code and courts of New York. The case of *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, and 18 Atl. 198, is also relied on by the complainants as an authority of importance in their favor,—a case which follows the opinion of the New York court in the *McGraw Case*, and in point corroborates that opinion. See, also, *Coggeshall v. Home for Friendless Children*, 18 R. I. 696, 31 Atl. 694. The only other case cited on this branch of the case in behalf of the complainants is *De Camp v. Dobbins*, 31 N. J. Eq. 671, and, as the defense also relies on the same case reported in an earlier volume, we will defer commenting on that authority until we make a cursory review of some of the adjudged cases cited on the other side of the question.

In opposition to the doctrine attempted to be maintained by the complainants, the respondents have cited quite an array of cases, both of a direct and indirect bearing on the question, some of which will receive our examination.

The first on the list is *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, a case of devise precisely in point, where Gray, J., delivering the opinion of the court, said: "But there are two conclusive answers to this argument: First, restrictions imposed by the charter of the corporation upon the amount of property it may hold cannot be taken advantage of collaterally by private persons, but only by the state which created it." This case is assailed in the argument of counsel in several ways, and, we think, without actual effect. It is said that it is brief, but its brevity indicates the assurance which the learned justice felt that his proposition was correct. It is also objected to the force of the opinion that two grounds are given for the result to stand upon. But the ground invoked by the respondents is first given as of first importance,

and this as well as the other ground is declared to be conclusive. It is further objected that the cases cited in support of the proposition of the opinion are not pertinent to the issue. The opinion does not discuss the very fine distinction, which the complainants contend for, between a gift by devise and a gift by deed, for the reason, undoubtedly, that the court entertained the belief that there is no real difference between the two, and that either is voidable only, and not void. And so the cases in support of the opinion are cited from both classes of the authorities. One voidable mode of gift cannot differ from any other voidable mode in its consequences and effect. And, if it be admitted that a devise of the kind in question is only voidable, all that the complainants are contending for falls to the ground. The learned counsel for the complainants does not notice the fact that the same case came to the supreme court by appeal from the circuit court below, where it was elaborately discussed by counsel and court, on this and other points; Mr. Justice Bradley, of the supreme court, sitting in the capacity of a circuit judge, and delivering the opinion of that court, reported in 3 Woods, 443, Fed. Cas. No. 7,465, in which opinion the learned justice, among other things, remarks as follows: "It seems to us that the gift to the Georgia Historical Society is not void. This, if the society accepted the trust, may have been cause of forfeiting its charter, but the gift would be none the less vested in it. To hold otherwise would be to render the society exempt from any inquiry on the subject at the suit of the state. * * * Certain things there are ultra vires of a corporation but when it has the power to hold property, and is forbidden to hold beyond a certain amount, the matter being one of degree merely, or of more and less, this is not a question of ultra vires, but of a violation of its charter. A contrary rule would involve many absurdities [the court here stating some of them]. The corporation may be amenable to the penalty of violating its charter, but individuals cannot call it in question. Its tenants must continue to pay its rents, and its debtors their debts. The state alone has the right to proceed against it. The state may see fit, or may not see fit, to do so. It would depend on the circumstances of the case, the greatness of the excess, the causes which led to it, etc. The state may condone the offense, and the legislature may relieve by enlarging its powers." The late Justice Bradley was far famed as an original thinker, and his idea that, if the contrary rule prevailed, a corporation could never be punished for accepting a bequest which gave it property of value above the limit allowable, because it could defend upon the ground that the bequest was completely void, is certainly original and forcible.

A similar, if not the same, question arose in *Bank v. Whitney*, 103 U. S. 99, affecting the present case in several respects. The case

was first decided by the New York court of appeals, and its decision reversed by the supreme court of the United States. The national banking act allowed banks instituted by its authority to take mortgages on real estate for certain specified purposes, "and no other." This bank took a mortgage on real estate to secure past indebtedness, and also for such future advances as the bank might furnish the mortgagor. The latter branch of the transaction was directly forbidden by the banking act, the security not being for one of the purposes permitting it to be taken, and was declared by the New York court to be utterly void, but by the supreme court to be voidable only until rendered void by some action on the part of the federal government. In the appellate court, Field, J., in the opinion, says: "Disregard for the prohibition only laid the association open to punishment by the government. The impending danger of a judgment for ouster and dissolution was, we think, the check, and no other, contemplated by congress. The consequence insisted upon did not follow. The statute did not declare such security void, but was silent on the subject. And, had congress so intended, it could easily have said so." All of this reasoning is as fitting in the present case as in that. There is nothing in the statute or charter of the infirmity stating that either deed or devise to it bestowing more property upon it than \$100,000 shall be void. We have already sufficiently discussed the position that the law commits no wrong by actively participating in the execution of merely voidable bequests, for the reason that such bequests are to be considered valid by the courts until vacated or avoided by the state through its representative officers. But that fallacious position of the complainants, as we think it is, was involved in the case cited. The bank was the plaintiff, asking for the aid of the law, not for defending a possession, but for obtaining possession. It never had any actual possession of the land or its proceeds. Subsequent mortgagees of the same property had the possession first of the land, and then of its proceeds. The bank was not sent out of court as a party unworthy on that account the protection of the court. Feeling the force with which this case presses against their position, the complainants contend that there is a substantial difference between that case and this. We think, however, that the principle supporting both cases is essentially the same, and must seem to be so to the mind of an impartial investigator. The legal authors so estimate it, as will be seen hereafter.

Vidal v. Girard's Ex'rs, 2 How. 127, may also well be regarded as a significant authority on the question, where Story, J., says: "If the trusts were in themselves valid in point of law, it is plain that neither the heirs of the testator, nor any other private persons, could have any right to inquire into or contest the right of the corporation to take the property, or to execute the trusts; but this right would exclusively be-

long to the state in its sovereign capacity, and in its sole discretion, to inquire into and contest the same by a quo warranto or other proper judicial proceeding."

In harmony with these federal cases is the very recent decision of the same question by the Maryland court of appeals in the case of *Hanson v. Little Sisters of the Poor*, 79 Md. 434, 32 Atl. 1052, affirmed January, 1897, in *Society v. Everett* (Md.) 36 Atl. 654, in which the court gives its reasons for preferring the adoption of the doctrine of the federal courts, rather than that promulgated in the Cornell University Case by the court in New York. In that case the proceeding was, as it is here, by a bill in equity brought by the heirs to have the devise declared void. The court, in its opinion, states the question and its decision of it clearly where it says: "It cannot be doubted that this corporation had power to take and hold any estate or property not exceeding the charter limits, and the devise, therefore, was not void on its face, and must be held valid as to all the world until it has been determined, at the instance of the state, that the charter has been violated. If they have violated the law of their being, they have committed a wrong, not against any particular individual, but against the state, and this wrong can only be inquired into at the instance of the state. In other words, the corporation can take property to any amount, but can hold it, as against the state, only to the amount provided by its charter." How does the active participation of a court, in promoting the administration of such a devise, become wrongful, as the complainants contend, so long as the wrong on the part of the corporation is not inquired into by the state, and the state, instead of urging objection, by its legislature consents thereto? Of course, in no sense can the state be considered as any party to the present proceedings. The meaning of the argument of the court in the case cited is that, while it is the law that a charitable corporation shall hold only the amount of capital prescribed by its charter, it is also the law that no one besides the state can, in any suit or proceeding, properly take notice of such transgression by the corporation.

In the case cited, the court also says: "The contrary doctrine would make it very hazardous to take title from a corporation with such a limitation on its charter, and, if the objection could be made by any one, title to property once held by such corporations would cease to be marketable, litigation would be promoted, and courts would be constantly called on to decide the very difficult question of fact as to whether the property of a corporation does or does not exceed in value the charter limits. In the case now before us, the estimates of the witnesses differ greatly, and a devise or bequest would be held valid or void according to the estimate adopted by the court. We think this is one of the cases which may be put in the class with those referred to by the late Justice Miller in his dissenting opinion in

Fritts v. Palmer, 132 U. S. 293, 10 Sup. Ct. 93, where he says: "I can conceive of cases where corporations have been authorized to acquire a limited amount of real estate, such as the legislature may conceive to be useful and necessary to the purpose for which they are organized, in which the question as to whether they have exceeded that amount may be one for the state alone, and not of any private citizen." The counsel for the present complainants argues that the objection of inconvenience should have but the slightest influence on a question where so much principle is involved. We think, however, that the position of the Maryland court in this respect is not to be underrated. Certainly, titles affected in the way above named would be much more hazardous if a devise of the kind be declared void, instead of voidable, for a devise to all intents and purposes void must remain so through all the mutations of ownership, and the heirs might never be shut out from reclaiming the property thus illegally devised. Many fixed principles of the law have been established on grounds of policy merely, even by the creation of legal fictions, if necessary to reach a just result. There are policies within a policy, questions within a question, the smaller controlling the greater question as the rim of a wheel is supported and controlled by its spokes. The difficulty of applying the restrictive rule is a circumstance worth consideration. In one of the New York cases where, under the policy acted on in that state, a part of the bequest only could be received, the decree of the court was that so much of the bequest of money might be taken as would, at 7 per cent. per annum, create an annuity of \$4,000; and, undoubtedly, the same fund would produce to-day not more than half as much annuity. Do not such considerations help to induce the belief that the liberal policy advocated by the defense is the better policy?

Another case is cited by the defense, over which there is some contention between the parties as to its value as a precedent,—the case of *De Camp v. Dobbins*, 29 N. J. Eq. 36. The exact question arose there as it exists here, and Chancellor Runyon decided it on the same line on which the question was disposed of in the cases in the federal supreme court, although the chancellor thought the same result might be reached also upon another ground disclosed by the facts. The case appears again on appeal in 31 N. J. Eq. 689, when the first decree was affirmed, *Beasley, C. J.*, writing an opinion sustaining the decree, upon a ground other than that selected by the chancellor, and in opposition to the latter's opinion. The counsel here assumes that the whole court adopted the views of Chief Justice *Beasley*. The case does not show such a thing. In closing his opinion, the chief justice says, "I shall vote to affirm the decree below;" and thereupon it is stated by the reporter that the decree below was unanimously affirmed. It is not intimated upon what ground the numerous members of that court cast their votes,

whether upon the opinion of the chancellor or that of the chief justice, and there was no occasion that it should appear. On the contrary, we think we are justified in the inference that the chancellor was supported by the court excepting the chief justice, and we notice that another court has the same supposition. *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, and 18 Atl. 198, cited *supra*. The chancellor stated (29 N. J. Eq. 41) the essential conclusion arrived at in his opinion as follows: "If such limitations did in fact exist, it would not incapacitate the corporation from taking the gift, although its property at the time of receiving the gift was of the full annual value of \$2,000. If a corporation takes land by grant or devise, in trust or otherwise, which by its charter it cannot hold, its title is good as against third persons and strangers; the state alone can interfere. *Perry, Trusts*, § 45; *Wade v. Society*, 7 Smedes & M. 663. And again, if the limitation did in fact exist, the legislature might remove the restriction, and permit the corporation to execute the trust, or authorize it to receive the gift, and administer the trust, notwithstanding the limitation. This court will not suffer a trust to fail for want of a trustee, but will uphold the trust for a reasonable time, when necessary in order to enable the trustee to obtain the requisite authority to take and execute it. *Bridges v. Pleasants*, 4 Ired. Eq. 23, 30; *Ingils v. Trustees*, 3 Pet. 99."

In *Hamsher v. Hamsher*, 132 Ill. 273, 23 N. E. 1123, where the validity of a devise was involved, it is said in the headnote of the case: "Whether the corporation exceeds its power in receiving land by gift or devise is a question alone for the state." And in the opinion the court says: "If the Young Men's Christian Association of Decatur has exceeded in extent its power of holding real estate, appellant (heir), we concede, cannot take advantage of the fact. *Alexander v. Tolleston Club*, 110 Ill. 65. Where a corporation may for some purposes acquire and hold the title to real estate, it cannot be made a question by any party, except the state, whether the real estate has been acquired for the authorized uses or not. *Hayward v. Davidson*, 41 Ind. 214. There being capacity to purchase or to receive by devise, whether the corporation, in so purchasing or receiving, exceeds its power, is a question between it and the state, and does not concern the appellant."

In a peculiar case of devise in Massachusetts (*Baker v. Institution*, 110 Mass. 88) the court says: "The purposes and objects of the trust are distinctly set forth. If its full execution had been found to be impossible by reason of the continued incapacity of the cestui que trust to take the whole fund, it might have become necessary and proper for the court to declare a resulting trust, as to the excess, in favor of the next of kin, to be applied by law,"—citing the New York case of *Chamberlain v. Chamberlain*, *supra*, for that proposition. Later in the opinion the court says: "But, even if it was intended to evade or disregard the

limit of legal capacity, we are not prepared to hold that it would render the bequest invalid, either in whole or for the excess." And the court further adds: "But we cannot doubt that a removal by the legislature of such a restriction upon the capacity of the corporation, before the complete execution of the trust, will enable it to receive the whole fund for its benefit, although for peculiar reasons, not important here, it could not do so at the time the will took effect." Here, certainly, is seen the idea of the court that the excessive bequest was no more than a voidable act, indirectly said as strongly as if directly expressed. Mr. Schouler, in his work on Wills (section 24), under the belief that receiving an excessive amount of capital is a voidable act merely, as will be seen by a later reference to his text, says, in a note: "Enabling acts of this character are frequently met in the special legislation of American states at each session; that of Massachusetts, for instance."

Chambers v. City of St. Louis, 29 Mo. 543, is a case of a devise of property to a municipal corporation for certain purposes, and the question was as to what extent the corporation could take and hold the property. In this case the court, among other things, said: "It is a matter between the state and the city. The law is only directory in relation to corporations taking land. It inflicts no penalty, nor does it in terms avoid the conveyance. Nowhere is a corporation in express terms prohibited from taking and holding lands. * * * It is not for the courts in a collateral way to determine the question of misuser by declaring void conveyances made in good faith." The city was authorized to acquire land necessary only for its municipal purposes. The case of *Hayward v. Davidson*, 41 Ind. 212, involved a similar question upon a devise to county commissioners for the benefit of a county, and was decided the same way as was the case in Missouri.

We have already referred to the case of *Rainey v. Laing*, 58 Barb. 453, as differing entirely from the McGraw or Cornell University Cases, for the reason that it was decided on a policy generally prevailing in the American courts, rather than on the statute of wills in the state of New York, which statute is, as construed by its court of appeals, intensely prohibitory in its character. In the case cited (*Rainey v. Laing*), the court said: "That the question whether the property, with that which the synod already held, would exceed in amount the sum to which its charter restricted it, could not be tried in an action brought by the executors for the construction of the will.

"That the question was not to be determined collaterally, but only in a direct proceeding by the state.

"That the condition imposed in the act incapacitating the synod, being, not against its taking, but against its taking and holding, the corporation could take; but whether it could hold was another question, not necessary or

proper in this collateral way to be considered,—a question purely of public policy, with which individuals had no concern, but in which the state, as the sovereign, was alone interested, and which it might either raise or waive according to its pleasure."

Another case of devise, relied on by both parties: *Heliskell v. Chickasaw Lodge* (a late case, reported in 1889) 87 Tenn. 668, 686, 11 S. W. 825. The case holds that as to a devise, where the charity is definite, heirs and other devisees cannot question the legal capacity of the trustee to hold and administer the trust, but the state alone can do so. At the time the devise took effect, the corporation held more than the amount prescribed in its charter. The same case also held, in deference to the decision in the Cornell Case, that there is a difference whether the funds bequeathed have been actually received or not by the donee, while we do not understand the latter case as admitting that a devise or bequest of the kind would be otherwise than void under any circumstances. But Mr. Pritchard, a Tennessee author, explains, in a note to his work on Wills, published as lately as 1894, that the Tennessee court was misled by not noticing the grounds upon which the Cornell University Case was decided by the New York court. And we quote below a portion of this note, numbered 13 to section 153 of the work referred to, as being instructive, because of its references to many cases, and nests of cases in books, and particularly because it contains a clear explanation of why and how the New York policy, as illustrated in the Cornell University Case, differs from the policy of other states on the same question. The note discusses the English statutes of mortmain, and says that by the English statutes of mortmain, beginning with 9 Hen. III., corporations were prohibited from taking or holding lands without the king's license, and that they were therefore excepted from the operation of the statutes of wills. The note then says that these statutes were never adopted in Tennessee, and then continues: "In Pennsylvania, however, no corporation can take or hold lands unless specially authorized by act of the legislature. *Gouldie v. Water Co.*, 7 Pa. St. 233; *Watts' Appeal*, 78 Pa. St. 370. The exception contained in the English statute of wills was incorporated into the New York statute of wills, and, under it, it was held that a devise of land directly to a corporation was void, but that a devise to a natural person in trust for a corporation was good. *McCartee v. Society*, 8 Cow. 437. A later statute of that state provides that devises of land may be made to every person capable by law of holding real estate, but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise. 2 Rev. St. N. Y. p. 57, §§ 1-3. This statute renders devises directly or indirectly to a corporation void in the prohibited cases. *Downing v. Marshall*, 23 N. Y. 306; *Bascom v. Albertson*, 34 N. Y. 584; *King*

v. Rundle, 15 Barb. 150; In re McGraw's Estate, 111 N. Y. 66, 84, 19 N. E. 233. This statute operates upon the testamentary power. Consequently, a devise made in New York to a foreign corporation is void, although the foreign corporation has authority by its charter to receive the devise. *White v. Howard*, 46 N. Y. 144, 165; *U. S. v. Fox*, 94 U. S. 315; *Boyce v. City of St. Louis*, 29 Barb. 650. But a New York corporation can take by devise in Connecticut, although the devise would be prohibited if made in New York. The reason is that the corporation carries with it its charter, but not the law of devise of New York. *White v. Howard*, 38 Conn. 342; *Thompson v. Swoope*, 24 Pa. St. 474; *Society v. Marshall*, 15 Ohio St. 537. But see, contra, *Starkweather v. Society*, 72 Ill. 50; *Trust Co. v. Lee*, 73 Ill. 142. A devise of land in New York to the United States is bad (In re *Fox*, 63 Barb. 157, 52 N. Y. 530; *U. S. v. Fox*, 94 U. S. 315), but good in Massachusetts, where there is no limitation as to devises to corporations (*Dickson v. U. S.*, 125 Mass. 311). Corporations are usually limited as to the amount or value of real estate which they may hold, but, even where the corporation is already holding as much land as it is authorized to hold, its right to land devised to it can be questioned by the state only, unless, as in New York, there is some statute declaring the devise itself void. *Bank v. Poltiaux*, 3 Rand. (Va.) 136; *Mallett v. Simpson*, 94 N. C. 37; *Blunt v. Walker*, 11 Wis. 334; *Leazure v. Hillegas*, 7 Serg. & R. 313; *Baird v. Bank*, 11 Serg. & R. 411; *De Camp v. Dobbins*, 29 N. J. Eq. 36; *Hough v. Land Co.*, 73 Ill. 23; *Barrow v. Turnpike Co.*, 9 Humph. 304. In *Helskell v. Chickasaw Lodge*, 87 Tenn. 668, 686, 11 S. W. 825, it is stated that there is a distinction between the case where a corporation is actually holding property in excess of the limitation of its charter, and the case where a devise is made to it, and the property devised has not yet come to its possession; and it is said that in the first case no one but the state can raise the question or enforce the forfeiture, but in the second case the heirs or residuary legatee may raise the question, because the gift would be void, and the property would go the same as if it had not been made. *Dickinson, Sp. J.*, cites In re McGraw's Estate, 111 N. Y. 66, 19 N. E. 233, to sustain this distinction. He seems to have overlooked the fact that the statute of wills in New York expressly declares such devises void. There can be no objection to the heirs making the question where the testamentary power is thus expressly limited by statute. In the absence of such a statute, the devise is not void, as fully shown by the authority cited above, and the heirs could no more attack it before the corporation went into the possession of a realty devised than afterwards. See extended note to *Page v. Heineberg*, 40 Vt. 81; *Barrow v. Turnpike Co.*, 9 Humph. 304; *Dockery v. Miller*, Id. 731; *Fellows v. Miner*, 119 Mass. 541; 1 Mor. Priv.

Corp. 332, 333, 678; *Bank v. Whitney*, 103 U. S. 90; *Runyan v. Coester*, 14 Pet. 122."

The foregoing cases, with one exception, are where the question is discussed as to the ability of corporations to acquire, by devise or bequest, property exceeding the amount which their charters expressly allow them to possess. In addition to those authorities, many others are cited by the counsel for the respondents, which affect the question in a less direct, but more general, way, and are important as containing discussions of the general principle at stake, and as indicating the common judicial sentiment on this and kindred questions; some of them bearing with special force on the question by analogy to it, others being the private opinions to some extent of individual justices perhaps, but all of them combined operating with much force and effect on the particular issue involved. The same idea pulsates through them all. Some of them are the following:

In *Heard v. Talbot*, 7 Gray, 113, in discussing the relations in which a corporation stands towards the state, as well as towards individuals interested in the same question, the following remarks made in the opinion of the court appear: "Although the disuse of the canal, and its abandonment by the corporation, may be a gross disregard of the duty imposed on them by law, and an essential violation of the terms and conditions implied from the contract entered into with the government by the acceptance of a charter, and, upon due proceedings had, may be a sufficient ground upon which to decree a forfeiture of all their corporate rights and privileges, they do not constitute any valid ground upon which the exercise by the corporation of any of the powers conferred by their charter can be defeated or denied by third persons in collateral proceedings. This results from the very nature of the act of incorporation. It is not a contract between the corporate body, on the one hand, and individuals whose rights and interests may be affected by the exercise of its powers, on the other. It is a compact between the corporation and the government from which they derived their powers. Individuals, therefore, cannot take it upon themselves, in the assertion of private rights, to insist upon breaches of the contract by the corporation, as a ground for resisting or denying the exercise of a corporate power. That can be done only by the government with which the contract was made, and in proceedings only instituted against the corporation. * * * Therefore, it has been often held that a cause of forfeiture, however great, cannot be taken advantage of or enforced against corporations collaterally or incidentally, or in any other mode than by a direct proceeding for that object in behalf of the government."

In *Davis v. Railroad Co.*, 131 Mass. 258, is a learned discussion by Gray, J., in the

course of which he says: "There is a clear distinction between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, and the abuse of a general power, or the failure to comply with prescribed formalities or regulations in a particular instance,"—to which proposition many and various cases are cited. In commenting on a former case between the same parties, it is in the opinion said as follows: "The objection that a corporation had no right to trade in gravel or land was raised by the defendant by way of defense to a bill in equity by the corporation for specific performance of his agreement. * * * There can be no doubt of the correctness of the decision overruling the objection. The corporation, by its purchase, had acquired a title to the land, which was good against all the world, except possibly by the commonwealth."

It was upon the distinction above stated that it was held, in *Brunswick Gaslight Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532, 27 Atl. 525, that one gas company could not sell its charter, inclusive of rights obtained through the exercise of the principle of eminent domain, to another gas company, without the consent of the legislature. The same distinction is aptly stated in a South Dakota mining case (*Gilbert v. Hole*, 49 N. W. 1), in this way: "There is a difference between exercising power entirely foreign to the nature of a corporation and exercising legitimate powers to an improper extent. In the former case the acts done might be absolutely void; in the latter they would only be voidable by a proper proceeding on the part of the state." The general rule, illustrated by some of the preceding cases, is also well put in case of *Alexander v. Tolleston Club*, 110 Ill. 65, where the headnote reads thus: "When a corporation, by the law of its creation, is authorized, in some cases or for some purposes or to a certain extent, to take and hold a title to real estate, it cannot be made a question by any party, except the state, whether its real estate has been secured for the authorized use or not, or is in excess of the capacity of the corporation to take and hold. The state alone must assert her policy in that regard." In another Illinois case it is said: "A third person cannot, in a collateral proceeding, question the power of a corporation to hold real estate; only the state can do this, and in a direct proceeding." *Barnes v. Suddard*, 117 Ill. 237, 7 N. E. 477.

But the present suit is not either instituted or controlled by the state. It is a collateral proceeding by private parties. The state is not thereby exercising her policy, and, if the suit can be sustained, the state will have no opportunity whatever to express by any act its assent or dissent in relation to the conduct of the corporation in accepting the bequests. The state is neither directly nor in-

directly represented in the litigation. What can be plainer? But the corporation is using the state's machinery for their purposes, it is said. Is not that the business of the state, whether such use of her procedure shall be had or not? Cannot the court wait until the state, through her officials, comes into court asking for any judicial assistance?

In *Briggs v. Canal Co.*, 137 Mass. 71, the point of many cases is expressed in these words: "The act of incorporation is a contract between the commonwealth and the corporation. Whether the corporation has complied with the conditions is a question of fact, to be judicially determined. The commonwealth may waive a strict compliance with the terms of the act, and may elect whether it will insist upon a forfeiture, if there has been a breach of condition." Even the North Carolina court feels some amelioration of its rigid doctrine maintained in *Trustees v. Chambers' Ex'rs*, the first case cited on complainants' brief, when, in *Mallett v. Simpson*, 94 N. C. 37 (30 years after its first decision), it says: "Conceding that the railroad company had not purchased the land in question, or used it for the purposes contemplated by the charter, the deed to it vested the legal title in it and its right to purchase and hold land could not be collaterally assailed. No one but the state could take advantage of the defect that the purchase was *ultra vires*."

The case of *Boom Corp. v. Lamson*, 16 Me. 224, is the only one looking towards the present question, but it contains a germ of the true principle when it decides that, in an action by a corporation, the defendant cannot take an advantage of any use or abuse of its corporate powers.

The law authors are nearly or quite unanimous in their concurrence on the exact question presented for our determination. In 1 *Devl. Deeds*, § 120, it is laid down that, "if a charter of a corporation forbids it to purchase or take lands, a deed made to it is void." And the author, in the next following section (121), ascribes to the state the discretion of applying any remedy, saying that "the general rule is that the state alone can take advantage of the clause of the charter prohibiting a corporation from holding land." In *Beach, Priv. Corp.* § 378, it is said that "no party except the state can object that the corporation is holding real estate in excess of its rights." And it seems to us that it is a consistent deduction from that proposition to say that no party but the state can object to any effort by a corporation to acquire real estate. How can a thing be wrong in the beginning, and right in the end? How can it be logically said that a contemplated act is wrong, and, as soon as consummated, is right? It would seem as if the first step towards a wrong act would constitute less offense than the last step would.

Says Mr. Perry, in his reliable work on

Trusts: "If a corporation takes land by grant or bequest, in trust or otherwise, which by its charter it cannot hold, its title is good as against third persons and strangers; the state only can interfere."

The quotation below from Schouler on Wills (section 24) directly implies that the bequests he is speaking of are merely voidable, for, if void, a legislature, at its will, could not cure the difficulty. The author says: "But limitations and restrictions under the act of incorporation should here be regarded, to the extent, at least, of procuring an enabling act from the legislature to hold the property where the original charter privileges would otherwise be transcended. In Massachusetts and many other states no disability to take by either devise or bequest is imposed by the statute of wills upon corporations. But the American rule is not uniform. Under the New York Code, for instance, it is expressly declared that no devise to a corporation shall be valid unless the corporation be expressly authorized by its charter or by statute to take by devise."

The text of the section, in Pritchard on Wills (section 153), an extended note to which we have already incorporated in this opinion, on a review of the authorities, says that, when a corporation is already holding as much land as it is authorized to hold, its right to land devised to it can be questioned by the state only unless, as in New York, there is some statute declaring the devise to be void. It is said in *Mor. Priv. Corp.* § 671, as follows: "The statute of New York prohibiting devises of real estate to corporations, unless expressly authorized by their charters or by statute to take by devise, renders prohibited devises absolutely void; and it has been held that the legislature cannot, by subsequent enactment, validate a devise which is void under the statute, for this would impair the vested rights of the heir."

"A distinction should be observed between the effect of laws restricting the power of testators to devise their property to corporations and laws restricting the power of corporations to take property. Such laws differ both in their application and in their legal effect." Again, the author says, in another section (section 332), as follows: "A distinction should be observed between those laws whose object it is to regulate corporations in respect of their power of acquiring and holding property and laws whose object is to restrict the power of testators to dispose of their property. Laws of the former description are enacted in pursuance of a general policy of preventing corporations from acquiring the ownership of real estate, in the absence of express authority from the state. But laws prohibiting devises to corporations are intended to restrict the testamentary capacity of testators, and their object in many instances is to prevent testators from being driven, by the improper use of religious in-

fluence, to devise their property to religious institutions, and thus disinherit their heirs."

Mr. Thompson, the learned and able commentator on Corporations, in his work, which is the latest of any in this country on the subject, considers carefully the precise point in dispute between the present parties, and, in a lengthy section, fairly and fully states the effect of the authorities on both sides, and expresses his own opinion on the point in very positive terms, in the manner following: "According to one view, if the amount of land which a corporation may hold is prescribed by its governing statute, and if it has already acquired lands to such an extent that a further devise to it will exceed that limit, then, in so far as the devise is in excess of that limit, it is void, and the title vests in the heirs. In such a case the principle that the state alone can question the right of the corporation to hold the lands does not, in the opinion of some of the courts, apply, but the heirs of the testator can raise the question. Nor in such a case is the construction put upon the language of the statutes of mortmain applicable, making a distinction between the power to take and the power to hold; but such a statute, in the absence of some plain expression showing the contrary intent, is construed as prohibiting a taking, where the prescribed limit has been reached. But other courts have taken the view that here, as in other cases, the question of the capacity of the corporation to take is one which can be raised by the state alone, and this is the only view sustainable on the analogies of this question. That view is that a devise to a corporation, incapable, for that or any other reason, from taking, is good as against every one save the state, just as is a deed to a corporation or to an alien; so that, whenever the state waives its objection to it, that is an end of the discussion. But, under the former view, the devise is void only as to the excess. It is good up to the statutory limit, though there may be difficulty in determining that limit. Moreover, under this doctrine, an act of the legislature passed subsequently to the death of the testator, enlarging the power of the corporation to take, will not affect the rights of the heirs, because the title vests in them instantly on the death of the testator, and it is not competent for the legislature to divest it." *Thomp. Corp.* § 5787.

The author, in section 6033, characterized the question as follows: "These considerations bring us to the somewhat new and growing doctrine that whether a corporation has acted in excess of its granted powers, or in the face of an expressed or implied statutory prohibition, is one which cannot be raised in litigation between it and a private party, or between private parties, but can only be raised by the state in a direct proceeding, either to forfeit the franchises of the corporation, or to subject it to punishment for doing the unlawful act." Other extracts from Mr. Thompson's book could be profitably added hereto,

if it were reasonable to usurp so much space.

The complainants quote a part of a section from the same author, as follows: "This principle [that the state alone can interfere] has no application where the corporation is seeking the aid of a court of justice to enable it to acquire lands which it has no power to acquire and hold. Here the principle is that a court of justice will not aid a corporation to do that which is impliedly forbidden by its charter or by the law." This might be misleading if read without the omitted portion of the section, which is as follows: "It has, for instance, no application to a case where a suit in equity is brought to compel the specific performance of a contract to convey land to a railroad company, which the latter has attempted to acquire, not for any purpose connected with the building and operating of its road, but merely for speculative purposes. In such a case the specific performance was refused, on the ground, among others, that the company has no power under its charter to take and hold land for such purposes." It is evident enough from the omitted extract, as well as from the citation in the note to the section, that the meaning of the author is not inconsistent with his avowals in other sections of the work. The section applies to cases when a corporation has no power to be exercised, and not merely where it exercises an excess of power of the same kind as that authorized by its charter. See, on this point, *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. 216.

The complainants quote in their brief an article in the *Harvard Law Review* (January, 1896), in which the writer, who was said at the argument by counsel for complainants to be a recent graduate of Harvard Law School, favors, upon the admittedly doubtful question, the view taken in the *McGraw Case*, and not that adopted by the United States supreme court. But the writer makes no allusion to the fact that the opinion in his favorite case was based on certain stringent statutes of New York affecting the testamentary capacity of the testator to give, as well as upon the lack of ability in the donee to receive, while a different question was presented in *Jones v. Habersham*, supra, in which Mr. Justice Gray wrote the opinion. The writer also asserts that the latter case received but slight consideration at the hands of the court, he evidently not being aware that the same case was first deliberately considered and decided by the circuit court, where Bradley, J., of the supreme court, delivered the opinion, Gray, J., stating that fact in the first line of his own opinion. The complainants also cite a bare remark in Bigelow's edition of *Jarman on Wills*, in note on page 63 of sixth edition, in which the editor seems to regard the doctrine that such a gift is invalid as the better doctrine.

But that learned author, in his brief note on the subject, takes no notice of the distinction between a want of testamentary capacity

to give and a mere lack of authority in the corporation to take.

Taking now a retrospective glance at the cases and authorities on both sides which we have noticed in the foregoing pages, we feel impressed with the correctness of the statement of Strout, J., at the hearing of this case below, that the decided weight of authority is in favor of these respondents on this "new and growing question," as the author Thompson expresses it. Upon closing his discussion of the direct cases cited on his opening brief, the learned counsel for the complainants says: "But, if the decisions of New York are claimed to rest upon the provisions of special New York statutes, what has the counsel to say as to all the other cases cited by the plaintiffs from North Carolina, from Kentucky, from New Jersey, and from Rhode Island?" We have substantially, according to our view, answered the question ourselves, by saying that the force of the opinion of the two judges in the North Carolina case is much lessened by the able minority opinion of the chief justice in the case, and by the fact that the majority opinion yields the question as to devises of real estate; that the Kentucky case is a better authority for the respondents than for the complainants; that it is not sure that the complainants have any support in the New Jersey case outside of that contributed by the chief justice in his opinion; and that the Rhode Island case evidently follows the decisions in New York. How little authority, then, have the complainants to rely on outside of the *McGraw Case* in New York? We have no reason to doubt the correctness of the result of the decision in that case, as based upon exceptional statutes in that state not existing elsewhere; and, should we undertake any criticism of that opinion, it would be that, while the case was decided upon the statutory policy of that state, the opinion endeavors to bend into line with its policy the policy of other states where no such peculiar conditions are found to exist.

The counsel for the complainants has very critically reviewed the cases cited against them, and in some respects, as seems to us, upon purely theoretical, rather than practical, grounds. Their argument would sweep away much of the more direct authority, and all of the auxiliary cases, as about worthless. This is too extreme. Of course, the cases of each class are not entirely alike, and may be of various degrees of force as authorities; but they all go to illustrate, as well as to bring out, the underlying principle on which a settlement of the case before us depends, and most or many of them are enough alike, in support of the principle involved, as to be regarded as leaves from the same tree.

The counsel rebels against regarding the *National Bank Cases* as fitting precedents in support of the question here, but they are so regarded in some cases and by some authors, which shows how other minds than ours are

influenced by them. So, the counsel protests just as strongly against the *Allen Cases* as being of any importance as authority. But that class of cases is constantly cited in the books as supporting, by analogy, such a position as the respondents stand upon here. Deeds to aliens may not be of principal importance, but it seems to us that devises to aliens, which are good at common law, are clearly cases in point, and of more consequence as precedents than any other analogous authority. Does not the will containing a devise to an alien have to be approved with the same formalities as are required of the will of the present testator, and is the land devised any more in the possession of the devisee in the one case than in the other? It is argued in behalf of complainants that there is this distinction between an alien as devisee and a corporation as such: that in the case of an alien the disability is personal, and does not attach until proved by some direct, and not collateral, proceeding, as bankruptcy must be proved in the case of a bankrupt, or as felony must be proved in the case of a felon, before the full consequences of such a condition fall upon them. There must be a conviction. Is not that the very contention of the respondents here? What is there in this will which should lead a court to establish any illegality except by a direct proceeding for the purpose? And why should the law be any more generous to a bankrupt or a felon in the dispensation of its favors than to a charitable association? At common law, and by the statute law of some of the states, an alien can take real estate by devise, and hold the same until office found to take it away from him. It is also argued for the complainants that executory contracts of an illegal nature, where the illegality is participated in by both parties, cannot be enforced by one party against the other, the parties being equally in fault. That principle is not applicable here. The executors and the corporation are not parties contending against each other. They are on the same side of this suit. It is admitted by the corporation that it would be a transgression of the law of its organization to accept the bequests, unless the state actively or passively consents to it, and its silence is its consent. But what wrong has the testator committed by his act? The only contract that can be pertinently discussed here is that between the state and the corporation, and the state can do no wrong.

A few of the more important propositions pertinent to the case may, in conclusion, be briefly restated, as these: That there is no restraining clause in our statute of wills preventing the testator from making these devises and bequests; that they are regular and valid on their face, nothing in the will indicating that the corporation might not be a competent trustee to administer the gifts; that the testator had no suspicion that there would be any question over the provisions of his will; that, if the bequests fail, it will be an accident

caused by a mistake of the testator respecting a fact or as to the legal construction of such fact; that the same bequests (and devises) could have been safely made to almost any individual, or to any one of many charitable corporations in the state, instead of to this corporation; that there is a very narrow difference, if there be any, between selecting this institution and selecting any other suitable trustee for the execution of the trusts committed to it, such a corporation as this being merely a technical and metaphysical entity, through which the benefit of the trusts were to go to poor persons suffering from certain diseases; that the heirs could have no voice or interest in the matter, unless accidentally so, through the innocent mistake of the testator, they having no lien on the estate of either a legal or moral kind; that there are no words in the charter of the corporation, or in the statute authorizing its organization, that forbid its holding more than the amount limited by the statute, nor any penalties attached whereby to punish any transgression of the limitation, the only punishment intended being the risk of a forfeiture of the bequests or of the charter; that the limitation is chiefly directory and regulative, and, if impliedly prohibitory, incidentally and mildly so; that the charter is a contract between the corporation and the state in which no person is legally interested but the parties thereto, the same general rules of interpretation applying as in other contracts; that, if the corporation fails to keep its side of the contract, the state can take advantage of the default, or not, as it pleases; that the transgression may be so slight in its consequences that the state will forgive the offense, or forgive it because occasioned by some accident or error resulting while the corporation is acting in good faith, or the state may, acting through its prosecuting officers, punish the offense for the public good; that the state may, by its legislature, authorize the corporation to increase its capital before the act is done, or, if the increase be made without authority, may ratify the act afterwards, either by some legislative provision, or, as may be done between any other contracting parties, by its silence and any other acts indicating consent; that from the foregoing propositions it is clearly deducible that bequests like the present are voidable only, and may be avoided by the state alone, and are in no sense to be regarded as void; that a policy arose as to what better be done in the circumstances of each particular case, and that that policy belongs to the state, and not to the court, and is an executive, and not a judicial, right, for the court would decide the question in the case for all cases and all time, while the state may decide the question differently at different times, according to its discretion and the public good. This right the state has never surrendered, and the court cannot take it from the state. But it would surely deprive the state of its privilege if the court fails to act upon these bequests as valid bequests, until, in proper and independent pro-

ceedings, such bequests are declared to be void.

This conclusion renders it unnecessary and inexpedient to discuss the further contention of the respondents that the bequests are valid in equity if not at law, upon the maxim that no legal trust of a charitable nature shall fail for want of a competent trustee, and that, if this corporation cannot act, some other party may be appointed by the court that can.

Exceptions overruled.

Appeal dismissed, and decree below affirmed.

PLANER et al. v. EQUITABLE LIFE ASSUR. SOC. OF THE UNITED STATES.

(Court of Chancery of New Jersey. May 23, 1897.)

SALE OF LANDS—BROKER—AUTHORITY—DEFECT IN QUANTITY—PARTIAL PERFORMANCE—ABATEMENT FROM PURCHASE PRICE.

1. A broker for the sale of land at a price fixed cannot bind the owner by representation or contract, and the owner's offer to sell cannot be varied by the broker's letter of acceptance reciting that the purchaser understands that the property is of certain dimensions.

2. A real-estate broker cannot bind the owner by granting possession, or by making repairs, unless with the owner's consent.

3. A building and the lot on which it stood had been known for 25 years as the "Union Hall Property." It was mortgaged, but a strip of land which the hall slightly overlapped was unintentionally omitted from the description. The mortgagee acquired title by foreclosure, and wrote to a broker that it would sell the "U. H. property" for \$3,000. The broker found a purchaser, both knowing that the hall overlapped the original lot, and the purchaser refused to receive the deed unless the defect in the quantity was cured by the purchase of the outstanding title. The owner had no notice of the defect, and did not agree to acquire the strip, which was but 3 per cent. of the property. The purchaser took possession, but did not demand a conveyance with abatement from the purchase price. No offer was made by the vendor, and it insisted that its title should be accepted as it was. The vendor brought ejectment, and the purchaser then first demanded a conveyance with an abatement from the purchase price, and filed a bill for specific performance. *Held*, that a conveyance would not be decreed.

Bill by Charles Planer and Martha B. Alyea against the Equitable Life Assurance Society of the United States for the specific performance of a contract. Heard on bill, answer, cross bill, and proofs. Decree for defendant.

This is a bill for the specific performance of a contract entered into, as alleged, on the 23d of March, 1893, between the complainant Planer and one Alyea (the husband of Martha B. Alyea, the other complainant, who is his executrix and universal devisee) and the defendant, the Equitable Life Assurance Society, for the conveyance by the defendant to Planer and Alyea of a piece of landed property in the borough of Rutherford, known as the "Union Hall Property." The bill sets out, in substance, that the deed tendered by the defendant to the complainants for this property in pursuance of the contract did not cover the whole property, and that, in fact, the defend-

ant did not have title to all the property, and the complainants pray specific performance, with an abatement in the price to correspond with the value of the part to which the defendant had no title. The bill alleges that the contract was made through an agent of the defendant. The answer denies the agency; admits that the defendant did tender a deed for the premises which it owned, at a price named, to wit, \$3,000, and that the complainants refused it; but denies the allegation in the bill of an offer on the part of the complainants to accept the title that the defendant actually had with a rebate; alleges that its officers supposed, up to the time that the deed was tendered, that its title covered the whole property, and denies that there is any valid contract to be enforced; and, further, that if the court should find such a contract, it denies that it is a proper case for conveyance with an abatement of price, but alleges it to be a case of mutual mistake, which absolves both parties from any obligation. At the hearing it appeared that the defendant had purchased the property in question under foreclosure of a mortgage which it held upon it, given under circumstances presently to be stated, and had, as owner, given notice through its duly-appointed general agent that it was for sale; that a Mr. E. S. Brown, a real-estate broker in Rutherford, being informed by the general real-estate agent of the company that the price set upon the property was \$3,500, and that he would earn a commission if he found a purchaser at that price, exerted himself, and procured an offer of \$3,000, and communicated that offer to the company either in person or by letter on the 20th of March, 1893. The letter (if there was one, and about which the evidence is not certain), is not produced, nor its contents shown, but the offer was turned over to Mr. Jordan, occupying the position of comptroller of the company, and whose function it was to determine upon sales of real estate, and he wrote to Brown the following letter, dated March 21, 1893: "E. S. Brown, Rutherford, N. J.—Dear Sir: Yours of the 20th inst. relative to the Union Hall property in Rutherford has been received. If your client will make an immediate closing, we will sell the property in question for \$3,000,—\$1,000 in cash, and the balance on bond and mortgage at six per cent. interest. Please give prompt reply. Yours, truly, T. D. Jordan, Comptroller." At the bottom of this letter Mr. E. S. Brown wrote: "23rd of March, 1893, accepted." That was signed by the complainant Planer in his own handwriting,—"Charles Planer." (This is the contract upon which complainants rely. It varies from that set forth in the bill.) Mr. Brown replied to Mr. Jordan as follows: "Rutherford, N. J., 23d March, 1893. Mr. Thomas D. Jordan, Comptroller.—Dear Sir: Your offer of sale of Union Hall property is accepted. You will please have deed of the property drawn at once. Make deed in name Charles Planer and Thomas W. Alyea of borough of Rutherford. Consideration, three

thousand,—one thousand cash, balance of \$2,000 on mortgage. I inclose check \$20. Balance of the thousand dollars will be ready soon as papers are made, and we have notice. Mr. Charles Planer is assessor, and he understands that he is purchasing the property on Ames [Ave.], which is assessed to the Equitable. It is on borough map No. 13, block 76; has 63.60 feet on Ames avenue. Very truly yours, Edward S. Brown." The conveyance under which defendant held title covered 50.60 feet only on Ames avenue, and the property was known as the "Union Hall Property" because there was a public hall situate upon it; and, in point of fact, the defendant's paper title did not at that time cover the whole of the hall. About 2 feet in front, running back to a feather-edge at a depth of about 15 feet, stood upon land not covered by the title of the defendant. Mr. E. S. Brown, the broker, swears that the property known as the "Union Hall Property" was the building and the land it stood upon. There was no evidence to the contrary. The 27th of March was fixed for the completion of the title at the office of the defendant association in its building on Broadway, New York. By the regular course of business in the defendant's association the completion of the title was turned over to a Mr. Gerald Brown, superintendent of the mortgage and real-estate department, and the preparation of the conveyance was under the supervision of Mr. Sidney Ward, one of the law firm of Alexander & Green. Mr. Brown handed the defendant's title deed to Mr. Ward, and he prepared from it a deed from the company to Messrs. Planer and Alyea. Mr. Alyea employed Mr. Luther Shafer, a member of the bar living at Rutherford, to accompany him to attend to the transfer of the title. Mr. Shafer knew that defendant's paper title covered only 50.60 feet frontage on the street, and not the 63 feet assessed to it, and the evidence indicates that Mr. Planer also knew it. When the deed was presented to Mr. Shafer, he at once stated that it only covered 50.60 feet, and not the whole of the hall, whereupon the complainants declined to accept the title, and the parties separated. No demand was then made by the complainants that there should be an abatement from the purchase price, and that they would accept the title with such abatement, nor was any offer of any kind made by the defendant, except that its title should be accepted as it was. The situation developed at the interview was a surprise to all the officers of the defendant. None of them had ever heard that the paper title of the defendant did not cover the whole of the Union Hall property. That defect of title arose in this wise: In January, 1870, the land in that neighborhood appears to have been owned by two different corporations. One was the Mt. Rutherford Company of Rutherford Park, and the other was the Home Land Company. The street afterwards known as "Ames Avenue" was then known as "Union Hall Place." On the 21st of January, 1870, the Mt.

Rutherford Company conveyed to the Union Lyceum of Rutherford Park, a corporation, for the sum of \$5, the plot of land 50.60 feet on Union Hall place now owned by the defendant corporation. There is no direct proof as to when the building known as "Union Hall" was erected. Witnesses speak of having known it for 25 years, and from the fact that the street was called "Union Hall Place," and that this conveyance was made to the corporation, the inference would be that it was built either shortly before or shortly after the giving of that conveyance. By the terms of that deed the northwesterly line or course of the conveyance bounded on land of the Home Land Company. The rear of the lot conveyed by the Mt. Rutherford Company is wider than the front, and the closing line running from the northeast to the southwest strikes Ames avenue at an obtuse angle. It is 110 feet long, and a line from the rear end drawn perpendicularly to Ames avenue strikes the avenue 12.71 feet northwest from the westerly corner of the Union Hall lot. In building the hall it appears that the society put their building about two feet at the front over on the Home Land Company's land; and subsequently, on the 15th of August, 1873, the Home Land Company conveyed to the Union Lyceum Company a wedge-shaped piece or gore lying on the northwest side of this tract, with a frontage on Ames avenue or Union Hall place of 13 feet. The consideration of that deed is \$5. By this means the Lyceum became the owner of a lot of 63.31 feet front on the avenue, and that lot was afterwards assessed to them, and they paid taxes for it, as did the defendant after it became the owner. But the assessment map shows the original line running through it. In September, 1873, the Lyceum Company negotiated a loan from the Equitable Life Assurance Society, the defendant, on that property, and the defendant company requiring, apparently, that they should have the bond of an individual, the Lyceum Company, for the named consideration of \$8,000, made a conveyance on the 15th of September, 1873, to one Floyd W. Tompkins of the original lot purchased from the Mt. Rutherford Company, having a frontage of 50.6 feet on the avenue, not including the 13-foot gore purchased from the Home Land Company. The omission of the 13-foot gore is not explained, but the clear inference is that it was through oversight. Tompkins then made a mortgage to the defendant corporation bearing date the 15th of September, 1873, covering the property so conveyed to him, to secure the sum of \$1,750. He then reconveyed the property to the Union Lyceum, subject to the mortgage. The defendant corporation obtained title by a sheriff's deed, under foreclosure, dated in 1879. After this foreclosure and sale, the Lyceum Company made a general sale of all its assets and property at auction, and, after selling all the specific articles which it supposed that it owned, it offered "all the then remaining property of the corporation,"

and it was knocked off and sold to one Love for two dollars, and a receipt given in this wise: "Rutherford, New Jersey, March 21, 1881. Edward J. Love bought of the Union Lyceum of Rutherford Park all the remaining property not mentioned in the sale of this date, not including the charter and the die portion of the seal, for the sum of two dollars. Received payment. Charles B. Lawson, Treasurer." It is manifest that at the time of this sale the Lyceum Company was not aware that it had not mortgaged the 13-foot gore to the insurance company, and that the title to the same still remained in it. Under this contract Mr. Love claimed to own this gore, and filed his bill in this court on the 22d of July, 1895, against the Lyceum Company, to complete his title. This suit was not defended by that company, and decree pro confesso went against it; and, after sleeping until the 31st of October, 1894, and after the contract here in question was entered into, a final decree was entered in favor of James P. Love, the heir at law of Edward J. Love, the original complainant, who had died pending suit. The party so purchasing early set about to make something out of his purchase, and before his suit for specific performance was commenced entered into negotiations, as is testified to, with a Mr. Pierson, who several years ago had charge of the real-estate department of the defendant corporation, and had some sort of a verbal promise from Mr. Pierson that the company would pay a round sum of money—\$400, I believe—for the 13-foot gore. At the time of the transactions here in question Mr. Pierson was not in the employ of the company, was not called as a witness, and each officer of the company under whose supervision the present transaction came denies all knowledge or information of any such negotiations, and they can find among the company's archives no memorandum or record whatever of any contract or negotiations for such between the owner of the 13 feet and the defendant corporation, or anybody connected with it. So that it abundantly appears that none of the persons connected with the defendant corporation at the time of the contract here in question in 1893 had any notice or suspicion of the real state of the title. There was no fence or other mark on the northwest side of the building which indicated where the property line was located. The building was placed upon the southeast line, with eaves or cornices overhanging the line. To return to the transaction of March, 1893, counsel for defendant testifies that when they parted on the 27th of March there was no understanding on his part, or on the part of the defendant corporation, that the defendant corporation undertook in any wise to obtain the title to this gore of land. On the contrary, he understood that the complainants intended so doing. The broker, E. S. Brown, swears that he understood that the defendant was to procure the title to this 13-foot gore, and complete the title at its expense. The complainants took possession—presumably by permis-

sion of the broker—as soon as the contract was signed. There is no proof that it was done by the consent or with the knowledge of the defendant. Later on—in the fall of the same year—they made some repairs, the extent and value of which are not shown, nor is it shown that they were made with the knowledge or consent of the defendant. The complainants have occupied the premises ever since, the defendant all the while calling on them to take the deed, and they refusing unless the title to the 13-foot gore was included. It does not appear that they ever offered to take such title as the defendant had in the 13-foot gore, or in the small slice of it occupied by the building. Their insistence was that the defendant should perfect the title to the 13-foot gore. Finally an action in ejectment was brought, and this bill was filed, and the ejectment stayed. At or about the time the ejectment suit was commenced, complainants first demanded a conveyance, with an abatement of \$500 from the purchase price named in the contract. The taxes on the whole lot for 1893 were not paid. The collector advertised and sold the same to the defendant for the term of 30 years. The cross bill prays that the actual contract may be declared void, and delivered up to be canceled.

Addison Ely, for complainants. R. L. Lawrence, for defendant.

PITNEY, V. C. (after stating the facts). The proofs show that Mr. E. S. Brown, the Rutherford real-estate broker who negotiated the sale in this case, had no authority whatever to bind the defendant, either by representation or contract. The distinction between a mere broker and an agent with power to contract is clear, and was pointed out in the case of Keim v. Lindley, in this court, reported in 30 Atl. 1063, and, on appeal, in 54 N. J. Eq. 418, 34 Atl. 1073. The broker here had a much more restricted authority than the one in Keim v. Lindley. In fact, he had none. The contract here, so far as binding on the defendant, is found entirely in the letter from Mr. Jordan of March 21, 1893. At that time the officers of the defendant had no suspicion or ground or reason to suspect that their title did not cover the property known as the "Union Hall Property." Mr. Brown, the broker, swears positively that what was known in Rutherford as the "Union Hall Property" was the building and the land upon which it stood. Mr. Planer does not swear that he had any other understanding. The contractual letter speaks of the "Union Hall Property." So that, for present purposes, the alleged defect in title to the property agreed to be conveyed extended to only the small gore with 2 feet front on the street, running back to nothing at a distance of about 15 or 20 feet. It is not altered or affected by the broker's letter of acceptance, in which he states that the property to be conveyed included the 13-foot gore. Nor is it affected by

the possession taken, in the absence of proof that it was so taken by the consent of the defendant. Besides, I do not understand that a mere naked taking of possession by a purchaser makes any equity in his favor, for the reason that it is not an irretrievable step which renders it impossible for him to be restored to his former position without loss. So with regard to the repairs. They were done after the difficulty about the title arose, and, as far as appears, without the knowledge and consent of the defendant. A restriction of the subject of the contract to the ground upon which the building stands, and of course so much of the rear of it as is not covered by the building, reduces the extent of the supposed defect in title to a very small figure. Its area is not over 10 square feet. The area covered by the building is about 300 feet, and by the defendant's paper title about 460 feet. Considered by area, it would be about 2 per cent. of the whole, and about 3 per cent. of the amount covered by the building, and, in frontage, it would be about 4 per cent. I think 3 per cent.—or say \$100—will be the extent of the abatement in the price (\$3,000) fixed by the contract. If specific performance with compensation shall be decreed, I am unwilling to take into consideration the extent to which the value of the property will be diminished by the failure of title to this little slice of the building. To do so would lead to manifest injustice. The rule is well settled that specific performance with compensation, as in all other cases, will be decreed only to such an extent as will work no injustice to any party.

Coming now to the question of the right of the complainants to specific performance, it is to be observed that at the time the contract was made the officers of the company, as we have seen, had no knowledge or suspicion that their title did not cover what they understood they contracted to convey. I find it difficult to come to the same conclusion with regard to the complainant Planer. He had been the local assessor of taxes, and the tax map showed the line running through the property separating the gore lot. Then we have the significant circumstance, of which no explanation was given, of the insertion in the broker's letter of the 23d of March of this clause: "Mr. Charles Planer is assessor, and he understands that he is purchasing the property on Ames [Ave.], which is assessed to the Equitable. It is on borough map No. 13, block 76, has 63.60 feet on Ames avenue." There is no suggestion that defendant owned any other property in Rutherford which might be mistaken for this, or that there was any doubt but that the contractual letter of March 21st referred to this property. Then we have Mr. Planer, or his associate, Mr. Alyea, who was the collector of the city, employing Mr. Shafer (who was then, and had all the time been, the counsel and agent of Mr. Love, who claimed to be the owner of the 13-foot gore) as his counsel to go to New York, and super-

vise the tradition of the title. Then Mr. Planer does not swear that he supposed that the defendant had title to the whole 63 feet, or even to all the land covered by the building. He does not deny knowledge of the alleged defect. And yet his counsel at the hearing must have known that his knowledge of such defect would constitute a serious, if not insuperable, obstacle to success in his present suit; for the general and familiar rule is that a vendee who seeks partial performance with compensation must have contracted without knowledge of the defect in title or quantity, as the case may be, and must show that the defendant undertook to convey what he knew he did not own. There are exceptions to this rule arising out of the peculiar circumstances of each case. But the court is loath to decree partial performance with compensation to be allowed to a vendee who knew when he made the contract that his vendor was unable to perform in full, while the vendor himself innocently supposed that he was able to perform. *Pom. Spec. Perf. Cont.* § 442; *Peeler v. Levy*, 26 N. J. Eq. 330, and cases cited on page 332. In *Nelthorpe v. Holgate* (a suit by vendee against vendor) 1 Colly. 203, at page 222, Vice Chancellor Knight-Bruce says: "If, indeed, Mr. Holgate had satisfied the court that he entered into the contract of March in ignorance of his mother's life estate, or under a mistaken notion that he was entitled to sell and could make a title to the fee simple in possession without her concurrence, or in consequence of any promise or representation on her part that she would concur in the sale; or, if he had shown that when the agreement was made either Mr. Holmes, Mr. Grantham, or Sir John Nelthorpe knew, or had, as between them and Mr. Holgate, notice of Mrs. Holgate's interest or her son's inability to make a title without her consent,—the case would have been different, and might, possibly, have been materially different from its present position." And see *Fry, Spec. Perf. Cont.* (3d Am. Ed.) §§ 1231, 1235, et seq. But, admitting that the complainants did not have notice that defendant's paper title did not cover all the land covered by the hall, let us see how the case will then stand; and the result is a clear case of mutual mistake. The defendant agreed to convey what it was unable, as complainants allege, to convey; and complainants were ignorant of such inability. The general rule is thoroughly established that where there is a mutual mistake of this kind, and even, in some cases, where the defendant (the vendor) alone was laboring under a mistake in entering into a contract, such a mistake is a defense. *Pom. Spec. Perf. Cont.* §§ 245, 250; *Fry, Spec. Perf. Cont.* (3d Am. Ed.) §§ 750, 751. Suppose we go a step further, and inquire into the character and extent of the defect. I doubt if Love would have succeeded in his suit for a conveyance if it had been contested by the Lyceum Hall Company. It seems probable, to say the least, that the hall company could have set up, with great show

of success, the fact that it did not intend by the contract which its treasurer signed, found in the receipt of the money, to convey a valuable gore of land which at the time it did not know that it owned. And I should be sorry to believe that this court would, in the face of such objection, have compelled it to so convey it. And I think I am safe in saying that Mr. Love would have had much greater difficulty in enforcing his contract as against the defendant herein if it had been made a party, so far as relates to the small gore covered by the hall. Of course, the decree, as obtained, has no binding force upon the defendant. Love was chargeable with having purchased with knowledge that the hall company had intended to mortgage the whole building to the defendant, and that the defendant was in possession of the building, claiming title to the whole. He stands by for 10 years, and permits the defendant to pay taxes on the whole 13 feet without taking any action to enforce his claim against it. It is probable that the taxes so paid amount to the whole value of the little gore covered by the building.

There is still another objection to granting relief upon the basis of a conveyance of the land covered by defendant's sheriff's deed, with abatement, namely, the time that has elapsed. The defendant's offer to take \$3,000 was made upon the condition that the affair should be closed immediately. The complainants at the time did not offer, and have never since been willing, to take a deed from the defendant for all its right, title, and interest in the hall property, whereby they would have gained whatever equitable rights the defendant might have had against the holders of the adverse title, nor did they offer to take the conveyance tendered by the defendant with a rebate of price by reason of the defect in title. The evidence on the subject of the rebate is that there never was any offer on the part of the complainants to accept the title with a rebate until after the ejectment was commenced. The evidence of Mr. Planer on this subject when first examined was explicit. His language is this: "Q. Did you offer to take the fifty feet? By the Court: Did you ever say you would do so? Witness: Yes, sir; I was willing. We were willing to take fifty feet and rebate. Q. If a proper rebate was made? A. Yes, sir. Q. By the Court: When did you make that offer to him? A. I think that was last summer. [This evidence was given on the 29th of April, 1896. The action of ejectment was commenced on the 11th of March, 1895.] Q. By the Court: About the time the suit was brought? Mr. Ely, Counsel for Complainant: I think it was after the supreme court suit, but before this suit. The Witness: Before this suit was commenced. Q. What did Mr. Jordan say to you? A. Said he would try to settle the matter satisfactorily, but never heard anything since until this suit was commenced." I am satisfied from the evidence that none of the officers

of the defendant encouraged complainants to believe that it would purchase the outstanding title from Love when perfected, and include it in the conveyance. I adopt the evidence of Mr. Ward on that subject. It was, no doubt, at the same time the complainants' hope either to induce, or to compel, the defendant to do so. This latter I find they cannot do. They are, therefore, responsible for the delay. In the meantime there has been some change in the value of the property, and the defendant has obtained a 30-year tax title to the part not covered by its conveyance. Under these circumstances I do not see my way to advise any decree against the defendant, and must therefore advise that the complainants' bill be dismissed, with costs, and the contractual letter be declared invalid as a contract, and delivered up.

TUCKER et al. v. CHICK et al. (two cases).
 ROCHESTER SAV. BANK v. SAME. SOMERSWORTH NAT. BANK v. SAME. HARGRAVES v. SAME. SOMERSWORTH SAV. BANK v. SAME.

(Supreme Court of New Hampshire. Strafford. March 14, 1890.)

ASSIGNMENT FOR CREDITORS—APPOINTMENT OF
 ASSIGNEE—ATTACHMENT—TRUSTEE PROCESS
 —CONTINUANCE OF ACTIONS.

1. Under statutory provisions authorizing the judge of probate to appoint an assignee for creditors on the recommendation of two-thirds in number and of a majority in value of the creditors who prove their claims, the trust does not fail because creditors neglect to prove their claims. The recommendation being optional, the court may appoint of its own motion.

2. Where an assignee has been appointed, and no creditors have proved their claims in the prescribed time, creditors cannot reach the funds in the hands of the assignee by trustee process.

3. The actions will not be continued till the final settlement of the assignee's account in the probate court, since the trustee process is an equitable proceeding, and it is not equitable that plaintiffs should stand any better than they would have stood if they had proved their claims in insolvency.

Separate actions of foreign attachment by Tucker and others, Tucker, the Rochester Savings Bank, the Somersworth National Bank, Hargraves, and the Somersworth Savings Bank, against one Chick and one Beacham, trustee. The facts are agreed. The trustee, as assignee of Chick, defendant in insolvency, has sold Chick's real and personal property, and holds the proceeds. A decree of distribution has been reversed (65 N. H. 119, 18 Atl. 234), on the ground that no claims were filed in the prescribed time. Trustee discharged.

James A. Edgerly, for plaintiffs Tucker, Cheney & Chandler. Worcester & Gafney, for plaintiff Rochester Sav. Bank. William D. Knapp, for plaintiffs Somersworth Nat. Bank and Hargraves. William F. Russell, for plaintiff Somersworth Sav. Bank. William S. Pierce, for defendant. Beacham & Foote and John Kivel, for the trustee.

SMITH, J. The fact that the creditors neglected seasonably to prove their claims did not affect the jurisdiction of the probate court. Chick was owing debts, and had property which the statute not only permitted him to assign for the benefit of his creditors, but, upon due proceedings instituted by them, would have compelled him to assign. All the estate of the debtor vested in Beacham as assignee upon his appointment, and was held by him for the benefit of creditors. He was assignee de facto, if not de jure. An assignee is appointed by the judge of probate, and not by the creditors, although the appointment is made upon the recommendation of two-thirds in number and of a majority in value of the creditors who prove their debts. The trust does not fail because creditors neglect to prove their claims, or, proving them, neglect to vote, or are unable to agree. The recommendation of an assignee is optional with the creditors, not compulsory. If they fail to agree, or neglect to recommend, unless the judge has the power to appoint, the object of the statute—the distribution of the debtor's property proportionately among his creditors, and the granting to him of a discharge if otherwise entitled to one (Laws 1885, c. 85, § 15)—would be defeated. Beacham, having been legally appointed assignee, had the right, and it was his legal duty, to convert the property of the debtor into money, to be distributed to those who, under a decree of the court, may be entitled to it. As no objection to his doings has been shown other than such as results from the manner of his appointment, no reason appears for declaring invalid any of his acts.

In the first two cases the plaintiffs reside in Massachusetts. If their claims are such as follow the person, a discharge of the debtor will not bar their claims, unless they prove them. *Perley v. Mason*, 64 N. H. 6, 3 Atl. 629; *Norris v. Atkinson*, 64 N. H. 87, 5 Atl. 710. In the fourth case the plaintiffs are a New Hampshire corporation. Their debt was contracted prior to the passage of the act of 1885, and, not having been proved in these proceedings, will not be barred by a discharge of the debtor. Laws 1885, c. 85, § 15. The plaintiffs in the three other suits are citizens of this state. The plaintiffs in all the suits except the fourth proved their claims, but not in season to be included in a decree for distribution. They are now attempting to reach the funds in the hands of the assignee by trustee process. The ground for their contention is that, as no debts were seasonably proved, there are no creditors entitled to share in the assets (*Tucker v. Beacham*, 65 N. H. 119, 18 Atl. 234), and hence that the funds in the assignee's hands remain in or are restored to the debtor, for whom he holds them in trust (*Towle v. Davenport*, 57 N. H. 149; *Towle v. Rowe*, 58 N. H. 394; *Ramsey v. Fellows*, Id. 607; *Fowler v. Down*, 1 Bos. & P. 44). But it is settled

in this state that a person cannot be charged as trustee who has in his possession money or credits in an official capacity, and for which he is obliged to account; until his accounts have been adjusted in the court having jurisdiction of the subject-matter. *Willard v. Decatur*, 59 N. H. 137; *Palmer v. Noyes*, 45 N. H. 174; *Woodbridge v. Morse*, 5 N. H. 519. A guardian cannot be adjudged the trustee of his ward until his accounts have been adjusted in the probate court, and a balance found due in his favor. *Davis v. Drew*, 6 N. H. 399, 400. An administrator cannot be adjudged trustee of a creditor before his claim has been allowed by the commissioner of insolvency, and ordered to be paid by the judge of probate. It is the decree that makes the administrator the debtor of the creditor. *Adams v. Barrett*, 2 N. H. 374. As a general rule, if the principal defendant would have no right of action against the trustee, the latter cannot be charged. *Getchell v. Chase*, 37 N. H. 110; *Greenleaf v. Perrin*, 8 N. H. 273; *Adams v. Barrett*, 2 N. H. 374; *Haven v. Wentworth*, Id. 93; *Richards v. Railroad*, 44 N. H. 127, 139; *Paul v. Paul*, 10 N. H. 117, 120; *Forist v. Bellows*, 59 N. H. 229.

Beacham cannot be charged as trustee of Chick upon the facts agreed. His accounts have not been settled in the insolvency court. That court has jurisdiction of him, and of the funds in his hands, and cannot be deprived of its jurisdiction except on appeal. The amount due him for his services, expenses, and costs since the settlement of his former account remains to be adjusted. If Chick is entitled to the balance after such adjustment, he cannot maintain a suit therefor before the amount has been determined by a decree of that court.

Justice does not require that the actions be continued until the accounts of the assignee can be settled. *Palmer v. Noyes*, 45 N. H. 174. The trustee process is an equitable proceeding, and it is not equitable that the plaintiffs should stand any better than they would have stood if they had proved their claims in insolvency. Upon this conclusion, it may be for the interest of all parties to agree upon a decree of distribution and a discharge of the debtor, or to make a distribution and discharge without a decree.

CARPENTER, J., did not sit. The others concurred.

STATE v. DALTON.

(Supreme Court of Rhode Island. June 7, 1897.)

COURTS—JURISDICTION—HOMICIDE—DYING DECLARATIONS—INFERENCES—PROVINCE OF JURY—WITNESSES—CONVICT—COMPETENCY.

1. The judiciary act (chapter 3) defines the jurisdiction of the common pleas division of the supreme court, which replaced the old court of common pleas, but omits all reference to indictments then pending in the court of common pleas.

Chapter 38, § 21, provides that the appellate division shall give directions to the clerks of the courts of common pleas in the several counties as to what disposition shall be made of all actions, civil and criminal, pending in said courts. In pursuance of section 21, an order was duly made by the appellate division, and such actions were transmitted, as directed, to the common pleas division of the supreme court. Section 22 provides that the courts to which the original papers have been transmitted "shall have jurisdiction of all actions in all respects" as if the same had been originally brought there. Section 36 contains a saving clause reciting that "no offense committed * * * under any of the acts hereby repealed, * * * and no suit, prosecution or indictment pending at the time of said repeal * * * shall be affected by such repeal, except that the proceedings * * * shall be conformed whenever necessary to the provisions of this act." *Held*, that the common pleas division had jurisdiction over an indictment found by the old court of common pleas, and duly transmitted under the judiciary act.

2. In a murder case, a state's witness testified that shortly after 8 o'clock in the evening he saw deceased staggering along the sidewalk; that deceased showed evidence of great pain by stooping down when he walked, pressing his hands on his abdomen, and groaning, and that he said to witness, "Let me tell you," that while sitting on a step, and groaning, with his hand across his abdomen, the expression of his voice and countenance plainly showing that he was in great agony, he said to witness, "They have done the old man up; I wish I could get home; I want to get home before I die;" that when witness attempted to assist him to a street car deceased suffered more acutely, lay down on the ground, and was very sick; that while there he repeated that he wanted to reach his home, adding, "It is all over with me;" that when plaintiff started for a conveyance, deceased made such an outcry at being left alone, and seemed in such pain, that witness remained with him, and that he was soon removed to a hospital. A nurse testified that there he said several times, "They have killed me, and I am a goner." Deceased died at 9 o'clock the next morning. *Held*, that statements made by deceased to the witnesses concerning the persons who inflicted the injuries which resulted in his death, and the manner of said injuries, were admissible as dying declarations.

3. To render a statement admissible as a dying declaration it is not necessary that the deceased should have apprehended immediate death, but only that he had no expectation of surviving the injury inflicted by defendant.

4. In a murder case, the testimony of one who had previously been convicted of the same crime, and was serving a life sentence in the state prison therefor, was admissible; its weight being for the jury.

Martin Dalton was convicted of murder, and petitions for a new trial. Denied.

Edward C. Dubois, Atty. Gen., for the State.
John M. Brennan and Dennis J. Holland, for defendant.

TILLINGHAIST, J. The defendant, Martin Dalton, who, on the 2d day of January, 1896, was convicted of the crime of murder, petitions for a new trial on the grounds: (1) That the common pleas division had no jurisdiction to try him under the indictment in this case; (2) that the court erred in matters of law in its rulings; and (3) that the verdict is against the evidence, and the weight thereof. The indictment was found at the September term, 1892, of the court of common

pleas held in and for the county of Providence.

In support of the first ground above specified, the defendant's counsel says that at the time when the defendant was tried the court of common pleas was an inferior court, having jurisdiction only of such cases as had been expressly conferred upon it by statute, and that its successor, now known as the common pleas division of the supreme court, cannot have jurisdiction over an indictment found by the abolished court, unless such jurisdiction has been expressly conferred by statute. He further says that chapter 3 of the judiciary act defines the jurisdiction of the common pleas division, but omits all reference to old indictments then pending in the court of common pleas. While it is true that said chapter 3 of the judiciary act does not refer to indictments then pending in the court of common pleas, yet chapter 38 of the same act expressly provides the manner in which cases pending in the court of common pleas shall be disposed of. Section 21 of this chapter provides that the appellate division shall give directions to the clerks of the courts of common pleas in the several counties as to what disposition shall be made of all actions, suits, and proceedings, civil and criminal, pending in said courts, and to transmit the original papers and records as may be necessary to carry out the provisions of the act. In pursuance of said section an order was duly made by the appellate division, and the indictment in question, together with all others then pending in the court of common pleas in this county, was transmitted to the common pleas division of the supreme court. And by virtue of section 22 of said chapter 38 the last-named court thereupon obtained full jurisdiction of the case. Said section is as follows: "The supreme court in its respective divisions and the district court to which the said original papers, exhibits and record shall have been transmitted as aforesaid, shall have jurisdiction of all actions, suits and proceedings so transmitted and shall proceed therein in all respects as if the same had been originally brought before such division or court under this act." The saving clause of the repealed statute is found in section 36, which is as follows: "No offense committed and no penalty or forfeiture incurred under any of the acts hereby repealed, and before the time when such repeal shall take effect, shall be affected by the repeal. And no suit, prosecution or indictment pending at the time of said repeal for any offence committed or for the recovery of any fine, penalty or forfeiture incurred under any of the acts hereby repealed, shall be affected by such repeal, except that the proceedings in such suit, prosecution or indictment shall be conformed, whenever necessary, to the provisions of this act." We therefore decide that the common pleas division had full jurisdiction to try and determine the indictment in question.

The rulings complained of are those relat-

ing to the admission of statements made by Anthony S. Haswell, the man who is alleged to have been murdered, as to the persons who injured him, and the manner in which the injury was inflicted. The attorney general contends that the statements were admissible on the ground that they were declarations made in extremity, when said Haswell was consciously at the point of death; while the defendant's counsel insists that the evidence fails to show that they were so made, and hence that they were improperly admitted. William E. Wilson, a witness called in behalf of the prosecution, testified: That shortly after 8 o'clock on the evening of the 18th of July, 1892, he saw a man staggering along in front of his house on the concrete walk. That the man looked as though he had tumbled in the dirt, and witness thought at first that he was intoxicated. That the man attracted his attention. That he showed evidence of being in great pain by stooping down when he walked, pressing his hands upon his abdomen, and groaning, and that he asked to be allowed to speak to witness, saying, "Let me tell you." Witness further testified that what the man said indicated that he was apprehensive of impending death from the injuries he had received. That while sitting on the step, and groaning, with his hand across his abdomen, the expression of his voice and countenance plainly showing that he was in great agony, he said to witness: "They have done the old man up. I wish I could get home. I want to get home before I die." And then said if he could get to the Brook street car, he could get home, and that he seemed impatient to go. He told witness that his name was Anthony S. Haswell. After attempting to go to the street car, and failing, witness testified that he suffered more acutely. That he lay down on the bank, and was very sick; and that while there he said again: "They have done the old man up. Take me home. I want to see my wife before I die. It is all over with me." Witness further testified that during all this time the man seemed to think he was killed, and that he was going to die from his injuries. The perspiration came out on his forehead, and he tried to vomit, but could not. Witness attempted to assist Mr. Haswell to the Brook street car, but, finding him too feeble, assisted him to the curbstone, where he left him, and started to telephone to the police station about the man, but he made such an outcry at being left alone, and seemed in such pain, that witness thought it would not do to leave him; that shortly afterwards blankets were brought from a neighboring house, and he was removed from the curbstone to the bank, where he lay until a wagon was brought, and he was taken to the hospital, where he died at 9 o'clock the following morning. To the witness Hughes deceased said, while lying on the ground: "I want to be taken to my wife. I will die. I know I will." To the witness Elizabeth T. Kerr, who was a nurse at the

hospital where he was taken, he said several times shortly after arriving there: "They have killed me, and I am a goner. Send for my wife."

In view of the foregoing facts, we think it is clear that the court did not err in allowing the witnesses to testify as to the declarations made by the deceased concerning the persons who inflicted the injuries upon him which resulted in his death, and also as to the manner of said injuries. In order to render the statements of the deceased admissible as a dying declaration, it was only necessary to show to the satisfaction of the court, in the first instance, that it was made under a sense of impending death (Whart. Cr. Ev. § 297); the rule as to the admissibility of a dying declaration being that it is enough if it satisfactorily appears in any mode that it was made under the sanction of impending death, whether this be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to to ascertain the state of the declarant's mind (Greenl. Ev. [13th Ed.] § 158; Whart. Cr. Ev. [8th Ed.] §§ 282, 293). After the evidence is admitted, however, its credibility is entirely for the jury, who are at liberty to weigh all the circumstances under which the declarations were made, including those already proved to the court, and to give the testimony only such credit as, upon the whole, they may think it deserves. *Com. v. Casey*, 11 Cush. 417-421. The weight to be attached to dying declarations, as laid down by Mr. Wharton in his work on Criminal Evidence (section 276), depends upon these conditions: "(1) The trustworthiness of the reporters; (2) the capacity of the declarant at the time to remember accurately the past; and (3) his disposition truly to tell what he remembers." In view of the exceptional character of such testimony, and of its liability to perversion, we think these tests are reasonable and proper; and the record before us in the case at bar shows that they were substantially applied to the testimony in question. In ruling on the declaration alleged to have been made by the deceased, "They have done me up," the court said: "The jury may draw their inferences from what was said as to what the man meant by that expression, being in the condition he was at the time, and suffering as he was. * * * To make it admissible, the man should have apprehended immediate death; and anything he said which convinces the jury that he did apprehend it is sufficient to allow the state to put it in. * * * If he believed he was in the immediate presence of death,—was about to die,—and made this declaration, then it is proper to show it." This was even more favorable to the defendant than he was entitled to, because it was not necessary that the deceased should have apprehended immediate death in order to render

his declarations admissible; but only that he had no expectation of surviving the injury inflicted by the defendant. 9 Am. & Eng. Enc. Law, pp. 679-682, and cases cited.

The record also shows that the jury were properly instructed as to the credibility of the witnesses who testified as to the declarations of the deceased, and as to the probabilities of the truthfulness of said declarations. We are therefore of the opinion that the court did not err in admitting the testimony as to the declarations of the deceased, and the exceptions relating thereto are overruled. After a careful examination of the evidence in the case, we are not convinced that it is insufficient to sustain the verdict. The testimony of the defendant Sullivan, who had previously been convicted of the same crime, and was serving a life sentence in the state prison therefor, was properly admitted, and it was for the jury to give it such weight, in connection with the other testimony offered, as they thought it deserved. Petition denied and dismissed, and case remitted to the common pleas division for further proceedings.

HEALY v. NEW YORK, N. H. & H. R. CO.
(Supreme Court of Rhode Island. June 15, 1897.)

TRIAL—SPECIAL FINDINGS—FELLOW SERVANTS—BRAKEMAN AND ENGINEER.

1. Special findings that plaintiff voluntarily signed a release of the claim in suit, and that it was read to him before signing, and was not obtained by fraud, are inconsistent with a finding that plaintiff did not know what he was signing, and a general verdict for plaintiff, and hence a new trial must be granted.

2. The engineer of a "wild" engine, who, by violation of orders, produces a collision, is a fellow servant of a brakeman on the train collided with.

3. Where a railroad company transmits to an engineer orders which, if obeyed, will avoid a collision with another train, it has in that respect performed its duty of furnishing a clear track for such train, and is not liable to a fellow servant of such engineer for injuries by a collision produced by the engineer's disobedience of the orders.

Action by John Healy against the New York, New Haven & Hartford Railroad Company. There was a verdict for plaintiff on the first count of the declaration, and for defendant on the second count, and both parties petition for a new trial on the respective counts. New trial denied on the second count, and granted on the first.

E. K. Parker, for plaintiff. Frank S. Arnold, for defendant.

TILLINGHAST, J. The verdict in this case was for the plaintiff on the first count of the declaration, and for the defendant on the second count. The first count is based upon an accident which happened to the plaintiff, who was a brakeman in the defendant's employ, on the 17th day of February, 1893, at Providence, while he was engaged in uncoupling

cars; and the second count is based upon another accident which happened to the plaintiff, while in defendant's employ, in the same capacity, on the 16th day of June, 1893, at Carolina Station, in Charlestown. The defendant petitions for a new trial on the first count of the declaration, and the plaintiff petitions for a new trial on the second count thereof.

Of the nine distinct grounds upon which the defendant bases its petition for a new trial, we will consider but one, for the reason that we are of the opinion that a new trial must be granted on that ground, and it therefore becomes unnecessary to consider the others. The eighth ground on which defendant relies is this: "Because the verdict upon the first count of the plaintiff's declaration, as found, is against the special findings of the jury, and inconsistent therewith." The special findings referred to are as follows: "(1) The release marked 'D,' and dated April 24, 1893, was executed by the plaintiff by his making his mark, in the presence of George W. Hobbs. (2) The plaintiff did execute said release, marked 'D,' voluntarily, and of his own free will. (3) The release marked 'D,' was read to the plaintiff before its execution by Mr. Hobbs. (4) The release marked 'D' was not obtained by the fraud of any agent or servant of the defendant. (5) The plaintiff did not know what he was executing when he executed the release marked 'D.' (6) The plaintiff could not read at the time the release marked 'D' is claimed to have been executed."

The release referred to in these special findings was as follows:

"Know all men, that I, John Healy, have received of the New York, New Haven & Hartford Railroad Company the sum of twenty-seven and thirty-hundredths (\$27.30) dollars, in full payment, discharge, release, and satisfaction of all claims, demands, and causes of action whatsoever, and especially of and from all claims and demands against said company on account of injuries to person sustained by me by having my fingers crushed while uncoupling cars at Providence, R. I., on the 16th day of February, 1893, and of all damages on account of such injuries. In witness whereof, I have hereunto set my hand and seal, the 24th day of April, 1893.

his
"John X Healey [L. S.]
mark.

"Signed, sealed, and delivered in presence of Willard I. Turner, George W. [unclear] at the [unclear]

It will at once be seen that the [unclear] of the special findings, any fine, penalty, or damages, if they are both inconsistent with the verdict of guilty. The jury found that the release in question was executed by the plaintiff; (2) that it was executed voluntarily and of his own free will; (3) that it was read to plaintiff before its execution; (4) that it was not obtained by fraud; and (5) that, notwithstanding all this, the plaintiff did not know what he was execut-

ing when he signed it. The last-named finding is so clearly inconsistent with those which precede it as to show that the jury must have been mistaken either as to it, or as to the others; and, as it is impossible for the court to determine wherein the mistake exists, we must hold that the entire findings were a nullity. Said first five findings are also clearly inconsistent with the general verdict of guilty. If the release was voluntarily executed by the plaintiff after it was read to him, and no fraud was practiced upon him in obtaining it, then it was a bar to his action, and the verdict should have been for the defendant, as it was only by ignoring the release as a valid and binding instrument that the plaintiff could be allowed to recover. The jury have practically found both ways as to this instrument,—first, that it was valid and binding, and, second, that it was invalid and of no avail,—and have based their verdict upon the latter theory. Such a verdict, of course, cannot be allowed to stand. And here we may suggest that it would be well for the trial court, in its discretion, to limit, as far as may be, the number of issues submitted to the jury under the statute, in order that they may not be confused, and that such questions as are necessarily involved in the general verdict may be excluded, as far as possible, from the special findings. For the reasons above given, the defendant's petition for a new trial is granted on the first count.

We will now consider the plaintiff's petition for a new trial on the second count in the declaration. The facts set out in the record are briefly as follows: On the 16th day of June, 1893, the train upon which plaintiff was a brakeman left Stonington for Providence, and arrived at Carolina at about 7 o'clock a. m. Prior to arriving at this station, the train had stopped at Wood River Junction, in pursuance of a signal, to receive orders. Up to this time the train had been run on the east-bound track, which was the regular track for this train to run on. The train was under the government of the conductor, Joseph R. Adams. At the last-named station a train order was delivered to the conductor, directing him to run his train from that point to Kingston on the west-bound track, and informing him that he had right of track over all west-bound trains. In accordance with this order, his train took the west-bound track at Wood River Junction, and proceeded on its way; and, when, he approached said Carolina Station, at the curve, and came in collision with an engine brought it would not plaintiff's train, on the same, or way afterwards. It appears that an engine had been negligently placed at Carolina Station on the east-bound track, so as to render it necessary to run plaintiff's train on the west-bound track to avoid the obstruction, and hence the giving of the order aforesaid to conductor of plaintiff's train. Albert C. Pickering was a locomotive engineer in the employ of defendant, and had charge of the engine No. 336, which collided with plaintiff's train.

At Kingston, on the day in question, said Pickering was duly ordered by the division superintendent, by telegraph, to take the east-bound track. This order was received by Engineer Pickering at Kingston, but, instead of obeying the same, he ran his engine onto the west-bound track, resulting in a collision with plaintiff's train as aforesaid, whereby plaintiff was injured. The jury found specially as follows: "(13) The accident on June 16, 1893, and the injuries to the plaintiff by him sustained on that date, were occasioned by the disobedience of train orders to Locomotive Engineer Pickering. (14) The injuries sustained by the plaintiff on June 16, 1893, were occasioned by the negligence of Locomotive Engineer Pickering."

The grounds upon which the plaintiff petitions for a new trial are that the court erred in refusing to instruct the jury as follows: "(1) The plaintiff requests the court to charge the jury that the engineer Pickering was in fact the conductor of his south-bound train, and was at the time of the said collision at Carolina, on June 16, 1893, acting as vice principal of the defendant, and was exercising its functions. (2) The plaintiff requests the court to charge that it was the defendant's duty, owed to the plaintiff, to keep its track clear of obstructions on the 16th day of June; A. D. 1893, at Carolina Station, and that said duty was not an assignable duty. (3) The plaintiff requests the court to charge that it is immaterial in the case at bar that the engineer Pickering disobeyed his instructions on the 16th day of June, 1893, as his disobedience does not release the defendant from its liability for his (plaintiff's) injuries incurred at Carolina, on said date."

The first and third requests to charge may properly be considered together. We think the court rightfully refused to grant them. The engineer Pickering, whose reckless disobedience of orders, in running his engine onto the west-bound track, caused the accident, was clearly a fellow servant with the plaintiff, not only under the decisions of this court, but also under the great current of decisions everywhere. They were simply engaged in different branches of a common service, and the service which the engineer was performing was of that character which the defendant could properly devolve upon him (there being nothing to show that due care was not exercised in selecting him therefor), without itself being liable for his negligence as to a fellow servant. See *Brodeur v. Valley Falls Co.*, 16 R. I. 448, 17 Atl. 54; *Hanna v. Granger*, 18 R. I. 507, 28 Atl. 659. But plaintiff's counsel, while conceding that an engineer and brakeman on the same train are fellow servants so long as the former is engaged in simply manipulating his locomotive, contends that when, in addition thereto, he assumes or is appointed to conduct a train agreeably to general rules or special orders, he is no longer a fellow servant with a brakeman, and especially with one upon another train. We do not understand that the case before us

shows such a state of facts as this argument assumes. There is nothing to show that Pickering assumed or was ordered to conduct a train, or that he was in fact conducting a train, when the collision occurred. He was simply running an engine, or what in railroad parlance is called a "wild engine," without any train being attached thereto, for some purpose connected with the management of the road; and he was running it under the direction of the division superintendent, who was practically the conductor thereof; and, had the engineer obeyed the instructions received, the accident would not have happened. In short, so far as appears, the defendant corporation had furnished safe and proper appliances for the management of its road, and had given explicit directions as to the running of the engine in question, which, if they had been obeyed, would have fully protected the plaintiff in his employment. And we fail to see that the defendant can legally be called upon to respond in damages for the happening of an accident in such circumstances, and for the simple reason that no negligence can be attributed to it. It was not a question for the jury whether the dispatching of an engine and tender, under the control of an ordinary engineer, constituted negligence on the part of defendant. It is a matter of everyday occurrence on railroads that engines are thus sent out. And the danger incident to the running thereof, including the carelessness of engineers, is clearly one of the risks of the employment which the fellow servants of the engineer assume when they enter the service of the corporation. See *Snow v. Railroad Co.*, 8 Allen, 445.

As to the second request to charge, viz. that it was the defendant's duty, owed to plaintiff, to keep its track clear of obstructions, and that this was not an assignable duty, we also think the court did not err in refusing the same, in so far, at any rate, as it is applicable to this case; for, while it is the duty of a master to provide a reasonably safe place for his employes to work in, and to furnish and keep in repair all the appliances of the business, and to protect his servants from injury therefrom by reason of unseen defects, so far as human care and foresight can accomplish that result, yet he is not an insurer of the servant against injury, nor is he liable for the willful misconduct of a servant in rendering the place of labor unsafe and dangerous, whereby a fellow servant is injured. In *Railway Co. v. Frost*, 21 C. C. A. 186, 74 Fed. 965, cited by plaintiff's counsel, which was a case where, by reason of the negligence of the telegraph operator, whose duty it was to receive and deliver the orders of the train dispatcher, the plaintiff was injured, the court said: "It seems just in principle to hold that the company has discharged its duty when it has given information to one of its servants, who is engaged in the common employment of the others that are to be affected thereby, and has instructed him to notify his co-em-

ployes, and that when the company has exercised due care in selecting such local operator in the first instance, and has not been negligent in employing or retaining him in his office, it has discharged its duty, and that such operator stands in the attitude of a fellow servant to the trainmen." See, also, *Slater v. Jewett*, 85 N. Y. 62. No amount of diligence on the part of a railroad company can prevent an accident like the one upon which the second count aforesaid is based. The company has the right to presume that its orders will be strictly followed; and all it can do when such orders are disobeyed is to summarily discharge the servant who thus offends, as was done in the case at bar. So far as appears, the defendant had no more reason to believe that Pickering would disobey the orders of his superior than the plaintiff had. Such conduct was not anticipated, and could not have been anticipated, by anybody. It was simply one of those strange and unaccountable things which sometimes happen. But, as there was nothing which the defendant could reasonably be called upon to do which it did not do in the premises, it follows that as to the plaintiff, who was a fellow servant with the person causing the injury, he has no legal ground of complaint, except as against the man who caused it. The plaintiff's petition for new trial on the second count is denied and dismissed, and the case is remitted to the common pleas division for new trial upon the first count, as aforesaid.

TOWN OF SIMSBURY v. TOWN OF HARTFORD.

(Supreme Court of Errors of Connecticut. June 15, 1897.)

PAUPERS—BASTARDS—DOMICILE.

Under Gen. St. § 630, providing that, on the marriage of the parents of an illegitimate child, it shall be deemed legitimate, and inherit equally with other children, such a marriage renders the child legitimate for all purposes, and hence it takes the father's domicile, so that the town in which he has his settlement is liable for its support.

Action by the town of Simsbury against the towns of East Granby, West Hartford, and Hartford, to recover for support furnished two paupers. There was judgment on a verdict against defendant the town of Hartford, and said defendant moves for a new trial, for a verdict against evidence. Denied.

The action was originally brought against the towns of West Hartford and East Granby. Before trial, Hartford also was made a defendant. The plaintiff claimed damages in the alternative against one of the three defendants. Separate judgments were rendered in favor of West Hartford and East Granby, and against Hartford. Hartford filed a motion for new trial, in pursuance of chapter 51 of the Public Acts of 1893. The process of this court contained a transcript of

the record in the trial court, and a report of the evidence. The paupers supported were the wife, daughter, and grandson (an illegitimate minor child of the daughter) of one Wallace Sands. The daughter was the child of Sands and his wife, but was born before marriage. It was admitted that the paupers did not belong to Simsbury to support. If the marriage of Sands had the legal effect of giving his domicile to the child born before marriage, then all the paupers belonged to the town where Sands had gained a settlement. At one time Sands had a settlement in East Granby, and the principal question for the jury was whether this settlement had been lost, and a new settlement gained, either in West Hartford or Hartford. It was admitted that the notice to Hartford was sufficient in form, but not that it was given within the legal time. Upon argument, it was claimed that each of the following material facts were found against the evidence: That Sands had a settlement in Hartford; that his wife, daughter, and grandson belonged to Hartford; that Hartford had notice within the time required by statute in order to make it liable to Simsbury; that the persons to whom supplies were furnished were in fact paupers.

William J. McConville, for appellant town of Hartford. J. Warren Johnson, for appellee town of East Granby. Joseph L. Barbour, for appellee town of West Hartford. George P. McLean, for appellee town of Simsbury.

HAMERSLEY, J. (after stating the facts). Section 630 of the General Statutes provides: "Children born before marriage whose parents afterwards intermarry and recognize them as their own shall be deemed legitimate and inherit equally with other children." We think the effect of this statute is to legitimize children born before marriage, not only for the purpose of inheriting property, but for all purposes. It follows that the daughter of Wallace Sands, being a minor child of Sands and his wife at the time of their marriage, then took her father's domicile as fully as if she had been born in wedlock. This being so, the town in which Sands had his settlement was liable for the supplies furnished to all the paupers specified in the complaint. The evidence on the trial below was conflicting, but there was some evidence tending to support each material fact. Upon a careful examination, we can find nothing in the record from which improper conduct on the part of the jury in fairly weighing this evidence, and honestly and reasonably reaching their conclusion, can legally be inferred. The present case is plainly governed by the rule long settled and quite recently reaffirmed: "This relief will be granted only when manifest injustice has been done by the verdict, and the wrong is so plain and palpable as clearly to denote

that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion that they, or some of them, were influenced by corruption, prejudice, or partiality." *Johnson v. Norton*, 64 Conn. 134, 135, 29 Atl. 242; *Brooks' Appeal*, 68 Conn. 294, 297, 36 Atl. 47. A new trial is denied. The other judges concurred.

KELSEY v. GREEN.

(Supreme Court of Errors of Connecticut. June 15, 1897.)

INFANTS—CONTEST AS TO CUSTODY—WHEN INTERESTS OF INFANT CONSIDERED—APPOINTMENT OF GUARDIAN—JURISDICTION.

1. G. was appointed guardian of a minor by a court in Connecticut, where the minor had his actual dwelling place for several years. K. was afterwards appointed guardian of such ward by a proper court in another state, where the technical domicile of the minor's father was, on the father's application. *Held* that, in determining a contest between such guardians as to the custody of such minor, the court should consider the interests of the minor.

2. Even in contests between parents and third persons as to the custody of minor children, neither party has any right that can be allowed to militate against the welfare of the infants.

3. The probate court of a district in which the actual stated residence of a minor is, has jurisdiction to appoint a guardian of such minor, though his technical domicile is out of the state, under Gen. St. §§ 458, 459, providing that when, on the application of relatives of a minor, or the selectmen of the town "in which he resides," for the appointment of a guardian, it appears that the parent is an unfit person to have the charge of him, the probate court shall appoint a guardian, etc., on notice.

Appeal from superior court, Hartford county; Frederick B. Hall, Judge.

Petition by Otto Kelsey for a writ of habeas corpus for the purpose of obtaining the custody of Clarence Ward, an infant, alleged to be unlawfully confined, imprisoned, and detained by Frederick D. Green. From a judgment remanding such minor to the care and custody of Green, petitioner appeals. Affirmed.

The return was as follows: "The respondent, in obedience to said writ, brings the said Clarence Ward into court, and says that he is in no manner, without law or right, confined, imprisoned, restrained, or deprived of his liberty, and further avers with reference thereto as follows: (1) The said Clarence Ward is the son of Ferdinand Ward, now of Geneseo, in the state of New York, and of Ella Ward, the wife of said Ferdinand, and the nephew of the respondent. (2) The said Ella Ward died at Stamford, Conn., on or about March 1, 1890. (3) The said Ferdinand Ward at the time of the decease of said Ella Ward, and for some time prior thereto, was a convict confined in the penitentiary at Sing Sing, in the state of New York; having been convicted in the courts of said state of a felony, and lawfully sentenced to imprisonment in said prison. (4) From the time of the sentence of

said Ward, as set forth in paragraph 8, until her death, the said Ella Ward and her said son, Clarence Ward, resided in Stamford, in this state; having removed from New York to Stamford with the knowledge and approval of said Ferdinand Ward. (5) The said Ella Ward, at her decease, left a considerable estate, and a last will and testament, by virtue of the provisions of which a trust was created for the benefit of the said Clarence; the income of said estate, or so much thereof as might from time to time be found necessary, to be expended by the trustees for the maintenance and education of the said Clarence until he shall arrive at the age of twenty-one years; the principal to be paid to him when he shall have arrived at said age, or, in case of his decease prior thereto without issue, said income to be paid one-half part to his said father, and the balance to other beneficiaries named in said will. (6) Said will was proved and approved at East Haddam, in the state of Connecticut, before the probate court for said district, and was also proved and approved in the proper tribunal in the state of New York. (7) The trustees named in said will declined to accept said trust, and thereupon the Franklin Trust Company, a corporation located in Brooklyn, New York, was duly appointed trustee under the provisions of said will, both in Connecticut and in New York, accepted said trust, duly qualified in both states, and are now in the discharge of their duties thereunder. (8) To all these proceedings the said Ferdinand Ward was duly made a party, and gave his consent and approval thereto. (9) Upon the decease of the said Ella Ward, the question presented itself as to the proper disposition to be made of the person of the said Clarence, as said the Franklin Trust Company, under its charter, had no power to act as guardian of the person of the said Clarence; his father being then confined in the state prison, and the nearest relatives on the side of the father positively declining to assume any personal care of, or custody of, the said Clarence. (10) It was finally agreed between all the relations upon both sides, including the father, and with the concurrence of the Franklin Trust Company, that said Clarence should be placed under the care and custody of his uncle, the respondent, at Thompson, in this state, and the respondent, without legal action being taken in reference thereto, should assume and thereafter occupy the position of a guardian over the person of the said Clarence Ward. (11) In accordance with the arrangement aforesaid, the said Clarence was forthwith removed from Stamford, Conn., where he was then residing, to the house of the respondent, in said Thompson, and has continued to reside there until the present time. (12) The said Ward was released from state prison in or about 1892. After being so released, the said Ward approved and ratified said arrangement with reference to the custody of Clarence. (13) Some time after the release of the said Ward from prison, he de-

manded of the respondent the custody of Clarence; but the respondent did not feel authorized to assume the responsibility of disregarding the terms of the arrangement hereinbefore mentioned without the consent and approval of the other contracting parties thereto, and referred the said Ward to such other parties for such consent and approval. (14) The other parties interested in the welfare of the said Clarence as aforesaid declined to consent to the change in the child's status as contemplated by the said Ward. (15) The respondent thereupon suggested that the question as to the right of the said Ward to the custody and control of the said Clarence be referred to the adjudication of the proper court upon the application of the said Ward. (16) The said Ward refused to take any legal action in the matter, but did on the 13th day of September, 1894, acting through his agents thereto by him employed, enter the state of Connecticut and the town of Thompson forcibly, and without prior demand upon the respondent, and, contrary to the wishes of the said Clarence, did attempt to abduct the said Clarence, and remove him from the custody and care of the respondent, and beyond the limits of this state and of the jurisdiction of its courts. (17) Thereupon, on the 8th day of October, 1894, after due hearing had, and upon legal motion thereof, the honorable court of probate for the district of Thompson did appoint the respondent the legal guardian of the person of the said Clarence, which said appointment the respondent accepted, and is now in the discharge of his duties thereunder, the same having never been annulled or set aside." "(21) The said Clarence, ever since the date of his residence with the respondent as hereinbefore set forth, has remained with the respondent of his own free will and accord, and has been supported, maintained, and educated by the respondent under the arrangement hereinbefore stated, and the said Clarence still desires to remain with the respondent. (22) The respondent is the legal guardian of the said Clarence, and as such is entitled to his care and custody, and is desirous of maintaining, supporting, and educating him as aforesaid, and it is for the best interests of the said Clarence to remain in the care and custody of the respondent; and the petitioner is not the guardian, and in no manner entitled to have the care and custody, of the said Clarence."

To this return the plaintiff replied as follows: "(1) Paragraphs 17 and 22 are denied. (2) All the other paragraphs of the return are admitted. Second. And by way of further reply to said return the petitioner says that the residence of said Clarence Ward was not at Thompson at the time of said Green's alleged appointment as his guardian, nor has it ever been at said Thompson, or elsewhere in the state of Connecticut, but is now, and always has been, in the state of New York, and that the probate court of Thompson had not jurisdiction to make the appointment alleged in paragraph 17 of said return. And

the petitioner says that on the 1st day of July, 1895, the residence of said Clarence Ward was, and for a long time previous thereto had been, at Geneseo, Livingston county, in the state of New York, and within the jurisdiction of the surrogate court of said county, and that on that day said court, having jurisdiction therefor under the laws of the state of New York, duly appointed said petitioner to be the guardian of said Clarence Ward, which appointment has never been annulled, and is in full force." The defendant denied the reply.

The court found that the defendant was lawfully appointed guardian of the person of said Clarence Ward on the 8th day of October, 1894, by the court of probate for the district of Thompson, in this state; that the plaintiff was appointed such guardian on the 1st day of July, 1895, by the surrogate court for the county of Livingston, in the state of New York. The finding then proceeds: "(6) It was admitted that at the time of the appointment of the respondent as such guardian the said Ferdinand Ward was, and for a long time had been, a legal resident of the state of New York, and that at the time of the appointment of the petitioner as aforesaid the residence of said Ferdinand Ward was Geneseo, New York. (7) Excepting as above stated, no evidence was offered at said hearing by either of the parties to said proceeding. (8) From the facts set forth in said return, I find it to be for the best interest of said minor child that he remain in the care and custody of the respondent. (9) Upon said hearing, counsel for the petitioner claimed, as matters of law, that the appointment of the respondent as guardian as aforesaid was void, and that because the said Ferdinand Ward, at the time of said application and appointment of the respondent, was a legal resident of New York state as aforesaid, said court of probate of Thompson had no jurisdiction of the subject-matter of said application and appointment, and that the same was of no effect, and that, because of said appointment of the petitioner by said surrogate court of New York state as aforesaid, it was the duty of the court, upon the facts set forth in said return to said writ, to award the custody of said minor, Clarence Ward, to the petitioner." The said judge found the issue for the defendant, denied the writ, and remanded the said Clarence Ward to the care and custody of the defendant. From that judgment the plaintiff has appealed to this court.

William C. Case and William S. Case, for appellant. Charles E. Perkins and Charles E. Searls, for appellee.

ANDREWS, C. J. (after stating the facts). Two errors are insisted on: (1) That the judge erred in holding that the question of the interest of the minor could affect the right of the plaintiff to the custody of his ward; (2) that the judge erred in overruling the claims

of the plaintiff that the appointment of the defendant as guardian was void for the reason that the court of probate in the district of Thompson had no jurisdiction to make the appointment.

Most of the argument which is made in behalf of the plaintiff seems to us to be misplaced. The contention here is not between the father, on the one hand, and a stranger, as guardian, on the other, but between two guardians,—one appointed by a court at the place where the minor has had his actual dwelling place for six or eight years, and the other by a court at the place where it is said the technical domicile of the minor's father is. This writ, if granted, would not put the minor into the care and custody of his father, but into the hands of an utter stranger in fact, as well as in blood, who, although a fit man to be a guardian, can have no kindness or affection for the minor, nor for whom can the minor have any affection or good will. *Prima facie*, it is true, a father has the legal right to the custody of his minor child. But he has no absolute right, which he can at his own will transmit to another, to the detriment of the child. The plaintiff was appointed guardian of the person of Clarence Ward by a court in the state of New York on the application, as the record shows, of Ferdinand Ward, the father of Clarence. By that appointment, made on that application, it is very likely that the father has excluded himself from the right to claim the custody of his son. It is certain that the appointment of the plaintiff, made on that application, gains therefrom no added merit or force. The stress of the argument made here, that the parental relation ought to control, has nothing to rest upon. But were it otherwise, and the case was between the father and a guardian, we think the court did not err in considering the interest of the minor, in determining into whose hands he should be placed. "While it is the strict legal right of the parents, and those standing in loco parentis, to have the custody of their infant children, as against strangers, a court will not, on habeas corpus, regard this right as controlling, when to do so would imperil the personal safety, the morals, health, or happiness of the child in controversy. The right of the father or mother to the custody of their minor children is not an absolute right, to be accorded to them under all circumstances; for it may be denied to either of them if it appears to the court that the parent otherwise entitled to the right 'is unfit for the trust.' And, in contests between parents and third persons as to the custody by such parents, the opinion is now almost universal that neither of the parties has any right that can be allowed to militate against the welfare of the infant. The paramount consideration is, what is really demanded by its best interests? And the rule is ordinarily the same in contentions between parents for the possession of children. The court is not bound to award the custody to either contesting party in such controversies, but may, subject to the

welfare and best interests of the child, award it to a third party. In contentions of this kind the child has the right to the protection of the court against such misfortunes of its parents, or the influences of such gross and immoral practices, as will seriously endanger its life, health, morals, or personal safety. But what measure of wickedness or profligacy on the part of the parent will be sufficient to warrant the court to deprive the parent of his natural right to the minor child must necessarily depend upon the facts and circumstances of each particular case." Church, *Hab. Corp.* § 440. Authorities to support the rule thus expressed may be almost indefinitely cited. Thus, in *Richards v. Collins*, 45 N. J. Eq. 283, 17 Atl. 831, it is said: "In resolving the general question, what will best subserve the interest and happiness of the child? its own wish and choice may be consulted and given weight, if it be of an age and capacity to form a rational judgment. There is no fixed age which capacitates such choice. It depends upon the extent of the mental development. The wishes of children of sufficient capacity to form these are given especial consideration, when parents have for a long time voluntarily allowed their children to live in the family of others, and thus form home associations and ties of affection for those having their care and nurture, and when it would mar the happiness of the children to sever such ties. The relation of parent and child is regarded as not fully characterized by the relative duties of service and support. Nature's provision of mutual affection commonly exists as the incentive to parental and filial duty and the bond of family union. It is the instinct of childhood to attach itself and cling to those who perform towards it the parental office, and they become endeared to it by ministering to its dependence. A parent, by transplanting his offspring into another family, and surrendering all care of it for so long a time that its interests and affections all attach to the adopted home, may thereby seriously impair his right to have back its custody by judicial decree. In a controversy over its possession, its welfare will be the paramount consideration in controlling the discretion of the court. The strict right of the parent will be passed by, if a judgment in observance of such rights would substitute a worse for a better condition." In *Re O'Neal*, 3 Am. Law Rev. 578, Judge Hoar gave this opinion: "Suppose, by a pure misfortune, as insanity, or being cast away, a father has left his child destitute and dependent on charity, does this give the child the right to form new relations, such as to take from the father the right to the custody of the child? Upon the best reflection, I am satisfied that it does. When the father, by misfortune, is compelled to leave the child utterly helpless, the child ought to be considered as emancipated by the father. If the child has made new relations in

life, so deep and strong as to change its whole nature and character, the father has no right to reclaim it. I am satisfied that this is a sound proposition. The child is not the father's property. It is a human being, and has rights of its own. The father has a right to the custody of his child, because, from general experience, the natural and trained affections of the child attach to the father, and those of the father to the child. If the father has left the child at an age too early for it to remember him, and it is placed in circumstances so that it must perish unless cared for, and other persons have expended money and become attached to the child, and the child has formed such associations as cannot be severed without injury to it, then the father has no right to sunder these ties. It is within the judicial duty of the court to determine that the assent of the father has been given to the arrangement, which cannot be terminated without injury to the child. This principle would apply under the same circumstances if the father became insane. A human being cannot be treated like a piece of property." "The father's right to the custody of his infant child is not absolute or unqualified. He may relinquish or forfeit it by contract, by his bad conduct, or by his misfortune in not being able to give it proper care and support. When a father has, through his fault or misfortune, lost or forfeited his right, and subsequently, by reformation or otherwise, reinstated himself in a position to properly care for and maintain his child, his right does not necessarily revive; but a court, upon habeas corpus, will exercise a sound discretion, in view of all the circumstances, with reference to the welfare of the child itself." *State v. Bratton*, 15 Am. Law Reg. (N. S.) 359. On a hearing of a habeas corpus relative to the possession of a child, the question is one of discretion, and the further question whether the father is the proper person to have the care of it is legitimate. *Johnson v. Terry*, 34 Conn. 262; *Wood v. Chapsky*, 26 Kan. 650; *Mercein v. People*, 25 Wend. 64; *Verser v. Ford*, 37 Ark. 27; 9 Am. & Eng. Enc. Law, p. 243; *Prime v. Foot*, 63 N. H. 52; *In re Goldsworthy*, 2 Q. B. Div. 75.

The court of probate in *Thompson* had jurisdiction to appoint a guardian to *Clarence Ward*. His actual stated residence was in that district. The statute (Gen. St. §§ 458, 459) uses the word "resides" in this sense, rather than in the sense of strict technical domicile. *Denslow v. Gunn*, 67 Conn. 361, 35 Atl. 24. In other sections of our statutes, generally, the word "reside" is used in a sense which includes all who are the actual, stated dwellers in any given place, even though they may have a technical domicile elsewhere. *Yale v. School Dist.*, 59 Conn. 489, 22 Atl. 295; *Connecticut Hospital for Insane v. Town of Bridgewater*, 69 Conn. —, 36 Atl. 1017. There is no error. The other judges concur.

BUDD v. MERIDEN ELECTRIC R. CO.

(Supreme Court of Errors of Connecticut. June 15, 1897.)

PLEA IN ABATEMENT—ACTION FOR WRONGFUL DEATH—NEGLIGENCE—INJURY TO CHILD ON STREET—EVIDENCE.

1. In an action against a corporation, a plea in abatement, alleging that the writ was served on a resident director and was insufficient, is defective, where it does not point out the circumstances making such service defective.

2. Under Gen. St. 1888, § 1008, providing, in an action for wrongful death, for payment of the sum recovered to certain relatives, and, if there be no such relatives, then to the heirs of the deceased, in a suit by an executor under the statute it is not necessary to name the heirs, or aver that there are any.

3. A notice of injuries received, given to a corporation, does not limit plaintiff, in an action to recover therefor, to the specifications of negligence mentioned therein.

4. An ordinance prohibiting any person from playing any game in the street which shall interfere with its convenient use is not applicable to a child of 21 months straying upon a public highway.

5. In an action against a street railroad for running over plaintiff's child, declarations of the mother, after the accident, that she did not blame the motorman, are inadmissible.

6. Evidence introduced by plaintiff to contradict evidence of defendant improperly admitted cannot be objected to by defendant.

Appeal from superior court, New Haven county; Milton A. Shumway, Judge.

Action by Daniel R. Budd against the Meriden Electric Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

This action was brought by the plaintiff, as the administrator of the estate of Mizze E. Budd, claiming damages of the defendant for an injury to the said Mizze from which she died. The defendant filed a plea in abatement for defective service, as follows: "The defendant pleads in abatement because said writ was not otherwise served upon it than by the officer's leaving a copy of said writ and complaint in the hands of W. C. Gray, a resident director of said Meriden Electric Railroad Company. In the office of said company, within the town of Meriden, instead of with, or at the usual place of abode of, Thomas W. Crockett, of the town of Meriden, county of New Haven, and state of Connecticut, cashier of the defendant. And therefore the defendant prays judgment." The plaintiff demurred to the foregoing plea in abatement because "(1) there is no allegation therein that said W. C. Gray, upon whom said service was made, was not a person upon whom such service might have been made at the time of such service; (2) there is no allegation therein that at the time said writ was served the said Thomas W. Crockett was a resident of the state of Connecticut, or that at said time he was the cashier of the defendant."

The trial court found the following facts: "(2) The plaintiff was and is administrator, as alleged in said complaint; and the allegations of paragraphs 1, 2, 5, 6, and 7 are found true, except as may be modified by this finding.

(3) And the court further finds that the deceased, Mizze E. Budd, at the time of her death, was a child and twenty-one months of age, and that she was on the 30th day of August, 1895, at about the hour of four o'clock in the afternoon, run over by one of the electric cars of the defendant corporation in the public highway, and died about three hours after such injuries were received, and in consequence thereof. (4) Said deceased had no brother or sister living at the time of her death, but a child was born to her parents within nine months after her death. Said child was born on May 27, 1896. (5) Said Mizze was of ordinary intelligence for a child of her age, and could walk, toddle, or run alone, but not faster than the ordinary walking pace of a woman. (6) The place where the accident happened was on Pratt street, and substantially at the time and place stated in the notice to the defendant corporation of such accident, and at a point about 120 feet north of the corner of Camp and Pratt streets in said city. There was no cross walk at the place of the accident. The nearest cross walk is at the intersection of Pratt and Camp streets. (7) At the corner of Pratt and Camp streets, Pratt street makes a turn towards the north, and the car tracks curve at that point; but such curve was not great enough to obstruct or impede the view of the motorman, and there was nothing to prevent, impede, or obstruct the motorman in charge of the car from a full and unobstructed view for a long distance before said curve was reached, and until the time of the accident, of the place and of the entire highway at the point where the accident took place. (8) Upon the afternoon when the child was killed, after dinner, the child was put to bed, and had an afternoon nap, waking about three o'clock, and thereupon was washed and dressed by her mother, and permitted to go into the back yard in the custody of her aunt Louisa, a girl of about twelve years of age,—a competent person to take charge of such child. (9) This back yard was separated from Pratt street by an open and vacant lot of the depth of about 130 feet, and between the said back yard and said open and vacant lot was a board fence, the boards of said fence running horizontally or parallel with the level of the ground, and were about six inches apart, and the fence was between three and a quarter and four feet high. (10) There was a gate in said fence, which gate was securely fastened on the day in question. (11) At one side of the gate, and some little distance therefrom, there was a small hole under the fence, through which the deceased escaped from said back yard, and passed across said vacant lot and down onto Pratt street, and said hole was obscured from ordinary observation by a growth of vegetation. The mother of the deceased knew of the existence of the hole, and also knew that the child had left the yard by crawling through this hole on one or two occasions before the day of the accident. (12) Directly before the child so escaped, she, with

her aunt, was playing at the foot of said back yard; and the grandmother of the deceased child called her daughter, directing her to come into the house, and the aunt, obeying her mother, left the child and went into the house. (13) The mother of the child and the grandmother lived in the same yard, but in separate houses, and the mother did not know that Louisa had left her child alone. (14) The grandmother of the deceased child, when she called her daughter into the house, did not know that the child was playing in the garden under her care. (15) Directly after the child was so left alone, she escaped by passing under the fence as aforesaid, and by crossing said vacant lot, and passed directly onto Pratt street, and in a few minutes thereafter met her death by being run over by said electric car. (16) The exact distance on Pratt street from said open lot to the place where the child was killed did not appear, but it was from one-half to two-thirds the distance of one side of the same block. (17) The circumstances immediately surrounding the accident are as follows: The car was coming up Pratt street, and as it approached the turn at the corner of Camp and Pratt streets the motorman slowed down to pass around the curve, and, having passed onto the curve and partially around it, put on additional power to start the car up for its run through the straight, level part of Pratt street to the end of the track, further up Pratt street. (18) The said child was standing beside the east curb in the street, and, as the car proceeded up Pratt street, started to cross the street at nearly right angles, and, as she passed onto the point between the rails, was struck by the car, run over, and received injuries which caused her death. (19) A little before she passed onto the rails, and as the car was approaching, she raised her hands and uttered some exclamation. (20) From the time that the car was upon the curve until the car was within three or four feet of the child, the motorman was looking to one side, and back towards the rear of his car, and not in the direction that the car was going, and in consequence thereof did not observe the child until within three or four feet, and did not see the child until the child was upon the track, and until it was too late to do anything towards stopping the car, or preventing it from running over and killing the child. After seeing the child upon the track, the motorman did all in his power to stop the car, and it appeared that the car was equipped with proper appliances for that purpose. (21) The motorman, when he was near the curve, and before he started the car up by applying more power, saw the child standing in the street near the curb, as above stated. (22) There was a conductor upon said car, on the rear end thereof. (23) The defendant corporation and the motorman were negligent in not seeing the deceased and stopping the car before it ran over and killed the child. (24) Pratt street is a street in which usually and commonly many children are found playing

and passing along and crossing the same, and this was well known to the motorman and to the defendant corporation. (25) There was no contributory negligence on the part of the deceased. (26) The defendant operates a single-track line on Pratt street, and at the time of the accident only one car ran thereon. (27) The car made regular trips from the square east of the steam-railroad tracks on Main street out to the end of the line on Pratt street and back again. The distance from said square out to the end of the line is about 5,000 feet. (28) The car was due to run to the end of its route in seven and one-half minutes from said square. (29) The car was not equipped with any fender, or life saving or protecting apparatus. (30) A man guard had been upon the car in front of the wheels, but, owing to some accident, had been either broken or taken off. (31) The appliances for protecting life by the use of fenders and man guards then in use were of some, but not of very great, utility; but no attempt on the part of the defendant had been made, by the use of fenders or man guards, to protect life, or persons upon the street from injury. (32) The time and place of the accident, and the nature of the injuries inflicted, are accurately stated in the complaint, except as modified in this finding. (33) The child suffered a severe shock by said injuries, and, although suffering pain, did not suffer very greatly, but died from the effects of shock and the injuries inflicted upon her. (34) The child was conscious, and called for her mother, and otherwise exhibited intelligence and consciousness from the time of the accident until shortly before her death."

The following notice was given the defendant corporation: "To the Meriden Electric Railroad Company, a Railway Corporation Operating an Electric Railroad Running through Pratt Street, in the Town of Meriden, Connecticut: Please take notice that Daniel R. Budd, of said Meriden, administrator of the estate of Mizee E. Budd, deceased, claims damages against said company for injuries inflicted upon the person of the said Mizee E. Budd, caused by the negligence of said corporation and its employes, resulting in the death of the said Mizee E. Budd. The injuries were inflicted on the 30th day of August, A. D. 1895, at about quarter past four o'clock in the afternoon, and at a place upon the railroad track of said corporation on Pratt street about one hundred and ten feet northerly of the cross walk at the intersection of Pratt and Camp streets in said Meriden. The cause of the injuries was that said corporation had negligently omitted and refused to equip and provide the electric car which the said company was operating and propelling at said time and place with any fender or other appliance for the safety of human life and limb, and the negligence and carelessness of the motorman in charge of said car, in managing and operating said car, and in his allowing and causing said car to strike, throw down, and run over and upon said Mizee E.

Budd, then an infant of the age of twenty-one months, while she was crossing said Pratt street; thereby injuring, mutilating, and crushing her, and causing her death. By said injuries both legs and both feet of the said Mizee E. Budd were crushed and broken, her right hip was crushed, and her perineum was cut open nearly to the spine, death resulting within three hours. The above claim and statement is made as nearly as the same can now be ascertained."

An ordinance of the city of Meriden, relied upon by the defendant, is as follows: "Sec. 28. No person shall within the limits of any street or highway in the city play any game of ball, or fly any kite or balloon, or throw any stones or other missiles, or engage in any other game or exercise which interferes with the free, safe, and convenient use of such street or highway by any person traveling or passing along the same."

The defendant assigned the following reasons of appeal: "(1) The court erred in sustaining the plaintiff's demurrer to the defendant's plea in abatement. (2) The court erred in overruling the defendant's claim that the complaint was defective as a complaint on the statute, because there was no averment that there is a husband or heirs at law, and that such a defect could be taken advantage of on a hearing in damages after default, and would prevent a recovery for more than nominal damages. (3) The court erred in overruling the defendant's claim that the plaintiff was limited in his recovery to the acts of negligence set out in his notice. (4) The court erred in overruling the defendant's claim that the alleged negligence of the motorman in not seeing the child and stopping the car before it ran over the child was not set out in the notice, and could not be considered by the court. (5) The court erred in overruling the defendant's claim that upon the facts the defendant was not guilty of negligence. (6) The court erred in overruling the defendant's claim that the child was in the street in violation of the by-law of the city of Meriden. (7) The court erred in overruling the defendant's claim that the fact that the motorman did not see the child in time to stop cannot be held to be negligence on the part of the defendant in behalf of a person not rightfully on the track. (8) The court erred in overruling the defendant's claim that this child had no right to be playing, running, or exercising in the street. (9) The court erred in overruling the defendant's claim that the parents were negligent in their care of the child. (10) The court erred in overruling the defendant's claim that the parents were the beneficiaries in this case, in event of any recovery, and, as they were negligent in their care of the child, no recovery could be had for more than nominal damages. (11) The court erred in overruling the defendant's claim that the suit here was for the benefit of the negligent parents, and that, therefore, only nominal damages could be awarded. (12) The court erred in overruling

the defendant's claim that the parents were responsible for the negligence of the person in whose charge they had put the child. (13) The court erred in excluding the testimony of Mrs. Berry. (14) The court erred in admitting the testimony of the witness who said she saw the motorman looking behind him, when it was shown that she did not refer to the time of the accident. (15) The court erred in admitting the testimony of the witness Johnson. (16) The court erred in finding, in paragraph 20, that from the time that the car was upon the curve until the car was within three or four feet of the child the motorman was looking to one side, and back towards the rear of his car, and not in the direction that the car was going. (17) The court erred in refusing to find the facts as requested in paragraph 19 of the defendant's request for a finding. The defendant therefore prays for such relief as is provided by law in the premises."

Seymour C. Loomis, for appellant. Henry Stoddard, Roger S. Baldwin, and Henry Dryhurst, for appellee.

ANDREWS, C. J. (after stating the facts). There was no error in sustaining the demurrer to the plea in abatement. The service of the complaint by leaving a copy with a resident director was a good service, unless such circumstances existed as made it a defective one. The defendant, in order to have that service set aside, was in duty bound to point out in his plea in abatement the existence of those circumstances by direct and positive averment. The defendant's plea did not do this. It may be true that the ancient rigor of pleading in abatement is not now insisted on. Courts do not now, in considering such a plea, "refuse to comprehend the ordinary import of language." *Draper v. Moriarty*, 45 Conn. 479. But pleas in abatement are not favored. They must be certain, positive, and direct. They cannot be aided by intendment or inference. In 1848 the legislature enacted (Acts 1848, c. 5) that:

"Section 1. No cause of action to recover damages for injury to the person * * * shall abate by reason of his death, but his executor or administrator may enter and prosecute the cause in the same manner as is now by law provided in regard to other actions.

"Sec. 2. Actions for injury to the person whether the same do or do not result in death, * * * shall survive to his executor or administrator, provided the cause of action shall not have arisen more than one year before the death of the deceased."

In 1853 it was enacted (Acts 1853, c. 74, § 8) "that if the life of any person, being a passenger, or crossing upon a public highway in the exercise of reasonable care, shall be lost by the negligence or carelessness of any railroad company in this state, or by the unfitness or negligence or carelessness of their servants or agents, such railroad company shall be liable to pay damages, not exceeding

five thousand dollars nor less than one thousand dollars, to the use of the executor or administrator of the deceased person, to be recovered by such executor or administrator in an action on the case on this statute for the benefit of the husband or widow and heirs of the deceased person, one moiety thereof to go to the husband or widow and the others to the children of the deceased, but if there shall be no children the whole to the husband or widow, and if no husband or widow to the heirs according to the law regulating the distribution of intestate personal estate." These two statutes are now brought together into section 1008 of the General Statutes of 1888, on which statute this suit was brought. The main difference between the section last named and the statute of 1853 is that the law as it now exists is not limited to injuries inflicted by a railroad company, but includes all injuries resulting in death. From these statutes it is evident that three things have been effected: First, the cause of action which existed in the deceased person is kept alive. The rule of law that all personal actions died with the person has been set aside as to these cases. Second, to limit the extent of the damages which may be recovered for such an injury. And, third, to direct the distribution of the sum recovered. The sum recovered is ordered to be paid to certain relatives in specified proportions, and, if there are no such relatives, then to the heirs of the deceased, as an intestate estate, excluding creditors. The statute, then, is as well a statute of distributions. *Murphy v. Railroad Co.*, 29 Conn. 496; *Goodsell v. Railroad Co.*, 33 Conn. 51; *Waldo v. Goodsell*, 33 Conn. 432; *Lamphear v. Buckingham*, 33 Conn. 237; *Railroad Co. v. Andrews*, 36 Conn. 213. As these statutes give the right to sue to the executor or administrator, and direct in what way the sum recovered is to be distributed, it is obvious that a suit upon the statute may be brought by the executor or administrator without naming the heirs, or even averring that there are any. The law ordinarily will presume that a deceased person has heirs. *Pitkin v. Railroad Co.*, 64 Conn. 487, 30 Atl. 772; *Warner v. Railroad Co.*, 94 N. C. 258; *Railroad Co. v. Wightman's Adm'r*, 29 Grat. 441; *Madden v. Railroad Co.*, 28 W. Va. 612. The plaintiff was not limited in his proof to those specifications of negligence mentioned in his notice of the injury given to the defendant pursuant to the statute. The notice is not a pleading. The object of such a notice is to put the officers of the corporation charged with the duty of investigating the claim made upon it in possession of such facts as will enable them to perform that duty understandingly. *Shaw v. Waterbury*, 46 Conn. 263; *Biesiegel v. Town of Seymour*, 58 Conn. 52, 19 Atl. 372. And, as to the "nature" of the injury, the notice is sufficient if it gives a general descrip-

tion which will reasonably apprise the defendants of its general character. *Brown v. Town of Southbury*, 53 Conn. 212, 1 Atl. 819; *Lilly v. Town of Woodstock*, 59 Conn. 219, 22 Atl. 40; *Gardner v. City of New London*, 63 Conn. 272, 28 Atl. 42. The sufficiency of the notice is to be tested with reference to the purpose for which it is required. If sufficient for that purpose, it is a good notice.

The fifth, ninth, sixteenth, and seventeenth reasons of appeal present no questions of law, —only questions of fact.

The sixth, seventh, and eighth reasons are predicated on the city ordinance which appears in the statement. A child only 21 months old cannot be affected by any such ordinance; and it is certain that the duty of the motorman to use care towards such a child alone in the streets is not, and cannot be, lessened or modified by that ordinance.

As it is found specifically that the parents of the said Mizze were not negligent, the tenth, eleventh, and twelfth reasons present no question. There was no negligence to be imputed to the deceased, and there was no negligence from which her parents could in any way derive advantage.

The defendants offered as a witness a Mrs. Berry, and claimed she would testify that, in a conversation she had with the mother of the said Mizze shortly after the accident which resulted in the death of Mizze, she (the mother) stated that she did not blame the motorman. On objection this testimony was ruled out, and we think properly. Whether the mother blamed the motorman, or did not blame him, was an irrelevant fact. Her belief that the motorman was blameworthy would not in any way tend to make the defendant liable in this action, and a contrary belief would not tend in any degree to show that the defendant was not liable.

The defendant called witnesses, and claimed to have proved by their testimony that the motorman of the car which ran over the deceased was a careful motorman, and a careful man generally. This testimony was objected to by the plaintiff, but admitted by the court. In reply to this testimony the plaintiff called a witness who stated that she had seen the motorman looking backward when the car was in motion. To this statement the defendant objected, but the court admitted it. It seems to us that the testimony offered by the defendant was not admissible. *Morris v. East Haven*, 41 Conn. 252; *Bassett v. Shares*, 63 Conn. 46, 27 Atl. 421. So that the evidence offered by the plaintiff did no harm. If the evidence offered by the defendant was admissible, it was certainly open to the plaintiff to contradict it. The testimony of the witness Johnson falls within the rule here given. It was offered to offset and contradict the testimony on the part of the defendant. There is no error. The other judges concur.

STATE ex rel. BARRY v. GETTY et al.
(Supreme Court of Errors of Connecticut. June 15, 1897.)

RELIGIOUS SOCIETIES—ELECTION OF OFFICERS —
MANDATORY STATUTE.

Gen. St. § 2092, providing, with reference to local corporations of the Roman Catholic Church, that the two lay members of the corporation "shall be appointed annually by the committee of the congregation," is mandatory; and, where it is admitted that there was no committee of the congregation appointed at a meeting to elect such laymen, the election by the congregation gave the persons elected no title.

Appeal from superior court, Windham county; Milton A. Shumway, Judge.

Information in the nature of quo warranto by the state, on the relation of George Barry, against Eli Getty and James Reynolds, tried to the court. Facts found and judgment rendered for the respondents, and relator appeals. Error.

The information charged the respondents with usurping the offices of lay members of the corporation known as the "St. James' Catholic Church of Danielsonville." The respondents justified solely by virtue of an election by the congregation of St. James' Church, the plea admitting "that there was no committee of the congregation appointed at said meeting." Upon the trial the state asked the court to hold and rule that neither Reynolds nor Getty had been legally elected lay members of said corporation, "because such election must be by a committee of the congregation duly appointed by it for that purpose as provided in the statute." This claim the court overruled. A further claim was made that, upon the facts found, the meeting of the congregation was so informally and illegally called and conducted that the action of the meeting in electing the respondents as lay members was wholly void. The court overruled this claim, and held that the meeting was lawfully called and conducted, and that the vote of the meeting electing the respondents as lay members invested each with a legal title to that office. The assignment of errors presents no questions of law except those involved in these two rulings.

Charles E. Perkins and Charles E. Searls, for the appellant. Thomas McManus and Henry E. Burton, for appellees.

HAMERSLEY, J. (after stating the facts as above). It is the settled policy of this state to so frame its legislation that each denomination of Christians may have an equal right to exercise "religious profession and worship," and to support and maintain its ministers, teachers, and institutions in accordance with its own practice, rules, and discipline; and this policy is conformable to the provisions of our constitution. Christ Church v. Trustees, etc., 67 Conn. 554, 555, 35 Atl. 552. In pursuance of this policy, our statutes provide a scheme for the formation and conduct of corporations known as "ecclesiastical socie-

ties," which may "hold and manage all property belonging to them, appropriated to the use and support of public worship, and may receive any grants or donations, and by voluntary agreement establish funds for the same object." Gen. St. § 2051 et seq. This scheme is arranged with special reference to the customs of the denomination of Congregationalists, which, prior to the adoption of a constitution, formed a sort of established church, and, while furnishing ample provision for the needs of many denominations, is not consistent with the customs of some. And so we have special legislation for "societies of particular denominations," and among these the Roman Catholic. This legislation is contained in sections 2092-2094, Gen. St., given in full in the note.¹ Such special legislation is not passed unless upon application of some religious body, and is intended to be framed in accord with what the legislature understands to be the peculiar customs and wishes of the applying denomination. But when the law is passed the corporations created under it are the creatures of the law, and must obey its requirements. The law for the Roman Catholics provides merely for corporations to hold the legal title to the property they may receive for the purposes named in the statute. They have no power of application. That can be done only in accordance with the general laws and discipline of the Roman Catholic Church. They differ from corporations established under laws relating to most other denominations, and which provide for the incorpora-

¹ See. 2092. A corporation may be organized in connection with any Roman Catholic church or congregation in this state, by filing in the office of the secretary of the state a certificate signed by the bishop and the vicar-general of the diocese of Hartford, and the pastor and two laymen belonging to said congregation, stating that they have so organized for the purposes hereinafter mentioned; and such bishop, vicar-general, and pastor of such congregation shall be members, ex officio, of such corporation, and upon their death, resignation, removal or preferment, their successors in office shall become such members in their stead. The two lay members shall be appointed annually, by the committee of the congregation; and three members of this corporation, of which one shall be a layman, shall constitute a quorum for the transaction of business.

Sec. 2093. Such corporation may receive and hold all property conveyed to it for the purpose of maintaining religious worship according to the doctrine, discipline and ritual of the Roman Catholic Church, and for the support of the educational or charitable institutions of that church: provided that no one incorporated congregation shall at any time possess an amount of property, excepting church buildings, parsonages, school-houses, asylums, and cemeteries, the annual income from which shall exceed three thousand dollars.

Sec. 2094. Such corporation shall at all times be subject to the general laws and discipline of the Roman Catholic Church, and shall receive and enjoy its franchises as a body politic, solely for the purposes mentioned in the preceding section; and upon the violation or surrender of its charter, its property, real and personal, shall vest in the bishop of the diocese and his successors, in trust for such congregation, and for the uses and purposes above named.

tion of the individuals of a particular religious body, with the power not only of holding property, but of managing and controlling their own concerns. Prior to 1866, when the law was passed, property appropriated to the uses of the Roman Catholic Church was held in trust by the bishop personally. The practical effect of the law is to enable the bishop to hold the property as a corporation. A careful examination of the sections cited shows that, while there are local corporations connected with local churches or congregations, nevertheless each corporation consists of five members, of whom the bishop, his vicar general, and pastor must form the majority, and section 2094 provides that, whenever the local corporation sees fit to surrender its charter, all the property vests in the bishop and his successors, as a corporation sole. This peculiarity creates a special difficulty in defining the meaning of "Roman Catholic congregation," as used in the statute, and in passing on any alleged illegality in the conduct of a meeting of such congregation. Doubtless the authentic ecclesiastical laws of the Roman Catholic Church would have to be consulted, and their meaning, as applicable to the subject, determined. It is not necessary, however, to discuss this question in the present case; for the law is mandatory that the lay members of each corporation, without the presence of one of whom no corporate act can be performed, must "be appointed annually by the committee of the congregation." It is claimed that the law is modified by a clause in the decrees of the Baltimore council, which reads, "It is for the bishop to judge, not only as to the necessity of employing such laymen auxiliaries [i. e. "lay members"], but also as to their number, and the manner of selecting them." It seems apparent that this language was not used for the purpose of attempting to prescribe the number and manner of selecting the lay members of corporations organized under section 2092. The advisory letter of the chancellor of the diocese, which appears in the finding, states that the first step in the choice of lay delegates is that "the members of the congregation, not the pastor, should elect a committee." But, if it were possible to assume that the church decree quoted was intended to alter the law, such intention can produce no result. Doubtless, if it were authoritatively represented to the legislature that the Roman Catholics of the state desired a change in the law, the change would be made. But the legality of the organization of this corporation must be tested by the law. The lay members can only be appointed by "the committee of the congregation." Whatever may be the appropriate method of selecting that committee, it is certain the respondents have not been so appointed. This is admitted in the plea, and is found by the court. The election by the congregation gave the respondents no title. As this is their only jus-

tification, it follows that, upon the facts found by the court, judgment of ouster should have been rendered. The issues were somewhat confused by the error of the parties in framing their pleadings as if the proceeding of quo warranto were a civil action under the practice act. This fault was commented on in the preceding case of *State v. Kennedy*, 37 Atl. 503. There is error in the judgment of the superior court, and the case is remanded to be proceeded with in conformity with the opinion. The other judges concur.

WOODBIDGE v. PRATT & WHITNEY CO.
(Supreme Court of Errors of Connecticut. June 15, 1897.)

CONTRACT OF EMPLOYMENT—CONSTRUCTION—PREMATURE ACTION—PLEADING.

1. Plaintiff contracted with the H. Co. for a certain commission on the profits of sales for the year, in addition to a stated salary, while superintendent of a department, for a term of years. Pending the term the shareholders of the H. Co. sold their shares to certain individuals, by whom they were transferred to shareholders of the N. J. Co., which had been organized by concert of the shareholders of both companies, with plaintiff's concurrence, in order to succeed to the H. Co.'s plant and property, and to carry on its business without interruption. *Held*, that such transfer did not constitute a sale of the goods of the H. Co. then on hand, entitling plaintiff to an accounting of the profits derived from such alleged sale to the N. J. Co.

2. Where a contract for employment for a term of years at an annual salary, providing for an additional salary for the last year of the term in case of neglect or refusal of the employer to renew such contract on the expiration of the term, was terminated by mutual consent pending the term, the employé is not entitled to recover such additional salary.

3. Where part of the compensation of an employé consisted of a certain percentage of the profits realized from sales during the year, the amount of which could not be ascertained, according to the terms of the contract, until the close of the year, and the contract of employment was terminated at the expiration of two months, an action for the recovery of such percentage, instituted before the close of the year, was prematurely brought.

4. The fact that allegations entitling plaintiff to the judgment rendered were erroneously set up in an amendment to the complaint, instead of in a supplemental complaint, will not invalidate such judgment, where defendant was not injuriously affected by it.

Appeal from superior court, Hartford county: George W. Wheeler, Judge.

Action by James E. Woodbridge against the Pratt & Whitney Company for breach of a special contract, and, by way of equitable relief, for an accounting under the contract, brought to the superior court for Hartford county, and judgment rendered for an account on certain terms. Each party appeals. No error.

The findings showed the following state of facts:

The defendant is a corporation chartered by the state, and until February 28, 1893, was engaged in manufacturing at Hartford. Its busi-

ness was conducted in several departments, one of which was known as the "Small-Tool Department." On January 1, 1889, it entered into a written contract with the plaintiff, containing the following provisions: It was to maintain, develop, and carry on for five years its small-tool department; and the plaintiff was appointed the superintendent of this department, having the whole management thereof, subject only to the board of directors, for said term. It was, during said term, to manufacture and deal in, through said department, goods similar to those that had been made by it under his superintendence during a previous term, under a previous contract, and not otherwise to manufacture or deal in such goods, to keep an accurate account of all proper debits and credits to said department, and to give the plaintiff access to all its books and accounts. Debits to said department were to be, for any year, only these: Five per cent. of the inventory price of all patents and plant used in it, on the inventory taken in January of that year; such proportion for that year of the taxes, insurance, counsel fees, and expense of lawsuits, salaries of officers, incidental expenses of gas, interest on borrowed money, water, advertising, stationery, and postage, as the inventory price of the machines, shop tools, shop fixtures, patents, and goods manufactured, in whole or in part, in said department, should bear to the inventory price in January of that year of all the company's machines, shop tools, shop fixtures, patents, and goods manufactured, in whole or in part; \$55 per horse power for the amount of power and heat used in said department for that year; 1 per cent. of the sales of goods manufactured in said department that year, for shipping and teaming, except when the boxing should be done in said department, in which case said percentage should be only one-fifth of 1 per cent. of the sales; the amount paid to agents, mechanics, and laborers for services rendered in or in behalf of said department for that year, and the amount paid in that year as royalty upon articles manufactured in said department; the cost of any and all materials used; also, of any services not hereinbefore mentioned, regularly employed in manufacturing, displaying, selling, and delivering the goods manufactured in said department that year, and the cost of goods dealt in by said company through this department for that year. All these debits were to be stated in itemized bills, and then presented to the plaintiff monthly for approval. If he disapproved any bills or items, the board of directors might nevertheless, by its approval before or during January in the following year, make them proper debits to the department, saving his right to resort to law to determine the difference between them. The credits to said department for any year were to be the entire proceeds realized from sales for that year of goods manufactured or dealt in by said company in or through said department. The defendant was

to pay the plaintiff each year during the term of this contract, except the last year thereof, an annual salary, to consist of \$3,600, and a percentage of 10 per cent. of the profits for that year; and the same said last year, provided, as was intended, another contract should be made during said year, substantially a renewal of the present one. If no such renewal contract were made, owing to the neglect or refusal of the defendant, the salary during said last year was to be \$5,600, in addition to said 10 per cent. of the profits of that year. The plaintiff was to give his exclusive attention to the business during the term. This contract was duly performed until February 28, 1893, except that the plaintiff was paid no profits on sales made in January and February, 1893. Early in 1890 the plaintiff and two others—all three being stockholders in the defendant—became dissatisfied with the management of the company by the president and general superintendent, and tried to find parties who would buy out the other stockholders and put the control of the business in the hands of a different president and superintendent. They resorted to one Reed, who had had some success as a promoter of corporate organizations, and at his request the directors, in March, 1892, voted to have an inventory and valuation made by experts of the assets and accounts of the company. This was primarily intended to give Reed a basis to work on, in interesting capitalists; but the directors thought it would be worth its cost, even if Reed failed in his scheme of promotion.

In May, 1892, the experts reported, and Reed proposed that he should have an option from the owners of the majority of the shares in the company, for 90 days, on certain terms. The directors were advised by counsel that this was the only practicable mode of reorganization. They approved the report of the experts, and gave it to Mr. Reed, and he obtained the options desired, expressed as follows: "Shareholders' Option to George W. M. Reed. Negotiations have been pending for some time for the purchase of the capital stock of the Pratt & Whitney Company, a corporation organized under Connecticut law by special charter, and whose capital stock is five hundred thousand dollars, divided into five thousand shares of one hundred dollars each. The negotiation has been advanced by Mr. George W. M. Reed, who has solicited an option to buy the stock for the purpose of selling it to parties in England who propose to form a new association as hereinafter set forth. An inventory of the assets of the Pratt & Whitney Company, and a statement of the profits of the business for a number of years, have been made by experts named by said Reed. This inventory and statement have been by the company delivered to Mr. Reed for his use in completing negotiations. The option desired by Mr. Reed is to buy all the shares of the Pratt & Whitney Company, so far as possible, upon the following terms: Each

share to receive two hundred dollars in cash, and two hundred dollars in securities of the new company to be formed by the purchasers; one-third of said securities to be bonds secured by pledge of the assets of the new association to be formed, and including as part of said assets the capital stock of the Pratt & Whitney Company owned by said new association, or the property of the Pratt & Whitney Company; these bonds to bear interest at the rate of at least five per cent. per annum; one-third to be cumulative, preferred stock, with preferred right to dividends at the rate of at least — per cent. per annum; and the remaining one-third of said two hundred dollars to be payable in common shares of the capital stock of said new company to be formed. The new company is to be capitalized at \$2,700,000, namely, \$900,000 in bonds secured by first lien on the assets of the company, \$900,000 in the preferred shares, and \$900,000 in common shares, and is to be formed by Mr. Reed's English parties; but, if necessary or convenient for purposes of holding land in this country, they may use a charter obtained for them from one of the United States. Now, therefore, in view of the foregoing matters and things, we, the undersigned, being the largest shareholders of the capital stock of the Pratt & Whitney Company, and including all its directors, and owning more than a majority of said capital stock, in behalf of ourselves and of such other shareholders as we can affect by our influence, do hereby give to said Reed the option to buy all of our shares in said Pratt & Whitney Company upon the terms aforesaid. It is understood that the purchase shall include all the shares owned or controlled by the undersigned, and all the shares that any other stockholder is willing to sell upon the terms aforesaid, and it is hoped by both parties that the purchase will cover all the shares of the company. This option is to run for ninety days from the date of this memorandum of agreement, and no more. If, within said period of ninety days, Mr. Reed shall obtain a good and binding contract, made to our reasonable satisfaction, by parties of reliable character and pecuniary responsibility, for the purchase from him of all the shares of the stock of the Pratt & Whitney Company owned by the undersigned, and all the shares of, all and several, the shareholders of said company who are willing to sell upon the terms aforesaid, such purchase to be completed within the term of six months from the date of this memorandum, or if said Reed shall within said period of ninety days obtain a good and binding contract, made to our reasonable satisfaction, by parties of reliable character and pecuniary responsibility, agreeing to purchase directly from the undersigned, and, all and several, the shareholders of said company, all their shares, on the terms aforesaid (such purchase to be completed within the period of six months from the date of this

agreement; sale and delivery to be made at the company's office in said Hartford, or at the office of a trust company satisfactory to all parties), and if said Reed shall within said period of ninety days produce such contract, and offer the same to the directors of said Pratt & Whitney Company, then we agree to join in a contract with said Reed, or with his assigns, as co-contractors in our behalf, and in behalf of all such other shareholders as we can affect by our influence, for the sale and transfer of all the shares owned or controlled by us upon the terms hereinbefore set forth. Unless said Reed shall produce such contract in writing within said period of ninety days (and time is an essential element of this memorandum of contract), then all claims upon us or the Pratt & Whitney Company on account of this option and of our antecedent negotiations shall cease and determine, without any further action or notice on our part or on the part of said Pratt & Whitney Company. Until the shares are in fact purchased and paid for, it is understood that the affairs of the company shall go forward in any and all respects as if no trade was in view, and the usual dividend, not to exceed five dollars a share, may be made on September 1st, 1892. Dated at Hartford this — day of —, 1892."

The option having been extended, the scheme was finally guarantied by underwriters, A. M. Kidder & Co. agreeing to advance the necessary funds; and on November 9, 1892, the following agreement was made and countersigned: "Agreement of Geo. W. M. Reed with the Shareholders and the American National Bank. The principal holders of the Pratt & Whitney Company stock having given Mr. G. W. M. Reed an option to purchase their shares of said stock and the shares of such other stockholders as may choose to join with them in said sale upon terms hereinafter set forth, and Mr. Reed having decided to use said option and to buy the said shares: It is hereby agreed between the said Reed, party of the first part, and Messrs. Francis A. Pratt and Amos Whitney, the said Pratt and Whitney acting for themselves and all and several of the other stockholders who will sell their stock to Mr. Reed on these terms, party of the second part, and the American National Bank of Hartford, party of the third part, as follows: Mr. Reed agrees to buy all and several of the said shares of the Pratt & Whitney Company's capital stock, at the price for each share of said stock of two hundred dollars in cash and one hundred dollars in preferred stock and one hundred dollars in common stock of a new corporation to be lawfully formed, and to bear the name of Pratt and Whitney, and to succeed to the business and good will of the Pratt & Whitney Company. Payments to be made as follows: One hundred dollars within a reasonable time after deposit, in the time hereinafter specified, of any of said shares

with the American National Bank, for the purposes hereinafter set forth; one hundred dollars, and the said two hundred dollars in stock, one-half preferred, and one-half in common, of the said new company, on or before the 5th day of January, A. D. 1893. Any and all of the shareholders of the Pratt & Whitney Company may deposit their shares with the American National Bank at any time after the 5th day of December, A. D. 1892, and before the 5th day of January, A. D. 1893, with an assignment and power of attorney to transfer the same to the nominee of Mr. Reed, which stock shall be and remain the property of the stockholders depositing it until full and final payment of the purchase price as aforesaid, according to its amount and time of payment; and, if the full amount of said payments is not made as aforesaid, any and all partial payments upon the same shall be forfeited to the said several shareholders, without any right or claim to the same by the said Reed. The said bank is to hold the said shares for the said stockholders and for the conditional purchaser until said payment is fully made according to its terms of amount and time, and then the said bank is to complete the transfer of said shares to the nominee of the purchaser; and on failure of Mr. Reed to complete this purchase in manner and form as aforesaid, and within the time aforesaid, then the bank is to return said certificates to the several stockholders who deposited them. Messrs. Pratt and Whitney, for themselves and for such other shareholders as elect to join with them in the sale, and for such shareholders as they can influence, agree to sell all their Pratt & Whitney stock to Mr. Reed upon the foregoing terms; and it is further agreed that any and all stockholders in the Pratt & Whitney Company may sign this instrument, and be included for all purposes in its party of the second part, as they are now intended to be so included beneficially by the signatures of said Pratt and Whitney. And the American National Bank agrees to fulfill all its agencies and attorneyships raised by the terms of this agreement. This agreement is made in consideration of the stipulation with each party by the other, and is executed in triplicate at Hartford this 9th day of November, A. D. 1892."

Among the signers was the plaintiff. This contract was sent to the stockholders with the following circular: "Private. Office of the Pratt & Whitney Company. To the stockholders of the Pratt & Whitney Company: Doubtless you are all aware that negotiations in your interest have been pending for some months, looking to a sale of our stock at a price largely above the value put upon it by the market. The negotiations have been completed, and the inclosed is a copy of a contract made in behalf of all stockholders who wish to avail themselves of the privilege of selling their stock for the price of four hundred per centum of its face value,—\$200 in cash and \$200 in new Pratt & Whitney stock

for each share. One-half of the new stock is to be preferred stock, entitled to 8 per cent. cumulative dividends if they are earned. The new company's capital is to be \$3,000,000, \$250,000 of which is to be added to the plant. We believe it is for the interest of every shareholder to sell his stock upon the terms indicated. Stockholders will observe that it is necessary to act immediately in order to participate in the sale. Certificates should be promptly surrendered. The directors will be glad to assist any of the stockholders in the transaction, and to furnish any further information in their power. Of course, this is a private transaction, and this circular and the contract are for the information and use of shareholders of the Pratt & Whitney Company only. Francis A. Pratt, Amos Whitney, Roswell F. Blodgett, Miles W. Graves, Henry C. Robinson, Rowland J. Swift, S. W. Bishop, A. S. Cook, J. E. Woodbridge, Directors Pratt & Whitney Company."

A. M. Kidder & Co. were to organize the company, capitalized at \$3,000,000; to issue 17,500 shares of preferred stock and 10,000 shares of common stock, par value \$100 each; to subscribe for 10,000 shares of the preferred stock which they proposed selling to the public, and advance \$1,000,000 to the shareholders of the Hartford company; to give the shareholders of said company 5,000 shares of preferred and 5,000 shares of common stock; to leave 2,500 shares of preferred stock, as treasury stock, in the treasury of the new company; and to take 2,500 shares of the preferred and 5,000 shares of the common stock (\$750,000, par value, in all) wherewith to pay the expenses of the transaction, the commissions to the underwriters, and the profits to them and to Reed. Pursuant to this agreement, A. M. Kidder & Co. issued a prospectus on November 21, 1892, to the public, offering 12,500 shares of the preferred stock for sale, and inviting the public to take this stock, which they did in large amounts. Pursuant to the agreement with Reed, and in accordance with the understanding of the directors and principal shareholders of the Hartford company, A. M. Kidder & Co. on December 1, 1892, caused to be duly and legally organized the Pratt & Whitney Company of New Jersey, with a capital of \$2,000 paid in, and a total authorized capital of \$3,000,000, to be divided into 20,000 shares of preferred and 10,000 shares of common stock. On the same day the stockholders voted to increase the capital to \$3,000,000. On December 28, 1892, the directors voted to levy an assessment of \$100 a share. Mr. Reed then appeared before the board, and submitted the following proposition: "To Pratt & Whitney Co.—Gentlemen: I hereby offer to sell to your company all the capital stock of the Pratt & Whitney Company of Hartford, Conn., together with contracts of Francis A. Pratt and Amos Whitney, executive heads of the Hartford Pratt & Whitney Company, for their continuance for not less than five years in the management of the

business. The ownership of this stock will enable your company to acquire all the property, plant, and good will of the Hartford company. I confidently expect to be able to deliver to you at once all the shares of the Hartford company. There may be, however, some delay in delivering a very trifling amount, not to exceed in any case 25 shares. I offer to sell and deliver the above to you in consideration of the payment to me by your company of \$2,748,000, payable as follows: \$1,750,000 in full-paid and nonassessable preferred stock, amounting to 17,500 shares, and \$998,000 thereof in full-paid and nonassessable common stock of your company, amounting to 9,980 shares." The board then passed the following resolutions: "Resolved, that the proposition of Mr. Reed be, and the same hereby is, accepted, and that the president and treasurer be, and they hereby are, authorized to issue to Mr. Reed 17,500 shares of the preferred stock of this company and 9,980 shares of the common stock of this company in payment for the property mentioned in said proposition; such issue to be made upon the delivery of such assignments, transfers, and other instruments as shall be satisfactory to the president: provided, however, that no issue of said stock shall be made until after the filing of the certificate provided for in the previous resolution of the board. Resolved, further, that all shares of stock mentioned in this resolution shall, when issued in accordance therewith, be deemed and taken to be, and the same hereby are declared, full-paid and nonassessable stock, and not liable to any further call." At a meeting of the board held on January 3, 1893, the president reported that he had arranged with Mr. Reed for the issue of the stock authorized at the last meeting to be issued to him in payment for the property mentioned in his proposition. The board then adjourned to meet at the office of the American National Bank, at Hartford, Conn., on January 4, 1893.

The certificates of stock of the Hartford company, of all the shareholders therein, were surrendered to the American National Bank, as trustee, after the agreement of November 9, 1892, and assigned in blank. The shareholders gave Mr. J. R. Redfield a power of attorney to transfer these, and upon his nomination the bank delivered all of these certificates either to Reed or Redfield on January 4, 1893. Before this delivery the bank had received from A. M. Kidder & Co., through the Fourth National Bank of New York, the \$1,000,000 for the said shareholders, in accordance with the contract with Reed. Mr. Reed or Mr. Redfield, his nominee, took these certificates to the secretary of the Hartford company, and he made out a certificate for 4,991 shares in the name of the New Jersey company; and thereafter, on January 4, 1893, Reed delivered this certificate to the New Jersey company, and the company delivered to Reed 17,500 shares of its preferred stock and 9,980 shares of its common stock. Thereupon

5,000 of these preferred and 5,000 of these common shares were delivered to the old stockholders of the Hartford company, one share of each for one share of the old stock. Ten thousand of these preferred shares were taken by A. M. Kidder & Co., for themselves and the underwriters, to pay for the advance of the \$1,000,000. Two thousand five hundred of the preferred and 5,000 of the common shares were taken to pay the expenses, the commissions, and the profits of the negotiating and carrying out this scheme by A. M. Kidder & Co. and Reed. On February 21, 1893, nine shares of the Hartford company were assigned to Pratt & Whitney Company of New Jersey by Jane E. Case, by J. R. Redfield, attorney; and on the same day one of these shares was transferred by the Pratt & Whitney Company of New Jersey by J. R. Redfield, attorney, to each of the following named persons: Francis A. Pratt, Amos Whitney, R. F. Blodgett, H. C. Robinson, Rowland Swift, J. E. Woodbridge, W. W. Hyde, J. R. Redfield, and G. W. M. Reed; making nine in all, and being said above nine shares, and making, with said certificate of 4,991 shares, all the shares of the capital stock of the Hartford company. The action of J. R. Redfield above was duly approved by the New Jersey company. The above-named persons were the directors of the Hartford company, and the said transfers to them were made in order to qualify them to act as directors of said company, and they were the directors of said company on February 28, 1893, and until the next annual meeting. The said G. W. M. Reed was elected treasurer of the Hartford company March 25, 1893, and continued as such to about May 1, 1896.

The original directors of the New Jersey company, as well as the original stockholders, had been mere figureheads for organization purposes. The directors subsequently resigned, and on February 28, 1893, and until the next annual meeting, the following named persons were the directors of the New Jersey company: Francis A. Pratt, Amos Whitney, Henry C. Robinson, Rowland Swift, G. W. M. Reed, Cornelius C. Cuyler, Roswell F. Blodgett, W. W. Hyde, J. R. Redfield, A. M. Kidder, S. E. Elmore. During said period the following named persons were the officers of the company: F. A. Pratt, president; A. Whitney, vice president; R. F. Blodgett, secretary; and G. W. M. Reed, treasurer. Between December 28, 1892, and February 28, 1893, J. R. Redfield was the treasurer of the company, but had little to do. The meeting of the directors of the New Jersey company of January 3, adjourned to January 4, to meet at the American National Bank at Hartford. was adjourned to February 22, and then to February 28, 1893. All of the directors were present. The following vote was unanimously passed: "Voted, to request the old Pratt & Whitney Company to deliver possession of all its real estate to this company for its use, and without rent, and to vest in and deliver

to this company all its personal estate, save and excepting such items as may be deemed best by this company to remain in the name of the old company, and all its contracts and its good will; this company to provide from said personal estate for the payment of all outstanding debts, obligations, and liabilities of the old company, and to undertake all the items of its business, of every name and nature, saving that the fee of its real estate is to remain with it for the present, and also the title to such items of the personal estate, especially patents, as the new company may think best." On February 28, 1893, the stockholders of the Hartford company duly met in the American National Bank, and adjourned an hour while the said meeting of the directors of the New Jersey company was held. The stockholders present were the same persons as the directors of the New Jersey company, except S. E. Elmore. After the interval of about an hour, the meeting of stockholders was resumed, and a vote was passed "to transfer the property from the Pratt & Whitney Company of Connecticut to Pratt & Whitney Company of New Jersey, in accordance with the following vote, which was received from the board of directors of the latter company, viz." the vote above set forth of the directors of the New Jersey company. On March 25, 1893, the directors of the Hartford company voted "to accept and confirm the transfer of property from the old to the new company in accordance with the vote to that effect passed by the new company at the meeting of its directors held on February 28, 1893, and by the stockholders of the old company at the annual meeting held on February 28, 1893." The purpose and intent of these votes was to transfer to the New Jersey company all the property and business of the Hartford company, except the real estate and the patents, the transfer of which was for the present postponed for the reasons hereinafter stated. The intention of all concerned, from the beginning, was to get the entire property and plant in the hands of the new company; and everything done was to this end, and all was done deemed necessary to accomplish this end. No money was in fact ever paid into the New Jersey company, except for the original \$2,000 of stock. Mr. Reed never paid anything to the New Jersey company for said shares transferred to him, except by the transfer of the stock of the Hartford company, and he never himself paid a dollar to the shareholders of the Hartford company or to the Hartford company. The only money paid was by A. M. Kidder & Co., as described above. The Hartford company stock at the date of the contract was worth between \$200 and \$225 per share, and the price paid was largely in excess of its value, and so regarded by the said directors and principal shareholders of the Hartford company.

Pursuant to these votes, and to carry out their purpose, the New Jersey company had delivered to it, and went into possession of,

the entire plant and property of the Hartford company on and after February 28, 1893, and carried on and conducted the business formerly conducted by the Hartford company at the same place and substantially in the same manner that it had been before conducted, without any break in said business, buying goods and selling goods on hand as usual. The executive officers, excepting the treasurer, remained the same. Contracts relating to the business were made and entered into by the New Jersey company relating to the conduct of this business. Buildings enlarging the facilities of the New Jersey company were erected after May, 1893, and became a part of this plant, and were paid for out of the funds of the New Jersey company. The liabilities of the Hartford company, which the New Jersey company assumed, were upwards of \$200,000, and as these became due the New Jersey company either paid or arranged for them. The New Jersey company used the same books as the Hartford company, including the bank book. Checks were signed by the same name, omitting the "the." The omission of this word constituted the difference in name between these two companies. On March 25, 1893, the directors of the New Jersey company declared a dividend on the preferred stock of 2 per cent., payable on and after April 1, 1893. The large majority of stock of the new company was held by persons not stockholders in the Hartford company. Mr. Reed was elected treasurer of the New Jersey company February 28, 1893, and continued as such until its dissolution. He collected the bills and accounts, and put them to the credit of the New Jersey company. He paid all the bills, including pay rolls, salaries, and material accounts. These bills and accounts included all of those existing February 28, 1893, of the Hartford company, and all those thereafter of the New Jersey company, as long as the company continued. The first bills paid by the New Jersey company were paid by Reed. Under express authority of the directors, he negotiated loans amounting to \$150,000 during the first six months of the business of the company. All the loans, in fact, used in this business, including renewals of bills payable of the Hartford company, contracted before February 28, 1893, he had made. He made report of the condition of the New Jersey company to its directors from the books of the company, and included in it a report of the entire business of the concern on March 25, 1893. All of these acts were done by Reed by virtue of the said votes of February 28, 1893. After February 28, 1893, and down to the dissolution of the New Jersey company, the Hartford company transacted none of the business it formerly did, and in fact did no business; and after said date, from the facts herein stated, the court found that said contract with Woodbridge was terminated.

The votes above mentioned were passed to carry out the entire arrangement made with Reed, as outlined in his said proposition to the

New Jersey company. Their purpose was to make a complete transfer of the property, plant, and good will of the Hartford company to the New Jersey company. The form of transfer was agreed upon by counsel for the New Jersey company and Hartford company, who were fully authorized; and the votes were passed in pursuance of a previous arrangement fully understood and agreed upon by the directors of each company, and by all of the stockholders of the Hartford company and the majority of stockholders of the New Jersey company. The real estate and patents were not transferred, because of the expense and complications attendant thereupon. It was proposed by all of the parties in interest that an attempt should be made to secure an amendment to the Connecticut charter of the Pratt & Whitney Company, permitting an increase of stock to \$3,000,000, and the issue of preferred and common shares to correspond with those of the New Jersey company, so that the New Jersey company might be then merged in the Connecticut company. It was believed that this name, "The Pratt & Whitney Company of Connecticut," was much more valuable to do business with than the New Jersey company name. In furtherance of this intent, on March 3, 1893, an amendment to the charter was introduced in the general assembly, and on April 19th it was duly passed and approved. It provided for an exchange of shares of the New Jersey company for corresponding shares of the Hartford company, and for the merger of the existing shares of stock of the New Jersey company in said new shares. The amendment was accepted by the Hartford company September 26, 1893. This exchange and merger were in fact made on November 22, 1895. The New Jersey company was dissolved December 30, 1895. After November 22, 1895, the Hartford company conducted the business of the New Jersey company. The Hartford company did, so far as it could, transfer its title to and possession of all its plant, property, and good will to the New Jersey company, in consideration of the assumption by it of its debts, contracts, and obligations, and of its entire ownership of its stock; and, in order to carry out the said arrangements heretofore described, the payment of the \$1,000,000 in cash and the \$1,000,000 in stock to the stockholders of the Hartford company was in fact a part of the consideration of the transfer, and these payments were in fact made for the New Jersey company. There was included in said transfer the small-tool department, and goods therein, manufactured by said Woodbridge in accordance with his said contract, of very large amount. Nearly all the items of debit referred to in said contract had already been paid for by said department, and the proceeds of these goods, when sold, would have represented, in large part, "profits," as defined in said contract. What exactly appeared upon the books of the Hartford company was, by stipulation of counsel, not gone into upon this hearing, and no evi-

dence was offered from which, under the contract, any profits could be determined.

Woodbridge knew all about, and took part in, the negotiations with Reed leading to the contract of November 9, 1892. He himself was a large stockholder in the defendant, and signed the contract of November 9, 1892, and surrendered his stock upon the terms therein stated. He advised and urged others to sell their stock upon these terms, and signed with the other directors the circular letter. He expected that the new company was to assume the debts of the old company, and to take possession of the plant and continue the business under a different management, and to assume his contract and all the other outstanding contracts of the old company. He expected to be a director in the New Jersey company until some time shortly before February 28, 1893. He at no time ever communicated anything regarding his contract, or a claim for commission under it, to any director or officer of the defendant or of the New Jersey company, except as hereinafter stated. He continued to carry on the small-tool department after February 28, 1893, and down to July 31, 1893, in substantially the same manner he had been doing before February 28, 1893, and received from the New Jersey company for services at the same rate he had before received from the Hartford company for salary under his contract. The payments were made by checks, which stated they were for the salary account. He continued as a director of the Hartford company up to February 28, 1893, and was on that day re-elected a director of the Hartford company. He was not present when the said stockholders' vote of February 28, 1893, was considered or passed. He underwrote \$10,000 of the stock of the New Jersey company, and received therefor, many months after, \$500 in preferred and \$2,000 in common stock of the New Jersey company, as commission. He had been advised by his counsel in January, 1893, that, in case the transfer to the New Jersey company was effected, he would have a claim for 10 per cent. of the profits on the goods in the small-tool department. He learned of the votes of February 28th shortly thereafter, and on March 3d notified Mr. Reed that he would not continue with the new company. Reed sent him to J. R. Redfield, and shortly after this, and before March 27, 1893, he notified Mr. J. R. Redfield, through his attorney, that he should not continue his contract with the New Jersey company. Redfield was perhaps the most active among the directors of each company. At the request of Redfield, made to Woodbridge's attorney, he agreed to continue with the New Jersey company temporarily, and did so continue. On March 27th, 1893, he caused to be served upon the New Jersey company this notice: "To the Directors of Pratt & Whitney Company, Organized and Doing Business under the Laws of New Jersey: Dear Sirs: I hereby give the above-named company notice that I do not desire the

fact that I have been in its employ since its organization until now, or the fact that I may continue in its employ, upon indefinite terms, until a contract may be made by and between said company and myself, or until it is decided that a contract shall not be made by and between said company and myself for my services, to be understood in any manner as indicating or admitting that I am willing to accept or that I do accept said company in any manner to be substituted to the place of, or to perform any of the duties imposed upon, the Pratt & Whitney Company of Hartford, Connecticut, by a contract made by and between the Pratt & Whitney Company of said Hartford and myself for the term of five years from the first day of January, 1890. James E. Woodbridge."

After March 27, 1893, Woodbridge continued in the employ of the New Jersey company at the request of said Redfield and Mr. C. C. Cuyler, the largest underwriter and one of the directors of the new company, made to him after February 28, 1893, and before March 27, 1893, to continue temporarily with the company. Woodbridge never served notice upon the Hartford company of his termination of his contract with it. He regarded the contract as terminated by the transfer of February 28, 1893. The Hartford company and no one representing it ever said anything to him before or after February 28, 1893, except as stated, regarding his contract, or his continuance under the contract. He never communicated with the New Jersey company, or any of its directors or officers, regarding the continuance of his contract, except with Cuyler and Redfield. He was never formally hired or employed by, or had any contract with, the New Jersey company, but continued on with them as herein stated. He had intended to continue on with his contract with the New Jersey company, provided the management of the New Jersey company had not been the same as the Hartford company; but after learning of this before February 28, 1893, he at once determined not to continue his contract with the New Jersey company, and at no time and with no persons ever agreed to continue under said contract, and no one ever spoke to him about it, or requested him to continue, except as herein stated. After it had been determined that there was to be no change in the management of the business, Woodbridge, for a while, expected to be a director of the New Jersey company, and intended to continue his contract with the New Jersey company; but after February 28, 1893, he never intended to continue, and never did continue, his said contract with the New Jersey company, nor assent to its assumption of his contract. The New Jersey company never arranged with him to continue his contract, or said anything to him about continuing his contract, nor he to them. After February 28, 1893, the Hartford company ceased to manage the business formerly conducted by it, and had in fact no business to conduct, and no plant to operate a business with, and no means of

carrying out its contract with Woodbridge, and the contract with Woodbridge was in fact terminated by said transfer. On June 20, 1893, he wrote to the Hartford company, asking them to state to him "the sum for which the manufactured goods made or dealt in by the small-tool department of your company were sold by your company to Pratt & Whitney Company of New Jersey on or about Feb. 28, 1893." The company replied that "there has been no sale of manufactured goods or of any of the property or assets of the old Pratt & Whitney Company to the new Pratt & Whitney [of New Jersey]. Whatever property was vested in the new company, the owners of all the stock, was so vested upon no other consideration than the fact of entire ownership, and of the new company's assuming the obligations of the old company." On July 20, 1893, this suit was brought. On July 26, 1893, the plaintiff wrote to the New Jersey company as follows: "I hereby give you notice that I shall terminate my connection with the above-named company on the 31st day of July, 1893, or sooner if it is your pleasure;" and on July 31st he terminated all connection with said company, and ceased his management of the said small-tool department. Woodbridge's commissions as profits under the contract had always, before said February 28, 1893, been figured up and paid at the end of each year for the year past. He has never been paid by the defendant or any one else for any profits upon the goods which were sold in January and February, 1893, in the usual course of business of the Hartford company, nor for any profits upon the goods in the small-tool department transferred to the New Jersey company on and after February 28, 1893, nor for the \$2,000 increased salary referred to.

Upon the trial the plaintiff requested the court to decide as follows: First. That upon the facts the transaction by which all the property of the Hartford company, including the small-tool department, was transferred by the Hartford company to the New Jersey company, was a sale of such property; that thereby the Hartford company had sold to the New Jersey company a large quantity of goods which had been manufactured by the plaintiff in the small-tool department under the contract; that under said contract the plaintiff was entitled to recover from the Hartford company 10 per cent. upon the amount of profits which the Hartford company received upon said sale of such goods; and that the defendant company should be obliged to account for such profits. Second. That upon the facts the plaintiff was entitled to recover from the defendant the sum of \$2,000 additional salary provided for in said contract, as it was in consequence of the acts of the defendant that it became impossible for any additional contract to be made between the plaintiff and defendant. But the court refused so to hold and decide. The defendant upon the hearing claimed as matter of law: (1) That no sale of the goods in the small-tool

department under the contract between Woodbridge and the defendant had been shown; (2) that no sale had been made by the defendant to the New Jersey company; (3) that there was no transfer of the property of the defendant to the New Jersey company which operated to terminate the contract between the defendant and Woodbridge; (4) that the contract was in fact terminated by Woodbridge himself, and therefore Woodbridge had no claim against the defendant; (5) that Woodbridge, by his conduct, both acts and omissions, both before and after February 28, 1893, had waived any claim against the defendant on account of the claimed sale by the defendant to the New Jersey company, and was estopped from making the claims set up in this action; (6) that Woodbridge's conduct, both acts and omissions, constituted an election to continue with the reorganized company under his contract; (7) that Woodbridge's conduct, both acts and omissions, was legally inconsistent with his present claims that the reorganization constituted a sale by the defendant, and was a breach of his contract; (8) that under the contract between Woodbridge and the defendant the commissions were to be fixed at the end of the year, and that he had no claim on which this action could be based at the time of the commencement of this action; and (9) that, as to the claim for \$2,000 additional salary set up in the sixth count, no such neglect or refusal on the part of the defendant to make a new contract as the contract provided had been shown, and that he was not entitled, therefore, to the penalty claimed. The court sustained the first claim of the plaintiff, and overruled the defendant's claims 1 to 7, inclusive, and sustained the conclusion set forth in claim 9. As to claim 8, it held that the plaintiff could not recover the entire damages resulting from a breach of the contract, but ordered an accounting for the profits realized by the defendant from the sales made from the small-tool department during the months of January and February, 1893, and judgment for 10 per cent. of the amount of said profits, with interest thereon from March 15, 1893, with directions not to consider, in computing said profits, the transfer by the defendant of the entire small-tool department to the Pratt & Whitney Company of New Jersey, but only such sales as were made in the ordinary course of business by the defendant during said two months. From this interlocutory judgment each party appealed, under the provisions of chapter 4, p. 446, of the Public Acts of 1895.

Charles E. Perkins and Daniel A. Markham, for plaintiff. William Waldo Hyde and Lucius F. Robinson, for defendant.

BALDWIN, J. (after stating the facts). The contract between the parties of January 1, 1889, made the compensation for the plaintiff's services, outside of his stated sal-

ary, dependent on the profits annually realized upon the sales for the year of goods manufactured or dealt in under his superintendence, and in his particular department of the business. He contends that the transfer of the main assets of the company in 1893 to the New Jersey corporation, which had been organized to succeed to its business, in which transfer all the goods then in the small-tool department were included, was in substance a sale of those goods for a price which can be readily computed by the aid of the inventory and the defendant's books, out of the profits from which he is entitled by the contract to receive 10 per cent. The Connecticut company sold nothing to the New Jersey company. Its stockholders sold their shares to certain individuals, who caused them to be transferred to the New Jersey company. Thereupon (subject only to any rights of creditors) the property of the defendant, which had been held by it for the benefit of its previous shareholders in certain proportions, remained in its keeping for the benefit of its new shareholders; that is, in effect, of the shareholders in the New Jersey company. The latter had been organized, by concert between its shareholders and those of the defendant, in order to succeed to the defendant's plant and property, and to carry on its business without break or interruption. Where all the stockholders in a corporation act together in its behalf, though there be no regular meeting or formal vote, their action is substantially corporate action. *Wood v. Construction Co.*, 56 Conn. 87, 96, 13 Atl. 137. So, where the directors of a corporation, by the desire of all the shareholders, take corporate action which has no other end than to protect or promote the shareholders' interest, the form of the transaction (if no rights of creditors are involved) is of little importance in determining its validity. *Smith v. Gaylord*, 47 Conn. 380, 383. The Hartford company, being in possession of property under a legal title, for the use of those holding the beneficial title (namely, the New Jersey company, in its own right, and as representing the nine individuals in each of whom had been vested, at its instance, one share of the Hartford company), transferred both its possession and its title to the real owner. No objection was interposed by any party in interest, or by the state. The transfer, therefore, must be treated as effectual for the purpose for which it was planned and executed. This was the continuance of the business of the Hartford Company upon a different basis of capitalization, and for the benefit of a new set of stockholders. That business was to make and sell certain goods. The goods which were on hand, unsold, on February 21, 1893, when the last share outstanding of the Hartford company was assigned to the New Jersey company, thereupon became in equity the property of the latter, and, if thereafter sold, would be sold for its benefit. Their de-

livery to it a week later simply changed the hand by which any such sales would be made. It did not affect the equitable title to the proceeds, or to the goods themselves. It simply clothed the equitable owner with the legal title and the possession which was its proper incident. The plaintiff's claim to an accounting of the profits derived from an alleged sale of these goods was therefore properly disallowed.

Nor was he entitled, under his contract, to an additional salary of \$2,000, for the last year of the term. Aside from any other considerations, such addition was only to become due if the contract were not renewed by reason of the neglect or refusal of the company. He contends that the transfer of February 28, 1893, made any such renewal impossible. But, if this be so, the transfer was the natural consequence of a reorganization actively promoted by the plaintiff, and under which he had originally intended to consent to a novation of his contract by its continuance under the New Jersey company. He cannot found a claim against the defendant for a neglect or refusal to renew the contract upon a course of action on which it entered by his own procurement. From the facts set forth in the finding, the superior court reached the conclusion that the contract between the parties was terminated on February 28, 1893. Before that time the plaintiff had determined not to consent to treat it as a continuing one with the New Jersey company. After that time, so far as the Connecticut company, which is the defendant in this cause, is concerned, he had no dealings with it, while, so far as the other company is concerned, he gave it prompt notice that he should not and did not consent to a novation, and to this it took no exception. It may be that his promotion of the scheme of reorganization would have given the New Jersey company, after the transfer of February 28th, an equitable right to insist on his continuance in the small-tool department during the residue of the term of his contract with the defendant. No such right, however, was asserted in its behalf. He notified it that his services were being rendered to it "upon indefinite terms" until they should agree either to make a contract in respect to his further employment, or not to make one, and it did not claim that they stood to each other in any other relation. While, therefore, there are circumstances (particularly the monthly salary payments) which tend to show that the New Jersey company considered the contract as in force, the superior court was justified in finding, from all the facts taken together, that it was terminated on February 28, 1893. This termination was virtually accomplished by mutual consent. It followed from a transfer of the plant and business, made as a part of a scheme which the plaintiff had been active in carrying through, and from his declining to accept a substitution of the new company as his employer. Such a rescission left the defendant under an obligation to pay him the

agreed percentage of any profits realized from the January and February sales. The amount of this depended on what might remain after deducting from the proceeds of the sales for that year of goods belonging to the small-tool department certain debts specified in the contract, and, of these, several were to be ascertained upon a computation of the defendant's expenditures or interest charges for the entire year. Had the contract been broken by the defendant, the plaintiff would have had a right to sue at once for whatever damages he might have thus sustained. But, as it was rescinded by consent, his only right was to recover what remained unpaid of the stipulated compensation for services already performed, the amount of which was to be determined, so far as practicable, by the terms specified in the contract under which they had been rendered. The stipulated debit of 5 per cent. on the value of the plant of the small-tool department, as it might be fixed by the inventory of January 1, 1893, was evidently intended as an equivalent for a year's interest on the capital thus invested; and, in stating the account for a period of only two months, it would be equitable to charge the plaintiff for the proportion due for that period only. But, while such a fixed charge would be susceptible of immediate apportionment, this would not be true respecting the debit of a certain fraction of the actual expenses for the year on such accounts as taxes, insurance, and litigation. Until the year had closed, these items would be incapable of exact computation. It follows that the action which was instituted in July, 1893, was prematurely brought.

During its pendency, however, and after the close of the year 1893, the complaint was amended by the addition of three new counts. Of these, the fourth and fifth set forth the contract of January 1, 1889, a sale on February 28, 1893, to the New Jersey company of all the goods then in the small-tool department, and sales of other goods in said department during January and February, 1893, and allege that upon an accounting it will be found that the profits upon the latter sales, determined according to the provisions of the contract, will be \$10,000, of which 10 per cent. will be found to be due to the plaintiff. The defendant met these accounts with a general denial, excepting only an admission of the execution of the contract, and an averment that on its part it had been duly performed. To the sixth count, in which the additional salary of \$2,000 for the year 1893 was claimed on the ground that the defendant had terminated the contract by its sale to the New Jersey company, and hence made its renewal of the contract for another term impossible, a demurrer was interposed, founded in part on the ground that the action was prematurely instituted. No such objection having been taken in pleading to the other counts, the parties went to trial on the merits of the case presented by these, and were fully heard. Under these circum-

stances, although the claim that the commissions could not be computed under the terms of the contract until the close of the year, and so that the suit was brought before the cause of action was complete, was made in argument before the trial court, and overruled, it is evident that no substantial injustice was thus done to the defendant. [An action at law can only be supported on the facts existing when it was first brought. It rests on the charge of a breach of duty, for which, at common law, the defendant was liable to immediate arrest and imprisonment. In such a proceeding, if it appears that the plaintiff had suffered no wrong which would support his suit when the process was served, there can be no recovery. Equitable proceedings rest upon different foundations, and in them the parties can always rely on new matter, if properly pleaded. The plaintiff asked for both legal and equitable relief, but the latter only was awarded him by the judgment. Had he put the allegations of the fourth or fifth count in the shape of a supplemental complaint, the accounting ordered would have been entirely proper. His failure to present his cause of action in that form cannot invalidate the judgment, unless the defendant was injuriously affected by it. Gen. St. § 1135. Nothing appears upon the record to indicate that such can have been the result. It had full opportunity, under the pleadings as they stood, to offer all testimony and present all claims of which it could have availed itself upon a trial under a supplemental complaint.]

The judgment of the superior court, in every other particular, is warranted by the facts found; it disposes of the whole controversy between the parties in such a manner as to do substantial justice; and it is not our duty to grant a new trial for a mere slip in pleading, by which no one has been really prejudiced. Similar considerations must govern the disposition of other well-founded assignments of error. It was held by the superior court, upon the facts found, that the transfer of February 23, 1893, constituted a sale of the goods in the small-tool department, though not such a sale as fell within the provisions of the contract, and that this transfer was of itself a termination of the contract by the defendant, which the plaintiff had the right to treat as a wrongful breach of its provisions. These conclusions of law were erroneous, but the resulting judgment was not. There is no error upon either the plaintiff's or defendant's appeal. The other judges concur.

SMITH v. HALL.

(Supreme Court of Rhode Island. June 30, 1897.)

TRUSTS—TERMINATION—DIVISION OF TRUST ESTATE —POWERS OF TRUSTEE—CHANGES IN INVESTMENTS.

1. Testator gave the residue of his estate in trust for his two daughters "during their natural lives," and on the death of either to transfer

said property to her children or their descendants, if any; "but, if either or both of my said daughters shall die without leaving issue or their descendants, then to the heirs at law of my said daughters, their heirs and assigns, forever; and the trusts herein declared shall thereupon cease and determine as to the property and estate so conveyed by my said trustee." Held that, on the death of one daughter, the trust terminated only as to the share to be conveyed to her child and grandchild, who survived her, and not as to both cestuis.

2. In the absence of any provision in the will for the payment of owelty in the division of the trust estate, which consisted of personal property, the division must be made in specie so far as possible.

3. Where a trustee is given authority to make all necessary changes in the investment of the property, and therefore to sell for that purpose, after his death, his successor has like authority, where such successor is appointed under Gen. Laws, c. 208, § 5, providing that every trustee appointed pursuant to such chapter shall have the same powers as the original trustee, and section 8, providing that the preceding seven sections apply to trusts "heretofore as well as those hereafter" created.

Bill by Charles M. Smith, trustee, against William F. Hall, for instructions.

Joseph C. Ely and Herbert Almy, for complainant. James M. Gilrain, for respondent.

MATTESON, C. J. This is a bill for instructions. The complainant is the present trustee under the will of Matthew Watson, deceased, which will, with the codicil thereto, was admitted to probate October 27, 1857. By the codicil the testator revoked the residuary clause of his will, in so far as it contained gifts of the one-third part of the residuary estate to each of his two daughters, Sarah M. Hall, wife of Peleg Hall, and Mary R. Allen, wife of Philip Allen, Jr. He then gives, devises, and bequeaths these shares of his estate to Francis E. Hopkin, in trust "that the said Francis E. Hopkin shall receive the principal and estate named in the residuary clause of my said will, which is therein given and devised to my said daughters, and shall hold and manage the same for their sole use and benefit during their natural lives, using his discretion in the investment of said property and estate and all necessary changes thereof; and shall, upon receipt of the rents, income, dividends, and profits thereof, after paying therefrom the taxes upon and the expense of managing said property, and a reasonable compensation for his own services, pay over to each of my said daughters, as they shall require the same, the annual amount of said rent, income, dividends, and profits, taking the individual receipts of my said daughters in full discharge for such payments. And upon further trust to transfer and convey said property and estate, upon the death of either of my said daughters, to her children or their descendants (if any there be); but if either or both my said daughters shall die without leaving issue or their descendants, then to the heirs at law of my said daughters, their heirs and assigns, forever; and the trusts herein declared shall thereupon cease and determine as to the property and estate so conveyed by my said trustee."

tee." The residuary estate consists of personal property only. Sarah M. Hall died April 5, 1897, leaving as her next of kin a child and a grandchild. The trustee desires the instruction of the court as to (a) whether the trusts above recited terminated as to both cestuis que trustent at the death of Sarah M. Hall, or only as to the share to be conveyed to her child and grandchild; (b) whether Mary R. Allen is entitled to a conveyance of the legal title of the share held in trust for her; (c) whether as trustee he has power, if the trust continues, to sell any of the residuary estate held in trust, for a change of investment; (d) whether he has power, if the trust is terminated only as to one-half of the estate, to give owelty in partition of the estate on conveyance of one-half of it to the child and grandchild of Sarah M. Hall.

We think that it is sufficiently evident that the trust was terminated, by the death of Mrs. Hall, only as to the share to be conveyed to her child and grandchild. The trustee, it will be observed, was to hold and manage the trust estate for the use and benefit of the daughters during their natural lives, and on the death of either to convey to her children or their descendants. The gift to the daughters was of a life estate, with a remainder to their children or descendants. The trust is in express terms to continue during the natural lives of the daughters, not during the life of one of them. If the provision were to be construed as terminating on the death of the daughter who first died, the trustee would hold, not during the lives of the daughters, but only during the life of the one dying first. It follows from what we have already said that Mary R. Allen is not entitled to a conveyance of the legal title of the one-half held in trust for her. The language of the trust clearly implies that she is to take only a life estate. Rev. St. R. I. c. 154, § 2, in force at the probate of the will, provided that a devise for life to any person and to the children or issue generally of the devisee, in fee simple, shall not vest a fee tail estate in the first devisee, but an estate for life only, and the remainder shall on his decease vest in his children or issue generally, agreeably to the direction in such will, thereby destroying any implication which might perhaps arise otherwise from the use of the words "children" and "issue." We think the trustee has power to sell any portion of the trust estate which the prudent management of the trust may dictate should be sold for the purpose of changing the investment. Authority was given to the original trustee to make all necessary changes in the investment of the property. Changes of investment were as likely to become necessary in the execution of the trust after the decease of the original trustee as before, and the power would therefore seem to be annexed to the trust rather than personal to the trustee. In *re Blakely*, Index RR, 152, 33 Atl. 518. The power to make necessary changes of investment implies the power to sell for that purpose. More-

over, Gen. Laws R. I. c. 208, § 5, provides that every trustee appointed pursuant to the provisions of that chapter shall have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust; and section 8 of the same chapter further provides that the preceding seven sections shall apply to trusts heretofore as well as those hereafter created, and shall be considered in addition to the ordinary equity powers of a court of chancery. The complainant, having been appointed a trustee under the provisions of chapter 208, has, by virtue of the statute, the same power to sell and convey, for a change of investment, possessed by the original trustee. We think that the direction to the trustee, on the death of Mrs. Hall or Mrs. Allen, to transfer and convey to her children or their descendants, if any there be, one-half of the trust property, implies a division of the trust estate in specie. The term "owelty" is usually, if not universally, applied to the partition of lands. The will contains no provision for the payment of owelty in the division of the trust estate. We are of the opinion that the stocks and property constituting the trust estate should be divided in specie, so far as possible, and that the trustee, in case an equal division cannot be made, has an implied power to sell enough of the trust property to equalize the division.

SPRAGUE v. GREENE.

(Supreme Court of Rhode Island. June 24, 1897.)

ABATEMENT AND REVIVAL — EXECUTORS AND ADMINISTRATORS — LIMITATION OF ACTIONS.

1. Under Pub. St. c. 204, § 8, which recognizes as surviving causes of action which survive at common law, an action of covenant survives.

2. Pub. St. c. 189, §§ 5, 6, as amended by the judiciary act, provide that in case either party to a suit pending in the supreme court die before final judgment his executor or administrator, if the cause of action survive, shall prosecute or defend the action to final judgment; and that if he fail so to do when duly notified, unless the estate is insolvent, the court may enter judgment against the estate. *Held*, that where defendant in an action which does not abate dies, and the executor does not appear and defend, Pub. St. c. 205, § 9, limiting the bringing of actions against executors and administrators to three years, does not apply, and that the executor was not cited until more than three years after appointment was immaterial.

Action by Amasa Sprague against Moses Greene. Pending the action, defendant died, and Henry P. Stone and Albert R. Greene, administrators with the will annexed, were substituted as defendants. Heard on demurrer to plea. Sustained.

James, Wm. R. & Theodore F. Tillingshast, for plaintiff. Albert R. Greene and Robert W. Burbank, for defendants.

MATTESON, C. J. This is an action of covenant in which a rule was entered. The

referee filed his report February 29, 1882, by which he awarded to the plaintiff damages for breach of the covenant in suit, with interest and costs. The defendant, on April 25, 1892, moved to set aside the award. While this motion was pending, on, to wit, July 14, 1892, the defendant died, and at the September term, 1893, of the supreme court for Kent county, his death was suggested. On January 2, 1897, on the plaintiff's motion, an order was made by the common pleas division, to which the suit had been transferred in accordance with the provisions of the judiciary act, that a citation issue to Henry P. Stone of Providence and Albert R. Greene of Warwick, administrators with the will annexed on the estate of the deceased, to appear and take on themselves the defense of the suit. In compliance with this citation, the administrators entered their appearance in the suit, and on March 2, 1897, filed a plea setting forth the decease of Moses Greene, and the suggestion of his death as stated above; that he left a last will and testament, which was duly admitted to probate by the probate court of Warwick on October 24, 1892, in which Susan S. Stone was appointed as sole executrix; that she was duly confirmed as executrix by the court, and qualified herself to act, and gave notice of her appointment and qualification by publishing notice, as directed by the probate court, on November 18, 1892, in the Pawtucket Valley Gleaner, a public newspaper published in Warwick; that she deceased in 189-, not having been discharged as executrix by the court; that they were, on —, 1895, appointed by the probate court of Warwick administrators de bonis non with the will annexed on the estate of Moses Greene, deceased, and duly qualified as such; that more than three years had elapsed since the appointment of Susan S. Stone as executrix as stated, and the publication of the notice of her appointment and qualification as such, but that the plaintiff did not, till after the three years had elapsed, cite Susan S. Stone in her lifetime as executrix, nor after her decease these administrators, to make defense to the case. The plea concludes with a verification and prayer for judgment whether the plaintiff ought further to maintain his action against them. The plaintiff demurs to the plea, and assigns as grounds of demurrer: (1) That under the statutes the suit was not abated by, but survived, the death of Moses Greene. (2) That under the statutes it became the duty of the executrix of the will to appear and take on herself the defense of the suit, and on her decease and the appointment of the administrators it became their duty to do so. (3) That, the court having retained its jurisdiction over the action, and continued it from time to time, the lapse of the period set up in the plea creates no bar to the further prosecution of the suit. The plea proceeds on the assumption that by the death of the defendant the suit was abated, so that it could not be revived, and consequently that the summoning in of the administrators was, in effect, the bringing of a new action against them. We do not think

that these views are correct. At common law a cause of action, arising on a covenant on which the testator or intestate might have been sued in his lifetime, survived his death, and was enforceable against his executor or administrator. 2 Williams, Ex'rs (7th Am. Ed.) 222, 234. Causes of action which survive at common law are expressly recognized as surviving by Pub. St. R. I. c. 204, § 8; and by chapter 189, §§ 5, 6, in force at the time of the confirmation of the appointment of the executrix, it was provided that in case any action or suit should be commenced or pending in any court of common pleas, or in the supreme court, and either party should die before final judgment, the executor or administrator of the deceased party, in case the cause of action survived, should prosecute or defend such action or suit to final judgment; and it was further provided that, if any executor or administrator should neglect to appear, and take on himself the prosecution or defense of any action or suit, when duly notified by order of the court, the court, unless the estate had been represented insolvent, might enter judgment against the estate in the hands of the executor or administrator, and the like process should be had thereon as if the action had been originally commenced against the executor or administrator. These provisions of the statute were also in force at the time of the appointment of the administrators, except that the words, "in any court of common pleas or in the supreme court," in section 5, had been changed, on the passage of the judiciary act, to "either division of the supreme court." Pub. St. R. I. c. 189, §§ 5, 6, were re-enactments of Rev. St. R. I. c. 161, §§ 5, 6. In Webster v. Baggs, 6 R. I. 247, 249, it was held that the rule of common law that a suit abated by the death of the plaintiff, though the cause of action survived, was modified by these statutory provisions, which contemplate that the suit, instead of abating, shall be carried on by the executor or administrator from the point where it may have been left by the deceased, and shall only be dismissed on the neglect of the executor or administrator to prosecute it within a reasonable time after becoming qualified to act. In that case it was the plaintiff who had died. But the provisions of the statute apply to the death of a defendant as well as the death of a plaintiff, and make it equally the duty of the executor or administrator of the former to come in and take on himself the defense of the suit as of the latter its prosecution. And see Vaughn v. Sturtevant, 7 R. I. 372, 374, 375. As, then, the suit did not abate by the death of Moses Greene, and as it was the duty of his executrix and of the administrators to have taken on themselves the defense of the suit at the point where it was left at his decease, the lapse of more than three years from the giving of the notice of her appointment as executrix by Susan S. Stone, before the summoning in of the administrators, was wholly immaterial, since the special statute limiting the bringing of actions against executors and administrators to

such period of three years (Pub. St. R. I. c. 205, § 9) applied only to the bringing of actions against executors or administrators, and not to the citing them to appear and take on themselves the defense of an action begun against the testator or intestate in his lifetime.

It may, perhaps, be thought at first glance that this decision is inconsistent with our decision in *Fox v. Hopkinson*, 19 R. I. —, 36 Atl. 824. That was a suit in which the defendant died between the date of the decision and the date of the entry of judgment on the decision, and before the expiration of the time, to wit, two days after decision, within which a jury trial could have been claimed. In that state of facts we held that the suit was abated by the death of the defendant, for the reason that, as a jury trial must have been claimed within the two days after the decision, the administrator, on being summoned in, could not have claimed a jury trial because the time for so doing must necessarily have elapsed before he could have been appointed. As the effect of a different holding would have been to deprive the administrator of his right to a jury trial, and as in that view it might well be doubted whether the statute would be constitutional, we came to the conclusion that the suit must be deemed to have abated. That, however, was a case in the district court of the Eighth judicial district, and the decision in it is to be limited to suits in district courts in which alone the difficulty can arise, since in suits in the common pleas division a jury trial must have been had or waived before a decision can be given. The demurrer is sustained, and the plea overruled. The case is remitted to the common pleas division for further proceedings.

RHODE ISLAND HOSPITAL TRUST CO. v. HARRIS et al.

(Supreme Court of Rhode Island. June 25,
1897.)

TESTAMENTARY TRUSTEE—CONVERSION OF REALTY —ANNUITIES—APPORTIONMENT.

1. A testamentary trustee directed to "immediately" pay over, "transfer, and convey" the estate to certain beneficiaries on the happening of a certain event, with express power to sell, may convert the realty by sale after the happening of such event: the trust being one likely to continue many years, and to require distribution among a large number of beneficiaries, and the will providing as to a part thereof that the "principal" should be paid to the beneficiary.

2. An annuity created by will in lieu of dower is apportionable on the death of the annuitant during a year.

Proceeding by the Rhode Island Hospital Trust Company, trustee, against Nathan B. Harris and others.

James, Wm. R. & Theodore F. Tillinghast, for complainant. Dexter B. Potter, Edwards & Angell, Henry J. Dubois, Clarence A. Aldrich, Cooke & Angell, and C. E. Salisbury, for respondents.

MATTESON, C. J. Three questions have been submitted to us, viz.: (1) Whether the

complainant had power, under the trusts in the will of Oaleb Harris, to sell and convey the real estate referred to in the bill to Emma L. Howard, as stated in the bill; (2) whether the complainant's deed to her vested in her an indefeasible estate in fee simple; (3) whether Frank Potter, as executor of the will of Eliza A. Harris, the widow of the testator, is entitled to receive a pro rata amount of the annuity of \$2,000, given to her in the will during her life, for the period between April 10, 1896, the date of the last payment to her on account of the annuity, and August 10, 1896, the date of her decease.

The trust concerning the residuary estate, of which the land sold to Emma L. Howard formed a part, provides that the trustee, immediately on the marriage or decease of the testator's wife, whichever may first happen, shall pay over, transfer, and convey nine-tenths of the trust premises and estate to the persons and in the proportions specified, and then provides: "As to the remaining one-tenth part, my will is, and I hereby direct, said Rhode Island Hospital Trust Company to hold the same in trust, and to pay over the income thereof annually to said William Harris, son of my brother, the said Harding Harris, during his natural life, and, immediately upon his decease, to pay over and transfer the principal thereof to the children of said William Harris then living, and to the descendants of any of them who may then have deceased, in equal shares," etc. Then follows a power to the trustee to sell and dispose of the trust estate by public auction or private sale, and to make and execute all necessary contracts and conveyances for vesting the premises sold in the purchaser or purchasers. In opposition to the view that the complainant had power to sell the real estate in question, reference is made to the language of the trust that the trustee shall immediately, on the marriage or decease of the testator's wife, pay over, transfer, and convey the trust premises; and it is argued from this that it was the testator's intention that the trust as to this portion of his estate should end with the death of his widow, and that the estate, as it then was, should be conveyed to the persons to whom it was given. Stress is laid on the word "immediately," and it is contended that the testator would not have used that word if he had intended that the trustee should have power to convert the real estate into money after the widow's decease; nor would he have used the words "transfer and convey," in the direction to the trustee as to the distribution of the estate, but would have used simply the words "pay over." And it is suggested in this connection that the power following the trusts is not inconsistent with these contentions, since the will contains other trusts, and the power may be necessary for the proper execution of the other trusts till they are terminated. While there is perhaps some force in these suggestions, we have, nevertheless, reached

the conclusion that the complainant had power to make the sale, and that its deed to Emma L. Howard, the purchaser, vested in her an indefeasible estate in fee simple in the land conveyed. The trust is not in terms terminated by the decease of the widow. It still remains for the trustee to distribute the trust estate as directed. The will was made in 1869, and admitted to probate in 1871. It was not improbable that the trusts might continue for a long term of years, as the event has proved. The distributees of the estate under the trust might, in the lapse of years, become numerous, and their interests in the trust property proportionately minute. In such circumstances it might become expedient that the real estate should be sold, for the advantageous distribution of the trust property. The word "immediately" may well be considered to mean "within a reasonable time," or "as soon as may be" after the decease of the widow; and, as the trust is not in terms terminated by that event, we think that the power is applicable to a sale by the trustee subsequently thereto, and, consequently, that it might properly be exercised for the purpose of distributing the trust estate if the trustee deemed it advisable for the interests of the cestuis que trustent to make the sale for that purpose. That the testator may have contemplated such exercise of the power is indicated by the language concerning the disposition of the one-tenth of the residuary trust estate, which the complainant is to continue to hold for the benefit of William S. Harris, son of Harding Harris, for life, the direction to the trustee, on his decease, being to pay over and transfer the "principal" thereof to his children, the word "principal" implying that, in so far as the real estate might constitute a part of that one-tenth of the trust estate, it might be converted into personality.

As to the third question, we are of the opinion that the executor of the will of the widow is entitled to the proportionate amount of the annuity of \$2,000 for the period between April 10, 1896, and the decease of the annuitant, on August 10, 1896. While it is the general rule that annuities, whether created inter vivos or by will, are not apportionable in respect of time, an exception has been allowed in case of an annuity given in lieu of dower, the reason for the exception being that, as dower lasts during the life of the widow, what is given in its place should last the same length of time. *Gheen v. Osborn*, 17 Serg. & R. 171; *Blight v. Blight*, 51 Pa. St. 420; *In re Cushing's Will*, 58 Vt. 393, 5 Atl. 186; *Lackawanna Iron & Coal Co.'s Petition*, 37 N. J. Eq. 26; 2 Am. & Eng. Enc. Law (2d Ed.) 400, 401. Such a conclusion is in harmony with the policy of our statutes (Gen. Laws R. I. c. 203, §§ 38, 39, 45), which provide for an apportionment for the current year of an annuity given by will made subsequently to February 1, 1896, unless provision be made to the contrary in the will in

case of the death of the annuitant before the termination of the year from the time when the whole of the annual allowance for the preceding year has become due.

HANSON v. BECKWITH.

(Supreme Court of Rhode Island. June 29, 1897.)

LESSOR'S LIABILITY—INJURIES TO STRANGERS.

A lessor who retains no control of the premises, the lessee being under covenant to repair, is not liable for injury to one entering by the lessee's invitation to deliver goods to him, by falling into an unguarded opening between the freight elevator and the outer wall of the shaft; the building in such respect being neither a nuisance, nor, by reason of secret defect, unfit for the purpose for which it was leased.

Action by Martin Hanson, administrator, against Lydia D. Beckwith, for death by wrongful act. Defendant demurs to the declaration, and plaintiff demurs to a plea. Demurrer to declaration sustained, and demurrer to plea overruled.

Bassett & Mitchell, for plaintiff. Joseph C. Ely and Herbert Almy, for defendant.

STINESS, J. The declaration alleges that the defendant, owner of a building known as the "Owen Building," on Dyer street, in the city of Providence, on April 3, 1895, and for a long time prior thereto, knew of a dangerous defect in the construction of the elevator well therein, by leaving a large opening between the elevator and the outer wall; that while the plaintiff's intestate was delivering goods, on said April 3d, to a tenant in the building, by his invitation, and while in the exercise of due care, said intestate fell through the opening, and was killed. The defendant demurs to the declaration for lack of material averments; but as these could be supplied by amendment, and as the real question of the case arises in a broader way upon the defendant's plea, to which the plaintiff demurs, we will consider the whole case as it is shown by the pleadings.

The plea sets up the fact that, excepting a small store, the whole building, together with the elevator, was under lease from January 1, 1895, to December 31, 1899, with covenant by the lessee to keep the interior in repair, and that the defendant had no control over the elevator, nor the right to make alterations. The case as thus stated raises the question of a landlord's liability to a stranger for the defective condition of premises under lease. In *Joyce v. Martin*, 15 R. I. 538, 10 Atl. 620, this court recognized three classes of cases of this sort: First. Where the owner leases premises which are a nuisance, or must, in the nature of things, become so by their use, then, whether in or out of possession, he is liable for injuries resulting from such nuisance. Second. Where premises are let for rent or profit, to be used for purposes for which they are not fit or

safe, and all this was known, or ought to have been known, to the lessor, he is also liable for injuries resulting from such use. Third. Where property, at the time of a demise, is not a nuisance, and an injury happens by some act of the tenant, or while he has entire possession and control of the premises, the owner is not liable. These three rules seem to us to be both comprehensive and correct. Our inquiry, therefore, is to which class the case at bar belongs. The first class of cases includes those where an owner has, by an express or implied invitation, brought persons to danger and injury, under conditions which amount to a nuisance. Examples of this kind are found in *Gordon v. Cummings*, 152 Mass. 513, 25 N. E. 978, where an owner maintained a common hallway for his tenants, to which a letter carrier was thereby invited; *Learoyd v. Godfrey*, 138 Mass. 315, where an owner maintained an uncovered well in a passageway to a house, to which a police officer was held to be invited; *Larue v. Hotel Co.*, 116 Mass. 67, *Irvine v. Wood*, 51 N. Y. 224, and *Tomle v. Hampton*, 129 Ill. 383, 21 N. E. 800, which were cases of holes in or adjacent to a public walk; and *House v. Metcalf*, 27 Conn. 631, where an overshot water wheel, so near the road as to frighten horses, was held to be a nuisance. *Wendell v. Baxter*, 12 Gray, 494; *Moody v. Mayor, etc.*, 43 Barb. 282; *Albert v. State*, 66 Md. 325, 7 Atl. 697, like *Joyce v. Martin*, were cases of piers or wharves to which the public were held to be invited. Of the second class, *Carson v. Godley*, 26 Pa. St. 111, is an example, the building having been unfit for the purpose for which it was let. We think it is clear that the case at bar does not fall within the first of these classes. The defect complained of was not in or near a public way, nor in a part of the premises held out by the owner for the entry of strangers, so as to amount to an invitation to a place which is a nuisance. The term "nuisance," in legal phraseology, "is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, * * * working an obstruction of or injury to a right of another or of the public." *Wood, Nuis.* § 1. One has the right to erect a building, in general terms, as he pleases; and, even if there be dangerous places in it, he violates no right of other people in so doing. If he invites others into such a building, he is, to some extent, responsible for their safety; but the building is not on that account a nuisance. So, one has the right to hire such a building, and, under the same limitations, he does not thereby maintain a nuisance. Nor is the case at bar within the second class of cases above described. It does not appear that the building was unfit for the purposes for which it was let. The defect complained of was open and obvious. It could easily have been guarded against by warning or a bar-

rier. Being a freight elevator, it was of itself a warning that it was not intended for the safety of passengers, and equally so was it a warning to those at work upon it. The injury was not caused by any defect in the elevator itself. Such elevators are now in common use, and it is a matter of common knowledge that they are more or less unprotected at the sides. The declaration does not state whether the plaintiff's intestate was an employé of the lessee, or a stranger; but it seems to imply the latter in stating that he entered upon the invitation of a tenant in said building. If he was an employé, the rule of *Kelley v. Dyeing Co.*, 12 R. I. 112, that one who works exposed to a manifest danger cannot look to his employer if he is injured, would apply with stronger reason to exonerate the lessor of the employer. If he was a stranger, on the premises at the invitation of a tenant, the case falls within the third class described above, and the owner is not liable. In *Harpel v. Fall* (Minn.) 65 N. W. 913, the rule is stated that where there is no agreement to repair leased premises by the landlord, and he is not guilty of any fraud or concealment as to their safe condition, and the defects in the premises are not secret, but obvious, the tenant takes the risk of their safe occupancy; and the landlord is not liable to him, or to any person entering under his title, or who is upon the premises by his invitation, for injuries sustained by the unsafe condition of the premises. To the same effect are *Freeman v. Hunnewell*, 163 Mass. 210, 39 N. E. 1012; *Leonard v. Storer*, 115 Mass. 86; *Mellen v. Morrill*, 126 Mass. 545; *Davidson v. Fischer*, 11 Colo. 583, 19 Pac. 652. *Sherman & Redfield on Negligence* (4th Ed. § 711) states the rule and the reason for it thus: "Those who claim upon the ground that they were invited into a dangerous place must seek their remedy against the person who invited them. If they are the guests of the tenant, he, and not the landlord, is the person from whom they must seek redress for injuries caused by any defects in the premises, even though the defects existed when the lease was made, for such persons would never have suffered any injury from these defects if they had not entered the premises, and the entry was not made at the request of the landlord or any agent of his." Bearing in mind the distinction of cases such as those cited above, where an invitation by the landlord may be implied, this rule limits the liability of lessor and lessee to their own acts with reference to a stranger.

Do the facts in this case amount to an implied invitation by the landlord? We think not. In *Gordon v. Cummings* and *Learoyd v. Godfrey* the landlords were in control of the dangerous passageways, and so themselves held out the invitation to enter. So, in places where the public go, the owner is held liable because of his participation in a nuisance. But it would be a startling propo-

sition that every owner who has leased property to others is liable for its absolute security, at the time of letting, to every person whom a tenant may invite to the premises, when such owner can neither have knowledge of such entry nor the chance for warning or protection. We do not think that the law goes to this extent; yet such a proposition would be necessary to sustain the present case. Ordinarily a freight elevator is used by employes. Can it be said that a landlord is bound to know that it will be used by strangers? The tenant and his servants, knowing its condition, may use it carefully and safely. If, then, the tenant invites a stranger to use it, he is the one who should give warning and look out for the safety of his guest. We are unable to see how the landlord in such a case can be held responsible, without saying that nobody has a right to let property that is in any way dangerous or out of repair, even though the lessee may be willing to take it as it is, and be able to use it with safety, having knowledge of the risk. Such a doctrine would be a serious limitation upon the ownership of real property. For these reasons, we conclude that, as the building in question was not a nuisance, nor unfit for the purpose for which it was let, by reason of any secret defect which the landlord may be presumed to know, and as the plaintiff's intestate was not upon the premises by invitation of the defendant, express or implied, and as the defendant was not in possession or control of the elevator well, the plaintiff shows no right of action against the defendant. The demurrer to the defendant's plea is overruled, and the demurrer to the declaration is sustained. Case remitted to the common pleas division for further proceedings.

COSGROVE v. MERZ et al.

(Supreme Court of Rhode Island. May 8, 1897.)

EXECUTION SALE—REDEMPTION—REIMBURSEMENTS.

1. The amount paid by purchaser at execution sale having been in satisfaction of judgments and claims against the judgment debtor, which would have been claims against her estate, such amount should, on redemption being allowed, be paid one to whom the purchaser conveyed the property.

2. Such person should also be reimbursed for raising the house on the property, and repairing it, it being reasonably necessary to raise it, because of the filling in of adjacent lots, and its value being thereby increased.

Appeal from court of common pleas, Providence county.

Suit by Ellen Cosgrove, by guardian, against John C. Merz and others, to set aside auction sales made under levies; the bill charging that the transactions were when the ward, Ellen Cosgrove, was insane; that the sales were at grossly inadequate prices; that she owned personality sufficient to satisfy the levy, but that no levies were made thereon; and that there

was fraud in the conveyance by the purchaser, the respondent Nachtrieb, to the respondent Rohrich. Leave to redeem was given, and certain claims of Rohrich for reimbursement disallowed, and respondents except. Modified.

Herbert Almy and James M. Gilrain, for complainant. Henry J. Dubois, for respondents.

PER CURIAM. It was provided in the decree that complainants should have leave to redeem the property purchased by the respondent Elizabeth Rohrich, on payment to her of the sum paid for the purchase thereof by Ernest Nachtrieb. This was based on the finding that that amount was paid in satisfaction of judgments and charges against Ellen Cosgrove, amounting to \$490, which would have been claims against her estate; and hence, as the estate has received a benefit to that extent, they were a proper subject for reimbursement to the purchaser. As the master has allowed only \$197.90 of this sum, we think the respondent is entitled to an allowance for the balance, viz. \$292.10. The master has disallowed the claims of the respondent Rohrich for reimbursement for the raising of the house and repairs upon it, on the ground that they were not necessary to the preservation of the property. A majority of the court is of the opinion that his construction of the decree, in thus limiting the right to reimbursement to compensation only for such improvements and repairs as were necessary to preserve the property, is too strict, and that he should have allowed also such sums as were reasonably expended upon it, considering its situation and condition, and which have materially enhanced its value. The evidence shows that it had become not only desirable, but reasonably necessary, to raise the house, in consequence of the filling of the adjacent lots; and the assessment for taxes put in evidence shows that, since the raising and repair of the house, its valuation has been increased \$550. A majority of the court is therefore of the opinion that there should be allowed to the respondent Rohrich the sum of \$550 on account of the raising and repair of the house. The exceptions are sustained to the extent herein set forth, and the report of the master modified accordingly.

CARROLL v. ALLEN, Town Treasurer.

(Supreme Court of Rhode Island. June 19, 1897.)

DEFECTIVE HIGHWAYS—SUFFICIENCY OF COMPLAINT.

1. A complaint in an action against a town for injuries caused by defective highway, which charges that the town "caused and suffered" its highway to remain out of repair, does not base the claim for damages on two distinct grounds, the word "caused" not necessarily implying active misconduct on the part of the town.

2. Under Gen. Laws, c. 36, § 15, providing that a town shall not be liable for damages unless it

had reasonable notice of the defect in the highway, or might have known thereof, an allegation in the complaint that the town was negligent is a sufficient allegation of notice, without a specific charge to that effect.

Case certified from court of common pleas, Providence county.

Action by John A. Carroll against John B. Allen, town treasurer, for damages sustained by reason of defendant's negligence. Demurrer of defendant sustained, and case certified; amended declaration filed, and demurrer overruled.

Hugh J. Carroll, for plaintiff. Albert R. Greene, for defendant.

TILLINGHAST, J. The defendant demurred to the declaration in the common pleas division, and the demurrer was sustained by that court, with leave given plaintiff to amend. No jury trial having been claimed, the case was thereupon certified to this division, after which the plaintiff filed what he denominates an "amended declaration," to which the defendant also demurs. Treating the so-called "amended declaration" as having been incorporated into and now forming a part of the original declaration, as the pleader evidently intended it to be treated, we have before us for consideration said original declaration which was held to be bad by the common pleas division, together with the amendment thereto. The declaration alleges that it was the duty of the defendant town to keep the highway in question in good repair, and safe for travelers with their carriages, at all times; that it so negligently performed said duty, and so carelessly suffered the highway in question to be and remain out of repair, that a large hole or cavity was formed and left in the driveway thereof; and that, by reason of said hole or cavity, the wagon in which the plaintiff was riding, and which was being driven properly and with due care, suddenly and without notice struck into said hole or cavity, and the plaintiff was thrown to the ground from said wagon, and his right arm broken at the wrist, and he was otherwise injured. It also avers that a claim for compensation for said injuries was presented to the town council of said town; that more than 40 days have elapsed since said presentation; and that no satisfaction has been granted. The amendment alleges the duty of the town as aforesaid; its neglect to perform the same; the defective condition of the highway; the fact that the town had due notice of the time, place, and cause of said injury; that said notice was given as required by statute; that no satisfaction has been rendered to the plaintiff thereof within 40 days; and, also, in order to meet the objection of the common pleas division to the original declaration, "that said town, its agents and servants, by the exercise of proper care and diligence on its part, might have had no-

tice, and said defect and want of repair might have been remedied by the defendant."

We think the declaration, although inartificially drawn, is not so defective as to be demurrable on the grounds alleged by defendant, the principal one of which is that the claim for damages is based upon two distinct and different grounds, viz.: (1) That it is charged that the town "caused" said highway to be and remain out of repair, etc.; and (2) that it "suffered" the same to be and remain out of repair, etc. The language used is that "said town of Warwick, its servants and agents, being wholly regardless and negligent of its duty in this respect, caused and suffered said highway to be and remain out of repair, and unsafe and defective." We do not think the word "caused," in the above connection, necessarily implies active and affirmative misconduct on the part of the town, its servants and agents, as contended by defendant's counsel. In other words, we do not think it necessarily means that the town actually dug, or caused to be dug, in said highway, the hole in question, but simply that the negligence of said town resulted in or caused the defect in question, and hence that the objection thereto is not well taken.

While no exception was taken to the ruling of the common pleas division in sustaining the demurrer to the original declaration, so that said ruling is not strictly before us for review, yet, as we are called upon to decide whether the declaration as amended is sufficient, it is necessary to consider it in its entirety. The ground upon which the demurrer was sustained was that the declaration did not allege that the town had reasonable notice of the defect in question, or that it might have had notice thereof by the exercise of proper care and diligence on its part. The rescript which was filed in the case shows that the court held that such an allegation is necessary, in view of Gen. Laws R. I. c. 36, § 15, which provides that a town shall be liable for damages sustained by reason of a defective highway which it is bound to keep in repair, "if such town had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence on its part." We do not think such an allegation is necessary. The charge that the town had notice of the defect, either actual or constructive, is necessarily involved in the charge of negligence. If it did not have notice, then it was not guilty of negligence, and hence there is no occasion for a separate allegation of that sort.

As the other grounds of demurrer are based upon the theory that the original declaration is not before us, which is not in accordance with the view which we have taken, as above indicated, it is not necessary to consider them, said original declaration containing most of the allegations which the demurrer alleges are lacking in the amended declaration. Demurrer overruled.

HUNT v. GORTON.

(Supreme Court of Rhode Island. June 25, 1897.)

TOWN ORDINANCES—VALIDITY—WIDENING HIGHWAY.

Under Gen. Laws, c. 248, § 7, providing that "no order or decree of a * * * town council, which may be appealed from, or in any collateral proceeding when the same shall not be appealed from, shall be deemed to be invalid or be quashed for want of proper form, or for want of jurisdiction appearing upon the face of the papers, if the * * * council had jurisdiction of the subject-matter of such order or decree," a decree of the council appointing a committee to widen a certain highway was, in a collateral proceeding, *prima facie* sufficient justification for defendant's entry on plaintiff's close, though the fact that the council had adjudged it to be necessary to widen the highway did not appear on the face of the record.

Action by Almira R. Hunt against Henry C. Gorton. On defendant's exceptions to instruction. Sustained.

Bassett & Mitchell, for plaintiff. Edwards & Angell, for defendant.

PER CURIAM. We are of the opinion that a new trial should be granted. The instruction of the court to the jury, excepted to, that "the failure of the town council to adjudge it to be necessary to widen said highway, at the time of the appointment of said committee to widen, is a fatal defect, and renders the proceedings to lay out said highway void," should not have been given to the jury. Its effect was to deprive the defendant of the *prima facie* justification for his entry on the plaintiff's close which the decree of the town council for the layout afforded. This action being a collateral proceeding, the decree of the town council was *prima facie* sufficient. Gen. Laws R. I. c. 248, § 7, provides: "No order or decree of a court of probate or town council, which may be appealed from, or in any collateral proceeding when the same shall not have been appealed from, shall be deemed to be invalid, or be quashed, for want of proper form, or for want of jurisdiction appearing upon the face of the papers, if the court or council had jurisdiction of the subject-matter of such order or decree." In Angell v. Angell, 14 R. I. 541, it was held that under this statute a judgment of a probate court was to be upheld as *prima facie* valid, even where the record did not show by allegations or recitals the existence of jurisdictional facts necessary to its validity. The court remarks (page 544): "We think it fair to assume that the purpose of the statute (Pub. Laws R. I. c. 181, § 5, of which Gen. Laws R. I. c. 248, § 7, is a re-enactment) in this respect was to communicate to the judgments and decrees of our probate courts and town councils the presumptions which attach to the judgments and decrees of courts of superior jurisdiction, in regard to which the common-law rule is that in collateral proceedings the jurisdiction will be presumed,

if it can exist, unless the contrary appears." If, then, the town council did not adjudge the widening of the highway to be necessary, and such adjudication was necessary, which we do not determine, the burden was on the plaintiff to show it, since, in the absence of such evidence, the decree of the town council was to be taken as valid.

PARDEY v. AMERICAN SHIP-WINDLASS CO.

(Supreme Court of Rhode Island. June 19, 1897.)

INFANCY — CONTRACT OF APPRENTICESHIP — VALIDITY.

An infant can make a binding contract of apprenticeship to learn a useful trade, and cannot avoid that contract on becoming of age.

Appeal from district court, Providence county.

Suit by Frank B. Pardey against the American Ship-Windlass Company to recover on a contract. Plaintiff appeals from the judgment. Reversed.

Henry W. Hayes, for appellant. Arnold Green, for appellee.

MATTESON, C. J. This is assumpsit to recover money claimed to be due to the plaintiff for wages retained by the defendant under the contract between them referred to below. The case is set forth in an agreed statement of facts as follows: The plaintiff entered the employment of the defendant April 17, 1893, under a contract by which he was to work for the defendant in the pattern-making business for the term of three years and a half. The defendant bound itself to pay the plaintiff for each day's labor of 10 hours at the rate of 68½ cents for the first year, 83½ cents for the second year, \$1 for the third year, and \$1.16½ for the last half year, and also to give the plaintiff reasonable and proper instruction as a pattern maker. The contract further provided that the sum of \$1 per week from the wages earned should be retained by the defendant till the end of the term, and should then be paid to the plaintiff, with interest from the end of each year, but that if the plaintiff should leave the employment before the end of the term, or be discharged for cause, the money retained should be forfeited. At the time of entering the employment the plaintiff was a minor. The contract was signed by him, and affirmed and approved by his father, Harold O. Pardey. The plaintiff attained his majority in July, 1895, and left the defendant's employment of his own accord September 7, 1895. The amount of wages retained under the contract, as shown by the defendant's books of account, is \$124. All other sums agreed to be paid under the contract have been paid. The plaintiff proceeds on the theory that the contract was voidable because of his minority, and that as he did not ratify it on becoming of age, but avoided it, and, as the wages spec-

fied in the contract were presumably the value of the labor performed, he is entitled to recover so much of them as the defendant has retained. The plaintiff is mistaken in his supposition that the contract was voidable; for, though it is true generally that a minor cannot bind himself by his contracts, for want of legal capacity, it is equally well settled that he may bind himself by a contract for necessities, if reasonable, or by a contract beneficial to him. *Stone v. Dennison*, 13 Pick. 6; *Cooper v. Simmons*, 7 Hurl. & N. 719; *Schouler*, Dom. Rel. (5th Ed.) §§ 410, 411. The contract before us fulfills these requirements. It is a contract for necessities, and is beneficial to the plaintiff, since it stipulates for his instruction in the useful art of pattern making, by which he would be better enabled to earn a livelihood. In *Co. Litt.* 172a, it is laid down that "an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." In *Middlebury College v. Chandler*, 16 Vt. 683, the court held that a common-school education was to be regarded as necessary, but that a collegiate education was not *prima facie* so, though it might be shown to be in a particular case. The court, however, limited its opinion strictly to a collegiate education; saying that it was not to be understood as referring to professional studies, or "to the education and training which is requisite to the knowledge and practice of the mechanic arts," which "partake of the nature of apprenticeships, and stand on peculiar grounds of reason and policy." And see *Cooper v. Simmons*, 7 Hurl. & N. 719, in which the indenture of apprenticeship provided for the instruction of the infant in the art of a rim and mortice lock maker, and in which it was held that the apprentice was held by his contract of service. The contract in the present instance was made with the sanction of the plaintiff's father, and there is nothing in the case, as stated, to show that the rate of compensation provided in it was not fair and reasonable, or that the retention of the \$1 per week until the completion of the term of service—the purpose of which, we presume, was to insure the plaintiff's performance of his contract—was not also reasonable. As the contract was binding on the plaintiff, and he has violated it by leaving the employment, he must be considered to have forfeited the wages retained as provided by the contract, and hence judgment must be rendered for the defendant for its costs. Case remitted to the district court of the Sixth judicial district, with direction to enter judgment for the defendant for costs.

JOHNSON v. GRANT.

(Supreme Court of Rhode Island. June 28, 1897.)

EASEMENTS—TERMINATION.

Plaintiff's close was originally composed of two parcels, having a gangway between them,

running southerly from the street to another gangway adjoining land of defendant's wife. One P. owning a parcel situated on both sides of the gangway, between the lands owned, respectively, by plaintiff and defendant's wife, defendant and his wife conveyed to P. all their right, title, and interest in and to that portion of the gangway included between the northerly and southerly lines of P.'s parcel. *Held*, that any and all right to the use of the gangway on plaintiff's land, to which defendant and his wife had been entitled, was terminated by their conveyance to P.

Action by Anna M. Johnson against Henry T. Grant. Judgment for plaintiff.

Clarke H. Johnson, for plaintiff. Robert W. Burbank, for defendant.

MATTESON, C. J. This is an action of trespass on the case for breaking and entering the close of the plaintiff, in the possession of her tenants, and cutting down, breaking, and destroying the plaintiff's fence, erected on the close. The case shows that the plaintiff's close was originally composed of two parcels, bounded, respectively, on the east and on the west, by a gangway 12 feet wide, and running southerly from Carpenter street, in Providence, to another gangway or court adjoining land of Mary M. Grant, the defendant's wife. Prior to the commission of the grievances complained of, the defendant and his wife, by deed dated January 9, 1886, had conveyed to Charles M. Perkins all their right, title, and interest in and to that portion of the gangway included between the northerly and southerly lines of a parcel of land owned by Perkins and situated on both sides of the gangway. By this conveyance the land of the defendant's wife was entirely cut off from the northerly portion of the gangway, which passed over the close of the plaintiff to Carpenter street. By the conveyance to the plaintiff's predecessors in title of the two parcels of land bounding westerly and easterly, respectively, on the gangway, the title to the land covered by the gangway, in so far as it was included between the northerly and southerly lines of the two parcels, passed to the plaintiff's predecessors in title, and from them to her, so that the title was vested in her at the time of the removal of the fence by the defendant. *Healey v. Babbitt*, 14 R. I. 533; *Anthony v. City of Providence*, 18 R. I. 699, 28 Atl. 766; *Bentley v. Root*, Index RR, 40, 32 Atl. 918. Though the defendant and his wife, by virtue of the wife's ownership of the land bordering on the court into which the gangway opened, were entitled to the use of this gangway as appurtenant to her land down to the time of the conveyance of their interest in the gangway to Charles H. Perkins, as stated above, such right was terminated by that conveyance, since by it the northerly portion of the gangway, included within the lines of the plaintiff's parcels, was cut off from and ceased to be appurtenant to the land of the defendant's wife. We are of the opinion, therefore, that

the defendant wrongfully removed the plaintiff's fence, and give judgment for the plaintiff for \$30 damages and costs.

BENTZ et al. v. MARYLAND BIBLE SOC.
et al.

(Court of Appeals of Maryland. June 23, 1897.)

WILLS—INTERPRETATION—ESTATE DEVISED.

Property was devised in trust, the income to be paid to two certain beneficiaries for 10 years, and at the expiration of that time the principal to be paid over to them in equal shares, free of all trusts, "to them and to their children after their death; the children to take among them equally the share of their father." The will further provided that if such beneficiaries, or either of them, should die leaving no descendants, whatever of the property "shall remain in their or his possession" should go to a certain corporation. *Held*, that at the expiration of the 10 years the beneficiaries took the property absolutely, the provision as to the distribution among their children being in case of their death before the expiration of such time.

Appeal from circuit court of Baltimore city.

Action by the Safe-Deposit & Trust Company of Baltimore City against the Maryland Bible Society and others. From a decree construing a will, defendants Richard L. R. Bentz and John Henderson Bentz appeal. Reversed.

Argued before McSHERRY, C. J., and BOYD, PAGE, ROBERTS, and FOWLER, JJ.

Edgar H. Gans and B. Howard Haman, for appellants. Saml. D. Schmucker and George Whitelock, for appellees.

FOWLER, J. This appeal brings before us for construction the will of the late Elizabeth Henderson, of Baltimore city. She devised and bequeathed all the rest and residue of her estate as follows: "All the rest, residue, and remainder of my estate and property, of every kind, nature, and description whatsoever, whether in possession at the time of my death, or in expectancy, remainder, or reversion, I give, devise, and bequeath to the Safe-Deposit and Trust Company of Baltimore City in trust to hold the same for ten years after my death, safely and profitably invested, and to pay the income, as it is received, in equal shares, to John Henderson Bentz and Richard L. R. Bentz, grandsons of my sister Caroline Jane Bentz, and at the expiration of said ten years to pay over the whole of the said rest, residue, and remainder of my estate and property, in equal shares, to the said John Henderson Bentz and Richard L. R. Bentz absolutely, free and discharged of all trusts, to them and to their children after their death; the children to take among them, equally, the share of their father. And it is further my will that if the said John Henderson Bentz and Richard L. R. Bentz, or either of them, shall die leaving no child or descendant them or him surviving, then and in that event whatever of my estate thus given shall remain in their or his possession at the time of so dying shall go to and become the property

of the Maryland Bible Society; and I hereby give, devise, and bequeath the same to the said society, to be used in its work of distributing the Holy Scriptures." The controversy here arises out of the several contentions as to the meaning and proper construction of the foregoing clauses. The trustee, the Safe-Deposit & Trust Company of Baltimore City, filed the bill to obtain the aid of the court in making distribution in accordance with the will of the testatrix, as properly construed. Ten years have elapsed since the death of the testatrix, and both the legatees first named in the residuary clause, John Henderson Bentz and Richard L. R. Bentz, are still living, each of them having several infant children, who, as well as the Maryland Bible Society, are parties to this proceeding. It was held by the circuit court that Richard and John each take only a life estate in half of the residuary estate, the share of each to go at his death to his children then living, per stirpes, and in default of such to the Bible Society. The trustee was directed to invest the net funds of the estate, and pay the income therefrom to Richard and John for life, and the principal, after their respective deaths, to the above-mentioned legatees in remainder. From this decree the two grandnephews of the testatrix have appealed. Their contention being that they are entitled to the whole residuary estate absolutely, while the appellees contend that the appellants take only a life estate, and that the remainder goes as directed by the decree. It appears to us, upon a careful reading and consideration of the language of the testatrix, that her intention was to give to John and Richard, her grandnephews, each one-half of her residuary estate absolutely, if they should be alive at the expiration of 10 years after her death. We will briefly state the grounds of this conclusion.

The most cursory reading of the residuary clause shows that the trustee at the end of 10 years after the death of the testatrix was to pay over the whole trust estate absolutely, free and discharged of all trusts. Now, to whom was this payment directed to be made? To John and Richard, "absolutely, free and discharged of all trusts, to them and to their children after their death; the children to take among them equally the share of their father." We think the meaning of the testatrix is quite apparent when we remember that the payment was to be made, whether to the fathers or their children, by the same trustee, at the end of 10 years after her death. And, this being so, we cannot suppose that in the same breath the testatrix intended to provide for the continuance of the trust during the joint lives of the father. The trust was to end at the time named by the testatrix, and, if John and Richard should be living at that time, they are to take absolutely. But, if either of them should die before the period for distribution (that is, within 10 years after the death of the testatrix), then the share of the one so dying is to be paid abso-

lutely to his children. In view of the language limiting the duration of the trust, it seems to us impossible to discover from the residuary clause any other intention. And although we do not consider it necessary to cite authorities to sustain this conclusion, based as it is upon the particular will before us, yet there are some general rules which seem to apply here with more than usual force. Thus, one of these is mentioned in Theob. Wills, 452, where it is said, "If the fund is vested in trustees who are directed to distribute it at a certain time, so that the trusts then determine, and the legatees who are to take upon the death of the prior legatees without issue are contemplated as taking through the medium of the same trustees, there is *prima facie* reason for restricting the death without issue to death without issue before the period of distribution." This rule is also quoted in 29 Am. & Eng. Enc. Law, 566, with a number of authorities to sustain it, to which many have been added on the brief of the appellant. But we need not extend this opinion by a discussion of them, for the same general principle has been approved by this court in the cases of *Hammett v. Hammett*, 43 Md. 307, and *Fairfax v. Brown*, 60 Md. 61. In the first case just mentioned the testator gave half his property to his widow during her widowhood, and further provided, if she should marry again, as follows: "I devise the same to my two children equally, and, should one of them die, the property to go to the survivor." The widow married, and the two sons survived her marriage; and it was held that the estate vested in the children on the marriage of their mother, and that the words "should one of them die" should be construed to mean, "should one of them die before the marriage of their mother." But, when we consider the remaining paragraph of the residuary clause, there would seem to be but little room for doubt as to the intention of the testatrix to give her grandnephews an absolute estate, with full power of disposition. She declares that if John and Richard, or either of them, shall die leaving no child or descendant surviving them, whatever of her residuary estate should remain in their, or either of their, hands, should go to the Bible Society. In the first place, it is apparent from this language that the testatrix intended that they should have the estate in their possession, and should also have the power of disposition over the whole of it; for it was only what should remain that was to go to the Bible Society. Having thus full power of disposition, and having also full possession, and, as we have said, there being no express language creating a life estate, they take the residuary estate absolutely. And to this effect is *Benesch v. Clark*, 49 Md. 497. See, also, *Foos v. Scarr*, 55 Md. 310; *Mines v. Gambrill*, 71 Md. 34, 18 Atl. 43; *Roberts v. Lewis*, 153 U. S. 367. Inasmuch as the decree appealed from continues the trust during the lives of John and Richard, while the testatrix, as we construe her will, intended it

should end in 10 years from her death, and inasmuch as said decree gives to the appellants only a life estate, while our conclusion is that they take an absolute estate, we must reverse it. Decree reversed and cause remanded; costs to be paid by the trustee out of the trust fund in its hands.

CLEDENIN v. MARYLAND CONST. CO. OF BALTIMORE CITY.

(Court of Appeals of Maryland. June 23, 1897.)

DEDICATION OF STREET—IMPLIED COVENANTS —REVOCATION.

The dedication of a street, resulting from the covenant implied by a conveyance by the owner thereof of abutting land as bounded by such street, is revoked by the conveyance of the bed of the street to the owner of such abutting land before the street is accepted by the public, opened, or in condition for use; the implied covenant being extinguished by such conveyance.

Appeal from circuit court of Baltimore city.

Bill by the Maryland Construction Company of Baltimore City against William J. Clendenin. There was a decree pro forma for complainant, and defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, and BOYD, JJ.

John P. Brown, for appellant. Hugh L. Bond, Jr., and H. R. Preston, for appellee.

BOYD, J. The appeal in this case is from a pro forma decree of the circuit court of Baltimore city, requiring the appellant to pay the purchase money for some property now in the city, but formerly in Baltimore county, bought by him of the appellee, which is bounded on the north by Clifton Park, on the south by North avenue, on the east by a line drawn through the center of Patterson Park avenue extended, and on the west by Choptank street (now called Collington avenue). The contract of sale is admitted, but the appellant objects to the title, because he is advised that a portion of the land sold to him has been dedicated to the public use, constituting the beds of certain streets spoken of in the proceedings as a 40-foot street, a 20-foot street, and a part of Madeira street. In 1853 Robert Boyd made a deed of trust for the benefit of his creditors to James Malcolm and William Talbott, trustees. They, having been directed to make sale of the property, filed a plat in the superior court of Baltimore city, upon which are shown Choptank street, extended north of North avenue, and the 40-foot street above referred to. So much of the plat as relates to any of the lots and streets in question is filed in this case, and marked "Exhibit Plat No. 2." The trustees, by deed dated May 31, 1856, conveyed, by courses and distances, to James A. Reed, a lot which embraces the seven lots in section No. 7 on said plat, and in the description called for the street 40 feet wide. Reed conveyed it to George Roast, by deed dated April 23, 1863, using the

same description as that in the deed to him. The trustees, by deed dated November 2, 1855, conveyed to James Cairnes, by courses and distances, the land which embraced all the lots composing section No. 6 on that plat. It was described as beginning at the northernmost corner or intersection of Choptank street and the 40-foot street, and bounds on the latter. James Cairnes conveyed it to George Rost, by two deeds, made in 1860 and 1862, one of which called for the 40-foot street, as in the deed to Cairnes. George Rost thus became the owner of all the property involved in this case, he having become possessed of a part of it east of Madeira street, through other courses. Several instruments were executed by him, in which the 40-foot street was referred to. He having died, a proceeding for the sale of the property was instituted in the circuit court of Baltimore city, which resulted in a decree on July 28, 1880, appointing John T. Morris trustee to sell the property. A plat was filed in that case, upon which were shown the 40-foot street, Madeira street, and the 20-foot street, being practically the same as Exhibit Plat No. 1. Mr. Morris, as trustee, sold the five lots described in the bill, which are also shown on Exhibit Plat No. 1, and called for these three streets. That purchaser sold them in 1888, by the same description, and they were eventually conveyed to the appellee, by a deed of October 23, 1890; and the beds of the three streets spoken of were also conveyed to it by Robert A. Dobbin, substituted trustee of the Boyd estate, and John T. Morris, trustee in the other proceeding spoken of, by deeds dated September 10, 1896, and January 29, 1897, respectively.

It was conceded by the appellee that the proceedings and deeds of the trustees, Malcolm and Talbott, of the Boyd estate, and Morris, in the equity cause, worked a dedication of the three streets. In point of fact, this court held in *Pitts' Case*, 73 Md. 326, 21 Atl. 52, that a sale made by the same trustees of the Boyd estate, Messrs. Malcolm and Talbott, did work a dedication of Argyle alley, although it did not of some streets mentioned in that case, by reason of certain expressions used which affected them. But it is contended that inasmuch as the streets were never, in point of fact, laid out or opened, and the public authorities did not in any way signify their acceptance of them, there has been a revocation of the dedication by the appellee, who has become the owner of all the property, including the beds of the streets. Although there have been numerous decisions in this court on the subject of dedication, which have settled certain general principles, the contention of the appellee presents a very important question, and one that, in the opinion of the learned solicitor for the appellant, has not been decided by this court. No dedication exists unless the intent of the owner to dedicate his land to the particular use claimed is clearly proven by the facts and circumstances. When those facts and circumstances warrant

it, the intent to dedicate is presumed. One of the most common modes by which dedication is evidenced is that which was presented in the early case of *White v. Flannigan*, 1 Md. 525, where it was held that if a party sells property lying within the limits of a city, and in a conveyance bounds such property by streets designated as such in the conveyance, or on a map made by the city, or by the owner of the property, such sale implies necessarily a covenant that the purchaser shall have the use of such street. The reason is that the existence of the street, either present or prospective, is presumed to have entered into the consideration of the purchase, and thus the grantor has been compensated for the use of the street. If such is not the fact, he can easily protect himself by showing in his deed, or in some way, the absence of intention to dedicate to the public use. The public authorities are not parties to the original transaction, but inasmuch as the law implies a covenant on the part of the grantor that the grantee has the right of way over the bed of the street, and the right to use it as a street, the public necessarily gets the benefit of the covenant. If, while such relation exists between the grantor and the grantee, or those claiming under him, the public authorities take steps to open the street, the grantor is only entitled to nominal damages, because his covenant that it can be used as a street is still in force, and he will not therefore suffer any damage by such use. But if one party acquires all the land, including the bed of the street, before the public has in any way accepted the proposed street, upon what principle can he be deprived of his property without full compensation? It could scarcely be contended that if an owner of land divided it into lots, streets, and alleys, and placed a plat of them on record, but sold none of the lots, the public authorities could for that reason take possession of the streets, or refuse to pay for them. It was held in *Hawley's Case*, 33 Md. 270, and followed in other cases, including the late one of *Mayor, etc., of Baltimore v. Frick*, 82 Md. 77, 33 Atl. 435, that "the doctrine of implied covenants will not be held to create a right of way over all the lands of the vendor which may lie, however remote, in the bed of a street. The lands must be contiguous to the lots sold, and there must be some point of limitation. The true doctrine is, as we understand it, that the purchaser of a lot calling to bound on a street not yet opened by the public authorities is entitled to a right of way over it, if it is of the lands of his vendor, to its full extent and dimensions only until it reaches some other street or public way. To this extent will the vendor be held by the implied covenant of his deed, and no further." In pursuance of that doctrine, the dedication in the two cases mentioned was held to extend only to one square of the streets on which the lots fronted, although on the plat they were considerably longer, and the city of Baltimore was required to pay substantial damages for

the other parts of the streets taken. If, then, grantees and the city are thus limited, it would seem to follow that, if there be no sale at all, no part of the street could be taken without the payment of full compensation. And if there be sales, and subsequently the title to the whole land, including the bed of the street, is vested in one person, how can any part of the street be taken? The city derives its right to the street through the grantee, and the portion of it it can take, without payment of full compensation, is only coextensive with the part the grantee is entitled to use. When the grantee's right ceases to every part of it, how can any right in the city still exist? Of course, we are speaking with reference to the facts of this case, which are admitted to be that the streets and alleys never were opened, and the land has been in such condition that it has been impossible to use the streets and alleys.

But Hall's Case, 56 Md. 187, would seem to be conclusive of this. Edward Hinkley was appointed trustee to sell the Greenwood estate, and had the property laid off into lots, streets, and alleys, and a plat made for the purpose of the sale of the lots. The lots were offered at public auction, but withdrawn for want of sufficient bids. He afterwards sold at private sale 12 lots, and then sold to one Van Camp a considerable body of the land, including the title to the bed of Wolf street, which was being condemned in Hall's Case. On the 30th day of March, 1848, Van Camp conveyed to one Leach three parcels of land, one of which extended to and bounded on the west side of Wolf street, and another bounded on the east side of Wolf street. The court cited several cases, beginning with *White v. Flannigan*, and said that from those decisions it would follow that the deed from Van Camp to Leach, of March 30, 1848, standing alone, would furnish evidence of the intent to dedicate. But on the 21st day of August, 1849, Van Camp conveyed to Leach in fee the bed of Wolf street, together with other property, thus vesting in him the fee of the whole property south of John street, including the bed of Wolf street and the property on each side of it. It was afterwards acquired by the Halls. Wolf street had not been opened or used as a street, and its condition was such that it could not be so used. This court said: "The implied covenant arising upon the deed of March 30, 1848, in favor of Leach, was rescinded and abrogated by the deed of August 21, 1849, whereby Leach acquired the fee-simple title to the bed of Wolf street; and consequently all right of the public to the use of the street, as the same could be derived only from the implied covenant of the parties, no longer existed." The principle involved in that and this case is the same. It matters not that in the Hall Case only about 17 months elapsed before the title became vested in one person, while in this case over 40 years had elapsed as to one street, and about 15 years as to the others. The theory of the appellant is that the dedication commenced at once, and

that it was "perfect and complete, without either acceptance or user by the public," as was said in *Frick's Case*. That is undoubtedly true, and, as long as the implied covenant between the grantor and grantee exists, the city can accept, unless there has been an abandonment or an estoppel of some kind; but as "the dedication to the public springs from, and is supported by, the title conveyed to the grantee," and must depend upon the existence of that covenant, it must cease with it if there has been no acceptance during the time it was in the power of the city to accept. There is nothing in *Frick's Case* or *Flersheim's Case*, 36 Atl. 1008, decided at the last term of this court, that conflicts with this view, as the appellant seems to think, for in those cases, as well as others, where it was said that delay in opening the streets had not defeated the rights of the public, the title to the whole lands, including the beds of the streets, had not become vested in one person. Equity and justice certainly require that, under such conditions as exist in this case, the owner of the property should not be compelled to await indefinitely the pleasure of the public authorities, and thus have his property burdened by what may be useless to the city, and yet be difficult, if not impossible, to satisfactorily remove without great expense or delay. We find nothing in the decisions of this court to require us to adopt such an inequitable rule.

The act of 1890 (chapter 628), in reference to streets, avenues, and alleys in the portion of Baltimore county annexed to Baltimore city, has no application, as the proposed streets and alleys had not "prior to such annexation become streets, avenues or alleys," in the county, and it is therefore unnecessary to discuss it. The pro forma decree must be affirmed. Decree affirmed, with costs.

FAITH v. BOWLES et al.

(Court of Appeals of Maryland. June 22, 1897.)

DEED—CONDITION SUBSEQUENT.

A deed to a county for full consideration, stating the land is granted "for a public school house, as the property of the schools of said county, and for no other purpose, in fee," does not create a condition subsequent, with consequent forfeiture in case of use for any other purpose.

Appeal from circuit court, Washington county.

Ejectment by Rosanna Bowles and others against Lewis Faith. Judgment for plaintiffs. Defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, BOYD, and ROBERTS, JJ.

Geo. W. Smith, Jr., and Wm. Kealhofer, for appellant. Lewis D. Syester, J. Marbourg Keedy, and J. C. Lane, for appellees.

ROBERTS, J. This is an action of ejectment, brought by the appellees to recover from the appellant a lot of land in Wash-

ington county, in this state. The circumstances under which this controversy arises are that on the 4th of June, 1835, Washington county, a body corporate of said state, purchased from John J. Bowles and wife, for the consideration of \$100, a certain lot of land, upon which Bowles then resided, and which was known in the corporation of the town of Hancock as "Lot No. 23." A deed of that date for said lot was executed and delivered to said county by said Bowles and wife, containing the statement that it was granted to said county "for a public school house, as the property of the schools of said county, and for no other purpose, in fee." The deed also contains a special warranty, and a covenant for such other assurances as may be requisite. Immediately after its purchase, the lot was improved by the erection of a school house thereon, and it continued to be used for public school purposes until the 13th of December, 1889, when it was sold and conveyed by the board of county school commissioners of Washington county to the appellant, who converted the same into a dwelling house, which for nearly seven years, and until after this suit was brought, he has continued to occupy as a dwelling. This suit is brought by the widow and heirs at law of John J. Bowles, the original grantor in the first-mentioned deed, who claim that the lot was conveyed by Bowles, the grantor, upon the condition that the lot was to be used for "public school purposes and for no other use," and that the abandonment of its use for public school purposes was a breach of the condition subsequent, and worked a forfeiture in favor of the grantor's heirs, who are the appellees here. The case was submitted to and tried before the court below, without the aid of a jury, and upon an agreed statement, the material facts of which have already been stated. So that the only inquiry necessary to be determined on this appeal relates to the proper construction and legal effect which should be given to the language employed in the deed from Bowles and wife to Washington county. Questions of like character with the one here presented have frequently occupied the attention of the courts, so that there is no want of decisions to guide us in reaching a satisfactory conclusion. In this case the original grantors are admitted to have received full consideration for the lot when sold, and, while the question of the amount of the consideration paid can have no effect in enlarging or extending the estate conveyed, it has nevertheless an important bearing upon, and greatly aids in the ascertainment of, the intention of the parties to the conveyance. To determine correctly the meaning and effect of the language of the deed which has brought about this controversy, it becomes our duty to ascertain as nearly as possible the intention of the parties, grantor and grantee. There can be no doubt of the intention of the grantors that the estate should

be used for public school purposes. This is clearly manifested, but we search in vain for any words which indicate an intention that, if the grantee omitted so to use the estate, and actually devoted it to another purpose, the same should thereupon be forfeited, and revert to the heirs of the grantors. After careful examination, we have found, as stated by Bigelow, C. J., in *Rawson v. Inhabitants, etc.*, 7 Allen, 129, 130, "no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purposes will not inure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled." In this case the words sought to be construed as creating a condition were, "for a burying place, forever," but the court held that it was not a condition. The grant in the case now under consideration was not a gratuity, nor merely voluntary, but made for a full consideration of the estate conveyed. This being the case, and there being no qualifying terms indicating that the grantors intended to retain any benefits to themselves, or to impress upon the estate conveyed any restriction as to its alienation which would necessarily be the effect of a condition subsequent, we find nothing to justify the appellee's contention. In the very recent case of *Kilpatrick v. City of Baltimore*, 81 Md. 179. 31 Atl. 805, this subject has been very fully considered, which determines a question substantially the same as here. It is there held that "conditions subsequent are not favored in law, 'because on breach of such conditions there is a forfeiture, and the law is adverse to forfeitures.' 4 Kent, Comm. 130; *Stanley v. Colt*, 5 Wall. 119. Therefore it is that a condition will not be raised by implication from a mere declaration in the deed that the grant is made for a special and particular purpose, without being coupled with words appropriate to make such a condition. *Packard v. Ames*, 16 Gray, 327; *Bigelow v. Barr*, 4 Ohio, 358." To the same effect is the case of *Barker v. Barrows*, 138 Mass. 580. where the qualifying words are, "Said lot of land to be used, occupied, and improved by said inhabitants as a school-house lot, and for no other purpose." *Greene v. O'Connor*, 18 R. I. 56, 25 Atl. 692; *Higbee v. Rodeman*, 129 Ind. 224, 28 N. E. 442. As also in the case of *Wier v. Simmons*, 55 Wis. 637, 13 N. W. 873, where the grant was "upon the express condition" that the grantee should pay to third persons, strangers to the deed, certain sums, the court construed the provision as not creating a condition subsequent, but as granting the land absolutely, subject to the sums specified as a charge or lien on it. The case illustrates how adverse the courts

are to uphold conditions that will defeat an estate vested. So in *Strong v. Doty*, 32 Wis. 381, where land was conveyed in trust to be devoted to a designated use, the court held that, because there were no words in the deed expressing an intent that the land should revert, there was no condition subsequent. In *Craig v. Wells*, 11 N. Y. 315, it was decided that a clause in the deed excepting and prohibiting specified uses of the land did not create a condition. In *Thornton v. Trammell*, 39 Ga. 202, the words, "it being expressly understood that said tract is not to be put to any other use than" (specifying it), were held to create a covenant, but not a condition. In *Packard v. Ames*, 16 Gray, 327, it was held that a grant for a specified purpose, without other words, cannot create a condition. In *Sohler v. Trinity Church*, 100 Mass. 1, the words, "in trust, nevertheless, and upon condition always" (to use the premises for public worship), in a deed to a religious corporation, were held to create only a "trust, and not a condition." It has been very earnestly contended on the part of the appellees that the cases of *Reed v. Stouffer*, 56 Md. 236, and *Society v. Dugan*, 65 Md. 460, 5 Atl. 415, are directly in point as sustaining their view, but such is not the effect of the two cases. In both cases the property was conveyed to trustees in trust for certain uses and purposes, clearly defined in the deeds, and in each case the legal estate vested in the trustees for the purposes of the trusts,—a totally different state of case to the one presented here, and in no respect entitled to be considered as controlling the question in controversy here. It results from what we have said that the court below committed error in granting the appellees' first prayer, and in rejecting the appellant's fourth prayer, which should have been granted. The judgment below is therefore reversed, without a new trial. Judgment reversed, with costs, and without a new trial.

HOBBS et al. v. BATORY.

(Court of Appeals of Maryland. June 22, 1897.)

LEASE — PAROL EVIDENCE — HOLDING OVER — INSTRUCTIONS.

1. As between landlord and tenants, an agreement that "B. has rented his farm * * * to the said T. and S." cannot be varied by parol to show that S. was merely surety for T.

2. Tenants for a year under an agreement to pay a certain rent, continuing thereafter to remain in possession with the landlord's consent, become tenants at the rent specified in the agreement.

3. A prayer denying generally plaintiff's right to recover, but submitting no proposition of law, and therein differing from a prayer that there is no evidence legally sufficient for plaintiff to recover, is properly denied, though the court is sitting without a jury.

Appeal from circuit court, Howard county.
Action by Ignatius Batory, administrator of John Buck, against Thomas A. Hobbs and an-

other. Judgment for plaintiff. Defendants appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Wm. G. Sykes and John G. Rogers, for appellants. James Mackubin and Daniel M. Murray, for appellee.

PAGE, J. This is an action of assumpsit, brought to recover the rent of a farm alleged to be due from the appellants to the appellee. The narr. contains the usual money counts, and in addition thereto two special counts, viz.: One that the appellee rented the farm to the appellants for one year, and the appellants held over for another year, but have not paid the rent for the second year; the other, that the appellants were indebted to the appellee in the sum of \$200 for the rent of the farm, and, in consideration of forbearance to "press the collection" thereof, promised to pay the same by the 1st day of December, 1895, but did not do so. The appellee offered in evidence a written contract signed by both the appellants and the appellee, and dated the 1st day of October, 1893, by which it was agreed that "John Buck has rented his farm on which he now resides to the said Thomas A. Hobbs and Stephen R. Hobbs for one year, containing one hundred & thirty-six acres, for the sum of two hundred dollars." The appellants offered oral evidence tending to prove that Stephen R. Hobbs signed the paper as surety only for his brother. On application of the appellee the court ruled, as matter of law, the case having been tried without the intervention of a jury, that "by the true construction of the agreement offered in evidence the defendants were co-tenants of the plaintiff of the property therein named." There was a special exception to this prayer, (the second asked for by the plaintiff), as well as to the plaintiff's third prayer, hereinafter referred to, upon the ground there was no evidence in the case legally sufficient to support them. In granting the prayer already stated, as well as the plaintiff's third prayer, we think the court committed no error. Evidence tending to show that Stephen R. Hobbs was a mere surety might be available for the purpose of determining the rights of Stephen as against his brother, Thomas Hobbs, but not for the purpose of altering the legal effect of the written instrument. It is by that the parties have deliberately chosen to express their agreement. All oral stipulations must be regarded as merged in it. This is the general rule, and, though there are certain exceptions to its application, it is sufficient to say that there are no facts in this case that prevent the general rule from applying. *Grove v. Rentch*, 26 Md. 367. Here the parties specifically agree that the appellee has rented to both the appellants, thereby clearly establishing the relation of landlord and tenant between the appellee, as landlord, and both the appellants, as tenants. The third prayer of the appellee asserted the propo-

sition that if, after the termination of the year mentioned in the agreement, the appellants "remained in possession of the property, as they had held it during that year, with the appellee's assent, then they became the tenants of the appellee at the rent named in the agreement." This prayer required two things to be established before the relation of landlord and tenants could be found for the second year, viz.: First, that the appellants remained in possession; and, second, that such holding over was with the appellee's consent. The words, "as they held it during the first year," do not affect the legal proposition; for, if they remained in possession during the second year, whether or not precisely in the manner and form of the possession of the first year, and with the landlord's assent, their possession will be referred to their agreement to rent, and the relation of landlord and tenant must be held to exist. Under such circumstances, the law implies a new renting, without a definite period of its termination. *Hall v. Myers*, 43 Md. 450.

But it is objected that there was no evidence legally sufficient to support the prayer. Now, the defendants, it is true, did offer evidence tending to show that Stephen Hobbs did not remain in possession during the second year, and in fact had never occupied the property. But the prayer is not based upon this theory of the evidence. It would have been perfectly proper for the appellants to have asked an instruction as to what the law was, in case the jury found that but one of the appellants had continued in possession after the first year. But this was not done, and the only question now is, was there any evidence in the case that both the appellants continued in possession after the first year with the appellee's consent? And that the possession, whatever it was, was with the appellee's consent, is not controverted. That there was evidence of the appellants' possession, we think, in the present condition of the record, cannot be successfully controverted. The appellee testified that "the defendants continued on in possession of said farm after the expiration of the year, just as they had held it during that year." This is an explicit declaration that the defendants (both of them) were in possession both years, and that the possession of each year was the same. There is no qualification as to the positive character of the possession in either year; and if the jury chose to believe this statement, without modifying it by what was subsequently testified to by the witnesses for the appellants, they would have been able to find the possession of both the appellants continued uninterruptedly during both years. Here the court was acting as both court and jury, and was entirely without error, in considering its rulings, as if, in its province as a court, it was instructing a jury. *Green v. Ford*, 35 Md. 82. It is true, as we have said, there was other evidence to the effect that Stephen Hobbs did not retain the possession during the second year, but whether this was the fact or not

was a question to be determined by the court when discharging the function of a jury. The prayers offered by the appellants fail to state any fact, or omission in the proof of facts, upon which, as matter of law, the court was called to declare that Stephen R. Hobbs was not responsible for the second year's rent. Where a court is called upon to discharge the functions of both judge and jury, the same rules as to instructions apply as would apply if there was a jury. *Lyon v. George*, 44 Md. 302. Now, this instruction would manifestly be improper to be given to a jury. It is a general denial of the plaintiff's right to recover as against Stephen Hobbs, but it submits no proposition of law, and therein differs from the prayer that there is no evidence legally sufficient for the plaintiff to recover, as was pointed out by this court in the case of *Railroad Co. v. Carter*, 59 Md. 311. It takes away from the jury its province of weighing the evidence, of determining upon the credibility of witnesses, and of finding the proper inferences of fact from the several matters offered in proof. It therefore entirely ignored the separate functions of court and jury, and was properly rejected. *Reier v. Strauss*, 54 Md. 291; *Dorsey v. Harris*, 22 Md. 88. Finding no error, the judgment will be affirmed. Judgment affirmed.

LAKE ROLAND EL. RY. CO. v. WEIR et al.
(Court of Appeals of Maryland. June 23, 1897.)

EMINENT DOMAIN—EVIDENCE.

1. The admission of immaterial testimony without objection does not authorize immaterial testimony in rebuttal thereof over objection.

2. In an action to recover the damages done to a lot by the construction of an elevated railroad, opinion evidence as to damages done an adjoining lot cannot be contradicted by proof of the amount received by the owners of the lot in settlement of such damages.

Appeal from court of common pleas.

Action by Levi C. Weir and others against the Lake Roland Elevated Railway Company for damages. From a judgment for plaintiffs, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, PAGE, and BOYD, JJ.

I. N. Steele, J. E. Semmes, and Francis K. Carey, for appellant. Wm. S. Thomas, for appellees.

BOYD, J. The appellees recovered a judgment against the appellant for damages sustained by them by reason of the erection by the appellant of a structure for its elevated railway in front of their property on North street, in the city of Baltimore. Adjoining the appellees' property was what was known as the "Maryland Paint Works," which belonged to the estate of Susanna Popplein, of which the Safe-Deposit & Trust Company of Baltimore was trustee. In the course of the examination of witnesses, W. W. McClellan, a real-estate expert, who was produced on

behalf of the appellees, testified that he had been employed by the safe-deposit and trust company to place a valuation on the Popplein lot in a division of the property which was contemplated by the heirs; that he had estimated the value of the lot prior to the erection of the elevated railway at \$21,687, and then deducted 20 per cent. to represent the damage done by it, and that in his opinion \$17,500 represented its value after allowance had been made for the damage done. He stated that he had not discussed with the trustee the effect of the structure upon the market value of the lot. John W. Marshall, who is secretary of the trust company, and who supervised the proceedings by which the property was allotted to two of the Popplein heirs, was called by the defendant. He testified to the fact that Mr. McClellan had been called upon to name a valuation, so it could be submitted to the family; that he had no recollection that in his conferences with him the elevated structure was ever discussed or taken into consideration; that he (the witness) had appraised the property at \$15,000, and he "never thought that that particular piece of property was injured by reason of the structure," and gave his reasons for that opinion. The witness was then asked the following question: "You spoke of a compromise between the Lake Roland Company and the Safe-Deposit & Trust Company of Baltimore, trustee. State whether, after the litigation was compromised, the safe-deposit and trust company, as trustee, executed a deed of release, for a sum of money, to the Lake Roland Elevated Railway Company, authorizing it to maintain their tracks opposite the structure." The question was objected to, and the record does not show whether it was answered or not; but the defendant then offered in evidence a certified copy of a release from the trustee to the railway company, which, after reciting the receipt of \$500 in full settlement of all claims against the company for or on account of the construction or maintenance of the elevated railway, released the company from all damages. The plaintiff having objected to the admission of the release, the court sustained the objection, and that ruling presents the only question that is before us.

We cannot see the relevancy of that testimony, from any view we take of it. We do not understand the appellant to contend that evidence of the value of the Popplein property was properly admitted at the instance of the appellees (the plaintiffs below), but it is contended that, if it be conceded that it was incompetent, the offer of the appellant was proper, because the evidence produced by the plaintiffs, though incompetent, had been admitted, and had injuriously affected the defendant, and therefore it was competent for it to meet it with evidence which would otherwise have been inadmissible. The general rule is that the introduction of irrelevant testimony by one party will not justify the in-

troduction of similar evidence by the other; for, as was said in *Walkup v. Pratt*, 5 Har. & J. 51, "Such doctrine would lead to endless confusion, and destroy all the established rules of evidence." This rule has been followed in numerous cases, among which are *Railroad Co. v. Woodruff*, 64 Md. 242; *Warner v. Hardy*, 6 Md. 525; *Higgins v. Carlton*, 28 Md. 115; *Bannon v. Warfield*, 42 Md. 22; and *Gorsuch v. Rutledge*, 70 Md. 272, 17 Atl. 76. We have been referred to no case in this state where the contrary has ever been held, unless the irrelevant evidence sought to be met had been admitted by the court after objection made to it. That was the case in *Milburn v. State*, 1 Md. 1. The court there said: "This evidence on the part of the plaintiff was objected to, but the court overruled the objection, and the defendants excepted. The testimony having been given to the jury, we are of the opinion that the court erred in withholding from the same tribunal the testimony proposed to be given by William Briscoe on behalf of the defendants. * * * Were the testimony offered by the plaintiff and allowed by the court inadmissible, yet, being admitted, the defendants had the right to rebut it. There is no principle better established, or more familiar to the profession, than that testimony inadmissible in itself becomes competent and proper by the admission of other testimony to which it may be a reply." The statement in 70 Md. 272, 17 Atl. 76, relied on by the appellant, that "in what we have said we do not wish to be considered as having any reference to a case where incompetent evidence has been admitted on the one side which may injuriously affect the opposite party," is in perfect accord with this view. The court went on to say, "It was decided in *Milburn v. State*, 1 Md. 14, that under such circumstances it was competent to contradict it;" thus showing that it referred to testimony admitted under such circumstances as existed in that case, where irrelevant testimony had been admitted notwithstanding the objection of the party afterwards seeking to rebut it. The distinction was also made in *Higgins v. Carlton*, supra, where it is said, "The fact that illegal testimony has been permitted to go to the jury without objection cannot be urged as a ground for allowing other testimony, inadmissible under the rules of evidence, to be given when objection is made." The distinction is a perfectly sound one. If, after objection is made to testimony, the trial court admits it, the plainest principles of justice, to say nothing of consistency in the court's rulings, would require that the other party be permitted to meet it. The ruling of the court in the first instance determines it to be competent, and the party offering it should not be permitted to object to the other side contradicting or explaining it on the ground that it is incompetent, when the court has held at his instance that evidence on that subject is admissible. But if every immaterial matter

suggested by witnesses themselves, or brought out without objection or the court's attention being directed to it, can be met with like evidence, trials will be uselessly prolonged, and the minds of the jurors led away from the real issues intended to be submitted to them. The closer jurors can be kept to the lines that separate suitors, the more likely will justice be done by them. If the evidence be clearly irrelevant, it should not be admitted on the ground that other irrelevant evidence had already been introduced, unless the latter was admitted by the court after objection. If the irrelevant evidence is offered by one party, the other side should object to it; and, if it be given before its irrelevancy is apparent, the court should strike it out on proper application.

But, if the appellant's views on that question had been adopted, this release was not admissible for other reasons. The testimony of Mr. McClellan simply showed his opinion of the damages to the Popplein lot by the erection of this elevated structure. If that had been relevant to the issues in this case, his valuation could not be contradicted by any recitals in that release. Mr. McClellan was not a party to it, and he says he had not discussed with the trustee the effect of the structure upon the market value. If the object was to show that the trustee was of the opinion that the damage was less than Mr. McClellan had estimated it, the testimony of Mr. Marshall, who represented the trustee, which was admitted without objection, was that he "never thought that that particular piece of property was injured by reason of the structure." If Mr. Marshall was mistaken in his opinion, that mistake entered into the consideration of the release, and it did not fairly represent the damage done to the property. If he was correct, the jury had the benefit of his opinion, and that, too, in a more favorable light to the appellant than it would have had from the release. Mr. Marshall also testified that, when Mr. McClellan gave his opinion of the value of the property, "the structure was complete, the compromise was fully consummated, and there was the property; that McClellan appraised it as it then stood." In point of fact, the release was executed nearly two months before Mr. McClellan made his report to the trustee. It is possible that, if the trustee had known his opinion of the damage done to the lot before the case was compromised, it might have demanded more; but, be that as it may, his testimony could not be rebutted in the way proposed, even if it be conceded that it could be by proper evidence. If the owner or representative of the Popplein lot saw proper to accept \$500 in full of all damages occasioned by the building of that structure, it could not possibly bind the owners of the lot involved in this controversy to any such sum, or reflect upon the real damage sustained by them. The front on North street of the appellees' property was 66 feet,

while that of the Popplein lot was less than 66. The two properties were used for wholly different purposes. The construction of the elevated railway might affect them very differently, and the owners might differ as to the advisability of settling the disputes with the appellant out of court, rather than have the annoyance and expense of a jury trial. But if the officers of the company thought \$500 was a full compensation for all damages sustained by that lot, and for that reason executed the release, it could not be offered in evidence in this case. It would be equivalent to permitting the appellant to offer the unsworn statement of third persons, not parties to this suit, to contradict the evidence of a witness who is under oath and subject to the cross-examination of the appellant's attorneys. If, then, the evidence of Mr. McClellan had been relevant, or had been admitted after objection, it could not have been met with evidence of this character. Other objections were urged to the admission of the certified copy of the release offered, but it is unnecessary to discuss them. The judgment must be affirmed. Judgment affirmed, with costs.

McCOLGAN v. BALTIMORE BELT R. CO. (Court of Appeals of Maryland. June 24, 1897.)

CONSTRUCTION OF RAILROAD—OBSTRUCTION OF UNACCEPTED STREET—DAMAGES TO PRIVATE PROPERTY—REMEDY.

Code, art. 23, § 169, provides that when necessary, in the location of a railroad, to occupy any public way, the authorities having charge thereof and the railroad company may agree on the terms of occupation, or, in case of disagreement, the company may appropriate a right of way, and shall be responsible for injuries done to adjacent private property. Acts 1890, c. 139, authorized the construction of the B. Railroad, and an ordinance provided for its construction through the city of B., reciting that for any final judgment recovered under Code, art. 23, § 169, for injuries to private property by such location, the owner of the judgment should have the right to enjoin the operation of the railroad if the judgment were not paid in a prescribed time. The road was constructed through a street which had been dedicated to the city, but never accepted. An abutting owner recovered judgment, and sought to collect it by an injunction. *Held*, that the injury was merely one for which the railroad company was liable at common law, and was not within the ordinance.

Appeal from circuit court of Baltimore city.

Bill by Charles C. McColgan against the Baltimore Belt Railroad Company for an injunction. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before McSHEBBY, C. J., and FOWLER, BOYD, PAGE, BRYAN, BRISCOE, and RUSSUM, JJ.

James McColgan, for appellant. W. Irvine Cross, for appellee.

RUSSUM, J. The appellant recovered a judgment against the appellee, which was affirmed on appeal by this court (35 Atl. 59); and, no payment or settlement thereof having

been made, he filed a bill in the circuit court of Baltimore city, praying an injunction to restrain the operation of the appellee's railroad until his judgment was satisfied, basing his claim to this relief on Ordinance No. 83 of the mayor and city council of Baltimore, approved May 14, 1890. The appellee filed its answer, denying that the ordinance in question gives the remedy by injunction for any judgment recovered for injuries to private property by the location and construction of its railroad; and claiming that the remedy by injunction is distinctly limited to judgments recovered under said ordinance, and denying that under the terms of chapter 139 of the Acts of the General Assembly 1890, and the Ordinance No. 83 of the mayor and city council of Baltimore, the appellant was entitled to an injunction prohibiting the operation of its railroad. Upon hearing, the court below dismissed the bill, and the plaintiff appealed.

The Baltimore Belt Railroad Company was organized under the general railroad incorporation laws of this state, for the purpose of constructing a railroad through parts of Baltimore city and parts of Baltimore county; and, by Acts 1890, c. 139, it was authorized to construct its railroad, or any part thereof, in a tunnel, under such ordinance or ordinances as might be passed by the mayor and city council of Baltimore, relating to the route of such railroad through the city of Baltimore, and the mode, terms, and conditions of the building and construction of said railroad within said city. By Ordinance No. 83, of the session of 1889-90, the consent of the mayor and city council of Baltimore was given to the construction of said railroad, and elaborate provisions were made in regard to the mode, terms, and conditions of the construction of the road through the city. One of the conditions of said ordinance provides "that for any final judgment recovered as provided in section 169 of article 23 of the Code of Public General Laws, which is hereby declared to be applicable to the building of said railroad, for injuries done to private property by the location and construction of said road, or any other judgment recovered under this ordinance, in addition to the ordinary remedies at law, the owner of such judgment shall have the right to enjoin the operation of said railroad, unless the same is paid in sixty days of the final decision of the action in which such judgment is recovered." The contention of the appellant is that the judgment referred to in this case having been recovered for damages to private property, and not being paid within 60 days of its final decision, he is entitled to enjoin the operation of the appellee's railroad until it has been paid in full. The answer to this contention is that in the former appeal between these parties it was clearly shown that the city of Baltimore had not in any way accepted the street over which the plaintiff claimed a right of way. It was a dedicated street only, and the plaintiff was not the owner of property abutting on any opened street, lane, or alley of the city, and therefore the city could

give no permission to obstruct or injure the plaintiff's right of way. The act of the defendant company which produced the injury for which this judgment was recovered was an invasion of the appellant's private rights, for which the appellee was liable at common law; and the ordinance of the mayor and city council of Baltimore under which the bill in this case was filed has no application to the case. It follows that the decree appealed from must be affirmed. Affirmed, with costs.

MOTT v. FOWLER.

(Court of Appeals of Maryland. June 22, 1897.)

CONTRACTS—VALIDITY—CONSIDERATION.

1. An agreement, on sufficient consideration, to act as administrator without compensation, is valid.

2. Where one agrees with the widow and children of a decedent to act as administrator without compensation, and they become sureties on his bond, as well as waive the right of administering given them by Code, art. 93, § 18, the agreement is supported by sufficient consideration.

Appeal from orphans' court of Baltimore city.

Petition by Elizabeth C. Mott, executrix of the estate of George P. Mott, deceased, against Oscar F. Fowler, administrator de bonis non of the estate of Caleb S. Maltby, deceased, for the allowance of a claim for commissions alleged to be due George P. Mott as administrator of the estate of Maltby, deceased. From an order dismissing the petition, petitioner appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, PAGE, ROBERTS, BOYD, and BRISCOE, JJ.

Abraham Sharp, for appellant, Emmons & Emmons and Robert H. Smith, for appellee.

FOWLER, J. It would be a reproach to the law if such a claim as the appellant is making in this case could be recovered. It appears that the late Caleb S. Maltby, who was a man of large means, residing in the state of Connecticut, died intestate. The principal administration upon his estate was had in that state. But he also owned some valuable leasehold property in the city of Baltimore, which his widow and two daughters sold; they also being residents of Connecticut. They were advised that they could not make a satisfactory title to this Maryland leasehold estate without administering here. Not desiring to be troubled with the details of this administration, and only for the purpose of making a good title to property they had already sold, they requested the late George P. Mott, who was then in their employ, and had been for a long time employed by the late Mr. Maltby, to act as administrator without compensation. He replied that he would be happy to act in the capacity mentioned if it would spare "the

ladies trouble and expense." And in the same letter in which he made this statement he estimated that the total expenses of administration, not including attorney's fees, would not exceed \$300; giving the two items, viz. state tax on commissions and court expenses, and excluding all commissions for himself, except, of course, sufficient to pay the state tax on administrator's commissions. But in addition to this he stated again and again that he was acting without compensation, and, when congratulated on the fact that he would get commissions on a large estate, he replied that "it did not amount to anything for him,—only the honor." But it is conceded that Mr. Mott agreed to act as administrator without compensation. He died, however, before completing the administration, leaving a will in which the appellant, his widow, was named as executrix. She filed a petition in the orphans' court of Baltimore city, claiming commissions for her husband as administrator of C. S. Maltby; and the court below refused to allow any, and passed an order dismissing her petition. From this order she has appealed. As we have already said, the claim here set up is without merit. In the case of *Bassett v. Miller*, 8 Md. 548, in which a widow gave up her right to administer upon the estate of her husband in consideration of receiving from the party in whose favor she relinquished all the commissions except \$100, this court (Mason, J., delivering the opinion) said, "While such contracts should not be encouraged, it is far better, in view of public policy and sound morality, that they should be sustained than that conduct should be tolerated by this court by which solemn engagements may be repudiated, and fraud and deception perpetrated, with impunity." But the "engagement," contract, or whatever it may be called, which was made between the late Mr. Mott and the widow and children of the late C. S. Maltby, by which the former was to act as administrator without commissions, can be sustained upon well-settled principles of law. It is said to be without consideration; but not so. The widow and children, in consideration of the agreement of Mr. Mott, not only waived a valuable right (that of administering) which the law (article 93, § 18, Code Md.) vested in them, but they assumed the obligation of sureties on his bond for the faithful performance of his duties as administrator. These constitute a sufficient consideration. *Drury v. Briscoe*, 42 Md. 154; *Steele v. Steele*, 75 Md. 477, 23 Atl. 959; *Ohlendorf v. Kanne*, 66 Md. 499, 8 Atl. 351. As was said in *McCaw v. Blewit*, 2 McCord, Eq. 90: "He voluntarily undertook the duty under the express stipulation that he would not charge commissions, and he cannot now be permitted to violate that contract. That which was expressly declared to have been intended as a gratuity shall not now be converted into a demand." We do not consider it necessary to fortify our conclusion by

the citation of other authorities, or by a discussion of the right of the orphans' court, in its discretion, to refuse commissions in a case like this. The testator of the appellant made a valid and binding agreement, which was binding upon him during his life, and now that he is dead it is equally binding upon his executrix. Order affirmed, with costs.

ROYSTON v. HORNER.

(Court of Appeals of Maryland. June 23, 1897.)

RES JUDICATA—ISSUES.

After a bill to set aside deeds had been dismissed by a consent decree, complainant brought suit for the same purpose, and said decree was pleaded in bar. *Held*, complainant having then had an opportunity to set up fraud in the rendition of such decree, and having failed without reason to do so, he could not, after decree against him in the second suit, maintain a bill to set aside the consent decree for fraud, so as to permit a setting aside of the deeds.

Appeal from circuit court of Baltimore city.

Bill filed by John W. Royston against Albert N. Horner. From a decree dismissing the bill, the plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, PAGE, BOYD, and FOWLER, JJ.

Richard S. Culbreth, for appellant. John Prentiss Poe, for appellee.

FOWLER, J. On the 6th of April, 1888, John W. Royston filed his bill in the circuit court of Baltimore city against the same appellee against whom the bill in this case was filed by him and his committee. In the first bill he alleged his own imbecility and unfitness to attend to business; that he could be easily influenced; that, while in this condition of mind, he had been induced to sell to the appellee certain valuable property for an insignificant sum; that another and the appellee combined and conspired to cheat him; that they, through fraudulent statements and promises, induced him also to execute a deed to the appellee of all his contingent interests in the estates of his brothers and sisters which he would own in the event of their dying without issue. In the bill of 1888, Royston prayed that all these deeds might be set aside; that a receiver might be appointed to collect rents, etc. Answers were properly filed by the appellee and his alleged co-conspirator, and in January, 1889, the plaintiff began to take testimony, and continued at intervals until 15th July of the same year. None appears to have been taken on his behalf thereafter. The defendants took no testimony whatever. The next step taken under the bill of 1888 was a decree dated August 28, 1889, which was passed with the consent of all the parties, that the bill be dismissed. Presently, when we have occasion to consider the facts set forth in the bill in this case, it will fully appear what induced, or at least what is alleged to have induced, the parties to take this course. The bill of 1888 having been thus dismissed, as appears by the evidence in this case,

after a settlement of the controversy, the plaintiff named in the bill, John W. Royston, was, without any notice to him, not only found to be a lunatic at that time, but it was adjudged that he had been so for 20 years, without lucid intervals, and incapable of the management of his person or property. Campbell B. Royston was appointed the committee of his person and estate. In less than a month thereafter, the bill which resulted in the appeal reported in 75 Md. 559, 24 Atl. 25, was filed. In this last-named bill filed by the alleged lunatic and his committee, it is alleged that the various conveyances therein named, being the same mentioned in the bill of 1888, were made by said Royston when he was in an unsound condition of mind, and that the defendant Horner had, within the short time he held and enjoyed the property so conveyed to him, received in rent the sum of \$4,315, or nearly three times as much as he had paid said Royston for it; and the prayer is that the deeds be set aside, because of the lunacy of Royston, and that Horner may be required to account for the rents which he has received, and that a receiver may be appointed, etc. To this bill Horner pleaded *res adjudicata*, based upon the consent decree of August 28, 1889. After a most careful and elaborate examination of the authorities, and of the decree itself, we held in 75 Md. 557, 24 Atl. 25, that that decree was a flat bar to the second bill, which, as we have seen, was the first attempt to get rid of the decree of 1889.

The bill in this case, which may be called the third of the series, and the second vain endeavor to avoid the binding force of the decree of 1889, was filed within a few months after the case in 75 Md. 557, and 24 Atl. 25, was decided. In the opinion in that case it is said that there was in the bill no allegation of fraud in obtaining the decree of 1889, and that without such allegation and proof the decree must stand. Hence in the bill now before us the allegation on which the appellant bases his claim to be again heard is that the decree of 1889 was obtained by means of certain threats made to the sister of Royston to have him arrested on the charge of forging certain promissory notes. It is to be noticed that it appears to be conceded that Royston had signed the names of the makers of the notes in question without authority. Claiming that these threats amount to fraud and imposition, the plaintiff again asks us to set aside the decree of 1889. But the plea of *res adjudicata* is again interposed, as it was in the former case, and must, we think, again prevail as it did there. When in the former case the decree of 1889 was pleaded, the opportunity was presented to show what now is alleged to be true, namely, that that decree was obtained by duress or fraud. The alleged facts upon which this allegation is founded were as well known to all the parties then as now. In the testimony of the able and distinguished counsel, who, in part representing the plaintiffs, signed the agreement consenting to the decree of 1889, he says:

"Miss Royston told me that Mr. Horner had threatened to prosecute her brother if the case was pressed;" and Miss Royston, to whom it is alleged the threats were made, shows very clearly, in her testimony, that she was fully informed, before the decree was passed, of the facts now alleged to constitute the fraud and imposition in obtaining it. She also communicated her knowledge to other members of the Royston family, and, indeed, the allegation in the bill now before us is that, because these same threats were known to them, the sister who had charge of the litigation, and all of them, consented to the decree which is now assailed. But we repeat that, if they had the information and were aware of the facts now relied on, they should have alleged them in the former bill, or should have relied upon them for the purpose of replying to the plea of *res adjudicata*. This rule was applied recently in the case of *Wagoner v. Wagoner*, 76 Md. 313, 25 Atl. 339. We there said: "It will not do to say that the facts relied on in the second bill were not alleged in the first bill, and could not therefore have been proved in the first case, for the answer is, it was the appellant's duty to have either alleged and proved them in the first case, or to have shown in this case some good reason for failing so to do." *Henderson v. Henderson*, 3 Hare, 115. And this rule extends not only to the questions of fact and of law which were decided in the former case, but also to the grounds of recovery or defense which might have been, but were not, presented. *Beloit v. Morgan*, 7 Wall. 622. Now, it is manifest that if, in the former suit, it had been alleged in the bill, and proved, that the decree of 1889 had been obtained by the duress or fraud now relied on, it would have been set aside. And, if no allegation to this effect was made, yet, when the decree was pleaded, then was the time to demonstrate its invalidity, by reason of fraud or duress or on any other ground available at that time. *Rouskulp v. Kershner*, 49 Md. 516. And it cannot be, as contended by the appellant, that simply because the first bill was not in form a bill to set aside the decree for fraud, and this is such a bill, therefore the plea of *res adjudicata* does not apply. If this be so, ingenuity can easily destroy the efficiency and force of solemn adjudications settling the rights of contending parties. And not only so; if such a bill as this may be filed now, it can be done at any time, for, as the appellant says, "the text writers mention no limitation as to the time within which such an original bill may be filed."

The conclusion we have reached is in no wise in conflict with the numerous authorities cited to show that a decree obtained by duress or fraud is void, and will be set aside. But having once had the opportunity to make this defense, and having failed to do so, or to give any valid reason or excuse for such failure, the rule must in this, as it has been in all similar cases, be rigidly applied. The plea of *res adjudicata* must prevail, and the decree of Au-

gust 28, 1889, must stand. We may add that this conclusion, which we have arrived at upon a consideration of the pleadings, is all the more satisfactory to us because it brings us to the same conclusion reached by the learned judge below on a full consideration of the facts, namely, that the bill must be dismissed. Decree affirmed, with costs.

BARABASZ v. KABAT.

(Court of Appeals of Maryland. June 22, 1897.)

MASTER AND SERVANT—LIABILITY TO THIRD PERSONS—SCOPE OF EMPLOYMENT—INSTRUCTIONS.

1. A pastor rightfully instructing a doorkeeper of a church to admit only such as have tickets is liable for injuries resulting from the use of unnecessary force by the doorkeeper in preventing from entering one who had no ticket.

2. Where it is sought to recover of a master for injuries resulting from unnecessary use of force by a servant, and for injuries sustained by a false arrest, and plaintiff can in no event recover for the arrest, it is error to charge that plaintiff may recover if the servant used unnecessary force, there being evidence that the injuries sustained resulted from the arrest alone.

3. A servant instructed to admit in a church only such persons as have tickets cannot, by directing police officers to arrest one who seeks to enter without a ticket, make his master liable for a false arrest made pursuant thereto, as he would not be acting within the apparent scope of his employment.

Appeal from Baltimore city court.

Action by Vincent Kabat against Mieczyslaw Barabasz and another. From judgment for plaintiff, defendant Barabasz appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, ROBERTS, and BOYD, JJ.

F. C. Cook, Joseph S. Heuissler, and Charles W. Heuissler, for appellant. W. C. Schloegel, Howard M. Emmons, and Thomas I. Elliott, for appellee.

BOYD, J. The appellee sued the appellant and James Gibbons, Roman Catholic Archbishop of Baltimore, for the time being a corporation sole, for an assault and battery on his wife, and causing her to be imprisoned, whereby he alleges he lost her services and the comfort of her society, and incurred expense for medical attention and medicines. There are two counts in the declaration, the first being for an assault and battery, and the second for false imprisonment. It was not pretended at the trial that either of the defendants personally committed the assault or procured the arrest of Mrs. Kabat, but the plaintiff sought to hold them responsible for the acts of one Joseph Moles, who was alleged to be the agent of the defendants. At the conclusion of the plaintiff's testimony, the court below instructed the jury that there was no legally sufficient evidence to establish any liability on the part of the defendant corporation, and a verdict was at once entered accordingly. The case then proceeded against the appellant alone, resulting in a verdict

against him. He was at the time of the alleged assault and imprisonment the pastor of the Holy Rosary Church in the city of Baltimore, having been appointed by Cardinal Gibbons, archbishop of that archdiocese. The evidence showed that according to the discipline and government of the Roman Catholic church the pastor "is the administrator and agent of the archbishop, who is considered as the owner of the church property." He has charge of the "temporalities" of the church; that is to say, the revenues of the church derived from pew rents, Sunday and other collections, graveyard charges, school fees, and donations. Some of the parishioners of the appellant took a very decided stand against him, and he seems to have had some very troublesome and unruly people in his congregation. Without undertaking to give in detail all that occurred, it was shown that the appellant had been assaulted and otherwise maltreated by some of them in the church, as well as elsewhere. Their conduct indicated an utter disregard for the house of God, as well as a total lack of respect for their pastor. At times they not only interfered with public worship, but their language and treatment of the appellant could well have led him to believe that his personal safety was not assured, when some of the unruly ones were present. It became necessary for him to seek the protection of the police, and he finally determined that it would be best to require those desiring to enter the church to have tickets of admission. It was duly announced that this would be required, and it was stated where they could be procured. On November 5, 1893, the day on which the alleged assault and imprisonment took place, this practice was begun. Tickets were furnished to those applying at the priest's house, which was adjoining the church, as well as by members of the committee who had them, and doorkeepers were stationed at the doors to require those seeking admission to exhibit them. The appellant, in his testimony, gave several reasons for adopting this course, but, as we understand the attorneys for the appellee to practically concede at the argument that under all the circumstances it was a reasonable regulation, it will be unnecessary for us to discuss it at length. The appellant was certainly justified in resorting to some plan that would have a tendency to exclude the disorderly members of his congregation who had been giving trouble themselves, and had been inciting others to acts that were not only liable to bring reproach upon the church, but to cause a breach of the peace. The protection of the city police had been required at the services of the church since July 30, 1893. Those desiring to enter the church for legitimate purposes could readily obtain tickets, and under existing circumstances we think it could well be conceded that the means adopted by the appellant to preserve order, protect himself from insult and possible injury, and the church from desecration, were reasonable and proper. On November 5, 1893, an immense crowd gath-

ered in the street in front of the church. Some of the witnesses numbered them by the hundred, others by the thousand. Many were doubtless there from curiosity, some desired to enter the church from proper motives, but that there were others there who were bent on mischief cannot be doubted. The police force on duty was considerably increased, and some of the policemen were assaulted and beaten in a manner that indicated that murder was more prominent than religion in the hearts of some of those present. When Mrs. Kabat presented herself at the door of the church, Joseph Moles was there as a doorkeeper, having been appointed by the appellant. He demanded a ticket of her, but she had none. The evidence is somewhat conflicting as to what occurred, but that on the part of the plaintiff shows that she tried to go into the church, and Moles pushed her back. Lawrence Loubya, one of the plaintiff's witnesses, said, "She was trying to go in when Moles pushed her off." Frank Zielski said, "When she tried to enter by force, he [Moles] pushed pretty strong toward the pavement." She was talking in a loud tone, and was evidently very much excited. Several policemen took hold of her, and according to her evidence dragged her down the steps, and took her to the police station, where she was held for some hours. At the conclusion of the plaintiff's testimony prayers were offered on behalf of the appellant, which, if granted, would have taken the case from the jury. They were rejected, but, as we do not find any exception to that ruling, we will proceed at once to the consideration of the other rulings of the court.

The first exception was to the refusal of the court to permit a question to be asked one of the plaintiff's witnesses, but it has not been pressed in this court. After the conclusion of all the testimony, the plaintiff offered five prayers and the defendant eight, all of which were rejected, excepting the defendant's eighth, and the court, in lieu of the rejected prayers, gave instructions of its own. The eighth, which was granted, was in reference to the measure of damages in case the plaintiff recovered. The instructions of the court were divided into three parts, the first being applicable to the first count, the second to the second count, and the third having reference to the burden of proof. By the first the jury was instructed that if they found "that one Joseph Moles acted as doorkeeper of the church by appointment of the defendant as its pastor, with instructions to admit only persons provided with tickets of admission, and that while so acting the plaintiff's wife presented herself for admission without such ticket; and if you further find that said Moles laid his hands upon the plaintiff's wife, using more force than was reasonably necessary under the circumstances to keep her out, or to prevent obstruction of the passage to the church door,—then the plaintiff is entitled to recover." It being

shown that Moles was appointed doorkeeper by the defendant, with instructions to only admit those who had tickets, it would seem clear that he was acting within the scope of his employment when he refused to admit Mrs. Kabat, unless she produced a ticket. Moles testified "that he was placed at the door by Father Barabasz, who told him, if they had tickets, to let them in, and if they had no tickets to keep them out." If we assume, as we may well do, that the defendant did not intend Moles to use more force than was necessary, and even went so far as to forbid him from using any force, he cannot, for those reasons alone, be relieved from liability for the acts of Moles. As his employment was to keep those out who had no tickets, his master or principal was liable if he used more force than was reasonably necessary for that purpose, to the injury of a third person, because the act was done in the course of the master's service, and for his benefit, within the scope of his employment. The principle is well stated in *Evans v. Davidson*, 53 Md. 245. Judge Alvey, in delivering the opinion of the court, said: "In one sense, when there is no express command by the master, all wrongful acts done by the servant may be said to be beyond the scope of the authority given; but the liability of the master is not determined upon any such restricted interpretation of the authority and duty of the servant. If the servant be acting at the time in the course of his master's service, and for his master's benefit, within the scope of his employment, then his act, though wrongful or negligent, is to be treated as that of the master, although no express command or privity of the master be shown." And this court, in *Tome's Case*, in 39 Md. 36, and in *Western Maryland R. Co. v. Franklin Bank of Baltimore*, 60 Md. 36, approved the statement of Story on Agency that the principal is "liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed know of, such misconduct, or even if he forbade the acts, or disapproved of them. In all such cases the rule applies, respondent superior; and it is founded upon public policy and convenience." But, although those principles are well established in this state, as well as elsewhere, yet under the facts of this case the above instruction was erroneous. The testimony shows very clearly that most of the injury to Mrs. Kabat complained of may have been, and most probably was, sustained after the police took charge of her, and not by Moles laying his hand on her, even if done in the violent manner that some of the plaintiff's witnesses speak of. The plaintiff was only entitled to recover for the loss of the services of his wife and of her society, and for the expense he had incurred;

and if the acts of Moles referred to in that instruction did not cause such injuries to Mrs. Kabat, as to produce some of those results, the plaintiff was not entitled to recover at all. It was therefore error to allow a recovery on the finding of the fact that Moles laid his hands on the plaintiff's wife, using more force than was reasonably necessary, which this instruction practically did, as there was no controversy about the other questions contained in it. Nor did the granting of the eighth prayer of the defendant correct this error, as it only applied to the measure of damages if the jury found for the plaintiff, while the court's instruction told them under what circumstances they could find for the plaintiff. The jury may have believed that Moles did use more force than was necessary, but may also have believed that the injuries sustained by Mrs. Kabat were caused by the treatment of the police after they had taken charge of her, and not by what Moles did; but there was nothing in the instruction granted that informed them that that would make any difference as to the right of the plaintiff to recover at all. Nor does the third instruction of the court, in reference to the burden of proof, cure the defect in the first. After saying that, if the jury found the facts set out in the first instruction, the plaintiff was entitled to recover, it did not sufficiently protect the defendant to grant the third instruction, which, to say the least, was not very clearly stated.

The second instruction we also think was erroneous. Although we have said above the defendant might be liable for assault if Moles used more force than was reasonably necessary to keep Mrs. Kabat out, or to prevent obstruction of the passage to the church door, for such damages as the plaintiff can recover, yet that is because the act of Moles was in the line of his employment. But we find nothing in the record that would justify us in saying, or the jury in finding, that the defendant ever in any way, expressly or impliedly, authorized Moles to have her arrested and held in custody for presenting herself at the church door without a ticket. Such an act, if done by Moles, was clearly not within the scope of his employment, and no such authority can be inferred. Yet by this instruction the jury was told that if they found that the plaintiff's wife, while acting in a quiet and orderly manner, without in any wise disturbing the peace of the congregation, or unreasonably obstructing the entrance to the church, was arrested and held in custody by the police, at the instance of said Joseph Moles, while acting as doorkeeper as above stated, for no other reason than presenting herself at the church door without a ticket, then the plaintiff is entitled to recover. If Moles did have her arrested for that reason alone, it was wholly unjustifiable, but we know of no authority that would hold his principal responsible for that act under such circumstances as existed in this

case. The reasoning of the decisions of this court in *Carter v. Machine Co.*, 51 Md. 290; *Improvement Co. v. Steinmeyer*, 72 Md. 313, 20 Atl. 188; *Baker's Case*, 77 Md. 462, 26 Atl. 867; *Brewer's Case*, 78 Md. 394, 28 Atl. 615; *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089,—and cases cited by them, would seem to preclude a recovery from the defendant for such an act of Moles, and we will not cite other authorities on the subject. The testimony shows that the police officers were sent there by the city authorities to preserve order, and they were eyewitnesses to what occurred. They knew, as well as Moles did, what Mrs. Kabat was doing; and unless she was, in their opinion, violating the law, they had no right to arrest her. Moles could give them no such right, and certainly could not require them to arrest her. It is not pretended that the defendant attempted to confer any express authority on Moles to have any one arrested because he presented himself at the church door without a ticket, and such an authority cannot be implied. There is nothing to suggest that he supposed an arrest would or could be made for such a cause, or that the police officers of the city would be guilty of such a flagrant violation of their duty as to do so, at the instance of Moles, although they knew as well as he did what had been done.

As we have intimated, the third instruction is not as clear as it might have been, but, as we have already said the first and second, to which it referred, were erroneous, we need not discuss it further.

Being of the opinion that the defendant is not liable for the arrest of Mrs. Kabat, even if it was made at the instance of Moles, as it was not within the scope of his employment, some of the prayers offered by the defendant may not be applicable at a new trial of the case, but we will very briefly refer to those that were rejected. The first embraces some matters that are now immaterial, and it did not fairly present the question as to whether Moles assaulted Mrs. Kabat by forcibly pushing her away. The second leaves out of consideration the theory of the plaintiff that there was an assault by Moles by the use of more force than was necessary. The third ought to have been granted. The fourth is not now material. The expression, "if the testimony in this case should be such as to leave the minds of the jury in a state of equipoise," might be improved on; but this court said in *Ohlendorf v. Kanne*, 66 Md. 495, 8 Atl. 351, that a prayer which contained that same expression ought to have been granted. As the defendant was not responsible if Moles did ask a policeman to arrest Mrs. Kabat, the fifth prayer, if sustained by the proof, presents a proper defense to the suit; for, if the injuries complained of were sustained by Mrs. Kabat while she was in the hands of the police, then, as we have already said, the plaintiff could not recover. The sixth referred to both counts in the beginning,

and then concluded with reference to matters that only affected the first. By changing it so as to make it applicable to the charge of assault, it can be made a good prayer. The seventh was properly rejected. It would be misleading, and ignores the important question as to whether Moles used more force than necessary. For the reasons we have given, the judgment must be reversed. As the case now stands before us, there can be no recovery against the defendant on the second count, but as on a new trial other evidence may be introduced, and as the plaintiff would be entitled to recover under the first count, if he can establish the fact that Moles did use more force than was necessary, and thereby caused the injuries for which the plaintiff can recover damages, a new trial must be granted. Judgment reversed, and new trial awarded, with costs to the appellant.

STATE (SPENGEMAN, Prosecutor) v. PALESTINE BLDG. ASS'N OF HUDSON COUNTY.

(Supreme Court of New Jersey. June 3, 1897.)
MONEY HAD AND RECEIVED—STATUTE OF FRAUDS.

The defendant agreed with the plaintiff that, if it would purchase a piece of land which the owner had employed him to sell, he would allow his commission to the plaintiff, and thus reduce the price by so much. Thereupon the plaintiff purchased the land, and paid the full stipulated price to the owner, who afterwards paid the commission to the defendant. *Held*:

(1) That the plaintiff could, at common law, maintain an action against the defendant for the amount of the commission on the count for money had and received; and

(2) That the statute of frauds did not prohibit such an action as one upon "a contract or sale of lands."

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of Frederick H. Spengeman, against the Palestine Building Association of Hudson County. Affirmed.

Argued February term, 1897, before MAGIE, LUDLOW, and DIXON, JJ.

John Garrick, for prosecutor. Henry G. Melosh, for plaintiff below.

DIXON, J. By this certiorari a judgment of the district court of Jersey City in favor of the plaintiff below against the present prosecutor is brought up for review. The first ground of objection is that the testimony was insufficient to warrant a verdict for the plaintiff, and therefore a motion to nonsuit should have been granted. The testimony tended to show the following facts: That the defendant, a real-estate agent, had for sale the land of one Tompkins, and, being also a director in the plaintiff association, was appointed a member of its committee to purchase a site for a building; that on a proposition being made in the association to buy the Tompkins land at a price not exceeding \$9,000, the defendant agreed with the association that, if it would

purchase the land, he would allow his commission to the association, and thus reduce the price by so much; that, relying on this agreement, the association bought the land at the nominal price of \$8,750, and paid that sum to Tompkins, who thereupon paid the defendant a commission of $2\frac{1}{2}$ per cent., amounting to \$218.75, for which the present judgment was rendered. If the jury believed these to be the real facts, evidently a verdict for the plaintiff was right, unless the objections hereafter to be noticed were fatal to the claim.

It is next insisted that as the narr. contained only the common counts, it could not legally sustain the cause of action. We think the recovery may rest upon the count for money had and received by the defendant for the use of the plaintiff. Regarding this count with the utmost strictness, it embraces those cases in which the defendant has received money that *ex æquo et bono* belongs to the plaintiff. Such was this case. Upon the facts above stated, the agreement of the defendant could have been exactly performed only by his allowing his claim against Tompkins for commissions to be canceled by the plaintiff on delivery of the deed, so that he might accept from the plaintiff \$8,750, less the commission of \$218.75, as the full price of the land. This shows that in strictness, as between the plaintiff and defendant, the \$218.75 should never have passed out of the plaintiff's possession, but should always have remained its property. The fact that in the transaction which took place in lieu of the exact performance of the defendant's agreement the plaintiff paid Tompkins the nominal price, \$8,750, and Tompkins paid the defendant the commission, \$218.75, does not affect the equitable truth that as between plaintiff and defendant the \$218.75 belonged to the plaintiff. Hence it appears that, having due regard to his obligation to the plaintiff, the defendant could not receive this money as his own, but only as a mere conduit through which there might be restored to the plaintiff what *ex æquo et bono*, between these parties, it ought to have always retained. In natural justice it must be presumed that he did so receive it, and such a claim on the fund itself constitutes the very essence of this style of action.

There is another criterion which may be applied with the same result. Where the defendant has received money from a third person, even though he received it under a claim of title to it in opposition to the plaintiff's right, yet if he had, by law, authority to receive it from such third person, and in equity the plaintiff ought to have it, this count for money had and received can be sustained. *Moses v. Macferlan*, 2 Burrows, 1005, 1008; *Sergeant v. Stryker*, 16 N. J. Law, 464, 468. The present transaction comes within this rule, even if it be assumed, as the defendant urges it must be, against the justice of the case, that when he received the money from Tompkins he had repudiated his obligation to the plaintiff, and was collecting it as his own;

for he alone could, at law, collect it from Tompkins, and yet in equity the plaintiff ought to have it.

It is lastly contended that the agreement between plaintiff and defendant was "a contract or sale of lands, or an interest in or concerning them," and therefore is unenforceable because of the statute of frauds, as it was not in writing. Whether this agreement can be deemed to be within the statute of frauds is certainly questionable (*King's Ex'rs v. Hanna*, 9 B. Mon. 369; *Browne, St. Frauds*, 268), but, if it be, the present action, according to our views, is maintained, not upon the express agreement, but to enforce an implied obligation arising in part from what the plaintiff did under the influence of that agreement, and in part from the defendant's subsequent conduct. The agreement is only collateral to the cause of action, and is resorted to merely for the purpose of showing what was, in contemplation of equity, the true nature of the defendant's act in receiving the money which he is now required to refund to the plaintiff. The case resembles in principle that of *Wetherbee v. Potter*, 99 Mass. 354, where the plaintiff and defendant had, with others, agreed to go into a joint purchase of real estate, for the price of which the plaintiff was to accept drafts, and the defendant was to pay one half thereof. The plaintiff, having paid the drafts, recovered one-half from the defendant on the common count for money paid. The court there said: "The statute of frauds does not apply to such an action, whether brought upon the implied or upon an express agreement. The obligation to repay money advanced for the use of the defendant is independent of the character of the consideration upon which the advance is made, provided it be not illegal." So here the obligation of the defendant to turn over to the plaintiff its money which he has received is independent of the character of the transaction by which that money became equitably the plaintiff's property. We find no error in the record, and the judgment must be affirmed.

SCHENCK v. STATE.

(Supreme Court of New Jersey. June 17, 1897.)

CONSTITUTIONAL LAW—TITLE OF ACT.

The title, "An act to provide for the regulation and incorporation of insurance companies," does not express as one of its objects the regulation of the business of individual insurers. Such regulation, if imposed in the body of the enactment, is in violation of Const. art. 4, § 7, cl. 4.

(Syllabus by the Court.)

Error to circuit court, Essex county; Child, Judge.

Action by the state against Clarence Schenck. Judgment for the state, and defendant brings error. Reversed.

"This suit is brought in the name of the state, on the complaint of the insurance commissioner, for the recovery of the penalty incurred by the defendant below by violating the insurance

laws of this state. There is no dispute as to the facts. The defendant negotiated a contract of insurance, and delivered a policy of insurance against fire on property in this state, and recovered the premium therefor. The policy was in the Metropolitan Lloyds of New York City.

"From the language of the policy, it appears that the insurance contract was a several contract with 20 individual insurers, each of whom assumed one-twentieth of the risk. The defendant, therefore, in negotiating the contract, delivering the policy, and receiving the premium, was acting as the agent of individual insurers.

"There are two questions in the case:

"(1) Do the insurance laws of this state prohibit an individual from becoming an insurer against fire, and inflict a penalty upon the agent of such individual insurer?

"(2) If the laws of this state so provide, are they constitutional?"

Argued at February term, 1896, before BEASLEY, C. J., and DIXON, MAGIE, and GARRISON, JJ.

Colle & Swayze, for plaintiff in error. Howard M. Hayes, for the State.

GARRISON, J. (after stating the facts). From the foregoing statement, which is excerpted from the brief of counsel for the defendant in error, it is evident that, if there exist no valid legislative authority for the action he has brought, no other question should be considered. In my opinion, there is no valid authority for inflicting upon the agent of an individual insurer the penalty provided by the several acts of the legislature upon which sole reliance is placed.

The course of legislation upon this subject in this state has been as follows, the significant feature being the evolution of the title of the present general statute:

In 1826 (P. L. 1826, p. 67) "An act relative to insurance companies" was passed.

In 1845 this act was amended by the title of "An act relative to ensurance companies." P. L. 1845, p. 166.

In 1846 it was further supplemented under the same title. P. L. 1846, p. 4.

In 1850 the original spelling of the title was restored. P. L. 1850, p. 183.

In 1860 a new statute was approved, with the title, "An act to regulate the business of fire insurance by companies or associations not incorporated by this state." P. L. 1860, p. 411.

Again, in 1867, a new act was passed, with a new title, to wit, "An act to regulate the business of fire, life, accident, marine and live stock insurance by companies or associations not incorporated by this state." P. L. 1867, p. 776.

In 1874 this act was amended by the original title.

The revision of 1875 repealed all of these acts, and enacted a general insurance law, the title of which is, "An act to provide for the regulation and incorporation of insurance companies." Revision, p. 507.

Since the adoption of the Revision, this statute has been at sundry times amended, but always under the title given to it by the revisors.

It will be observed that from the earliest period of this statutory history down to the present time the legislative will has always been expressed under a title that included companies, associations, and corporations, but never individuals, the existing title being in this respect the least flexible of them all.

The canon of constitutional limitation applicable to this state of legislation is illustrated in the opinion delivered in the court of errors and appeals in the case of *Hendrickson v. Fries*, 45 N. J. Law, 555.

"Under the provisions of our constitution," said Mr. Justice Depue, "the title of a statute is not only an indication of the legislative intent, but is also a limitation upon the enacting part of the law. It can have no effect with respect to any object that is not expressed in the title." This necessarily disposes of the writ of error now before us, for the regulation of the business of an individual insurer is an object that is in no wise expressed by the words "regulation and incorporation of insurance companies."

The proposition so ably argued by either counsel, viz. "that the legislature is devoid of right to prohibit the transaction of the business of insurance by individuals," should not, upon this record, be decided. It is fundamental in character, and to be passed upon only when necessary to the exposition of an existing enactment.

The judgment brought up by this writ is reversed.

STATE (CLAYTON, Prosecutor) v. BOARD OF CHOSEN FREEHOLDERS OF HUDSON COUNTY.

(Supreme Court of New Jersey. June 24, 1897.)

CERTIORARI—TITLE TO OFFICE.

A writ of certiorari, bringing into court the appointing body alone, is not a lawful mode of trying the title of the appointee to a public office which he has actually assumed.

(Syllabus by the Court.)

Certiorari by Arthur W. Clayton to review the resolutions of the board of chosen freeholders of Hudson county. Writ dismissed.

Argued June term, 1897, before LUDLOW and DIXON, JJ.

Leon Abbett and Flavel McGee, for prosecutor. Allan McDermott and C. L. Corbin, for defendants.

DIXON, J. This certiorari brings up the following resolutions adopted by the board of chosen freeholders of Hudson county on December 30, 1896: "Resolved, that for the causes aforesaid the director of this board be, and he hereby is, removed and amoved from the office or position of director of this board, and that the said office or position be, and the same hereby is, declared and made vacant, and that this resolution shall take effect im-

mediately." And, "resolved, that William Green, a member of this board, be, and he hereby is, appointed and elected director of this board; this resolution to take effect immediately." The chief function of the director of the board is to preside at its meetings. Between the passage of the first and that of the second of these resolutions there was no longer interval than the time required to vote upon the first, and immediately thereafter Mr. Green took the oath of office, and Mr. Clayton left, and Mr. Green assumed the chair as presiding officer of the board. It also appears that when this writ of certiorari was issued, Mr. Green was the actual incumbent of the office of director. He is not a party to the present proceedings. Under these circumstances the real question for decision obviously is whether the prosecutor of this certiorari or the actual incumbent of the office is legally entitled to the office of director. The proper mode of raising such a question is by quo warranto proceedings against the incumbent, and not by certiorari to the body which appointed him. *Haines v. Freeholders of Camden*, 47 N. J. Law, 454, 1 Atl. 515; *Simon v. City of Hoboken*, 52 N. J. Law, 367, 19 Atl. 259; *Roberson v. City of Bayonne*, 58 N. J. Law, 325, 33 Atl. 784. The writ must be dismissed, but without costs.

STATE (CLAYTON, Prosecutor) v. BOARD OF CHOSEN FREEHOLDERS OF HUDSON COUNTY.

(Supreme Court of New Jersey. June 24, 1897.)
CHOSEN FREEHOLDERS—APPOINTMENT OF COMMITTEES.

In view of section 2 of the act of May 16, 1894 (1 Gen. St. p. 422), the board of chosen freeholders of Hudson county cannot take from the director of the board the right to appoint the standing committees thereof by simply designating them subcommittees in their rules and by-laws.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Arthur W. Clayton, to review the resolutions of the board of chosen freeholders of the county of Hudson. Resolutions set aside.

Argued June term, 1897, before LUDLOW and DIXON, JJ.

Leon Abbett and Flavel McGee, for prosecutor. Allan McDermott and C. L. Corbin, for defendant.

DIXON, J. This certiorari brings up the following resolutions, adopted by the board of chosen freeholders of Hudson county on December 17, 1896: "Resolved, that there shall be but one standing committee of this board, which committee shall be and hereby is authorized to appoint such subcommittees as may be found necessary from time to time. The standing committee hereby created shall be known as the 'Committee on County Affairs,' and shall consist of twenty-six members of this board. And resolved,

that until the appointment and organization of said committee on county affairs all matters properly referable to a committee of this board be, and the same are hereby, referred to the board as a committee of the whole."

The circumstances under which these resolutions were passed, and the subsequent proceedings of the board, make it manifest that the resolutions were designed to be, as in substance they were, a mere evasion of the statutory provision (1 Gen. St. p. 422, § 2) that the director of the board should appoint the standing committees thereof. There had sprung up an irreconcilable antagonism between the director and a majority of the members of the board, and in order to thwart his statutory power this scheme was devised, by which all the members of the board save one would form the only "standing committee," and a majority of that committee, being, of course, those opposed to the director, would appoint the committees by which the ordinary business of standing committees would be transacted. That these committees, called in the resolution "subcommittees," were not really to be subcommittees of this so-called "standing committee," but were to be standing committees of the board itself,—that is, permanent committees, to each one of which the board itself would refer all matters of similar nature,—is evident from the "rules and by-laws" adopted by the board at the same meeting for its own government. According to these rules, the "reports of subcommittees" were to be presented in writing as a regular proceeding at every meeting of the board, all claims presented to the board were to be referred to an appropriate subcommittee, and, if found correct by that subcommittee, were then to be referred to "the subcommittee on finance and audit" before being ordered paid; and it was also made the duty of the clerk of the board to present "written contract claims" directly to this subcommittee on finance and audit without previously presenting them to the board. We perceive no substantial difference between the functions of these "subcommittees" and the "standing committees" usually formed in parliamentary bodies and provided for by the statute. The resolutions should be set aside, but without costs.

DE BAUN v. BRAND.

(Supreme Court of New Jersey. June 18, 1897.)

CONTRACTS—JUDICIAL SALES—CHILLING THE BIDDING—PUBLIC POLICY.

At a sale of testator's property by a decree of the court of chancery, the defendant agreed with the plaintiff that, if the plaintiff would not bid against him, he would pay her and other legatees the amount of their legacies under the will. Only one of the other legatees consented to or knew of this arrangement. This agreement is contrary to public policy, and void, and will not support this action brought by the

plaintiff to recover from the defendant the amount of her legacy.

(Syllabus by the Court.)

Case certified from circuit court, Passaic county; before Justice Dixon.

Action by Hester E. De Baun against John T. Brand. Case certified. Nonsuit advised.

The Passaic circuit court has certified into this court for its advisory opinion the question presented in its certificate as follows: "Hackensack, N. J., October 2, 1896. This action was brought upon an agreement made by the defendant with the plaintiff to pay her the sum of two thousand dollars, as hereinafter stated. The following facts were proven at the trial: The father of the plaintiff and defendant, one Amos Brand, died seised of a farm in Saddle River township, Bergen county, on March 4, 1879. The said Amos Brand died as aforesaid, leaving a will, which was afterwards duly probated in the surrogate's office of Bergen county, in which he made the following bequests: To his wife, Jemima, an annuity of one hundred and fifty dollars during her lifetime; to his daughter, Hester E. De Baum, the plaintiff in this suit, the sum of two thousand dollars, to be paid within six months after the sale of his real estate. To his son, Edward A. Brand, the sum of one thousand dollars, to be paid within six months after the sale of his real estate. By the terms of the will, the aforesaid legacies were made a charge upon the real estate of the said Amos Brand, which, as far as appeared by the evidence, consisted solely of the farm in question, and which the testator directed the executors to sell at auction within two years after his death. The defendant, John T. Brand, and his brother, George A. Brand, were nominated in the will, and duly qualified, as executors thereof, and were also made residuary legatees of the balance of the estate remaining after the payment of the aforesaid legacies. There was no evidence that any of the legacies mentioned were ever paid, and some time in the year 1883 the widow, Jemima Brand, obtained a decree in a suit instituted by her in the court of chancery, to which all the persons mentioned in the will were made defendants, directing a sale of the aforesaid farm, to satisfy and pay so much of her annuity as was then in arrears. By the terms of the decree, the defendant, John T. Brand, was first to be paid, out of the proceeds of such sale, the amount of the principal and interest of a mortgage executed to him by his father, Amos Brand, before the latter's death. Under and by virtue of a writ of fieri facias, issued out of the court of chancery upon said decree, the said farm was advertised to be sold on October 17, 1883, by the sheriff of the county of Bergen. Upon the day of the sale, and before it actually took place, the defendant made a verbal contract with the plaintiff, by the terms of which he agreed that, if she would let him purchase the said farm when it was offered for sale by said sheriff, he would pay her and other legatees the amount of the legacies under the will. The said farm was

duly sold by the sheriff of the county of Bergen on October 17, 1883, at public sale, and the defendant, in pursuance of said arrangement, bid it in for \$3,113.62, the amount of his claim and the widow's, and obtained a deed for the same from the said sheriff. The plaintiff, on account of said contract she had made with the defendant, refrained from bidding on the farm at the sale, although she had intended, before the time the said bargain was entered into, to go to the sale, and pay as high as seven or eight thousand dollars for the property, if necessary. There was no proof that any one of the other legatees mentioned in the will ever consented to said agreement between plaintiff and defendant, or were aware of its having been made, except that one of them, George A. Brand, assented to it. It was further proven that one Joseph Thompson attended said sale, and wanted to bid upon the farm, being willing to pay six or seven thousand dollars therefor, and, upon being informed of the said bargain by the defendant, refrained from bidding on account of it. Upon the trial, at the close of the plaintiff's case, the defendant moved for a nonsuit, on the ground that the contract shown by the evidence was against public policy, and void, and the court reserved its decision upon said motion. Whether a nonsuit should be ordered is a question reserved and certified to the supreme court for its advisory opinion. Jonathan Dixon, Judge."

Argued February term, 1897, before DE-PUE. VAN SYCKEL, and LIPPINCOTT, JJ.

Z. M. Ward, for plaintiff. Wm. W. Watson, for defendant.

VAN SYCKEL, J. Agreements having for their object the suppressing of competition in bidding at public sales have been very generally regarded with disfavor by courts when their aid has been invoked to enforce them. As early as the days of Lord Mansfield, it was held to be contrary to good faith, and a fraud upon the real bidders, for the owner to employ puffers to bid for him at an auction. *Bexwell v. Christie*, Cowp. 395; *Howard v. Castle*, 6 Term R. 642. The converse must be equally true, that an arrangement to suppress bidding, to the detriment of the owner, is inimical to good faith, and a fraud upon the owner. The law justly administered guards with like care the rights and interest of bidder and owner. In *Jones v. Caswell*, 3 Johns. Cas. 29, the court refused to enforce payment of a promissory note given to induce the payee to desist from bidding at a sheriff's sale. Judge Kent united with Judge Radcliff in placing the contract in the same category with the employment of puffers by the vendor, and in pronouncing it contrary to good faith and sound public policy. That case came under review in our own court, and was approved by Chief Justice Ewing in *Gulick v. Ward*, 9 N. J. Eq. 87, where the court refused to recognize the validity of an engagement by the defendant to pay the plaintiff \$1,000 if he

would forbear to bid for carrying the mails. In *Morris v. Woodward*, 25 N. J. Eq. 32, the complainant agreed with a mortgagee defendant that if such mortgagee would not bid, and would permit the complainant to buy the mortgaged premises, the complainant would pay said defendant his claim against the property. It was held that this arrangement was a fraud upon the mortgagor, and that it vitiated the sale. In *Gardiner v. Morse*, 25 Me. 140, the agreement was that, if defendant would not bid at a bankrupt sale, plaintiff would, in consideration thereof, surrender a claim he had against defendant. The court refused to entertain such a defense to a suit by the plaintiff for the claim, on the ground that the stipulation was to be classed with fraudulent combinations, and contrary to public policy. The like view was taken in the following cases, where the undertaking sought to be enforced was made in consideration of a promise to abstain from bidding at a public auction: *Gibbs v. Smith*, 115 Mass. 593; *Goldman v. Oppenheim*, 118 Ind. 95, 20 N. E. 635; *Bank v. Holm*, 19 C. C. A. 94, 71 Fed. 489; *Doolin v. Ward*, 6 Johns. 194; *Barton v. Benson*, 126 Pa. St. 431, 17 Atl. 642. Judge Story, in treating of this subject, says: "Such contracts are void as against public policy, and as tending injuriously to affect the character and value of sales at public auction, and to mislead public confidence. They operate virtually as a fraud on the sale." 1 Story, Eq. Jur. § 293. In the case of *Marie v. Garrison*, 83 N. Y. 14, there was no contract to refrain from bidding; and in *Hopkins v. Ensign*, 122 N. Y. 144, 25 N. E. 306, the contract was regarded as not infirm, because every one who had any substantial interest in the land consented to the arrangement. In the case sub judice the agreement of the defendant was that he would pay the plaintiff and other legatees under the will the amount of their legacies. There is no proof that any of the other legatees, except George, knew of or consented to the agreement. Those not assenting might have been unwilling to accept the personal obligation of the defendant to pay their legacies. It may also be that there are creditors who were injuriously affected by this arrangement. The circuit court is advised that the contract is against public policy and void, and that a nonsuit should be ordered.

IN RE BOORAEM'S ESTATE.

(Prerogative Court of New Jersey. June 28, 1897.)

RIGHT TO ADMINISTER—RESIDUARY LEGATEE.

1. Upon the death of renunciation of an executor the right of a residuary legatee to administer is superior to the right of the next of kin.

2. Upon the death of the residuary legatee his right to administer passes to his personal representatives.

(Syllabus by the Court.)

Appeal from orphans' court, Middlesex county; Strong, Judge.

In the matter of the estate of Henry H. Booraem, deceased. Certain of the heirs appeal from the appointment of Daniel G. Stubblebine and Emma Stubblebine administrators de bonis non. Affirmed.

Voorhees & Booraem, for appellants. A. V. Schenck, for respondent.

REED, Vice Ordinary. Henry H. Booraem appointed his wife, Maria, and Philip Kulthau, executors of his will. The testator left all his real and personal estate to his wife, Maria, during widowhood; devised a farm to his son Garrett; left a small legacy to a cemetery association; and then gave to his grandson Henry L. Stubblebine, upon the death or marriage of his widow, all the rest of his real and personal estate. He declared that, should his wife die or marry before this grandchild should attain the age of 30 years, then all his estate so devised to the grandson should be held in trust by his executor, Philip Kulthau, for said grandson, with a discretion in said executor to convey the same to his grandson before he should attain the age of said 30 years. The executrix and executor are dead. Maria, the widow, did not remarry. Henry L. Stubblebine, the said grandson, died on September 24, 1890, in the 26th year of his age, after the decease of the testator, before the decease of the said Maria Booraem, and after the decease of the executor, Philip Kulthau, who died May 25, 1890. Letters of administration upon the estate of the grandson were granted to Daniel G. Stubblebine, his father. Certain personal estate, amounting to \$4,500, of the estate of Henry H. Booraem, deceased, is still unadministered, and Daniel G. Stubblebine, the administrator of the grandson, applied to the orphans' court for letters of administration de bonis non cum testamento annexo of Henry H. Booraem. A counterclaim to such administration was preferred by John V. L. Booraem, a grandson and next of kin of the testator, to whose appointment by the surrogate a caveat was interposed by Daniel G. Stubblebine, by reason of which dispute the matter went to the orphans' court.

In support of the decree below, the following propositions are asserted: First, that the residuary personal estate of Henry H. Booraem, under his will, became a vested interest, upon the death of the testator, in Henry L. Stubblebine in fee; second, that the gift to trustee did not affect the vesting of the interest, for, the gift being for the sole use and benefit of the cestui que trust, is to be regarded as a gift to the cestui que trust; third, that the residuary legatee, if he had lived, would have been entitled to the administration of his father's estate, in preference to legatees, next of kin, or creditors; and, fourth, that upon his death his legal representative is entitled to the appointment to such office. The accuracy of the first of these propositions is too plain for discussion.

The gift to the grandson was a vested legacy in remainder. The person who was to take, and the event upon which he was to take, was certain. The time of payment alone was postponed. The legatee's interest is vested. *Gifford v. Thorn*, 9 N. J. Eq. 702; *Van Dyke's Adm'r v. Vanderpool's Adm'r*, 14 N. J. Eq. 199; *Nelson v. Bishop*, 45 N. J. Eq. 473, 17 Atl. 962. So the truth of the second proposition is equally manifest. The legacy, when the time of payment arrived, viz. on the death or remarriage of the widow, was to go either to the trustee or the legatee, just as it happened that either of the events mentioned occurred, before or after the legatee should attain the age of 30 years. The contingency, in view of which the intervention of a trustee was provided for, did not in the least change the quality of the interest of the legatee. The property was to be held for the exclusive benefit of the residuary legatee, and his interest in it was as much a vested right as if he was to have had the entire legal control of the property. *Gifford v. Thorn*, supra; *Nelson v. Bishop*, supra.

In respect to the third proposition, it is clear that, had the residuary legatee lived, he would have been entitled to the appointment as administrator of the estate of his testator, upon the death of the executor. In *re Kirkpatrick's Will*, 22 N. J. Eq. 463. The point upon which the right of the appointees of the orphans' court is mainly challenged is that the claim of the residuary legatee to such appointment, had he lived, did not pass to his representative. The argument in support of this point is that the appointment goes to the residuary legatee, because he is the testator's choice, and is the next person in his election after the executor, but that the representative of the legatee is not the testator's choice. But when it is said, as it has been, that the residuary legatee is the testator's choice, it is meant only that the residuary legatee has the most interest in an economical and efficient administration of the estate. Such choice by the testator does not arise from any expressed preference, but it is implied from the fact that the legatee is entitled to what is left of the estate, after the payment of debts and legacies, and so has a superior right to handle the estate, so as to preserve as much as possible for himself. It is upon this ground that the presumed preference of the testator is said to exist. *Donahay v. Hall*, 45 N. J. Eq. 720, 18 Atl. 163. The rule of practice in the ecclesiastical court in cases where the grant of administration was not within the statute was to consider which of the claimants has the greatest interest in the effects of the deceased, and decree the administration accordingly. If there were no peculiar circumstances. *Wetdrill v. Wright*, 2 Phillim. Ecc. 243-248. Hence in all cases where no executor is appointed, or the appointed executor fails to represent the testator, the residuary legatee, if there be one, is preferred to the next of kin, and

entitled to administer cum testamento annexo. The reason, said the court in *Thomas v. Butler*, 1 Vent. 219, that the statute 21 Hen. VIII. required that administration should be granted to the next of kin, was upon the presumption that the intestate intended to prefer him. But now the presumption is here taken away, the residuum being disposed of to another; and to what purpose should the next of kin have it, where no benefit could accrue to him by it, and it is reasonable that he should have the management of the estate, as he is to have what remains of it after the debts and legacies are paid? Now, in the same way that the preference of the testator in favor of the residuary legatee is inferred from the superior interest of the latter in the administration of the estate, so, for the same reason, his preference for the administrator of the deceased residuary legatee over his next of kin is inferred. The interest of the residuary legatee passes to his personal representative, and with the interest passes the right to administer. In *Wet-drill v. Wright*, supra, the testator left a widow and a daughter. He bequeathed his property to his wife, and after her death to his daughter. The wife was executrix, and proved the will. The daughter died after the testator, but before the widow. After the death of the widow and daughter, the daughter's husband was appointed administrator de bonis non cum testamento annexo of the testator. The court said: "The general principle, both by statute and practice, is to give the management of the property to the person who has the beneficial interest. Being a vested interest in the daughter, and she having married, and her husband having survived her, he has the same right that she would have had." In *Jones v. Beytagh*, 3 Phillim. Ecc. 685, letters of administration which had been granted to the executor of a creditor were rescinded at the suit of an executor of a residuary legatee. In *re Thirlwall*, 6 Notes Cas. 44, the letters went to the personal representative of the residuary legatee. The insistence, therefore, that the right of administration did not pass to the representative of the residuary legatee, is not tenable.

Nor is there any substance in the notion advanced that the father and widow of Henry L. Stubblebine took no interest in the residue of the estate of Henry H. Booraem, and therefore had no right to administer. Henry L. Stubblebine died without issue, leaving a father and widow. Each took one-half of his estate. But whether the father was so entitled or not in no degree affects his right to this administration. It is by force of his representative character, and not by reason of the fact that he is to receive ultimately any part of the estate, that he acquires the interest which equips him with the right to administer upon the still unadministered goods of the original testator. In respect to the appointment of the father, that appointment was entirely regular. The appointment

of the widow as joint administrator does not affect John V. L. Booraem. He does not complain of the joinder of the widow with the father in the administration. His complaint is that he himself should have been appointed, together with his brother Joseph, and that, therefore, neither Daniel G. nor the widow should have received the appointment. I advise a decree affirming the decree of the orphans' court.

STATE (MONMOUTH PARK ASS'N, Prosecutor) v. STATE BOARD OF ASSESSORS.

(Supreme Court of New Jersey. June 28, 1897.)

TAXATION OF RAILROAD.

A railroad, not the property of a railroad company, and neither owned nor operated under a franchise by an individual or an unincorporated association, is not subject to taxation by the state board of assessors.

(Syllabus by the Court.)

Certioraris by the state, on the prosecution of the Monmouth Park Association, against the state board of assessors. Heard together under stipulation to remove taxes assessed from years 1890 to 1896. Taxes set aside.

Argued February term, 1897, before DIXON, LUDLOW, and COLLINS, JJ.

R. W. De Forest, for prosecutor. John P. Stockton, Atty. Gen., for defendant.

COLLINS, J. At the time of the enactment of the general railroad law in 1884 there was in existence a railroad of about a mile and a half in length, running from the New York & Long Branch Railroad to the race course of the Monmouth Park Association. It was constructed upon the filed route of the Monmouth Park Railroad Company. That company made return for it in the year 1884, and it was taxed in due course. The next year no return was made, but the Monmouth Park Association, the present prosecutor, filed a protest, claiming that the road was on its land, and was its private property, not subject to railroad taxation. Nevertheless the state board continued to tax the road until and including the year 1889. The taxes assessed were paid, and are not now questioned. In 1889 the association built a new grand stand for its race course. The railroad was demolished, and a new one was constructed to reach the new grand stand. This new road ran from a different point on the New York & Long Branch Railroad, and was entirely off the filed route of the Monmouth Park Railroad Company. It is proved to have been constructed by the association on its own lands and under private right. The association is a company formed under the general corporation act. Its object, as stated in its certificate of incorporation (as amended in 1877), was "to carry on exhibitions for the encouragement of competition in breed of stock and development of speed

of horses." It had no railroad franchise, and could have none, for its organic law expressly excludes the formation thereunder of a railroad company, except under conditions not pertinent to it. 1 Gen. St. p. 946, pl. 189; Id. p. 950, pl. 208; Id. p. 969, pl. 292. The state board of assessors, assuming the new railroad to be a substitution for the old one, taxed it, with its appurtenances, in the name of the Monmouth Park Railroad Company, as railroad property used for railroad purposes; and such action is now before this court for review.

Writs of certiorari were promptly purchased, but by consent have not been pressed to hearing until now. The taxes assessed in 1890 and 1891 were paid; but, within the spirit, if not the letter, of the railroad tax act, such payment presents no bar to relief. 3 Gen. St. p. 3333, pl. 240. From 1890 to 1893, inclusive, the railroad taxed was used, during the racing season, by the two railroad companies that operated trains over the New York & Long Branch Railroad. These companies, under business arrangements with the association, sold tickets that included passage over the road and admission to the race course and grand stand. At other times of the year the road was only used to send freight to the race course when shipped to the association. In 1893 the connecting switch was removed, and since then the road has not been used at all.

Warrant for the taxes assessed is sought in "An act for the taxation of railroad and canal property," approved April 10, 1884. That act has been revised and amended, but, so far as the authority to tax is concerned, remains hitherto unchanged. The mandate of this law, in the second section of the act, is that "all property of any railroad, and of any canal company used for railroad or canal purposes, shall be assessed by a state board of assessors," etc. 3 Gen. St. p. 3334, pl. 243. This language is defined and enlarged by section 27 (now 23), which reads as follows: "If any railroad or canal shall be owned or operated under a franchise by any individual or association not incorporated, the term 'company' used in this act shall apply to such owners or operators, and such property shall be assessed and taxed under the provisions of this act in the same manner as if operated by a company; and the persons operating or owning such railroad or canal shall make the returns required by this act to be made by companies." 3 Gen. St. p. 3332, pl. 234. The "franchise," intended by this section, is of course a franchise to own or operate a railroad or canal. The element of such a franchise enters into the classification of the act. Perhaps the legislature meant to include all cases of operation under such a franchise. Perhaps the use of the railroad in question by two railroad companies in the manner above mentioned may be considered as such operation; but, if so, the case is not covered by the act.

This court cannot supply the omission, and the taxes under review must fall, for in no year involved was the property that was taxed the property of a railroad company, or owned under a franchise to own or operate a railroad, or operated under such a franchise by any individual or association not incorporated. The taxes under review are set aside, but, inasmuch as the state board of assessors represents the state, no costs can be awarded to the prosecutor.

TRENTON PASSENGER RY. CO., CONSOLIDATED, v. COOPER.

SAME v. BENNETT.

(Court of Errors and Appeals of New Jersey.
June 28, 1897.)

NEGLIGENCE—ESCAPE OF ELECTRICITY—EVIDENCE—RES GESTÆ—LEADING QUESTIONS.

1. Escape of electricity from a street railway, to the injury of a horse being driven on a public street, is presumptive proof of negligence in the operation of the railway. "Res ipsa loquitur."

2. Words spoken by a driver in the effort to control a runaway horse are admissible in evidence as part of the *res gestæ* on the trial of an action for damages for injuries resulting from the frightening of the horse. Evidence of previous experience of the driver in case of electric shock to a horse was competent, not to prove the fact of shock in the case in hand, but to account for the driver's words and conduct.

3. Evidence legal for some purpose cannot be excluded because a jury may erroneously use it for another purpose. The defendant's protection against this is to ask for cautionary instruction.

4. The admission of a leading question cannot be reviewed on error.

(Syllabus by the Court.)

Error to supreme court, Mercer circuit; before Justice Gummere.

Action by Charles S. Cooper against the Trenton Passenger Railway Company, Consolidated, and by Samuel M. Bennett against the same defendant. Judgment for plaintiffs, and defendant brings error. Affirmed.

James Buchanan, for plaintiff in error. G. D. W. Vroom and J. H. Backes, for defendants in error.

COLLINS, J. These two causes were argued together upon identical bills of exception and assignments of error, the original actions having been tried together in the Mercer circuit. The actions were based upon alleged negligence in the lawful operation by means of electricity of a street railway in the city of Trenton. In such operation an electric current was conducted through rails laid on the street, the ends of the rails being fastened together with metallic ties by a process called in the declaration and testimony "bonding." The negligence averred was in insufficient or defective bonding, permitting the escape of electricity. In one of the actions the result averred was injury to a valuable horse owned and being driven by the plaintiff Cooper, and in the other personal injury to the plaintiff Bennett, who was

Cooper's hostler and was riding with him. The horse ran away, and both men were thrown from the carriage. The plaintiffs recovered damages, and the judgments have been removed by writs of error to this court.

Error is first assigned upon refusal to nonsuit. The contention is that, as the averments of negligence were limited to the bonding of the rails, the plaintiffs were obliged to point out and establish some particular defect or insufficiency in such bonding. I do not assent to this view. It would have been sufficient to aver that electricity was, through negligence, permitted to escape from the rails; but, as it appeared in the case that such escape was only possible at the ends of the rails, it was a necessary conclusion that, if it occurred, it must have been due to insufficient or defective bonding. It must be assumed that with proper and sufficient bonds the rails would have carried a current of electricity with safety to horses stepping upon them. Otherwise the operation of the railway in a public street by means of such a current passing through its rails was ipso facto a nuisance. No legislation has authorized such an infringement on the rights of the public in a highway. If, therefore, electricity did escape from the rails, that fact was presumptive proof of negligence. The case comes clearly within the bounds set by this court for the right of a plaintiff to say, "*Res ipsa loquitur*." *Bahr v. Lombard*, 53 N. J. Law, 233, 21 Atl. 190, and 23 Atl. 167. Of course, proof of a latent defect or of a break in a bond, of which the managers of the railway could not with due diligence have learned, might rebut the presumption of negligence, but no such proof appeared in the plaintiff's case. Assuming that there was proof tending to show that electricity did escape from the company's rails and affect the horse, it was the duty of the trial judge to require a defense. There was proof sufficient to go to the jury of such escape and shock. The horse, previously docile, and accustomed to the city streets, was being driven across the railway track. Immediately after stepping on a rail, he stopped, shook, quivered, and then plunged forward, and ran so violently as to overcome all efforts to restrain him. A subsequent examination by a veterinary surgeon revealed symptoms of shock by electricity. The motion to nonsuit was properly denied, and, as no conclusive rebuttal of such presumption of negligence was established by the defense, there was no support for the renewal of the motion at the close of the evidence. The case was one for the jury.

Error is also assigned upon exceptions to the admission of testimony. Stress is chiefly laid upon permission given to the plaintiffs to testify to certain ejaculatory words admitted in evidence by the trial judge as part of the *res gestæ*. Cooper testified as follows: "My horse put his foot on the north-bound track,—the easterly track. He stopped, came

to a standstill, and he shook and quivered, and then kicked, and I said to my man—(interrupted by objection, ruling, and exception.) I said: 'He has got a shock, Sam. Catch hold.' And he caught hold, and I found we had no control of the horse, as we pulled all we knew how." Bennett's narration was substantially the same, and both witnesses added their statements of what happened up to the time they were, respectively, thrown from the carriage. It is not disputed that words spoken while an affair is in progress are admissible in evidence in a narrative of the affair. The claim is that the affair in question had ended before the words were spoken; that it ended with the frightening of the horse, however caused. The contrary seems too plain to need argument. The management of the horse, the conduct of both men (one of them the servant of the other), were involved in the affair. Without proof of the call for help, how could the plaintiffs satisfactorily account for Bennett's seizing the reins? The ejaculation was part of what occurred, and explained what might otherwise have defeated a recovery by one or both plaintiffs. It did not prove that the horse had received a shock, but only that Cooper said so. As was said by Chancellor Zabriske in a case decided in this court where words spoken by a bystander in an affray were held admissible in evidence, "*The proof is only proof of the fact that the words were spoken, and not of the truth of anything as stated in them.*" *Castner v. Sliker*, 33 N. J. Law, 507. The testimony was properly admitted.

Cooper was also permitted to testify that he had seen a horse similarly affected by an electric shock received under like circumstances. Exception was sealed only upon the admission of a preliminary question, but I will assume that exception as intended to cover the testimony challenged in this court. I think that any experience of the witness before the emergency in which he was called to act was competent evidence in the cause to account for his exclamation and conduct in that emergency, and to relieve him from any imputation of contributory negligence. It is claimed that it is not clear from the testimony that the experience was previous to the affair in controversy. If there was ambiguity in that regard, the defendant should have removed it by cross-examination.

It was argued in this court that the admission of evidence of the witness' experience, and of his cry that the horse had received a shock, might have been considered by the jury as tending to prove the fact of such a shock; but a simple request for proper instructions to the jury would have afforded all needed protection to the defendant. Evidence legal for some purpose cannot be excluded because the jury may erroneously apply it otherwise. The court, on request, will always guard against such an error, or, if not, a party aggrieved may then take his ex-

ception. *Williams v. Sheppard*, 13 N. J. Law, 76, 78.

The only other complaint was of a question propounded to a veterinary surgeon touching the symptoms of the horse. It was contended in this court that the witness did not show expert knowledge, but there was no such objection at the trial. The objections there taken were that the question was leading, and called, not for facts, but for an opinion. Its lawful purpose was to call for an expert opinion based on observation. The competency of such an opinion cannot be gainsaid. The question was somewhat leading, but the discretion of the judge in admitting it cannot be reviewed on error. *Chambers v. Hunt*, 22 N. J. Law, 552. The judgments should be affirmed.

GARRISON, J., dissents in the Cooper Case.

602-1-141
ERWIN v. CITY OF JERSEY CITY.

(Court of Errors and Appeals of New Jersey.
July 1, 1897.)

OFFICER DE FACTO—CITIES—APPOINTMENTS—APPROVAL BY MAYOR—COMPENSATION.

1. When an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters upon such office, and performs its duties, his official acts will be valid with respect to the public and to third persons with whom he deals officially, and he will be an officer de facto, notwithstanding there was a want of power to appoint in the body or person who professed to do so.

2. Under the provisions of section 19 of "An act for the government of the cities of the state," approved April 6, 1889 (Laws 1889, p. 187), the approval of the mayor is not required to validate an appointment to office by a board.

3. One who becomes a public officer de facto, without dishonesty or fraud on his part, and who renders the services required of such public officer, may recover the compensation provided by law for such services during the period of their rendition.

(Syllabus by the Court.)

Error to supreme court.

Action by James S. Erwin against the city of Jersey City. Verdict for defendant, and plaintiff brings error. Reversed.

Charles L. Corbin, for plaintiff in error.
William D. Edwards, for defendant in error.

MAGIE, C. J. The record returned with this writ disclosed a judgment in favor of the city of Jersey City (which was the defendant below), and against Erwin (who was plaintiff below), upon the verdict of a jury. The bills of exception show that the verdict was directed by the trial judge. Erwin duly excepted to that direction, and has assigned error thereon. The issue in the cause had been previously tried by the same judge without a jury, and his finding was in Erwin's favor. A rule to show cause why that finding should not be set aside was allowed, and afterwards made absolute. The opinion of

the late chief justice (with whom Mr. Justice Garrison concurred), and the dissenting opinion of Mr. Justice Dixon, are reported in 35 Atl. 948. The cause again going down for trial, the issue was submitted to a jury, by consent of both parties, upon the same evidence which had been presented to the trial judge upon the former trial, and on which he had found in Erwin's favor. In conformity with the views expressed in the prevailing opinion of the supreme court, a verdict was directed in favor of the city. The pleadings disclose that Erwin's action was brought to recover the compensation attached to the office of corporation attorney of the city of Jersey City for the period of three months.

At the trial, Erwin claimed (1) that he had been duly appointed to that office, and (2) that, if not so appointed, he filled the office de facto, and duly performed its duties for the period for which he claimed compensation. The prevailing opinion of the supreme court indicated two grounds upon which it was concluded that the finding in Erwin's favor, upon the same evidence which is now before us, could not be supported. In the first place, it was determined that the evidence showed that Erwin had not become corporation attorney de jure, because, conceding that the board of finance of Jersey City had power to appoint that officer, one of the members of that board, who acted with it, and whose vote was necessary to make a valid appointment, was afterwards adjudged, upon quo warranto, to have been a usurper in office, and was ousted therefrom. It was determined that the principle applicable in such a case was that a de facto board could not create a de jure officer by appointment. In the second place, it was determined that Erwin, although admitted to have been corporation attorney de facto during the period in question, could not recover the compensation attached to the office, because there was during that period another corporation attorney de facto, and that, under such circumstances, neither de facto officer could maintain an action for such compensation. The situation of the case before us practically compels a review of the decision of the supreme court. Passing for the present the conclusion of that court first above indicated, I find myself unable to discover, after a careful examination of the evidence, anything to support the conclusion secondly above indicated. As before stated, the supreme court determined that Erwin had become corporation attorney de facto. In that conclusion I entirely concur. By the provisions of section 1 of "An act concerning the appointment of municipal officers and boards in cities," approved March 11, 1893 (Laws 1893, p. 224), it was enacted that the law officers of cities of the first class (of which Jersey City is one) should be appointed by the board having charge of financial affairs by a vote of not less than two-thirds of all the members. In Jersey City the board pointed out by these

provisions as intrusted with the appointing power of law officers was the board of finance, and that board, on December 27, 1893, while the act was still in force, appointed Erwin corporation attorney for the time limited by law.

It is, however, contended on the part of the city that Erwin not only did not acquire, by this appointment, a title to the office de jure, but none de facto. This contention is first put upon the ground that the act under which the board of finance made the appointment was not within the constitutional power of the legislature to enact. The successful maintenance of this proposition might affect Erwin's title as an officer de jure, but, in my judgment, would be without effect upon his position as an officer de facto: for, at the time the board of finance appointed him corporation attorney, the validity of the act of the legislature had never been judicially questioned. It conferred apparent authority to make such an appointment. It is admitted to be difficult, if not impossible, to express in a single formula what constitutes a public officer de facto. The masterly and exhaustive review of the adjudged cases on the subject made by Chief Justice Butler in his opinion in *State v. Carroll*, 38 Conn. 449, plainly discloses the difficulty of an exact definition, including all circumstances in which the law, because of public convenience and necessity, treats one as a public officer, although not such, and calls him an officer de facto. I deem it unnecessary to prolong this opinion by any account of my own consideration of the subject; for the circumstances of the case before us do not leave it upon any debatable ground. It plainly falls within at least one of the classes defined by Chief Justice Butler to which the doctrine derived from the cases he reviewed was deemed by him to be applicable. Other cases justifying the same conclusion may be found collected in 5 Am. & Eng. Enc. Law, p. 96. The definition may, I think, be thus stated: When an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters upon and performs the duties of such office, his acts will be held valid in respect to the public whom he represents, and to third persons with whom he deals officially, notwithstanding there was a want of power to appoint him in the person or body which professed to do so. Applying this definition to the facts before us, we find that Erwin unmistakably acquired the position of corporation attorney de facto; for the board of finance had apparent authority to appoint to that office, and exercised that authority, and Erwin accepted the appointment. It is beyond doubt that his acts on matters in which the corporation attorney could act would bind the city and parties dealing with the city.

It is, however, further contended that the appointment of Erwin by the board of finance gave him no apparent title to the office of corporation attorney, because, as is claimed, that action required the approval of the mayor of

Jersey City, which approval, it appears, was refused. This contention is put upon the provisions of section 19 of "An act for the government of cities of this state," approved April 6, 1889 (Laws 1889, p. 187). Although this act has been pronounced by this court to be a general law, it is called in the brief of counsel the "New Charter of Jersey City." Assuming, although there is no proof of it, that the act in question is in force in Jersey City, we will consider the contention thus made. By the provisions of the section above referred to, the mayor of the city is given authority to veto the "acts" of any board of the city, and it is required that copies of all resolutions and "other matters" shall be furnished to the mayor for consideration; and the board is empowered to pass any vetoed resolution or other matter over the mayor's objection by a two-thirds vote. It is insisted that a resolution appointing to office is subject to the mayor's veto. If a literal construction be given to the provisions of the section thus appealed to, it is obvious that the business of any municipal board will not only be hampered and delayed, but practically be rendered impossible to be performed. Resolutions to approve minutes, to lay on the table, to postpone, to adjourn, and numberless others, are resolutions expressing acts of such boards. If all such acts are to be presented to the mayor, and only be effective upon his approval or their passage over his veto, the business of the board could not be done. It is so insisted that the legislative intent was to produce such a result that a restricted construction of these provisions, consistent with their practical operation, should be adopted, if possible.

A question identical with that thus presented was considered by the supreme court in *Haight v. Love*, 39 N. J. Law, 14. By the provisions of a section of a former charter of Jersey City, the mayor was given power to veto the "action" of any municipal board, and all ordinances and resolutions were required to be sent to him for consideration. If any were vetoed, it was provided that the action resolved upon or ordained should be void, unless such board should sustain it by a two-thirds vote at its next meeting. The point presented in the case was whether the appointment by the board of finance of a city collector required to be presented to the mayor for his approval. The opinion of the court was delivered by Mr. Justice Dixon, who justly pointed out the impracticability of a literal construction of those provisions, and who concluded that the actions which the mayor might approve or veto must belong to the class of acts usually performed by such bodies by resolutions or ordinances, viz. acts of a legislative character. As appointments to office were not of that character, and were not usually made by resolution, but rather by ballot or viva voce, the legislation then under consideration was construed as inapplicable to acts of such boards, appointing to office, and it was held that such acts did not require the approval of the mayor. With the views expressed in that case I am in entire accord, and I think

them applicable to the statutory provisions now under consideration. The absurd result of a literal construction of those provisions tends to induce the belief that such construction was not within the legislative intent, and the fact that it is required that the mayor is to be informed of "resolutions and other matters" for consideration in respect to his approval or veto justifies the conclusion that the "acts" which are thus to be submitted to him for approval are only such as are usually performed by such bodies by resolutions or other similar evidences of action. "Other matters" is a phrase not very aptly chosen, but, in my judgment, it can only mean matters of a similar character to resolutions, of which I know none but ordinances. The result is that the power to appoint a corporation attorney, if only apparent, was conferred upon the board of finance, and their appointment did not require the mayor's approval.

While thus concurring in the view of the supreme court that Erwin became corporation attorney de facto, I am unable to agree with their conclusion that, during the period Erwin was such corporation attorney, there was another corporation attorney de facto. In my judgment, the evidence affords no ground for such conclusion. It appears by the uncontradicted evidence that Spencer Weart had been in the service of the city as corporation attorney. His term had expired in April, 1893, but, no successor having been appointed, he was holding over by virtue of his previous appointment. As has been stated, the board of finance appointed Erwin to that office on December 27, 1893. On December 29, 1893, Weart sent to Erwin a letter describing the legal business of the city in his hands, and inclosing papers relating to actions against the city then pending. It closed with the following words: "As far as I know, these are all the facts and papers which I can give relating to the office of corporation attorney of Jersey City which would be of assistance to a corporation attorney of said city." On December 30, 1893, Weart sent Erwin another letter, inclosing a summons relating to another pending action against the city. On the same day the city clerk sent Erwin four summonses in actions against the city, which he had received from Weart, whom he described as "formerly corporation attorney." From these acts it is obvious that Weart, if he had any claim to the office of corporation attorney de jure by reason of any defect in Erwin's title, abandoned to Erwin the position de facto. The evidence is clear that Erwin assumed the position, and performed its duties.

But it is argued that Weart afterwards became corporation attorney de facto, and such was the conclusion of the supreme court. This contention is put upon the following facts: On January 9, 1894, the mayor of the city notified Weart, by letter, that he had received a resolution of the board of finance purporting to appoint a corporation attorney, which he had not yet approved, and requesting Weart to con-

tinue to act as corporation attorney for a time. To this letter Weart replied by letter containing the following: "I do not want to take up the work of the office of corporation attorney, and, if I do so, it will be a secondary matter to my own matters, as I intend to command my own time, and give the first attention to my own affairs." From these acts it is obvious that the mayor, being of opinion that his approval was essential to Erwin's appointment, was desirous that Weart should continue to act as if Erwin's title had not been perfected. He made no pretense of any power to appoint Weart to that office. On the other hand, it is equally obvious that Weart did not recognize any claim to exercise the office as corporation attorney de jure. He had in fact laid down the work, and he justly characterizes his action when he discloses his reluctance to "take it up." Under these circumstances, he did not acquire the position of an officer de facto by doing some work for the city. He had no new appointment to the office, and his work, which consisted in the approval of a few contracts, must be considered as the work of a mere volunteer.

As the uncontradicted evidence established the fact that Erwin rendered services to the city as corporation attorney de facto for the period named in the declaration, and that no other person was acting in that office, it only remains to determine whether Erwin can recover from the city the compensation attached to the office for that period. The right of a de facto public officer who has accepted the position, and performed its duties, to the emoluments of the office, has been carefully considered in our courts, and conclusions have been reached which, although somewhat at variance with those of the courts of other states, I deem to be in the highest degree reasonable. In *Stuhr v. Curran*, 44 N. J. Law, 181, this court had the matter under consideration. That was an action by a de jure officer, who had, by quo warranto, ousted from his office an intruder, who had during his intrusion performed the official duties and received the salary attached to the office, to recover from the de facto officer the salary thus received. The prevailing opinion of Mr. Justice Van Syckel contains an accurate review of the cases on the subject, and convincingly shows that no authority precluded the adoption of rules respecting it, consonant with reason and public policy. It was declared that in this country public office was not property, and public officers had no proprietary interest in their offices; and it was deduced therefrom that the right to the emoluments of the office arose, not out of the title to the office, but out of the actual rendition of services for which such emoluments were designed to be compensatory. It was carefully pointed out that, upon grounds of public policy, a limitation to the doctrine stated must be applied, so that one who obtained office dishonestly and fraudulently could not demand the emoluments of the office. The result was that a majority of the court held

that the intruder into office, who had become such under a certificate of election regular on its face, and without fraud on his part, could retain the salary he had received while he performed the duties of the office, as against him who had, during the performance of such services, the de jure title to the office. The supreme court afterwards decided that one who had intruded into public office by force and fraud could not recover from the public the salary attached to the office, although he had performed the duties devolving upon the officer. *Meehan v. Board*, 46 N. J. Law, 276. This result I deem to be in entire accord with the doctrine of *Stuhr v. Curran*. That doctrine applied to the case before us requires us to hold that one who becomes a public officer de facto without dishonesty or fraud, and who has performed the duties of the office, may recover such compensation for those services as is fixed by law from the municipality which is by law to pay such compensation. In the case before us there is no pretense that Erwin dishonestly or fraudulently intruded into the office of corporation attorney. He took possession of the office when surrendered to him by the previous incumbent. He performed its duties. It follows that he is entitled to the compensation. For these reasons, the direction to the jury to find a verdict for the city was erroneous. This result renders it unnecessary to determine whether or not the appointment of Erwin by a board one of the members of which was only a member de facto, and afterwards adjudged to be a usurper, constituted Erwin corporation attorney de jure, and no opinion is intended to be expressed on that point. The judgment below must therefore be reversed.

YEARANCE v. POWELL.

(Court of Errors and Appeals of New Jersey.
June 28, 1897.)

WILLS—PROMISE BY LEGATEE—LIABILITY.

1. A father, in extremis, being about to execute a will making his three children his residuary devisees, stayed such execution in order to add a bequest to another person. One of the children, without the knowledge of the others, assured him that, if he should execute the will without change, his wish with regard to the intended bequest would be fulfilled. On this assurance he did so execute the document. *Hill*, that the share in the estate of the child giving the assurance must contribute a third only towards making good the intended bequest.

2. Quere: Can like contribution be compelled from the shares of the other children?
(Syllabus by the Court.)

Appeal from court of chancery; Reed, Vice Chancellor.

Bill by Anna Powell against Lillie E. Yearance and others. Decree for complainant against Mrs. Yearance alone, who appeals. Reversed and modified.

Howard W. Hayes, for appellant. Frederick W. Ward, for respondent.

COLLINS, J. In 1855 George D. Randell, of Newark, took into his family the respondent,

who was the motherless niece of his wife. She was then about 15 years of age. She had outside employment, and paid board at a low rate. About 1862 Mrs. Randell died, leaving two children,—Lillie E., aged 8 years, and Frederick L., aged 4 years. At Mr. Randell's request the respondent abandoned her employment, and took charge of the children. She received no stated wages, and paid no board. In 1867 she married, but remained in the household until the next year, when Mr. Randell married the second time. Her relations with the family continued close, and in times of sickness she was called in to assist. One child, Edith, was born of Mr. Randell's second marriage, in the year 1869. Even she seems accustomed to call the respondent "Aunt Anna," and, in the light of the relations of the parties, the occurrences at Mr. Randell's deathbed, hereafter to be stated, seem very natural. In March, 1889, Mr. Randell was stricken with a fatal illness, and essayed to make his will. He was then a widower, with the same three children. Lillie had been married. Her married name is Yearance. She is, and was then, childless. Frederick was married, and had, and still has, infant children. Edith was a girl of 20. She has married pending this litigation. Her married name is Hopping. A draft for a will had been prepared for Mr. Randell in the lifetime of his wife, but he had never executed it. He gave instructions to counsel to prepare a redraft, simply omitting the provisions in favor of his deceased wife, and to bring it to him at once for execution. Counsel presented such redraft at his bedside the same evening. By its terms, after giving the use of his residence to Lillie and Edith, at their option, the entire estate was, with the intervention of trustees, to go to the three children in equal parts. Lillie was to take an estate for life, with remainder to her issue, or, in default of issue, to Edith and to Frederick's children; Frederick was to take an estate for life, no provision being made for remainder; and Edith was to take an absolute estate on reaching the age of 24 years. Pending the preparation of the will, Mr. Randell determined to bestow something upon Mrs. Powell, and, when the draft was brought to him, he asked to have added a clause devising to her a house and lot on Brunswick street in the rear of his residence. He had already conveyed that property to Mrs. Yearance, and, on being reminded of that fact, which had escaped his enfeebled memory, he directed that the clause in Mrs. Powell's favor should take the form of a money bequest of \$4,500, fixed by him as the equivalent in value of the property. Counsel was about to redraw the will, but the attending physician expressed the opinion that there ought to be no delay. Mrs. Yearance was the only one of the testator's children present. She at once said "Papa, that will be all right; just as you wish." And Mr. Randell responded, "All right; if that is so, I will execute the will as

it is." And he did so execute it. He died in the afternoon of the next day. Mrs. Yearance has always been ready to carry out her father's wish, either by permitting \$4,500 to be paid to Mrs. Powell from the residuary personalty of his estate, or by conveying to her the Brunswick street property, on receiving \$1,500 from each of the shares thereof bequeathed to her brother and sister, respectively. The matter was held in abeyance until Edith should reach the age of 24 years. When that time arrived Edith made her consent to any settlement dependent on Frederick's concurrence, and he refused to have his share of the estate in any way diminished. In this posture of affairs Mrs. Powell filed her bill against the trustees of the will, the three children of the testator, and the children of Frederick L. Randell. The bill prays decree for the payment by the trustees of \$4,500 from the testator's residuary estate. The decree made charges the whole \$4,500 on Mrs. Yearance alone, giving her the option to convey the Brunswick street property instead of paying that sum. From this decree she has appealed, making the complainant the sole respondent.

The principle recognized by this court in *Williams v. Vreeland*, 32 N. J. Eq. 734, and the precedents therein approved, warrant a decree in Mrs. Powell's favor; but not the one made. It is not necessary to recite the testimony in the case. It is well summarized by the vice chancellor, and we differ in but one respect from his conclusion on the facts. We think that the testator could not have supposed that Mrs. Yearance meant to agree that his wishes should be fulfilled, even if it were necessary, to that end, that the whole of the bequest he contemplated should have to come from her share of his estate. He accepted her assurance as binding the three devisees and remainder-men, and not herself alone. The decree is wrong to the extent that it charges her with more than her share of the \$4,500. We have not considered the very interesting question of the right to compel payment of the residue of the intended bequest from the shares represented by Mrs. Hopping and Frederick L. Randell. The learned vice chancellor assumes that this is impossible, in the absence of promises by them, respectively. There are decisions holding otherwise in cases like the present. They proceed on the theory that one of several devisees of a class represents all, and that where a testator executes his will on the faith of a promise that some trust will be performed, made by one of the class in behalf of all, it is fraud for the others to claim the devise without sharing its burdens. We are precluded from examining and determining the question because the other devisees are not before this court on the appeal of Mrs. Yearance. Should the court of chancery adhere to the view of the vice chancellor, the question may be presented by Mrs. Powell by appeal. The present decree must be re-

versed, and a decree must be made in conformity with this opinion, so far as the respective rights of appellant and respondent are concerned.

NEW YORK & L. B. R. CO. et al. v. ATLANTIC HIGHLANDS, R. B. & L. B. ELECTRIC RY. CO. et al.

(Court of Errors and Appeals of New Jersey. June 28, 1897.)

GRADE CROSSINGS—DERAILING SWITCHES.

Under the act of March 22, 1895 (2 Gen. St. p. 2717), the chancellor cannot impose upon the company whose steam railroad is to be crossed at grade by an electric railroad the duty and responsibility of operating a derailing switch in the line of the electric railroad.

Depue, Lippincott, Ludlow, and Bogart, JJ., dissenting.

(Syllabus by the Court.)

Appeal from court of chancery.

Petition by the Atlantic Highlands, Red Bank & Long Branch Electric Railway Company against the New York & Long Branch Railroad Company and the Pennsylvania Railroad Company for directions as to crossings of the respective roads. From the decree the New York & Long Branch Railroad Company and the Pennsylvania Railroad Company appeal. Reversed.

On March 22, 1895, the following statute was enacted (chapter 241): "An act to regulate the crossing at points not within the limits of cities of this state, of steam railroads by steam, or electric railroads hereafter to be constructed. (1) Be it enacted by the senate and general assembly of the state of New Jersey: That whenever the route of any steam or electric railroad hereafter to be constructed shall cross at points outside of the limits of cities the line of any steam railroad in this state, such crossing shall be made in such a way as will inflict the least injury upon the rights of the company owning or operating the railroad to be crossed, and as will afford proper protection to the public; and no company shall hereafter construct any steam or electric railroad across the line of any steam railroad, except within the limits of a city, until it shall have first made application to the chancellor of this state to define the mode in which such crossing shall be made, and it shall thereupon be the duty of the chancellor, after causing reasonable notice of such application to be given to the municipal authorities, and also to the corporation owning or operating the railroad intended to be crossed, to define by his decree the mode in which such crossing shall be made; and if in his judgment it is reasonably practicable and public safety so requires to avoid a grade crossing, he may in his discretion by his decree define and regulate the mode and manner of such crossing, and thereupon such crossing shall be made in the mode defined by such decree, and in no other way." In July, 1896, the Atlantic Highlands, Red Bank & Long Branch Electric Railway Company, claiming that the route of its electric

railroad crossed the line of the steam railroad of the New York & Long Branch Railroad Company within the lines of Monmouth street in the town of Red Bank, presented to the chancellor a petition praying that, in accordance with the statute above recited, he would "define the mode in which such crossing should be made." On filing the petition notice was given to the appellants, and after the taking of testimony the chancellor decreed that a grade crossing must be made in the mode pointed out in the decree, and therein further ordered as follows: "Sixth. And for the better assurance of safety in the grade crossing aforesaid, the electric company shall, at its own expense, provide and completely erect at the crossing in question a tower suitable for the construction and operation of the system known as the 'Gibbs Signal System,' and equip such tower with the said Gibbs signal system, which system shall include the power cut-off and the derailing switch for the purpose of depriving the electric cars of motive power and bringing them to a standstill while cars are passing on or about to pass upon said steam railroad. The mechanism of such system shall be so arranged that, when the way for the electric car is open, danger signals at one thousand feet in each direction from said crossing shall be exhibited on said steam railroad, which signal shall be so maintained until the electric car shall have passed over such crossing, such system to be constructed according to the plans hereto annexed, and made a part hereof. After the construction and completion of said tower and signal system, and as a condition precedent to the right of said electric company to cross the tracks of said steam railroad, the electric company shall place said tower and signal system in the control of said steam railroad, and shall also, before it constructs such crossing, and annually thereafter, give bond to the said steam railroad, with sufficient surety or sureties, in the penal sum of five thousand dollars, conditioned to pay at stated periods the reasonable salaries of such competent men as the steam railroad may employ in the operation of said system, and such other expenses as shall be necessary to the efficient maintenance and management of the signals and cut-off hereinbefore mentioned, during the continuance of said crossing." The appellants insist, *inter alia*, that so much of the decree as places upon the steam railroad company the duty and consequent responsibility of operating the Gibbs signal system is beyond the authority conferred by this statute upon the chancellor.

Alan H. Strong, for appellants. J. E. Degnan and C. L. Corbin, for respondents.

DIXON, J. (after stating the facts). It is unnecessary now to consider whether the legislature, in the exercise of its police power, could impose upon the steam railroad company the duty of taking any precautions for the safety of the electric cars and their occupants while crossing the steam railroad within the limits

of the public highway, beyond such precautions as were required for the safety of travelers using the highway in customary modes, without making compensation to the steam railroad company for the additional expense. It is also unnecessary now to consider whether, if such compensation be constitutionally required, the electric railroad company possesses legislative authority to have its amount determined and paid, against the will of the steam railroad company. At present it is enough to say that we can discover in this statute, which, with regard to a grade crossing, empowers the chancellor only "to define the mode in which such crossing shall be made," no warrant for imposing upon the steam railroad company the duty of operating the electric railroad in any particular. If this decree should be enforced, the steam railroad company would become responsible to the electric railroad company, its employees and passengers, and to all other travelers, for injury happening to them through the negligence of the persons in charge of the derailing switch, for those persons are to be employees of the steam railroad company; and yet that switch is a part of the electric railroad, and not of the steam railroad. The right to impose such a responsibility upon the company whose railroad is to be crossed cannot fairly be brought within the terms or intentment of this statute. In this respect the decree is illegal, and, as the scheme devised by the chancellor is an entirety, the decree must be wholly reversed.

DEPUE, LIPPINCOTT, LUDLOW, and BOGART, JJ., dissent.

VREELAND et al. v. MAYOR, ETC., OF CITY OF BAYONNE.

(Court of Errors and Appeals of New Jersey. June 28, 1897.)

APPEAL—FINDINGS OF SUPREME COURT—CONCLUSIVENESS—MUNICIPAL IMPROVEMENTS—ASSESSMENT LIENS.

1. When a writ of error is prosecuted to reverse the judgment of the supreme court rendered upon proceedings in certiorari to review a municipal assessment for benefits, the finding of the supreme court upon questions of fact is a finality.

2. Under the act of 1887 (P. L. p. 231) and the act of 1895 (P. L. p. 95), when the benefit is prospective, and depends upon the construction of lateral and connecting sewers not yet built, the benefits derived from existing sewers are to be determined and assessed when the assessment is made upon property sewerred and benefited by such existing sewers, but such assessments become liens only after connecting sewers are built, and draw interest only from the date of the confirmation of the assessment for the connecting sewer.

(Syllabus by the Court.)

Error to supreme court.

Certiorari by Marie A. Vreeland and others against the mayor, etc., of the city of Bayonne to review municipal assessments. Judgment for defendant, and plaintiffs bring error. Reversed.

Samuel C. Mount, for plaintiffs in error. T. F. Noonan, Jr., and James Benny, for defendant in error.

VAN SYCKEL, J. The writ of error in this case is brought to reverse the judgment of the supreme court rendered upon proceedings in certiorari to review a municipal assessment for benefits. The finding of the supreme court upon questions of fact is a finality, and this court will not review it in that respect. *Moran v. Jersey City*, 58 N. J. Law, 653, 35 Atl. 950. The judgment of the supreme court is erroneous, and must be set aside in so far as it adjudges that assessments for future benefits are illegal, and must be vacated. In *Central New Jersey Land & Improvement Co. v. City of Bayonne*, 56 N. J. Law, 297, 28 Atl. 713, this court held that the act of 1887 (P. L. p. 231) is constitutional. The act of February 19, 1895 (P. L. p. 95), is to the same effect, and is a valid law. Under the provisions of these acts, "when the benefit is prospective, and depends upon the construction of lateral and connecting sewers not yet built," the benefits derived from existing sewers are to be determined, and the assessment made, when the assessments are made upon property sewered and benefited by existing sewers; but such assessments become liens only from the time connecting sewers are built, and draw interest only from the date of the confirmation of the assessment for the connecting sewer. It is simply an ascertainment of benefits. In the case last cited this was declared to be the proper interpretation of the act of 1887, and in that view it was pronounced to be constitutional. The property indicated on the map on "Street No. 2" was subject to assessment in accordance with the above-stated rule. The benefits accruing to lots on street No. 2 from the sewers already constructed are required to be assessed when the assessment is made upon lands fronting on such sewers. The benefits to flow from the construction of lateral or connecting sewers cannot be assessed until such lateral or connecting sewers are built. As to the latter benefits, the problem would be incapable of solution, because the cost of the work would not be known until it was done. The benefits flowing from the existing sewers can be ascertained as readily before the connecting sewers are completed as afterwards. Like assessments are frequently made on lands not fronting on the line of the improvement, as in the case of opening new streets. Lands not on the line of such new streets may be held to be in the area of assessable property, and benefits accruing to them included in the assessment. In this case there are cross writs of error. The landowners' writ submits for review the judgment below except as to the 20 per cent. reduction, and the prospective assessments on lands on street No. 2. The city of Bayonne also prosecuted a writ of error, and assigned as errors the 20 per cent. reduction and the ascertainment of prospective benefits on lands on street

No. 2. There is no error in the judgment below in respect to the errors assigned by the landowners who sued out the writ of certiorari; nor is there any error in respect to the 20 per cent. reduction ordered by the judgment of the supreme court. But the judgment of the supreme court is erroneous in so far as it directs that the assessment upon lands indicated in red on said street No. 2 shall be vacated and set aside. The judgment below must therefore be reversed, and modified in accordance with this opinion.

MANLEY et al. v. MICKLE.

(Court of Errors and Appeals of New Jersey.
July 1, 1897.)

EQUITY—CROSS BILLS—ANSWER—DISCOVERY.

1. Decree was sought to restrain a judgment creditor from executing his judgment on lands alleged to be held by the judgment debtor in trust for the complainants. The bill set up the acknowledgment of the trust by a deed given after the recovery of the judgment. *Held*, that a cross bill, seeking to have the trust deed declared void, might be maintained.

2. When there is submission to answer, there must be a full answer.

3. When a case is made for relief and discovery, discovery will be compelled, although answer without oath is prayed.

4. *Quere*: Is an order for a further answer appealable?

(Syllabus by the Court.)

Appeal from court of chancery; Pitney, Vice Chancellor.

Bill by Georgiana Manley and others against John J. Mickle. Cross-bill by defendant. From an order for further answer and discovery, complainants appeal. *Affirmed*.

On appeal from an order for further answer and discovery, advised by Vice Chancellor Pitney, who delivered the following opinion:

"The object of the bill is to establish a secret trust in real estate, and thereby to vest the lien of a judgment against the holder of the legal title. The trust is alleged to result from the investment of trust moneys in lands by a deed which, through mistake and oversight, did not declare the trust. The bill alleges the investment of the trust fund in the land, and that, after the recovery of the judgment, the mistake was attempted to be corrected by a conveyance in trust to one of the complainants which recited all the facts out of which the trust resulted. I think the bill is defective in not stating in detail the particulars of the sources of the trust moneys, and their amounts, and that, if defendant had seasonably moved the court for a more specific statement thereof, an order would have been made before answer compelling complainants, under rule 213, to make a more specific statement in this behalf. This, however, was not done. Defendant answered, denying that any of the trust moneys were used to purchase the lands in question, and denying the existence of any trust fund, and then, by a cross bill, called upon the complainants to specify the sources and

amounts of such trust moneys, if any. The cross bill also attacks the late remedial conveyance made by the judgment debtor, and prays that it may be set aside, so that a sale may be made under his judgment to advantage, and a clear title assured to the purchaser. The complainants answered the cross bill without demurrer or objection to any of its charges so far mentioned, except to that calling on them to specify the particular sources and amounts of trust moneys. To this they except by way of demurrer, and decline to answer, and the motion is to compel them to answer. The prayer of the cross bill is for answer without oath. Complainants resist the motion on the ground that defendant is not entitled to discovery in his cross bill, because it is not asked for under oath, and relies on *Johnson v. Buttler*, 31 N. J. Eq. 35. I think the cross bill is maintainable as a defense to the complainants' bill. It is necessary in order to have a complete adjudication of the rights of the parties, which, it seems to me, included, from defendant's standpoint, a decree declaring the trust deed void. At any rate, if the complainants desired to test this question, and take the ground they now take, they should have moved to strike out the cross bill. But, having answered, they must answer in full, unless their objection to the particular interrogatories is well taken. The position was taken that, under the case just cited from 31 N. J. Eq., a party is no longer entitled to discovery unless he asks it under oath. But this I cannot consent to. The well-settled practice is the other way. The decision in *Johnson v. Buttler* went on the ground that the cross bill was entirely unnecessary, unless for the purpose of discovery, and that it was not necessary for that purpose, because the defendant had the privilege of administering interrogatories to the complainant. Chancellor Runyon, who decided *Johnson v. Buttler*, subsequently, in *Iron Co. v. Beach*, 40 N. J. Eq. 63, held that the defendant in a cross bill there was entitled to have full answer to interrogatories, though not asked under oath. The defendant in his cross bill prays general discovery of other property of the judgment debtor. This he is not entitled to, and the especial objection to answering that part of the bill is well taken, and it should be stricken out. There will be no costs on this motion, because the defendant is in error in the matter last alluded to."

James H. Van Cleef, for appellants. Halsted H. Wainright, for respondent.

COLLINS, J. (after stating the facts). We agree with the vice chancellor that the cross bill is maintainable as a bill for relief. The judgment creditor was entitled to seek a decree declaring the trust deed void. The complainants might dismiss their bill, and the deed would stand of record a perpetual menace. The cross bill was in the nature of a bill quia rimet. Even if this were not so, nevertheless, the complainants, having submitted to answer

the cross bill, were bound to answer it fully. *Hogencamp v. Ackerman*, 10 N. J. Eq. 267; *Vreeland v. Stone Co.*, 25 N. J. Eq. 140.

But it is urged that discovery will not be compelled where answer without oath is prayed. Originally a complainant was required to pray for answer on oath, and was bound by the answer, if he could not overcome it by preponderant evidence. It was because a corporation could not make oath, and answered only under its common seal, that discovery by it had to be secured by the somewhat incongruous course of making its officers co-defendants. In special cases the chancellor would permit a complainant to waive answer on oath, but would not ordinarily compel affirmative discovery where the defendant could not have the attendant advantages. The subject came to be regulated in some jurisdictions by standing rule of court, and in others by statute. Most states now have such statutes, and decisions on the subject in those states can only be understood when the statutes are read with them. There must always be borne in mind, also, the difference, often lost sight of, between bills for discovery only and bills for relief with incidental discovery. I have found no decision questioning the right of a complainant to require discovery in answer to a bill of the class last named, although prayed without oath, except the case of *Congdon v. Aylsworth*, 16 R. I. 281, 18 Atl. 247. This case, inferentially, is to that effect. The Rhode Island statute is peculiar. It enacts that, whenever a complainant shall waive oath, the defendant's answer shall have the same effect as a plea to an action at law. Gen. Laws 1896, p. 826, § 19. A plea at law, of course, has no evidential force at all, even against the pleader. In Massachusetts the standing rule of court (now statute,—Laws 1883, c. 223, § 10) excepts from the right to call for answer, without oath, bills filed for discovery only, and therefore we are not surprised to find the supreme court of that state deciding that, because it prayed answer without oath, a bill ostensibly for relief as well as for discovery could not be upheld if no case for relief was presented. *Ward v. Peck*, 114 Mass. 121; *Badger v. McNamara*, 123 Mass. 117. The exception of the statute was not apparent from the report of this last decision, and the supreme court of Rhode Island seems to cite the case as a general precedent in *McCulla v. Beadleston*, 17 R. I. 20, 26, 20 Atl. 11. The Rhode Island statute really controlled, as appears from *Harrington v. Harrington*, 15 R. I. 341, 5 Atl. 502, and *Congdon v. Aylsworth*, supra. The supreme court of the United States, however, has held that, notwithstanding the broad general rule of court permitting waiver of oath to answer (Eq. Rule No. 41), a bill for discovery only cannot be maintained if it waive answer on oath. At least, that was Mr. Justice Miller's opinion in *Huntington v. Saunders*, 120 U. S. 78, 7 Sup. Ct. 356. The decision in that case can be upheld on other grounds. It sustained on appeal

a demurrer to a bill filed for relief and discovery where no case for relief was made, and it had already been held that such a bill cannot be maintained for discovery alone. *McClanahan v. Davis*, 8 How. 170. Such, also, is the rule in this state. *Metler's Adm'r v. Metler*, 18 N. J. Eq. 270, affirmed 19 N. J. Eq. 457. It is evident that Judge Miller's opinion has no bearing on the case of discovery prayed in connection with a proper case for relief. This is recognized in the federal courts, for in the later decision of *Uhlmann v. Brewing Co.*, 41 Fed. 369, in the Pennsylvania circuit, it was held that a defendant must answer the interrogatories of such a bill, although oath to the answer was waived. In Tennessee, where the act is general in terms, Chancellor Cooper said that to allow a demurrer to so much of a bill as seeks discovery would be to go in the teeth of the statute. *Payne v. Berry*, 3 Tenn. Ch. 154, 160.

Of course, discovery in an unsworn answer is not available, collaterally, but as an admission in a pleading it may be useful to a complainant in a pending cause, and there is no sound reason for denying the right to demand it. Indeed, every answer implies some sort of discovery, even if only by way of admission of the allegations of the bill, and the decisions of this state abundantly recognize its evidential force in favor of a complainant. *Hyer v. Little*, 20 N. J. Eq. 443; *Symmes v. Strong*, 28 N. J. Eq. 131; *Reed v. Insurance Co.*, 36 N. J. Eq. 393; *Walker v. Hill's Ex'rs*, 22 N. J. Eq. 513, 519,—a case decided by this court. The statute in this state is very broad. It enacts that "the complainant may in any bill in chancery pray that the defendant answer without oath, in which case the answer need not be sworn to, and the allegations and statements therein, whether responsive or not, shall not be evidence against the complainant except on a motion to grant or dissolve an injunction, on which motion the statement and denials in an answer duly sworn to shall have the same effect as heretofore." It is not necessary to decide what is the effect of this statute on a bill filed for discovery only, where answer is called for without oath. That question may be reserved until some one shall try the fruitless experiment of exhibiting such a bill. The practice with regard to bills for relief with incidental discovery has been long settled in chancery. It accords with the practice elsewhere in this country. We see no reason to disturb it, even if it be within our province to do so, which, also, is not necessary to decide. The order appealed from is affirmed.

SCULL et al. v. BRINTON.

(Court of Errors and Appeals of New Jersey.
July 1, 1897.)

REAL-ESTATE AGENTS—AUTHORITY TO BIND
PRINCIPAL.

1. Proof that an owner of lands employed agents to sell the lands as mere real-estate

brokers will not be sufficient to establish authority in such agents to bind their principal by a written contract of sale.

2. The doctrine announced in *Lindley v. Keim*, 54 N. J. Eq. 418, 30 Atl. 1063, reaffirmed. (Syllabus by the Court.)

Appeal from court of chancery; Grey, Vice Chancellor.

Bill by J. Percy Brinton against Enoch B. Scull and others. Decree for plaintiff, and defendants appeal. Reversed.

A. Stephany and C. L. Cole, for appellants.
Lindley M. Garrison, for respondent.

MAGIE, C. J. The decree appealed from required the specific performance of an agreement in writing for the sale of lands belonging at its date to Enoch B. Scull, one of the appellants, to J. Percy Brinton, the respondent, which agreement was signed, not by Scull, but by Porter & Crowley as agents for him. The decree further required E. Bartine Johnson, the other appellant, who had taken a conveyance of the lands from Scull, after notice of the Porter & Crowley agreement, to convey the same to Brinton. To justify such a decree, proof that Porter & Crowley had authority to bind Scull by such an agreement was essential. The case shows that they had no written authority from Scull. The contention was that such authority had been conferred by parol. This court has lately had under consideration contracts for the sale of lands executed by an agent whose sole authority to thus bind his principal, the owner, was claimed to have been conferred by parol. Mindful of the easy opportunity for evading the provisions of the statute of frauds in respect to contracts for the sale of lands afforded by the settled doctrine that an owner, who cannot make a valid contract for such sale except by writing, yet may confer authority by parol to make a contract in writing which will bind him, it was determined, without dissent, that proof of the conferring of such authority by parol must be clear and decisive; that the employment by an owner of a real-estate agent or broker to sell lands (i. e. to procure a purchaser for them) will not confer authority to bind the owner to sell by a contract in writing, and that proof of circumstances merely justifying the inference of employment as real-estate broker will not justify an inference of a grant of power to execute a written contract of sale. *Lindley v. Keim*, 54 N. J. Eq. 418, 30 Atl. 1063. We have no desire to reverse or modify in any respect the adjudication in *Lindley v. Keim*. An examination of the evidence in the case before us is convincing that, tested by the views then expressed, there is no sufficient proof that authority to bind Scull by the written contract in question had been conferred upon Porter & Crowley. They were evidently employed as mere real-estate brokers, and no greater authority is shown. For this reason the decree appealed from must be wholly reversed and set aside, with costs.

GARRISON v. TECHNIC ELECTRICAL WORKS et al.

(Court of Chancery of New Jersey. June 29, 1897.)

RESCISSIO OF CONTRACT—FRAUD.

A contract for the purchase of shares of the unissued capital stock of a corporation was obtained to be made with the company by the fraudulent statements of its president, secretary, and treasurer, in the conduct of the company's business. On this contract the company issued the stock and received the purchase money. On bill filed by the purchaser, against the officers and the company, to abrogate the contract because of the fraud, and for the restoration of the price paid, the company cannot retain the money paid, and defend by denying that it authorized or knew of the fraudulent statements. To do full equity, it must also return the money obtained by the fraud.

(Syllabus by the Court.)

Bill by Frank Lynwood Garrison against the Technic Electrical Works and others. Heard on demurrer. Overruled.

This bill is filed by Frank Lynwood Garrison, complainant, against George M. Sinclair, John J. Zimmele, and the Technic Electrical Works, defendants. The complainant states: That the Technic Electrical Works was duly incorporated under the laws of New Jersey on July 14, 1893. That the object of the incorporation was the manufacture and repair of electrical and other machinery. The company commenced business in the month of September, 1895. In February, 1896, the defendant Sinclair had been secretary and treasurer of the company for a month, and the defendant Zimmele was at the same time a stockholder and president and manager of the corporation. Sinclair requested the complainant to purchase of him 50 shares of the stock at \$40 per share, and 20 shares of the treasury stock of the corporation; and it was represented to the complainant by Sinclair and Zimmele, principally the former, that the company was in a solvent condition, but that its collectible assets were in excess of its liabilities, counting the capital stock issued as part of the liabilities. They exhibited to the complainant a balance sheet of the condition of the company, which they stated was true, and that the receipts from sales of its manufactured commodity were in excess of its expenditures; that it was then doing a profitable business, and, with a small additional capital, and attention such as the complainant could give, it would make money and become prosperous; and that, if the complainant would purchase the stock, he should be elected an officer of the company, and receive a salary of \$25 per week for his services as such officer. Relying on these statements, the complainant agreed to purchase 50 shares of the capital stock of the company belonging to Sinclair for \$2,000, and 20 shares of the treasury stock of the company for \$1,000, cash, to be at once paid to the treasurer of the company,—the \$2,000 to be paid to Sinclair to be one-half cash and one-half by duebill of the complainant. On March 2, 1896, Sinclair and Zimmele gave the complainant a memorandum of the agreement,

which, however, contained no mention of the office and salaries to be bestowed as above stated, and by the memorandum of agreement Sinclair and Zimmele pledged their word that their assets and liabilities of the corporation, as stated in trial balance sheet of February 1, 1896, submitted to the complainant at that time, and their statement as to the solvency, credit, and condition of the corporation, were true, as the memorandum, a copy of which is annexed to the bill, will show. On March 5, 1896, the complainant paid Sinclair, under the agreement, \$1,000 in cash, and gave him a duebill for \$1,000, and on the same day he paid into the treasury of the company \$1,000. The complainant received, by transfer from Sinclair, 50 shares of stock, and from the company 20 shares of stock, and from Zimmele 20 additional shares of stock, making in all 90 shares, and was thereupon elected president of the company in place of Zimmele, and placed in the management of its affairs and business, and given power to control the disbursements of the company by regulation that all the checks of the treasurer should be countersigned by the complainant as president. Zimmele was made secretary and treasurer of the corporation in the place and stead of Sinclair. There are 137 shares of the stock of the company held by other persons than the complainant, the principal part of which were held by Sinclair and Zimmele, although the complainant is the largest individual holder of the stock, and Sinclair is the next largest holder. The company does not own any real estate. Its manufactory and works are rented in the city of Philadelphia. The employment of Zimmele was to obtain orders for goods to be manufactured by the company. When the complainant took charge he found the plant of the company, including the orders on hand, engaged in the work of making up stock. The complainant cut off unnecessary expenses, and reduced the force of employes, so that there should be no more than sufficient to fill profitable orders, in which course Zimmele and Sinclair acquiesced. The complainant states that shortly after he took charge he ascertained that the balance sheet of February 1, 1896, was inaccurate in several particulars: Bills payable to the amount of over \$400 were admitted by Sinclair to have been omitted from that item on the balance sheet. The inventory of the plant and tools stated as assets had been made up over a year prior to that time, and no allowance had been made for depreciation. The item, accounts receivable, had been represented to the complainant to be collectible to the extent of two-thirds, but the complainant found that less than one-half was collectible. The balance sheet was in every respect incorrect and misleading. About the end of March the complainant was paid three weeks' salary at the rate of \$25 per week, and the complainant ascertained that, notwithstanding the additional capital which had come into the treasury, yet, by reason of Sinclair taking stock for a part of the account which he held against the company, the company was in financial diffi-

culties. The complainant then made a thorough examination of the financial condition of the company, and ascertained that its assets then were, and for over two years prior thereto had been, insufficient to pay its debts and continue its business; that its expenditures for the previous five months had been in excess of its receipts, without any corresponding increase in the assets; that its business for the previous five months had been unprofitable; that the company had been for over two months, and at the time of the statement made to the complainant was, insolvent, and unable to pay its liabilities without suspending its business. The complainant charges that the mistake in fact made by him in the condition of the company, which led him to invest his \$1,000 in the company, was entirely due to the misstatements, misrepresentations, and concealment of the condition of the company, made by Sinclair and Zimmele; that it arose from no want of care or omission of legal duty on the part of the complainant. The complainant refused to pay the due bill of \$1,000, which fell due on the 1st of April, 1896, and proposed to Zimmele that the company should go into liquidation, to which Zimmele at first acceded; and when the complainant made an application to the circuit court of the United States in the district of New Jersey for a decree of insolvency and the appointment of a receiver, the complainant having failed in the said application, abandoned his suit, and dismissed the bill. Sinclair brought suit against the complainant on the due bill for \$1,000 in the Philadelphia common pleas, to which suit the complainant filed an affidavit of defense and put in a counterclaim against Sinclair for the \$1,000 which he had already paid. Since the futile proceedings in insolvency, the control of the business has been interfered with, and the complainant ousted therefrom, and combination of the safe has been changed to prevent his access thereto, and by-laws adopted containing provisions for a vice president, and giving him power to countersign the treasurer's checks, which power theretofore was held exclusively by the president. Pending the application of insolvency in the United States court, the company's business was practically suspended, and not carried on in a way to be substantially effective, owing to the financial condition of the company. Since that time the business has been carried on by borrowing large sums of money, increasing its liabilities, without adding to its assets, and Zimmele and Sinclair are carrying on the business at a heavy loss, consuming the assets of the company, and in fraud of the complainant, making his stock daily less valuable. The complainant further charges that the company is doing business at a loss, consuming its assets and increasing its liabilities in the regular course of business, and that, if it did pay its liabilities, there would not be over \$1,000 of assets left to be divided among its stockholders, holding capital stock to the amount of \$11,350, less the stock held by complainant; and the complainant states, if the company is allowed

to proceed with its business, these remaining assets will be consumed, and nothing left for its stockholders. He further states that, since he knew of the insolvency of the company, he took measures to rescind his contract by which he paid \$1,000 into the treasury of the company, and is now ready to return to the treasurer of the company and to return to Zimmele the stock that he received from them when he paid \$1,000 to the company. The bill prays answer without oath, and that the defendant may be decreed to pay to the complainant the \$1,000 paid by the complainant to the company, with interest, upon the complainant delivering up to the company and to Zimmele the 40 shares of stock received by him from them, and that, on failure, a receiver may be appointed to take the assets of the company and sell or dispose of the same for so much as it may be necessary to pay the complainant his said sum of \$1,000 and interest, or, if it be more equitable, that the receiver may first pay all other debts of the company than the capital stock and the claim of the complainant, his said sum of \$1,000, with interest, provided they be sufficient, and, if they be insufficient therefor, that the balance of the \$1,000 be paid by Sinclair and Zimmele, or one of them, and that an injunction be issued to the company, and Sinclair and Zimmele restrained from further carrying on the business of the company, and disposing of or meddling with the same, etc.

To this bill the defendants, the Technic Electrical Works, Sinclair, and Zimmele, demur by joint and several demurrer. They state as the causes of their demurrer (1) that the bill does not contain any statement that the defendant the Technic Electrical Works has become insolvent, or suspended its business for want of funds to carry on the same, so as to entitle the complainant to a receiver and injunction as prayed for in the bill; (2) that the statement in the bill contained as to the alleged misrepresentations made by Sinclair and Zimmele as to the financial condition of the company and its prospects do not show a case to entitle the complainant to any discovery or relief; (3) that, even if the representations alleged to have been made were false and fraudulent, they were beyond the scope of the power of the defendants Sinclair and Zimmele as officers of the company, and cannot bind it; (4) that if the conduct of the business set out in the bill was the cause of loss, yet that such management and conduct was nothing more than a mistake in judgment on the part of the officers of the company, and does not show a case which entitled the complainant to relief; (5) that the complainant has not by his bill stated a case which entitled him to either discovery or relief.

E. R. Walker and G. D. W. Vroom, for demurrants. J. H. Carpenter and Herbert Armitage Drake, for complainant.

GREY, V. C. (after stating the facts). The first ground of demurrer is that the bill does

not contain any statement that the defendant corporation has become insolvent, or suspended business for want of funds, etc., so as to entitle the complainant to a receiver and injunction, etc. On the argument it was assumed that the bill as framed is a proceeding seeking to have the defendant company declared insolvent and this court to appoint a receiver to wind up its affairs. Bills for such a purpose must undoubtedly set out facts which indicate that the financial condition of the company is such that it is, because thereof, compelled to suspend its business. Stopping of its works is not necessarily a suspension "of its ordinary business for want of funds to carry on the same." There are many occasions when the stoppage of production is not only advisable, but necessary, and without insolvency. Nor does carrying on business at a loss, or borrowing money, necessarily indicate a condition of insolvency. That the company is able to do these things, and still proceed with its business, is rather an indication that its financial credit is good. The bill under consideration, while alleging the company to be insolvent, as a part of the complainant's case to show that its financial standing was misrepresented to him, and with some surplusage stating subsequent details of its business, does not attack the defendant company in order to declare its insolvency, appoint a receiver, and wind up its affairs. No decree that the company is insolvent is prayed for. What the complainant asks is a decree for the return of his money, and a receivership for the purpose of applying the assets of the company to the payment which he seeks,—not a preliminary decree of insolvency and a receivership for the purpose of administration, but a receivership as a final mode of relief to procure the payment of his own claim. The prayer for injunction to restrain the further conduct of the business of the company, contained in the bill, is evidently also sought as an ultimate remedy in aid of any decree the complainant may obtain for the payment of his claim. Inasmuch as the bill is not one for the administration of the defendant company's assets because of its insolvency, I think the first ground of demurrer, which criticizes it for the lack of the fullness of statement required in such a bill, cannot be sustained.

The second ground of demurrer is that the misrepresentation, etc., charged in the bill as to the financial condition of the company and its prospects, do not show a case to entitle the complainant to discovery or relief. In examining this objection, misrepresentations, so far as they relate to matters of opinion and judgment as to the happening of future events,—as that the company, "with a small addition of capital, and attention such as the complainant could give, would make money and become prosperous,"—cannot be regarded, as it is well settled that such statements, even if false, do not constitute a fraud, if

there be no relation of trust or confidence between the parties. *Wise v. Fuller*, 29 N. J. Eq. 257; *Conlan v. Roemer*, 52 N. J. Law, 53, 18 Atl. 858. Allegations of such statements afford no ground for relief, and are not to be regarded as well pleaded, nor can they be taken as admitted to be true by the demurrer. But representations made by an owner or his agent to an intending purchaser, at the time of the bargain, descriptive of the existing condition of the subject-matter of the proposed sale, as to its kind, quality, or quantity, stand on a different basis, and, if falsely made, to mislead the buyer, they may be the basis for a recovery. A statement that income from a property is greater than it is, is a fraud, for which an action will be supported. *Wise v. Fuller*, supra; *Crosland v. Hall*, 33 N. J. Eq. 111. So, also, a statement that a property rented for more than in fact it did rent for was held to avoid a contract of sale. *Dimmock v. Hallett*, 2 Ch. App. 28. The allegations of this character, which the defendants admit by their demurrer, are that Sinclair requested the complainant to purchase shares of stock from him individually, and also from the company defendant; that Sinclair and Zimmele, during the negotiations for the sale of this stock, exhibited to him a balance sheet, which they said was true, and stated that the collective assets were in excess of the company's liabilities, taking capital stock to be a liability; that the receipts from sales of its products were in excess of its expenditures; that it was then doing a profitable business. They gave to the complainant a written memorandum, pledging their word that the assets and liabilities of the corporation stated in the trial balance sheet of February 1, 1896, submitted to the complainant, and all their verbal statements as to the solvency, credit, and condition of the corporation, were correct and true. Sinclair was at this time the secretary and treasurer of the company, and Zimmele was its president. They were, therefore, so related to the company that they knew its financial condition. Relying on the truth of these statements, made by these men whom he knew to be officers of the company, the complainant agreed to purchase 50 shares from Sinclair and 20 from the company, and paid \$1,000 in cash to Sinclair, and gave his note for the balance, on which Sinclair transferred to him the 50 shares; and the complainant also paid \$1,000 to the company for its 20 shares, and accepted the issue of them from the treasury of the company. It is these 20 shares, received directly from the company, which the complainant now offers to return, and the payment for which he seeks to have refunded to him. Upon the sale of the stock to the complainant being concluded, he was elected president of the company, and then discovered that the balance sheet was not true; that \$400 of bills payable had been omitted; that the inventory of plant and tools was made more than a

year before, and that no allowance had been made for depreciation; that the item, bills collectible, represented to be collectible to amount of two-thirds value, was in fact less than one-half of it collectible; that for over two years prior thereto the assets of the company had been insufficient to pay its debts and continue its business; that its expenditures for the previous five months had been in excess of its receipts, and its business for the same time had been unprofitable; and that the company had been insolvent for over two months, and unable to pay its liabilities without suspending its business. These allegations show that the actual condition of the company varies, in substantial particulars, and in matters of existing fact then within the knowledge of the defendants, from the representations alleged to have been made by them which induced the complainant to make the purchase of the company's stock. If true,—and on this issue they must be taken to be true,—they show that Sinclair and Zimmele, the executive officers of the defendant company, and its largest stockholders, being interested to have additional capital put into the company, and knowing its true financial condition, while they were conducting the company's business in obtaining purchasers of its stock, made false statements indicating a much more favorable financial situation of the company to be the fact than then actually existed, for the purpose of inducing, and thereby actually induced, the complainant to purchase the 20 shares of the treasury stock. In such cases courts of equity afford relief by cancelling the contract, and thus relieving the party injured from its obligation if it be executory, or compelling a restoration of the property obtained by fraud if it be executed. 2 Pom. Eq. Jur. 372 et seq. I think the second ground of demurrer cannot be sustained.

The third ground of demurrer is that the misrepresentations of Sinclair and Zimmele were beyond the scope of their power as officers of the company, and cannot bind it. The complainant's allegations in this respect charge that Sinclair, who was the secretary and treasurer, and Zimmele, who was the president, of the defendant company, by false and fraudulent representations induced him to purchase from the company 20 shares of its stock; that the company issued this stock to him, and received his money, under this contract, into which he was thus induced to enter; that he now finds the statements made to him to have been false, and the value of the stock by reason thereof to have been worthless, or nearly so, and he therefore tenders a return of the stock, and asks a decree that the company refund the money. He does not seek to make the company respond in damages for the unauthorized false statements of its affairs, but only to restore the money which the company has received by fraud. The insistence of the demurrants amounts to this: That the company may recognize and ratify the acts of

its officers whereby it obtained the complainant's money, but that it has no responsibility for the fraudulent misrepresentations which they made to secure it, because it did not expressly authorize the false statements to be made. This contention has had support in England in a number of cases arising on subscriptions to stock, and in *Ayre's Case*, 25 Beav. 513, it was declared that misrepresentations by the manager and secretary of a company, by which subscriptions to its stock were obtained, were not chargeable against the company, to relieve from the subscription because not authorized by the company,—the master of the rolls holding that "any false statement made by an agent of a company, not sanctioned by the company, would not bind it." The necessary effect of such a declaration is that a corporation may retain the beneficial results of a fraud perpetrated by its officers in the conduct of its business, unless the fraudulent acts are expressly authorized. In the house of lords, however, the responsibility of a corporation for the fraudulent contrivance of its agents was put upon broader ground. Lord Cranworth declared that the objects of a corporation can only be accomplished through the agency of individuals, and that there could be no doubt that if the agents employed act fraudulently, so that, if they had been acting for private employers, the person for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation. *Ranger v. Railroad Co.*, 5 H. L. Cas. 85. As to the validity of contracts of subscription for stock of a corporation obtained by misrepresentations made by its officers, though there has been considerable conflict in the English cases, the true doctrine on this point is declared to be that, where the person who has been deceived institutes a suit to rescind the contract to purchase shares, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract. *Bank v. Addie*, L. R. 1 H. L. Sc. 145; *Oakes v. Turquand*, L. R. 2 H. L. 825. It is unquestioned law that a corporation must respond for the acts of its agents in the conduct of its business which are injurious to others, though they may be wholly unauthorized by the corporation,—indeed, forbidden by it,—as in the cases of railroad train operatives, who, while driving trains, injure passengers or travelers of highways, in breach of the company's rules, and the many negligence cases which arise in the conduct of the business of railway, steamboat, ferry, and other corporations. These acts are done, perhaps, by day laborers, and are not beneficial to the company, nor in any way ratified or approved by it. The company answers for these wrongdoings, because it has put the wrongdoers in its place to do its business, and it must respond for the wrong so done to other persons in the course of its

business. I can see no reason why the corporation should not respond, at least to the extent of restoration, in cases where the officers and agents of the company perpetrate a fraud in the conduct of its business, and thereby induce the making of a contract which the company accepts and executes, and of which it retains the benefit. The American cases on the liability of corporations for the frauds of their agents committed while in the conduct of their business assert a jurisdiction quite as extensive for the correction of such wrongs. If the corporation has clothed the agent with the power to act in its behalf, and receives and accepts the benefits resulting from his agency, then the parties injured by the fraud may resort for redress to the principal. But it is no answer to say the corporations could not authorize an agent to perpetrate a fraud, because, if this were so, no corporation could be held liable for any acts of its authorized agents, however great the injury to others. *Fogg v. Griffin*, 2 Allen, 6. This liability of the company is stated to attach, not on the ground of express authority given by the corporation to its agent to make the statement, but because the corporation cannot act save through its agents, and as to the particular matter the agent stands in the place of the principal, and whatever he does or says about that matter is the act or saying of the principal. *Sharp v. Mayor, etc.*, 40 Barb. 256. The execution by the corporation of the resulting contract, and the retention of its benefits after knowledge of the fraud, are not only a ratification of the contract itself, but also an adoption of the statements of the company's agents whereby the contract was obtained. It is unconscionable that the corporation principal should be permitted to keep the results of a fraud by merely denying the authority of its agents to perpetrate it. 1 Story, Eq. Jur. § 193a. In the case in hand, whatever may have been the lack of authority of the president, secretary, and treasurer of the defendant company to make the misrepresentations which led to the sale, or even to bargain for or issue its stocks, the fact is admitted that the company, on the bargain made by these officers (who probably comprise all the executive officers), accepted the payment and issued the stock. The company thereby ratified their action and conduct. When the company took the benefits of the fraud, it took with those benefits the responsibility for the fraud which procured them, at least to the extent of an obligation of restoration to the party defrauded. It is no answer to say it did not know of nor authorize the fraudulent statements. It knows them now, and, by retaining the money with knowledge, it ratifies their acts, and the statements by which the money was obtained. If it disavows the fraud, it has not done full equity until it restores to the injured party the benefits which it received by reason of the fraud. It can-

net, in a court of equity, in a case where the superior rights of the creditors of the company do not intervene, retain the profit resulting from a fraud done in its behalf, and refuse restoration, upon an allegation of its ignorance of the fraudulent acts or the lack of authority of its officers who acted for it in the conduct of its business in perpetrating the fraud. In this state, in just such a case, the rule is stated in the broadest terms. If such contracts are induced by fraud, they create no obligation, and the injured party has a right to have them abrogated. *Vreeland v. Stone Co.*, 29 N. J. Eq. 189. In the latter case, the fraud by which the subscription was obtained consisted of a false representation made by a single director, in the presence of other directors, at a directors' meeting, but upon which no corporate action whatever was taken. The complainant was held to be entitled to have his contract of subscription abrogated, and a decree for the return of his money, not only against the company, but also against all the directors who were present; and the court of errors (20 N. J. Eq. 651) unanimously approved the decree. The third ground of demurrer cannot be sustained.

The fourth ground of demurrer is that, even if the conduct of the business set out in the bill was the cause of loss and financial embarrassment to the company, yet that such conduct was only a mistake in judgment on the part of the defendants as officers of the company, and is no ground for the relief prayed for. This ground of demurrer seems to be based upon the supposition that the complainant seeks to charge the defendants because they mismanaged the company's affairs, and thereby caused him a loss. I have already shown that the bill, though not free from surplusage, sufficiently indicates that the ground of complaint is that the defendants, by false statements, made to him, to the effect that the company's financial condition was of a certain favorable character, in details named, induced the complainant to take the company's stock, and he now asks that this contract be abrogated, and that the definite sum of money he paid for the stock be restored to him. The complainant does not ask any remedy against the defendants *Sinclair* and *Zimmele* because of their mismanagement of the general business of the company, though the bill does set out some acts of the defendants which were alleged to have been to the disadvantage of the company. These allegations are surplusage, and do not affect the substantial relief sought by the bill. As no relief is sought because of this conduct, it is of no significance whether it arose from mistakes in judgment or gross negligence or willful fraud. The defendants have all demurred generally to the whole bill. The demurrer must be effective as against the bill in all its parts, or it must be overruled. The bill, taking its well-pleaded allegations to be

true, exhibits a case where the complainant was induced by false representations to purchase shares of stock, which he tenders himself to be ready to return, and prays that the defendants who made the false representations, or received and accepted the benefit of them, may be decreed to refund the money. That the complainant also asks relief by specific methods not applicable in the same suit for the enforcement of such decrees will not deprive him of his rightful remedy. There is in the bill an exhibition of a right to equitable relief, and a prayer for a decree accordingly, and a general demurrer will not be sustained because relief may not be given in one or more special modes which are suggested in the prayer of the bill. In such cases a general demurrer is too broad, and must be overruled. *Banta v. Moore*, 15 N. J. Eq. 97; *Durling v. Hammar*, 20 N. J. Eq. 228. I will advise that the demurrer be overruled, with costs.

ATKINS' ESTATE v. ATKINS' ESTATE.
(Supreme Court of Vermont. Washington.
Oct., 1896.)

**EXECUTORS AND ADMINISTRATORS — CLAIM BY
WIFE'S ESTATE AGAINST HUSBAND'S—WIT-
NESSES—COMPETENCY.**

1. The amount a husband was to pay his wife for property conveyed to him by her procurement is recoverable in proceedings by her estate against his after the death of both.

2. In proceedings by a wife's estate against her husband's estate to recover the amount he was to pay her for her property conveyed to him by her father's administrator by her direction, such administrator was a competent witness in support of the claim.

3. The administrator of the wife's estate was also a competent witness.

Exceptions from Washington county court; Ross, Chief Judge.

Claim by Julia Atkins' estate against Hiram Atkins' estate. There was a judgment for plaintiff, and defendant excepts. Affirmed.

The plaintiff estate was represented by Henry M. Kimball, administrator, and the defendant estate by George Atkins, executor. Said Kimball, as administrator upon the estate of Julia Atkins' father, had, during her life, by her direction, conveyed to Hiram Atkins her share in that estate, the price of which property was here sought to be recovered.

L. M. Read and Geo. W. Wing, for plaintiff.
Dillingham, Huse & Howland, for defendant.

MUNSON, J. This is an appeal from the decision of the commissioners on the estate of Hiram Atkins, disallowing a claim presented by the estate of Julia Atkins. The decedents were husband and wife. The claim is for the amount the husband was to pay the wife for certain property conveyed him by her procurement. Such a claim is recoverable in this proceeding. *Spaulding v. Warner's Estate*, 52 Vt. 29; *Purdy v. Purdy's Estate*, 67 Vt. 50, 30 Atl. 695.

Henry M. Kimball was a competent witness in support of the claim. He was not within the provision which excludes the testimony of the survivor of contracting parties. He was in no sense a party to the contract in issue and on trial. His only part in the transaction from which the claim arose was to convey the property as directed. Nor was he within the purpose and meaning of the provision which excludes the opposite party from testifying against an administrator. There was no inequality between the parties contesting this suit. Both the original parties to the contract were dead, and both were represented by administrators. See V. S. §§ 1237, 1238.

The court below has found that the expressed purpose of Mrs. Atkins to give the property to her husband was not carried out, and that she died leaving it as her own in his hands. There was evidence tending to support this finding, and it is conclusive. Judgment affirmed.

RUSSELL v. DAVIS et al.
(Supreme Court of Vermont. Rutland. Oct.,
1896.)

**APPEAL AND ERROR—DECISION ON COMMISSIONER'S
REPORT—TRUSTEE PROCESS.**

1. A judgment of the county court on a commissioner's report will not be disturbed if it can be fairly sustained by any inference of fact deducible from the report.

2. On trustee process the commissioner reported that defendant and his mother sold land jointly owned by them, the mother's share of the price being \$300; that that sum was afterwards paid by the purchaser, and used in buying, in the name of defendant's wife, a mortgage given by the trustee; that the balance of the price was used by defendant; and that the mother thereafter assigned to defendant's wife her interest in the land sold. *Held*, that the report would support an inference that the \$300 first paid was set apart as the mother's share, and that the mortgage was purchased therewith for her benefit, and hence a decision discharging the trustee should be sustained.

Exceptions from Rutland county court.

Action by James Russell against Henry S. Davis, wherein trustee process issued against J. J. Norton, trustee (Clara M. Davis, claimant). There was judgment for the claimant, and discharging the trustee, on commissioner's report, and plaintiff excepted. Affirmed.

The report disclosed the following facts: August 14, 1894, the defendant, in common with his mother, Elizabeth Davis, owned real estate, which on that date they conveyed for the price of \$1,000, in which price the mother's share was \$300. About September 27, 1894, the defendant received, as part payment from the purchaser, \$300, which he used on that day in purchasing and taking to his wife, Clara M. Davis, an assignment of a real-estate mortgage against the trustee. Two or three months later, Elizabeth Davis and Clara M. Davis made an oral agreement that the former's interest in the real estate so conveyed by the defendant and herself should thereafter belong to Clara M. Davis, in consideration of

their mutual expectation that the mother would live more or less in the son's family. The rest of the \$1,000 was used by the defendant. The trustee was not notified of the assignment, nor was it ever recorded.

Horace W. Love and A. G. Coolidge, for plaintiff. Butler & Moloney, for claimant.

THOMPSON, J. If the judgment of the county court can fairly be sustained by any inference of fact it might have drawn from the commissioner's report, it is to be presumed in this court that the county court based its judgment on such inference. *Emery v. Tichout*, 13 Vt. 15; *Stone v. Foster*, 16 Vt. 546; *Birchard v. Palmer*, 18 Vt. 203; *Wills v. Judd*, 26 Vt. 617; *Pratt v. Page*, 32 Vt. 13. From the facts reported, the county court might well draw the inference that the \$300 invested in the John J. Norton mortgage was set apart by the defendant and his mother, Elizabeth Davis, as her share of the money received for their house in Granville, N. Y.; that the assignment of the mortgage and debt thereby secured was made to the claimant for the benefit of Elizabeth; and that subsequently the latter sold her interest therein to the claimant; and that all this occurred prior to the service of the trustee process. On these facts, the claimant was clearly entitled to this fund. The plaintiff does not now claim to hold the amount of the \$100 note secured by chattel mortgage. Judgment affirmed, with costs to the claimant.

In re KELSO'S ESTATE et al.

(Supreme Court of Vermont. Bennington. Oct., 1896.)

WILLS—CONSTRUCTION—NATURE OF ESTATE.

Testator gave his wife the use of his real estate during her life, and devised one-half of any remainder to his daughter, to be held by her in her own right, and the heirs of her body forever. Held that, on the death of the wife, the daughter took an estate for life only, and the remainder passed in fee to the heirs of her body, under V. S. § 2201, providing that where, by the common law, a person might become seised in fee tail of lands by virtue of a devise, etc., such person, instead of being seised thereof in fee tail, shall be seised thereof for his natural life only, and the remainder shall pass in fee simple to the person to whom the estate tail would, on the death of the first grantee, devisee, or donee in tail, first pass, according to the course of the common law, by virtue of such devise, etc.

Appeal from Bennington county court; Ross, Chief Judge.

Distribution of the estate of John Kelso, deceased. From a judgment affirming pro forma the decree of the probate court, Mariette Packard and Fred B. Packard appeal. Reversed in part and affirmed in part.

Barber & Darling, for appellants. Batchelder & Bates, for appellee.

START, J. John Kelso, by his last will, gave his wife, Susan E. Kelso, the use of his real estate during her natural life, and devis-

ed one-half of what should remain of his real estate at the decease of his wife to his daughter Mariette Packard, to be held by her in her own right, and the heirs of her body forever. After the decease of Mrs. Kelso, the probate court, and the county court on appeal, decreed distribution of the estate of John Kelso under his will, and thereby decreed to Mariette Packard the use of one-half of the real estate during her natural life, and the remainder to Fred Packard, Carrie Packard, and Lizzie Packard, and their respective heirs and assigns forever. Mariette Packard insists that on the decease of her mother, Mrs. Kelso, one-half of the real estate passed to her in fee simple, under V. S. § 2201, and that the same should have been so decreed to her. This statute provides that where by the common law a person might become seised in fee tail of lands by virtue of a devise, gift, grant, or other conveyance, or by other means, such person, instead of being seised thereof in fee tail, shall be seised thereof for his natural life only, and the remainder shall pass in fee simple absolute to the person to whom the estate tail would, on the death of the first grantee, devisee, or donee in tail, first pass, according to the course of the common law, by virtue of such devise, gift, grant, or conveyance. Under this statute, Mariette Packard took by the will of her father an estate for her life, and by virtue of the devise the remainder passed in fee simple to the heirs of her body. Mrs. Kelso was not seised of the estate in fee tail. By the express terms of the will, she took only the use of the estate during her natural life. This created a life estate only, and not an estate in fee tail. *Blake v. Stone*, 27 Vt. 475; *Ford v. Flint*, 40 Vt. 382. The first estate devised in fee tail was to Mariette Packard, and by force of the statute she became seised of the estate for life only, and the remainder passed in fee simple absolute to the heirs of her body forever. *Giddings v. Smith*, 15 Vt. 344; *Thompson v. Carl*, 51 Vt. 408. The remainder of the one-half of the real estate decreed to Mrs. Packard during her life should have been decreed to the heirs of her body, instead of the children named in the decree. In other respects the decree is correct. The pro forma decree of the court below is reversed, and the remainder of the one-half of the real estate decreed to Mariette Packard during her life is decreed to the heirs of Mariette Packard's body, and their heirs and assigns forever. In other respects the decree is affirmed, without costs.

CAMP v. WARD et al.

(Supreme Court of Vermont. Washington. Jan., 1897.)

JUDGMENTS—EQUITABLE RELIEF—PLEADING—DISCOVERY.

1. A bill seeking to set aside a judgment, and charging that defendants "knew, or ought to have known," that certain testimony on which

the judgment was based was false, was insufficient on demurrer to charge either subornation of perjury or knowledge of the falsity.

2. A bill in equity will not lie to set aside a judgment obtained by perjured testimony respecting a material issue which surprised orator, where defendants were not guilty of subornation of perjury, and had no knowledge that the testimony was false.

3. A plaintiff is not entitled to discovery concerning a supposed chattel mortgage on property against one who has recovered a judgment against him for false warranty of title to such property, since the judgment establishes that plaintiff has no interest in the property.

Appeal from Washington county court; Ross, Chief Judge.

Bill by H. O. Camp against J. H. Ward and others. From a decree sustaining a demurrer, the orator appeals. Affirmed.

John W. Gordon and R. A. Hoar, for orator. J. P. Lamson and E. W. Bisbee, for defendants.

ROWELL, J. The question arises on demurrer to a bill for relief from a judgment rendered on a verdict obtained by perjury in a suit in favor of the defendants against the orator for false warranty of the title of a horse that he sold to them at sheriff's sale on an execution against McKane. The main issue tried in that case was, as alleged in the bill, whether McKane's wife bought and owned the horse, and whether Mann Bros. acquired a legal title thereto by purchase from her. She testified that she bought the horse with money that she inherited from her father's estate, and sold it to Mann Bros. This testimony both surprised and defeated the orator, and when it was too late to petition at law for a new trial he discovered, and can prove, that it was wholly and purposely false. But the bill does not implicate the defendants in the fraud otherwise than by alleging that the orator is informed and believes that Mann Bros. were in collusion and fraudulent combination and conspiracy with McKane and his wife and the defendants to defraud and defeat him in that suit, and that Mann Bros. and the defendants knew, or ought to have known, that Mrs. McKane's testimony was knowingly and purposely false. But the allegation on information and belief is obviously not sufficient to implicate the defendants; and the allegation that they knew, or ought to have known, charges neither with certainty, and, if the demurrer is taken as admitting the averment, it can at most be said that they ought to have known, but did not, for, as here is an equipoise, no intendments on demurrer are to be made in favor of the pleader's case that do not naturally result from the allegation. Story, Eq. Pl. (Redf. Ed.) *452a; Simpson v. Fogo, 6 Jur. (N. S.) 949. There was, then, no subornation of perjury by the defendants, nor even knowledge on their part that the testimony was false, and it was relevant to the main issue tried, which was decided against the orator, who had his

day in court. It is said in *Burton v. Wiley*, 26 Vt. 480, that the early English cases, and some of the American cases, go upon the ground that a bill will be entertained for a new trial in an action determined at law upon much the same grounds that new trials are granted at law, when the courts of law have no means of granting such trials, either for want of authority or from lapse of time; but that in this state the rule has been established on a much narrower basis, and that the party must have failed of obtaining redress in the suit at law by the fraud of the other party, or by inevitable accident or mistake without fault on his part or that of his attorney. This is said to be the doctrine of the best-considered and more recent cases. It is not enough to show that injustice has been done. It must appear that it was done in circumstances that authorize a court of equity to interpose; that afford ground of equity jurisdiction. *Bateman v. Willoe*, 1 Schoales & L. 201. But surprise is not such a ground, unless accompanied with fraud and circumvention (*McDaniels v. Bank of Rutland*, 29 Vt. 230); nor is the lapse of the statutory period for petitioning at law for a new trial (*Burton v. Wiley*, above cited). The maxim that fraud vitiates every proceeding must be taken to apply to cases in which proof of fraud is admissible. But when the same matter has been actually tried, or was so in issue that it might have been tried, it is not again admissible, for the party is estopped to set up such fraud, as the judgment is the highest evidence, and cannot be contradicted. *Shaw, C. J.*, in *Greene v. Greene*, 2 Gray, 361, 366. The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or a decree between the same parties, rendered by a court of competent jurisdiction, have relation to fraud extrinsic or collateral to the matter tried by the first court, and not to fraud in the matter on which the judgment or the decree was rendered. This is the precise point ruled in *U. S. v. Throckmorton*, 98 U. S. 61. This rule is based upon the maxims that it is for the public good that there be an end of litigation, and that a man shall not be twice vexed for one and the same cause. The court there says that when, by reason of something done by the successful party to the suit, there was in fact no adversary trial, nor decision of the issue in the case, equity will grant relief; but that it is well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument or perjured testimony, nor for any matter that was actually presented and considered in the judgment assailed. This has long been the settled doctrine in this state. Thus, in *Emerson v. Udall*, 18 Vt. 477, 483, it was said that, notwithstanding some early cases to the contrary, it was then well settled that a court of equity will not examine into the foundation of a judgment of a court of law upon any ground that either was or might

have been tried in such court, but that equity will sometimes grant relief when a party, by accident or mistake, without his own fault, or by the fraud of the other party, has failed of an opportunity to present his case, and also when his defense is purely of an equitable character, and therefore could not avail at law. Beyond this, the court said, it was not aware of any good ground on which equity could enjoin a judgment of law, although cases were to be found, but not of very high authority, that have gone somewhat further. So in *Fletcher v. Warren*, 18 Vt. 45, it is said that the fact that a judgment at law has worked injustice between the parties is not, of itself, enough to authorize a court of equity to grant relief, for suggestions of injustice can always be made, and, if it was competent for equity to interpose on such grounds alone, no determination at law would ever be final; that it would, moreover, be a manifest repugnancy in any system of jurisprudence that the decisions of one ultimate and final jurisdiction should be subject to the revision and correction of another; that, therefore, it is only on collateral grounds, not passed upon by the court of law, that a court of equity can proceed in such cases, and then it acts upon the conscience of the party in fault, and not upon the court of law; and hence that it is usual to allege and show that the party seeking relief has a just defense, of which, through the fraud or wrongful act of the other party, he was unable to avail himself at the trial. *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, and 25 Am. St. Rep. 159, is a very strong case to the same effect. It decides that neither a judgment nor a decree will be set aside in equity on account of any fraud that is not extrinsic or collateral to the question examined and determined in the original action, and that a fraud is not extrinsic or collateral, within the meaning of the rule, unless it prevents the party from having a trial. There the successful party bribed a witness to swear falsely, and it was claimed that the bribery was the fraud, and as it was not, and could not have been, the subject of investigation at the trial, it was extrinsic and collateral, and brought the case within the rule. But the court held that the production of the perjured testimony was the fraud, and that the means by which the witness was induced to swear falsely was but an incident. In a note to that case Mr. Freeman says that there is little or no doubt of the truth of the proposition there stated, but he thinks that subornation of perjury is an extrinsic or collateral fraud within the meaning of the rule, and ought to be held such; but he does not intimate that the credibility of testimony relevant to the issue tried is extrinsic or collateral, as it clearly is not. 1 Herm. Estop. § 394. See monograph note to *Oliver v. Pray*, 19 Am. Dec. 603, on the power of a court of equity to relieve from judgment at law. If the bill can be treated

as a bill of discovery concerning the supposed chattel mortgage of the horse from McKane to Mann Bros., it cannot be sustained as such, for the orator has no title nor interest in the matter respecting which discovery is sought, as the judgment at law finally and conclusively settles that matter against him. Although the demurrer is only to the amendment of the bill, it was treated in argument as being to the whole bill, and hence we have so treated it. Decree affirmed, and cause remanded.

FAIR HAVEN MARBLE & MARBLEIZED SLATE CO. et al. v. OWENS et al.

(Supreme Court of Vermont. Rutland. Jan., 1897.)

FRAUDULENT CONVEYANCES — CONSIDERATION — SERVICES OF FAMILY — DEEDS — DELIVERY.

1. In determining the indebtedness of a grantor at the time of conveyances alleged to have left him without means to pay his existing debts, his indebtedness for advances made to him by the other party to a contract, to enable him to perform the same, dates from the time the advances were made, not from the date of the contract; such advances not being provided for by the contract.

2. The moral obligation to pay for services rendered to a debtor without a contract for compensation by the members of his family is not, as against creditors, a sufficient consideration for a transfer of property to them without retaining enough to pay his then existing debts.

3. The recording of a deed is only prima facie evidence of delivery.

4. In the absence of actual fraud, a conveyance without consideration is invalid only as to creditors whose then existing claims it left the grantor without means to pay.

Appeal from Rutland county court.

Bill by the Fairhaven Marble & Marbleized Slate Company and others against Sarah D. Owens and others to set aside certain conveyances by Owen Owens to defendants. On a hearing on the report of a master the conveyances mentioned in the decree at the end of the opinion were adjudged fraudulent, and defendants ordered to reconvey to the executors of Owen Owens for the benefit of his creditors, and the parties appeal. Reversed.

Owen Owens was a partner in the firm of Owen Owens & Co., the other members of which were of no financial responsibility. February 16, 1882, the firm made a contract with the orator, the slate company, under which the firm was to quarry and deliver to the slate company stone at a stipulated price. The slate company was not bound to pay for the stone until it had been measured, but for the purpose of enabling the firm to carry on its part of the contract adopted the practice of making advancements of money, which formed a balance against the firm, increasing from year to year. If these advancements were treated as constituting a debt, under the contract, as of the date of the contract, then certain of the conveyances were found to leave the grantor, Owen Owens, without adequate

property to pay his debts; whereas, if the advancements were treated as debts accruing as they were made, said conveyances left the grantor with sufficient assets.

W. H. Preston, H. A. Harman, and F. S. Platt, for orators. Joel C. Baker, for defendants.

THOMPSON, J. It is contended that the final balance found due to the orator, the Fair Haven Marble & Marbleized Slate Company, must be considered as having existed since February 16, 1892, the date of its contract with Owen Owens, deceased, for the purpose of determining the validity of his conveyances and assignments of his property to the defendants, who are his daughters. By the stipulation filed as supplementary to the master's report, it is conceded that no part of that final balance is for damages accruing from a breach of the contract by Owen Owens, but the balance is for money advanced to him from time to time to enable him to carry on the contract. The contract did not provide for such advances, and they cannot be considered as a part of the performance of it. Hence, it is not necessary to decide whether an indebtedness resulting from the performance of a contract according to its terms relates back to the date when such contract became operative, so far as the right of such debtor to dispose of his property to the detriment of the creditor is concerned. In this case, the indebtedness only dates from the time when the advancements were made.

As against the creditors, the moral obligation arising from the services performed by the daughters of Owen Owens while members of his family, without contract or agreement that they should be paid therefor, is not a sufficient consideration for a transfer of a part of his property to them, without retaining sufficient property to pay his debts then owing. *Udike v. Titus*, 13 N. J. Eq. 151. The law implies no promise to pay for services rendered by members of a family to each other, whether by children, parents, grandparents, brothers, stepchildren, or other relations. In the absence of a contract or agreement to pay for them, no action can be maintained for such services. *Udike v. Titus*, supra; *Fitch v. Peckham*, 16 Vt. 150; *Cobb v. Bishop*, 27 Vt. 624; *Davis v. Goodenow*, Id. 715; *Putnam v. Town*, 34 Vt. 429; *Sprague v. Waldo*, 38 Vt. 139; *Ashley v. Hendee*, 56 Vt. 209; *Sawyer v. Hebard's Estate*, 53 Vt. 375, 3 Atl. 529, and cases there cited; *Ormsby v. Rhoades*, 59 Vt. 505, 10 Atl. 722; *Hatch v. Hatch's Estate*, 60 Vt. 160, 13 Atl. 791.

The deed of the dwelling house and lot, and of the brick block, executed May 25, 1885, although recorded by the grantor, was never delivered by him to the grantees, nor to any person for them, but was found among his papers after his death. The fact that a deed is on record is only prima facie evidence of a delivery, which may be rebutted, and which,

in the case at bar, is explicitly negated by the facts found. A deed does not take effect until delivered. So long as the grantor retains the control of the deed, he retains the title. *Elmore v. Marks*, 39 Vt. 538; *Walsh's Adm'x v. Insurance Co.*, 54 Vt. 351; *Dwinell v. Bliss*, 58 Vt. 353, 5 Atl. 317. Hence, the grantees took nothing by virtue of the deed executed May 25, 1885.

The conveyance by a debtor of his attachable property, without consideration, and without making adequate provisions for the payment of his debts, is fraudulent and void as to his creditors. Such fraud on the part of the debtor may be an actual fraudulent purpose to cheat and defraud his creditors, or it may be constructive fraud, which is fraud that the law imputes to him from the condition of his estate and the necessary consequence of his act in respect to his creditors. The effect of both these kinds of fraud, in respect to creditors, in the case of a voluntary conveyance by the debtor without consideration, was so fully discussed in the recent case of *Wilson v. Spear*, 68 Vt. 145, 34 Atl. 429, that it does not require further discussion here. In the case at bar the master fails to find an actual fraudulent purpose on the part of Owen Owens to defraud his creditors by making the respective conveyances and transfers of his property to his daughters. No actual fraud being found, such conveyances will be sustained as were made at a time when he retained sufficient property to pay the debts which he then owed. *Brackett v. Waite*, 4 Vt. 389; *Dewey v. Long*, 25 Vt. 564; *Church v. Chapin*, 35 Vt. 223; *Wilbur v. Nichols*, 61 Vt. 432, 18 Atl. 154; *Wilson v. Spear*, 68 Vt. 145, 34 Atl. 429. At the time of the conveyance of July 9, 1883, of the house and lot to the defendant Kate L. Humphrey, and of the execution and delivery of the mortgage of May 25, 1885, to the defendant Sarah A. Owens, Owen Owens retained ample property to pay all his then existing debts, and these conveyances are, therefore, valid as against his creditors. In respect to the other conveyance and assignments of property by Owens to the defendants, or either of them, it must be held that they are invalid as to his creditors to the extent of their then existing debts, as he did not at the time of making them retain sufficient property to pay such debts. Except in this respect, such conveyance and assignments are valid, and they must be set aside only to the extent of satisfying the debts specified.

The decree is reversed, and cause remanded to the court of chancery, to the end that a decree may be made as follows: (1) That the deed mentioned in the special master's report in this cause, made by Owen Owens, deceased, May 25, 1885, to the defendants Ellen E. Thomas, Jane E. Jones, Kate L. Humphrey, and Sarah A. Owens was and is inoperative and void by reason of the nondelivery thereof by the grantor to the grantees therein named, and that said defendants and their husbands,

defendants, execute and deliver to the defendants Sarah A. Owens and Jane E. Jones, as executrices of the will of said Owen Owens, deceased, or to their successors in said trust, such conveyance, in trust for said estate, as may be necessary to remove the cloud from the title to the real estate described in said deed; (2) that the conveyance of October 22, 1885, and the assignments of mortgages made June 2, 1885, to the respective defendants, as stated in said master's report, are void as to the creditors of said Owen Owens, deceased, to the extent of the deficiency of the assets of his estate to pay the debts against his estate owing at the time said conveyance and assignments, respectively, were made; (3) that said executrices, or their said successors, have the power of sale and the right to convey so much of said real estate conveyed October 22, 1885, to the same effect as if said conveyance had not been made, as shall be necessary to make up such deficiency of assets, and that all necessary and proper orders may be made and proceedings had for carrying into effect such decree by such sale, unless the defendant Jane E. Jones shall make up such deficiency by paying to said executrices, or their successors in said trust, the amount of such deficiency, and that when such sale shall have been made by said executrices, or their said successors, the defendants Jane E. Jones and her husband, Hugh T. Jones, be decreed to make proper and effectual conveyance of the portion so bargained and sold; (4) that the defendants to whom said mortgages were assigned June 2, 1885, respectively account for and pay over to said executrices, or their said successors, all money which they collected thereon, to the extent of the deficiency of the assets of the estate of said Owen Owens to pay the debts against it owing at the date of the assignment of such mortgages; (5) that each and every one of said defendants account for and pay over to said executrices, or their said successors, all and singular the rents, income, profits, and interest received by any of said defendants, respectively, derived from the assignment of said mortgages and said real estate, adjudged to have been assigned and conveyed in fraud of the rights of creditors, after deducting all taxes paid by the defendants, or either of them, on said property, personal and real, to the extent of the deficiency of assets of the estate of said Owen Owens, as hereinbefore stated; (6) that the orators recover costs of suit, and have execution therefor; (7) that all causes be retained in the court of chancery, for effectuating all matters embraced in the premises.

SOWLES v. BAILEY, Judge.

(Supreme Court of Vermont. Franklin. Jan., 1897.)

CERTIORARI—WHEN LIES—OTHER REMEDIES—DISCRETION OF COURT—REVIEW.

1. Certiorari will not lie where there was a remedy by appeal, of which petitioner failed to avail himself.

2. Certiorari is allowed only in the discretion of the court, and it will not be granted where its effect would be to blot out the record of an entire insolvency proceeding, covering a period of 12 years, by means of which rights of property have been compromised, and title to property transferred, and interests of third persons become fixed and incapable of restoration to their former condition, especially where petitioner has been active in and consented to nearly all that has been done therein.

3. Under 2 St. § 1640, providing that "a writ of error or petition for certiorari shall be commenced and served on the adverse party within one year after the rendition of the judgment to reverse, which such writ or petition is commenced," certiorari lies only for the reversal of final judgments and decrees.

Petition by Albert Sowles for a writ of certiorari against Myron W. Bailey, judge. Dismissed.

E. A. Sowles, for petitioner. H. A. Burt, Wilson & Hall, and Farrington & Post, for petitionee.

ROSS, C. J. This is a petition, dated October 14, 1896, for a writ of certiorari, preferred to this court at its October general term, 1896, against Myron W. Bailey, as judge of the court of insolvency within and for the district of Franklin. The petitioner avers that proceedings in insolvency were commenced against him before the petitionee, as such judge, in 1885, and that the petitionee, as such judge, had made various decrees and orders against the petitioner down to the time of filing this petition; that the petitionee, as such judge, had no jurisdiction in the premises; and that the files and records therein of the court of insolvency are erroneous and illegal for the causes recited in and annexed to the petition. For causes of error, the petitioner avers that before and at the time of the adjudication, and ever since, the petitionee was the owner and possessor of a certain claim, debt, or account against the petitioner, which in 1889, in his own behalf,—he then being an attorney at law,—the petitionee proved, allowed, and adjudicated in the court of insolvency, whereby the petitionee was and is interested, as a creditor or otherwise, in the questions and proceedings decided and to be decided in and by the court of insolvency, and was and is interested in the event of the cause, either by his interest in the claim, or by reason of having acted as an attorney in the proof thereof, and so became disqualified from acting in a judicial capacity, either as trier or otherwise, in the matter of the insolvency proceedings; that the petitioner on October 1 and 7, 1896, filed in the court of insolvency motions and objections to the jurisdiction of the petitionee as judge of the court of insolvency in the matters and proceedings therein against the petitioner. For these errors he prays that the writ may issue, and, on the record being certified to the court, that all judgments, orders, and decrees in the insolvency proceedings in the court of insolvency may be set aside and declared

void. Upon presentation of the petition, the court issued an order to the petitioner to answer the petition, and made orders in regard to taking testimony. The answer was duly filed, and the testimony taken and filed. The testimony is voluminous. About many things the parties and witnesses agree. In regard to others they disagree. These facts, in substance, appear: The petitioner has been judge of probate for the district of Franklin for a good many years, and ex officio judge of the court of insolvency. In 1877 and 1878 the petitioner was administrator on the estate of C. S. Hogle, then being administered in the probate district, before the petitioner. During the years of 1877, 1878, and 1882, fees accrued in the settlement of that estate against the petitioner to the amount of \$39. By the statute it was the duty of the petitioner to pay these fees to the petitioner, as judge of probate, for the benefit of the state. There are fees payable not for the benefit of the state, but it is not shown that any such are in this bill. It was the duty of the petitioner, as such judge, to account for them in his settlements with the auditor of accounts semiannually. It does not appear whether he did or did not so account for them. During all the time covered by the proceedings in insolvency the petitioner knew that these fees were due from him, as such administrator, to the petitioner, as such judge of probate, and knew that the petitioner made proof of them against his estate in insolvency at the time they were proved, in 1880, or soon thereafter, and made no objection thereto. On the testimony of the petitioner, the petitioner expressly assented to their allowance against his estate. In March, 1884, George W. Foster, claiming to be a creditor of the petitioner, filed in the court of insolvency a petition to have the petitioner adjudged an insolvent. No action was taken on this petition until May, when the National Bank of Middlebury intervened as a petitioning creditor. The two petitions were heard together by the petitioner, acting as judge of the court of insolvency, in July, 1884. He ordered the petitions dismissed. From this order the National Bank of Middlebury appealed to the county court. In the latter court such proceedings were had that at its April term, 1886, the petitioner was adjudged to be insolvent, and the cause was remanded to the court of insolvency to be proceeded with. Thereupon, in compliance with the order of the court held by the petitioner, the petitioner filed a schedule of his debts and of his assets. These showed that the petitioner was deeply insolvent. The first meeting of the creditors was called and holden. The petitioner assented to the debts then proved against his estate, and agreed, with those voting, upon the assignees chosen. One was his brother-in-law, and president of the National Union Bank of Swanton. The other had given certain notes for the petitioner's accommodation to the

First National Bank of St. Albans, of which the petitioner had been cashier. The petitioner also had large interests in the National Union Bank of Swanton. His brother, Merritt Sowles, was president of the First National Bank of Plattsburg, in which the petitioner had an open, unsettled account. His estate was involved with the affairs of these three banks. The first two were insolvent, and then, or soon after, placed in the hands of receivers. Complications and suits arose between his estate and these banks which delayed the settlement of his estate. The assignees also brought a suit against the Burlington Savings Bank to have a mortgage annulled which the petitioner had given to the savings bank to secure a debt due it shortly before the Foster petition was filed. These suits, except that last named, were finally compromised, with the consent of the petitioner and approval of the petitioner, acting as judge of the court of insolvency. Every debt, or nearly every debt, proved against his estate, was originally proved with the petitioner's consent and approval. Since then he and his brother Merritt have moved to have the allowance of some of the debts vacated, or some portions of them, on the claim that the consent was given in ignorance of certain facts touching their validity against his estate. These claims were made after the petitioner and his brother Merritt became interested, by having purchased quite an amount of the claims proved. The petitioner was in full accord with, and consented to, all the actions of the assignees and of the court, to January, 1891. The suits and the relation of his estate to the affairs of the First National Bank of St. Albans and of the National Union Bank of Swanton were adjusted in 1889. Soon thereafter the petitioner, mostly through his brother Merritt and the First National Bank of Plattsburg, began to purchase claims proved against his estate, and schemes for a settlement of his estate by way of compromise have been on foot ever since. None of them ripened into an adjustment. The parties do not agree in regard to whose fault defeated their accomplishment. At times the petitioner and his brother Merritt did not agree. The assignees were interested in some of the allowed claims which the petitioner and Merritt desired to have disallowed, and disagreement arose in regard to this. One of these claims was in favor of the First National Bank of Plattsburg. Early in 1896 Merritt Sowles, the First National Bank of Plattsburg, and the assignees owned nearly all, if not all, the claims proved against the petitioner's estate in insolvency. The petitioner claims to be interested in those standing in the name of his brother Merritt. The petitioner and Merritt did not agree in regard to the proposed compromise. Hence, with the petitioner's approval and consent, and under an order of the court, after a good deal of negotiation, the assignees effected a

settlement of all the claims owned by Merritt Sowles and by the First National Bank of Plattsburg August 8, 1896. By this settlement all such claims were canceled, and a certain mortgage which the bank held was transferred to the assignees. During these years, settlements had been made with other claimants, with the consent and approval of the petitioner and of the court; also, property belonging to his estate had been sold and conveyed. Some of it had been conveyed to a trustee, and some to the petitioner, with a view of carrying into effect some of the proposed compromises. The assignees found that the petitioner had conveyed some real estate, which they claimed to be a part of his estate, to his daughter. They also claim that he had property in his hands which belonged to his estate. He made a claim for services rendered for the assignees in the settlement of his estate. Early in 1896 the assignees petitioned the court of insolvency to have the petitioner called before the court and examined in regard to his property which they claimed he had not turned over to them, and in regard to his conveyance of some of it to his daughter. There were two petitions brought for this purpose. The hearing of them had been continued from time to time, but at length were brought on October 1, 1896. The petitioner refused to answer when put under oath for the purpose of being examined, and objected that the petitionee was without jurisdiction in the matter, because of the proof of the claim for probate fees made in 1889. The petitions were then discontinued, and the petitionee filed a release, under seal, of the claim for probate fees proved. The assignees then renewed their petitions, and called the petitioner and his daughter before the petitionee, as judge of the court of insolvency, for examination. On being sworn, both declined to answer, and this petition was brought to have the writ of certiorari issue to bring up and quash the entire record in the insolvency proceedings against the petitioner. This is an outline of the main features and facts of the case. It is to be observed that the only order or decree of the court of insolvency shown to be made in the insolvency proceedings against the petitioner within the year next before this petition was brought is that approving the purchase and cancellation of the debts proved against his estate, from Merritt Sowles and the First National Bank of Plattsburg, of which the petitioner at the time approved, and of which he does not especially complain either in his petition or in his testimony. Edward A. Sowles, the brother and attorney, in his brief of facts makes many and grievous charges against the assignees and against the petitionee in his action as judge of the court of insolvency; but he does not say that the purchase and cancellation of the claims proved against the estate, held by Merritt Sowles and by the First National Bank of Plattsburg, were improvi-

dent, nor does he ask especially to have the decree of approval of the purchase and cancellation vacated and set aside. He contends vigorously that the debt proved in favor of the First National Bank of Plattsburg was unjustly proved, and ought to be expunged from the list of debts proved. He admits that the petitioner consented to most of the orders and decrees of the petitionee, acting as judge, now complained of, and of most of the acts of the assignees, but contends that he was induced to take this course in the vain endeavor to get his estate settled.

The question is whether, on this outline, it is the duty of this court to issue the writ of certiorari. It is an extraordinary remedy, not applicable to courts whose proceedings are according to the course of the common law. Errors in those courts are rectified by appeal, exceptions, and writs of error. It is quite generally held that this writ will not be allowed where the errors of an inferior court, whose proceedings are not according to the course of the common law, can be corrected by appeal to a higher court. *Logue v. Clark*, 62 N. H. 184. In the insolvency proceedings the petitioner could have appealed from an adjudication of insolvency to the county court. V. S. § 2156. Appeals are also allowed to creditors and assignees in regard to allowance or disallowance of claims to an amount exceeding \$20. Id. §§ 2058-2090. They are allowed to the debtor, creditor, or assignee, to the court of chancery, from the decision of the judge upon the question of granting the certificate of discharge. Id. § 2136. If, as now contended, the fact that the petitionee was connected with the probate fees, as heretofore stated, disqualified him from acting as judge of insolvency in the matter of the petitioner, the latter could have availed himself of that fact both when the petitions of Foster and the National Bank of Middlebury were before the petitionee for hearing, and on the appeal in the county court. The attorney for the petitioner concedes that the granting of this writ rests in the sound legal discretion of this court. It cannot properly be contended that sound legal discretion requires the granting the writ to the extent of blotting out the record of the whole insolvency proceedings, covering a period of 12 years, in and by means of which rights to property have been compromised and settled, the title to property transferred, and the interests of third parties become fixed and cannot be restored to their former condition, especially when the petitioner, if not a party, has been active in, and consented to, nearly all that has been done therein. A party, as shown by all the authorities, may estop himself from the right to invoke the aid of this summary remedy by laches, or failure to invoke it until the rights of third parties have intervened and become fixed so that they cannot be restored to their former condition. It is

to take, in a measure, the place of a writ of error, when that writ is not available. It is a common-law writ, and available to a party only under the circumstances provided by statute. By statute it is coupled with a writ of error. V. S. § 1640, reads, "A writ of error or petition for certiorari shall be commenced and served on the adverse party within one year after the rendition of the judgment to reverse which such writ or petition is commenced." From the language of this section, its use is evidently confined to the reversal of final judgments or decrees. This clearly requires this court to deny the writ under the circumstances of this case. At most, it could only reach and vacate the decree of approval of the purchase and cancellation of the claims proved against his estate owned by Merritt Sowles and the First National Bank of Plattsburg, which is an interlocutory order. Besides, what is shown in regard to his approval and helping on that purchase forbids this court from granting it. We thus dispose of this application without considering many of the questions discussed before us. In this disposal the court is not to be understood as approving of the course of the petitioner in endeavoring to manage and control the settlement of his estate by compromise, so as to save a good share of it to himself; nor of the appointment or acceptance by assignees of the settlement of an estate in which they are largely interested, and in which conflicting interests may arise; nor of a judge in taking jurisdiction of the settlement of an insolvent estate in which he may be directly or indirectly interested, or in taking steps, with consent of the adversary party or otherwise, which may apparently give him pecuniary interest, however small, in its settlement. The petition is dismissed, with costs.

POMEROY et al. v. POMEROY et al.

(Court of Errors and Appeals of New Jersey.
July 5, 1897.)

PARTITION—LIEN ON SHARE OF CO-OWNER.

Partition of land will not be delayed until the establishment, on an accounting in a pending suit in equity, of the amount of a possible lien in favor of one of the co-owners upon the shares of the others. Such lien will attach to the divided shares, and rights acquired pendente lite will be subject thereto.

Depue, Dixon, Gummere, Van Syckel, Hendrickson, and Nixon, JJ., dissenting.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill by Josephine Pomeroy and others against Eugene C. Pomeroy and others. Decree for complainant, and defendants appeal. Affirmed.

The late Vice Chancellor Green delivered the following opinion:

"This bill is filed to partition the real estate of which George Pomeroy died seised. Mr. Pomeroy died in the year 1880, owning very

large tracts of land in Morris, Union, and Hudson counties, including a homestead at Madison, inclosed by a park with a stone wall around it, called the 'Homestead' lot or tract. His family and heirs at law consisted of his wife and his four children, George P., Edward, Julia, and Josephine. His will was duly probated in Morris county, and letters testamentary issued to Edward Pomeroy and Alfred Mills, who were appointed in the will as his executors. The provisions of the will were, substantially: (a) The executors were authorized to deliver to the New York Life Insurance and Trust Company securities to the amount of \$50,000, to be held in trust for the benefit of his wife during her life, and upon her death to divide the securities and proceeds equally among his children Edward, Julia, and Josephine. (His widow died February, 1883.) (b) Securities to the amount of \$30,000 were directed to be deposited with the same company, to be held in trust for the benefit of his son George P. during his life, and at his death such securities and the proceeds thereof were also to be divided among the said children Edward, Julia, and Josephine. (c) The testator directed that no partition or sale of his real estate should be made until his executors should have sold real estate to the amount of at least \$100,000, and directed the proceeds of the first of such sales to be deposited with the same company until the amounts should reach that sum, which was to be held and invested for the benefit of his daughters, Julia and Josephine, with instructions to collect and pay to each of them the interest on \$50,000, with certain directions in the case of the death of either of them. (d) The residue of the estate, aside from some immaterial legacies, was devised to his three younger children, Edward, Julia, and Josephine, in equal parts. It was provided that the homestead at Madison, New Jersey, should be kept up by the three younger children as long as they and the widow could live harmoniously, etc. The son George P. Pomeroy was living in Europe. Edward Pomeroy took upon himself the main management of the estate and the sale of the real estate to procure the trust funds of \$100,000 for the daughters, and of \$30,000 for George P. Pomeroy. Disputes arose between Edward Pomeroy and his sisters some time about 1884, the sisters claiming that he had not paid over to them their proper share of the estate, and they commenced suit in New York against him, pending which suit he died, leaving a will, by which he gave all his property of every kind and nature, real as well as personal, to his brother, George P. Pomeroy. George P. Pomeroy, who had been cut off from the residuary estate of his father by his father's will, was thus, by the will of his brother, Edward, put in Edward's place. In 1887 an agreement was entered into with reference to the estate between George P. Pomeroy and his two sisters, Julia and Josephine. George P. Pomeroy died November, 1887, leaving all his property in the first instance to his son, Eugene C. Pome-

roy, an infant, who is made a party to this suit, the estate being limited over to other persons, who are also made parties. Mrs. George P. Pomeroy died before her husband. The sisters, Josephine and Julia, subsequently claimed that the agreement referred to had been signed by them under a misapprehension, and in fraud, and declined to carry it out; and Frank R. Chandler, who had been appointed administrator de bonis non of Edward Pomeroy's estate, and who was also the executor of George P. Pomeroy's estate, filed a bill in the United States circuit court for the district of New Jersey to enforce that agreement. Julia Pomeroy having, after her father's death, married William Foster Morrison, the defendants to the suit were Josephine Pomeroy, Julia P. Morrison, and William F. Morrison. While that suit was pending, Miss Josephine Pomeroy filed her bill in this court for the partition of the real estate in New Jersey of which her father died seised, and, I understand, similar actions were commenced in the courts of New York and Missouri, in which states her father had died seised of real estate. After the partition bill was filed in this suit, pending the suit by Chandler to enforce the agreement, Judge Bradley granted therein a temporary injunction or stay of these partition suits pending the argument in that court. The cause was subsequently tried before Judge Bradley, who set the agreement aside. The case then went by appeal to the supreme court of the United States, and the decree of Judge Bradley was reversed, and the agreement held to be a valid agreement. 143 U. S. 318, 12 Sup. Ct. 410. After the injunction had been granted by Judge Bradley, Mr. Chandler appeared in the New Jersey suit with a plea setting up the proceedings in the United States court, and also that the injunction had been granted therein. That plea remained without hearing or decision until after the decision of the United States supreme court sending back the original suit to the circuit court. On the case being remitted to the circuit court by the supreme court of the United States to enforce the agreement, the case came on for hearing before Judge Green, and a decree was entered in compliance with the decision of the supreme court. The matter was referred to William L. Dayton, Esq., as master, to take and state the account of the transactions between the parties, and the master has since that time gone on with the accounting, which it was represented on the argument was practically completed. After the remission of the cause to the circuit court, counsel of Miss Pomeroy moved to dissolve the injunction restraining her from proceeding with the partition suits in the New Jersey, New York, and Illinois courts. On this motion Judge Green filed this memorandum: 'On motion to dissolve injunction restraining prosecution of suits for parties, etc. Memorandum. When Mr. Justice Bradley allowed an injunction to go against the defendants, restraining them from prosecuting certain suits for the partition of real estate

in which the complainants and defendants were interested as tenants in common, and which were pending in the courts of New Jersey, New York, and Missouri, he stated, in effect, that such injunction was to be temporary only, and was intended rather to prevent an embarrassment which might arise from a conflict of jurisdiction during the pending litigation, seeking the specific performance of the agreement which has now been upheld by the supreme court as a good and valid agreement. He expressly said that in enjoining those partition proceedings at that time it was not the intention of the court to permit the suit then under consideration by him to be converted into a suit for the partition of the lands in question. To these remarks of the learned justice I only add that I am unable to understand how lands situate in New York and Missouri can be legally partitioned by a court which has no jurisdiction over them. The parties complainant and defendant are, it is admitted, tenants in common of large estates situated in those different states. Some of these tenants in common desire a partition of these lands in accordance with law. This is an undoubted right of a tenant in common. And no reason has been presented to the court of sufficient weight to cause any interference with such right, now the object of the injunction granted by Mr. Justice Bradley has been fully attained. It was avowedly to be temporary only in its duration. It ought not longer to be held over the heads of the defendants, barring them from asserting and enforcing their clear rights. No good purpose could be thereby accomplished, and the causes which warranted its original issue no longer exist. The motion to dissolve is granted.' And an order was entered April 3, 1894, in accordance therewith, dissolving the injunction. Julia P. Morrison, having been divorced from her husband, William Foster Morrison, was subsequently married to George P. Newell, who was made a party to the suit, and the plea heretofore mentioned filed by Mr. Chandler was withdrawn. Mr. Chandler was then appointed guardian for the infant defendant, and filed an answer, substantially, after admitting the undisputed facts of the case, setting out the will of George Pomeroy, and also of Edward Pomeroy, and also setting out the agreement executed between the two sisters and their brother, and the proceedings in the circuit court of the United States, and the suggestion that this suit in partition of New Jersey property ought to be stayed because of the pendency of the suit in the United States court. The case was then set down for hearing on bill and answer. There is practically no dispute between the parties as to the facts of the case, viz. that there is real estate in this state, as well as in New York and Missouri, of which they are tenants in common. Counsel for the guardian of the infant, however, now applies to the court on behalf of the infant to have the proceedings in this case further stayed (1) on the ground that it is for

the interests of all the parties, and especially of the infant, that all of the real estate in the three states should be partitioned in one proceeding. What that proceeding was to be, what court has jurisdiction to that extent, or how it was to be effectively accomplished, was not very clearly developed. The supreme court of the United States, in the case of *Chandler v. Pomeroy*, 143 U. S. 318, 12 Sup. Ct. 410, expressly avoided the expression of an opinion whether in that suit the court might proceed to a partition of the real estate. And on remitting it to the circuit court, Judge Green remarked that he was unable to understand how lands situated in New York and Missouri could be legally partitioned by a court which had no jurisdiction over them. It would appear to be the right of one tenant in common, in the absence of any restrictions upon the title, to have partition of the real estate, and this right should not be denied or postponed in enjoyment simply because the interests of some one or more of the other tenants in common might be advanced or improved by delay. The only suggestion made by counsel upon this point which is entitled to consideration as a reason was that the accounting before the master had not proceeded to a report, and it was not known as yet how the indebtedness between the parties would stand. But, as suggested on the argument, this furnishes no obstacle to the court proceeding in partition, for, if the amount due from one tenant in common to the other is a claim or lien upon such daughter's share in the real estate, the decree of the court can, and in fact always does, transfer, so to speak, the lien from the undivided shares to the share of the party as set off.

"The next ground urged for the postponement is that by a fair construction of the agreement made between George P. Pomeroy and his sisters the real estate is not to be partitioned until a settlement of the accounts between them. Confessedly, the agreement does not expressly contain any such provision, nor does it seem to me that it is open to that construction on a fair reading of it. It is dated April 13, 1887. After reciting, in substance, that Edward at the time of his death was indebted to Julia, Josephine, and George P., or some one or more of them, to an unknown amount; that the parties desire to settle the estate of their father and their brother Edward without litigation, and to adjust the claims of the parties against Edward's estate, suppressing and terminating the suits brought against him, and pending when he died; and that they desired to vacate the provisions of their father's will, in order to be equally charged with, and equally to share in, the estates of both George Pomeroy and Edward Pomeroy, and to settle said estates, and determine the value of the shares of each of said heirs,—they agreed in substance as follows: (1) The remainder of the estate of George Pomeroy, the father, was to be equally divided among the three living children, Julia, Josephine, and George P. (2) This division to be made as of

the date of the death of the father. (3) To arrive at the interest to which each should be entitled at the date of the agreement, each was to be charged with the amount he or she had received with six per cent. interest from the date of the receipt to the date of the document, payable annually. (4) The estate of Edward was to be divided and distributed equally between George P. and his two sisters, after payment of his just debts and the specific legacies of \$6,500. (5) In case it should be found that the personal property of said George or Edward could not be equally distributed in kind, then so much as might be necessary be sold, and the proceeds divided. (6) The real estate of said George and of said Edward, wherever situated, and by whomsoever held, to be conveyed by good and sufficient deeds, so that each of the three parties should hold an undivided third thereof as a tenant in common with the others. (7) In the division of the said estate, the proceeds or revenues to be derived from the trust funds for the benefit of George P., Julia, and Josephine, created by the will of their father, to be treated as a general fund, and divided equally between them, and, so far as it lay in their power, the parties agreed that the said funds should be considered and be the general fund of the parties. The partition of this real estate cannot in any way interfere with the carrying out of this agreement, unless it might be that the indebtedness of one to the other should be a charge upon that other's undivided interest which can and will be protected as before suggested. It would seem that a partition of the real estate between these tenants in common would be carrying the terms of the agreement into effect, rather than interposing any obstacle thereto.

"The other ground urged by the counsel is that this court should not proceed to partition this estate, in obedience to the rule that he who seeks equity must do equity, and that it will be inequitable to permit two sisters to have partition of their real estate until all the terms of the agreement shall have been carried into effect by the report of the master, and a compliance with the decree of the court thereon. As was very forcibly and clearly stated by the opposing counsel, this rule applies only to acts of the party with reference to the subject-matter of the suit, and it does not apply to what has been done or what has not been done by the party with reference to some outside matter; but, independently of that position, I see no merit whatever in the objection. As stated before, there is nothing in the agreement which, in law, equity, or morals, would interfere with these parties instituting and proceeding with this suit to have partition of the real estate. In my judgment, no good ground has been shown why the complainant and her sister should be further delayed in their proceedings to have their respective shares of their real estate in New Jersey set off to them. And the testimony having been taken which clearly establishes that these

are now held by these parties as tenants in common, I will advise the usual decree for the appointment of commissioners."

William B. Guild, for appellants. A. Q. Garretson, for respondents.

COLLINS, J. The partition reported by the commissioners has not, in the judgment of any member of this court, been successfully impugned; but some of my brethren think that any partition should be stayed until final determination on the accounting in the suit in the federal court referred to by Vice Chancellor Green. If a majority of the court held that opinion, it would be matter of regret that the objection had not been presented in limine by an appeal from the decree appointing commissioners. It savors of disingenuousness to experiment with a partition at very considerable cost to the co-owners, and then press the objection to having any partition at all; especially in the light of the offer made in the brief filed for appellants to waive all objections upon condition that the allotment reported be changed so as to give the appellants the share awarded to another owner. The facts of the case were clearly stated by the vice chancellor, and his reasons for not delaying partition seem to me conclusive. In this connection, also, the opinion of the late Mr. Justice Bradley may be profitably read. *Chandler v. Pomeroy*, 40 Fed. 533, 545. His decision that the agreement was not valid was reversed; but his remarks on the subject of partition were not criticised in the supreme court. That tribunal left the matter to be settled by the circuit court after remittitur; and when we find that court declining jurisdiction and dissolving its injunction against the chancery partition, it would seem proper that such partition should proceed. The only reason suggested for delay in severing the common ownership of the parties, and the only reason possible to suggest, is that the accounting of the personal estate may show something due appellants from the other owners, which, under the agreement, may be chargeable on the real estate. The parties have voluntarily divided about \$500,000 worth of personal estate. They could very easily have withheld a fund sufficient to make the necessary adjustment, for the margin of difference was well known to all of them. The master's report to the federal court shows a small balance in favor of appellants, but both sides have excepted, and no one can tell when the contest will end. It is not even hinted that the respondents are peculiarly irresponsible; indeed, it is perfectly clear that they are possessed of large means. If the appellants have a lien, either legal or equitable, upon the real estate, it will attach to the divided shares. 2 Gen. St. p. 2430, § 36; *Speer v. Speer*, 14 N. J. Eq. 240. There will be no more danger from bona fide purchasers after partition than before, for in either case any purchase will be pendente lite. Partition simply permits each owner to enjoy his or her share in severalty in-

stead of in common, and I can see no objection to the exercise now of that undoubted right. The decree and partition thereunder should be affirmed.

DEPUÉ, DIXON, GUMMERE, VAN SYCKEL, HENDRICKSON, and NIXON, JJ., dissent.

MOTT v. GERMAN HOSPITAL et al.
(Court of Chancery of New Jersey. June 17, 1897.)

**MORTGAGES—ASSIGNMENT—NOTICE—FORECLOSURE
—EXECUTORS—JUDGMENTS—LIEN—ESTOPPEL—DEVISEES.**

1. In a foreclosure suit begun more than a year after the death of a decedent mortgagor, a proof of claim exhibited against the estate of the decedent cannot be set up as a lien on the mortgaged premises.

2. Where an executrix is also a devisee, and a judgment is recovered against her as executrix, eo nomine, upon a claim against the decedent's estate, the judgment is no lien either upon the estate of the decedent, or upon the estate which came to the defendant, not as executrix, but as devisee of the lands of the testator.

3. An assignment of a bond and mortgage for a presently paid consideration, executed under seal, duly acknowledged and delivered for the purpose of pledging the bond and mortgage as security for the payment of a debt, is an effectual pledge, although manual delivery of the bond and mortgage may not have been made.

4. An estoppel will be worked, not because the loss to the party injured was a succeeding event to the act or omission of the party to be estopped, in dealing with the subject-matter of the transaction, but because the act or omission of the party to be estopped was a moving cause which led the party injured to do the act, or into the position, resulting in the loss.

5. Under the statute (Revision, p. 708, § 32), the recording of an assignment of a mortgage is notice, from the time the assignment is left for record, to all persons concerned, that the mortgage is assigned. A subsequent assignee of the mortgagee is a "person concerned," within the meaning of this statute, and must be held to have had constructive notice of the previous assignment, from the date when it was deposited for record.

(Syllabus by the Court.)

Bill by James B. Mott against the German Hospital and others. Decree advised for complainant.

This is a foreclosure suit, making the German Hospital of Newark, the holder of the title, and several subsequent mortgagees and judgment creditors, parties defendant, and praying foreclosure and sale of the mortgaged premises in the usual way. The matters in dispute arise out of the claim of the two parties (the complainant, Mott, and the defendant Somerville) to the ownership of a bond and mortgage upon a house and lot in Newark, and a claim of the priority of a judgment over the second and third mortgages. John Hartman and Helena, his wife, made the mortgage in question to Phoebe I. King and others, executors, etc., to secure the payment of \$700. It was recorded December 31, 1885. On October 23, 1886, the mortgagees assigned the mortgage to Isaac W. King. This assignment was recorded November 22, 1886. King applied to one Sayre, who was a friend of the complain-

ant, Mott (with whom King was unacquainted), for a loan of \$1,000 on two mortgages (one of them the Hartman mortgage), which he said were "gilt-edged securities." Sayre took him to Mott, who made the loan, actually paying to King \$980; receiving King's note at four months, retaining \$20, discount of the note, and also receiving, in accordance with the contract of loan, an assignment of the bond and mortgage in question. Mott asked King for the mortgage, but he said the assignment was sufficient security, and, without refusing to deliver it, evaded doing so. This transaction took place April 29, 1890. The note was not paid, but was often renewed; the last renewal coming due January 9, 1892, after which time King paid no attention to it. Immediately that King took this position of indifference, Mott and his friend Sayre, for him, demanded from King the possession of the mortgage. These demands began when the renewed note was not paid, about January 9, 1892, and seem to have been frequently repeated,—Sayre swears, "Perhaps fifty times." King never denied Mott's right to it, but postponed and avoided compliance by various excuses. After King's failure to pay the last renewal note, Mott, on February 5, 1892, recorded his assignment of the mortgage. Mott also went to see Mrs. Hartman, one of the mortgagees; showed her his assignment; forbade her to pay principal or interest to any one else; was by her referred to her business man, Mill; and also showed him the assignment, and explained the situation to him. As King paid nothing on the loan, Mott recovered judgment against him for \$1,234.83 in Essex circuit court, and issued execution, which was returned nulla bona. It seems to be undisputed that King is insolvent and financially irresponsible. In the spring of 1893, on March 25th, about three years after the assignment of the mortgage by King to Mott, and one year after Mott had recorded his assignment, King obtained the defendant Somerville to loan him \$325 upon the security of an assignment of the Hartman mortgage—the one now in question—and another mortgage. The loan was afterwards paid off, was renewed by Somerville, and finally, at King's request, in the fall of 1893 Somerville purchased the Hartman mortgage from King, outright, for \$425. Previous to the taking of the assignment on March 25, 1893, Somerville had his lawyer examine the record for assignments of the mortgage, and received an assurance from him to the effect that there was none on record. He had another search made before he made the absolute purchase of the mortgage, with like result. Before the time of this earlier search the assignment from King to Mott was in fact on record, for the registrar's certificate indorsed on it shows it to have been recorded on the 5th day of February, 1892; and it was admitted at the hearing that, in making the searches, Somerville's representative did not see this record of Mott's assignment. At the time of the first negotiations between Somerville and King for the loan, Som-

erville was taken by King to Mill, the business man for Mrs. Hartman. Somerville swears he told Mill that he was about to take an assignment of the mortgage, and Mill said that would be all right; that he would pay the interest as it matured. Somerville does not testify that he told Mill he was about to take an assignment of the mortgage from King. Mott appears to have been a stranger to both Mill and Somerville, and, as Mill was not told by Somerville from whom he expected to take an assignment, Mill had no reason to believe that there might be two claimants to be owners of the mortgage, as his conversation with Mott was held probably a year before his talk with Somerville. The latter is not shown to have seen Mrs. Hartman, the mortgagor, at any time. Somerville, after the assignment to him, did collect the interest from Mill, who paid it as executor of John Hartman, the deceased mortgagor. The first time that Somerville heard that Mott had or claimed any interest in the mortgage was less than a year prior to April 1, 1896, when the parties desired to pay off the mortgage, and Somerville went to get the money, and was notified that the mortgage belonged to Mott. The latter appears to have heard of Somerville's claim on the same occasion. Under these circumstances, the defendant Somerville claims that he is the owner of the Hartman mortgage. A collateral question is raised by the answer of the defendant Gottfried Krueger. The latter sold merchandise to John Hartman in his lifetime, and, this debt remaining unpaid, Krueger proved it as a claim against his estate in the hands of his executrix, Helena Hartman. On March 4, 1890, he recovered a judgment against the executrix in Essex circuit court on this claim. The defendant Krueger claims that the lands of John Hartman are subject to the lien of this debt and judgment, and were devised to Helena Hartman (John Hartman's devisee of the mortgage premises) with notice thereof, and that the lien of his debt precedes the lien of two mortgages made by Helena Hartman, in her personal capacity, after title had vested in her as devisee of John Hartman, and now held by the defendants Marcus L. W. Kitchen and Joseph M. Ward, administrator, etc., respectively.

David Kay, Jr., and H. H. Dawson, for complainant. Edwin A. Rayner, for defendant executors of M. L. W. Kitchen. Philemon Woodruff, for defendant Alonzo Somerville. H. Compton, for defendant Gottfried Krueger.

GREY, V. C. (after stating the facts). The defendant Gottfried Krueger has filed a proof of claim against the estate of John Hartman, deceased. Hartman was in his lifetime the owner of the mortgaged premises, which on his death passed by his devise to his surviving wife, Helena Hartman, and on her death passed by her devise to the defendant the German Hospital. Mr. Krueger had also recovered a judgment on this claim against

Helena Hartman, as executrix of John Hartman's will. It is this claim and this judgment which Mr. Krueger claims are liens against the mortgaged premises precedent to the two mortgages made by Mrs. Helena Hartman in her lifetime. The act of December 2, 1743, (Allinson's Laws, 129), was, during the time that it was operative, construed to make the lands of a decedent liable to be sold under a judgment recovered against an executor or administrator without making the heir a party to the suit. *Ely v. Jones*, 1 N. J. Law, 133. This enabled the executor, who was the only defendant, to let a fraudulent judgment be recovered, which the heir's land might be taken to pay. But section 18 of the act of February 18, 1799 (Pat. Laws, p. 373), relieved from this embarrassment, and in terms declared that no lands of the testator or intestate should be in any wise affected by a judgment against an executor or administrator. The same statute provided for the application of the lands of a decedent to the payment of his debts, by making it the duty of the executor or administrator to exhibit to the orphans' court the condition of the estate, and directing that court thereupon to make an order to show cause, etc., why the land should not be sold to pay debts. This statute is the basis of our present act providing for the sale of decedents' lands for the payment of debts. That it was effectual to hinder a judgment against an executor from becoming a lien on the lands of the testator is plainly shown by the adverse criticism of this provision by Mr. Griffith (see 4 Griff. Law Reg. p. 1288, note) in 1822. The force of this statute to prevent such a lien is fully recognized by the supreme court in *Insurance Co. v. Meeker*, 37 N. J. Law, 302. The judgment against the executor is therefore no lien on the lands which had been devised to the devisee. Now, is the judgment sued out against the executrix, who is also a devisee, a lien on the estate of the devisee in the land devised? The capacity in which the defendant party is sued fixes the estate which is bound by the judgment, and the coincidence that the defendant may also happen to be devisee does not extend the lien to charge lands so received from the testator. The claimant against the testator had two modes, by either of which he could compel the lands of the testator to be taken for the satisfaction of his debt: First, by an order of the orphans' court, obtained by the testatrix within one year from the death of the testator, under the statute (2 Gen. St. p. 2370, § 70 et seq.); or, second, by an action brought against the heir or devisee, as such, under the statute (2 Gen. St. p. 1679), to fix their liability regarding the lands which had descended or been devised to him. *Stone v. Todd*, 49 N. J. Law, 276, 8 Atl. 300; *Dodson v. Taylor*, 53 N. J. Law, 200, 21 Atl. 293. It is for the creditor to choose which of these remedies he will use. *Stone v. Todd*, 49 N. J. Law, 276, 8 Atl. 300. If the suit is against the devisee, it must appear to have been begun, maintained,

recovered, and entered against the defendant in that capacity, in order to comply with the statutory requirements. The devisee may be compelled to pay in the first instance, though there may be personal estate which in due course of administration should be primarily liable. In such case his remedy would seem to be to stand in the place of the creditor who forces him to pay, and reimburse himself out of the personal estate. *Dodson v. Taylor*, 53 N. J. Law, 200, 21 Atl. 293. To enable him to do this, there must have been a recovery against him as devisee, by which he must have been compelled to pay as devisee, because of the devise to him, and not as executor out of the whole estate. The defenses which the defendant Mrs. Hartman would make in the capacity of a devisee receiving lands from a testator are wholly variant from those which she would make when sued as executrix. As to these defenses, the defendant has not been brought into court to answer, nor has any judgment been pronounced which precludes her from asserting her rights as devisee. There is no ground to justify the argument that the judgment is a lien on the lands of the devisee.

The counsel for the defendant Gottfried Krueger also insisted that by reason of the proof of his debt against the testator to his executrix, Helena Hartman, the lands of the decedent became subjected to the lien of his claim, and that the same Helena Hartman who took the testator's lands as devisee received her title with notice of this lien, etc. If the claimant against a testator desires to make his money out of the real estate of the decedent, he must follow one of the modes prescribed by the statutes provided for that purpose. By the common law the land of a deceased debtor was not liable for his debts. *Insurance Co. v. Meeker*, 37 N. J. Law, 295. The act of 1799 above referred to charged the lands of the decedent with this liability, to be enforced in the mode indicated,—through the action of the orphans' court; but, as it gave no protection to the creditor in case the heir or devisee had aliened the land before the executor took the action needed, the supplement of December 12, 1825 (Hair. Comp. p. 130), was passed, which declared that the lands of any one dying seised should remain liable for his debts for one year after his decease, and might be sold, etc., by order of the orphans' court, etc., any alienation or incumbrance made by the heir or devisee notwithstanding. See 2 Gen. St. p. 2370, § 70. The testator, John Hartman, died July 22, 1888. The judgment defendant entered his judgment on March 4, 1890; the mortgages made by the devisee, the priority of which is challenged by the judgment defendant, were both made within one year after the death of the testator; and, had the judgment defendant been diligent in enforcing his remedies within the year, neither of these mortgages would have been deemed to be precedent liens to the title of a purchaser under an order for sale made by the orphans' court. But the judgment defendant suffered the year of limitation to expire without doing

anything to compel the application of the lands to pay the testator's debts, and thus lost the security of the statutory provision. When the creditor of the testator desires the benefit of this statutory charge, he can only take it subject to the limitations, and by pursuing the methods of procedure required by the statute. If the executor does not act, the creditor has his remedy to compel action by obtaining judgment against the executor, and forcing him to proceed to sell the lands as provided in section 79 of the orphans' court act (2 Gen. St. p. 2373). Neither the judgment of the defendant Krueger, nor his proven debt against the estate of the testator, John Hartman, is any lien on the mortgaged premises.

The main contention in the case is between the complainant, Mott, and the defendant Somerville, as to the ownership of the mortgage sought to be foreclosed. That the previous holder, Isaac W. King, was the owner of the bond and mortgage in question, is admitted by all parties. That he assigned it to the complainant on the 29th of April, 1890, as collateral security for the payment of King's note, then discounted by Mott, who, in accordance with the contract of the loan, then actually paid to King \$980, is either admitted or conclusively proved. It is also shown that King did not then deliver the bond and mortgage to Mott, who asked for them, and that King evaded compliance, and to many repeated demands for actual delivery of the bond and mortgage made by Mott and his agent, Sayre, King replied that his wife objected, and a trustee who had charge of them refused to give them up, etc. In February, 1892, Mott recorded his assignment, and about this time notified Mrs. Hartman, one of the mortgagors and the owner of the mortgaged premises, and also her business man, Mr. Mill, of his assignment, and forbade the payment of either interest or principal to any one else. It is the efficiency of this transfer of the mortgage from King to Mott, when asserted against the subsequent assignment of the same security by King to Somerville, which is in question in this branch of this case. Somerville attacks Mott's title to the bond and mortgage upon several different grounds. He denies that Mott's title was perfected, because no manual delivery of the bond and mortgage was made by King to Mott, though he admits a written assignment was made of them by King to Mott, for which Mott at the time paid King the full amount of the loan. If this criticism has any force, it must exist because of the circumstances attending the transaction between King and Mott, which took place several years before Somerville had any dealings with King. This objection raises the question whether a full and formal assignment in writing of the bond and mortgage executed under the seal of the holder, for a valuable consideration then paid and delivered to the assignee, is effectual to pass to the assignee title to the bond and mortgage, by way of pledge, without actual delivery of the latter. *Palmer v. Merrill*, 6 Cush. 282, is cited by the defendant Som-

erville to sustain his claim that an assignment in writing of a bond and mortgage is not effectual as a pledge without actual manual delivery of the bond and mortgage themselves. There are in the discussion of that case dicta touching the general requirements of assignments of choses in action which seem to support the defendant's contention. In that case a debtor whose life was insured marked on the policy an assignment and request to the insurers to pay part of the policy to the plaintiff, to whom he was indebted, but he did not deliver either the assignment or the policy to the plaintiff. Shortly after, the insured died. The administrator of the insured collected the policy, and the plaintiff sued him for the portion claimed to be assigned. There was no delivery by the insured debtor to his creditor, the plaintiff, of any evidence whatever of the transfer. Neither the assignment nor the policy ever left the possession of the insured. Chief Justice Shaw held that the plaintiff acquired no such interest in the policy as would support an action, declaring it to be impracticable to make a charge on a chose in action by an assignment which the assignor retained in his own possession. In the present case there was an actual delivery of a perfected assignment, and a payment therefor, then made, of a full and valuable consideration, and with an undisputed intention at that time by that act to pledge the bond and mortgage assigned. Other cases are cited to support the proposition that an actual delivery of the bond, mortgage, or other evidence of the chose in action assigned, is a proper and effectual mode of pledging it. This is not disputed. But no case has been cited where it is held that an assignment expressed in terms applicable for the transfer of a bond and mortgage intended to be assigned, executed with all the formalities incident to such transfers, acknowledged so that it is capable of being recorded as the statute in such cases requires, paid for by a presently passing, valuable consideration, and the assignment delivered to the intended pledgee, is ineffectual to complete the pledge solely because the bond and mortgage are not actually delivered. Delivery is an essential feature in the making of a pledge, in order that all persons who deal with the property pledged may be notified of the rights of the pledgee, by his possession. But possession cannot always be shown by an actual, physical holding of the pledge. Many articles may be pledged which are not susceptible of such visible holding, and the parties may pledge such property by acts indicating delivery which are apt and proper to the nature of the thing intended to be pledged, or in compliance with accepted usage or with the requirements of law. The rule has long been established, and is now of universal acceptance, that the possession of the thing pledged may be according to the nature of the subject. *Wilson v. Little*, 2 N. Y. 443. If the subject of the pledge be of an incorporeal character, as a debt secured by a mortgage, possession may be given either by actual delivery of the indicia of the debt, etc., or by

written transfer to the hands or power of the pledgee, so as to be made available to him for the satisfaction of the debt. Goods at sea may be pledged by an assignment of the bill of lading, and debts and choses in action may be pledged by a written assignment. *Wilson v. Little*, 2 N. Y. 447; *Story*, *Baflm.* §§ 290, 297; *Pars. Cont.* 595. In the case in hand the thing intended to be pledged was the debt which *Hartman*, the mortgagor, owed. The mortgage itself was not the pledge, but only accompanying security of the bond which was the evidence of the debt. The making and delivery of the assignment of the mortgage was an appropriate method of indicating the full accomplishment of the pledge of the debt, even without the actual manual delivery of the mortgage. Such a method would have transferred the entire ownership, and has been recognized by statute as effectual for that purpose (2 Gen. St. p. 2108, § 31), and is apt and proper to express the result of the action of the parties. This section is obviously intended to make the written assignment of a mortgage, and the record of the assignment conclusive evidence of a transfer of the holder's interest; and I can see no reason why this effect should be denied to a transfer which is absolute on its face, though it may be in fact, as between the parties, a transfer of a qualified interest by way of pledge. The assignment of the mortgage under the circumstances narrated was, in my view, as between *King* and *Mott*, an effectual pledge of the mortgage to *Mott*.

The defendant *Somerville* also claims that the complainant is estopped to deny his title to the mortgage, under the operation of the rule that, if one of two innocent parties must suffer by a fraud, that one must bear the loss who enabled the fraud doer to consummate the fraud. There is no pretense that *Mott* either colluded with *King* in aid of his subsequent fraudulent assignment to *Somerville*, or knew of such purpose, or had any information which might have warned him of such design. He had been persistent in his efforts to get possession of the mortgage from *King* for a long while before *Somerville* took his assignment. The only basis for criticism of *Mott's* position is that he did not succeed in these efforts to obtain from *King* the actual possession of the mortgage, and *Somerville* insists that this fact alone enabled *King* to defraud him. This question has been considered in the courts of England, where there was no registry, when there was a first mortgage, but no delivery of the title deeds, and the mortgagor having possession of the title deeds again mortgaged the estate, and delivered the title deeds to the second mortgagee. In *Tourle v. Rand*, 2 *Brown*, Ch. 650, Lord *Thurlow* held that mere nonholding of the title deeds by the first mortgagee was not enough; that fraud or gross negligence on his part must be shown to postpone him. In *Evans v. Bicknell*, 6 *Ves.* p. 183, Lord *Eldon* denied that it was a rule in equity that, if a mortgagee lends money upon a mortgage

without taking the title deeds, he enables the mortgagor to commit a fraud; and in *Barnett v. Weston*, 12 *Ves.* 180, before Sir *William Grant*, the point was made that the first mortgagee had permitted the mortgagor to keep the title deeds, which he produced to the second as evidence that there were no incumbrances, and thus obtained a loan. In that case it appeared there was an actual lending of the deeds by the first mortgagor, who exhibited them as proof that there were no incumbrances affecting the premises. Sir *William* observed that the first mortgage was not to be postponed unless a case of fraud could be made out, and the point was abandoned. That the mere circumstance of leaving the title deeds with the mortgagor is not of itself sufficient to postpone the first mortgage has been accepted in this country. Chancellor *Kent* held in *Berry v. Insurance Co.*, 2 *Johns. Ch.* 609, that there must be fraud or gross negligence, which amounts to it, on the part of the first mortgagee, to defeat the prior mortgage. These rulings were declared upon general equitable principles in cases where registry acts did not operate to give notice of the rights of the mortgagee, and where the holding of the title deeds was one of the indicia of the existence of the mortgage, and might be the sole evidence of it. In New Jersey the latest deliverance on the subject is that of the court of errors in *Lawson v. Nicholson*, 52 N. J. Eq. 823, 81 Atl. 386, reversing *Lawson v. Carson*, 50 N. J. Eq. 370, 25 Atl. 191, where the holder of a mortgage had deposited a bundle of papers, among which was a bond and mortgage, for safe-keeping, with a scrivener, who had not only negotiated the loan and drawn the bond and mortgage, but who had been authorized to collect, and had collected, the interest from the owners of the mortgaged premises. The scrivener took the bond and mortgage out of the bundle, accepted payment of the principal from a subsequent owner of the land, and absconded. It is to be observed that the scrivener was by the act of the owner of the mortgage given, not only the actual possession of the security, but also a colorable right to exercise some authority regarding the collection of a portion of the mortgage debt. It was not shown in the case that the owner who paid the money had any notice of the limited extent of the authority of the scrivener, nor was any bad faith successfully charged upon him. The court of chancery considered that the placing of the bond and mortgage by the owner of them with the scrivener, with authority to collect the interest, rendered the fraud of the scrivener possible, and for this reason decided that the loss must fall on the holder of the mortgage. But the court of errors held that the facts did not justify the decision, and it declared, in substance, that the rule of estoppel in such cases is, did the party sought to be estopped act in such a way as to lead the other party reasonably to the conclusion of fact upon which

he acted to his damage? The fault of the party against whom an estoppel is sought to be worked must not only have existed, but it must have been the occasion of the injury to the party who sets it up.

In the case in hand the fault of Mott which is alleged to have caused the injury to Somerville was his omission to secure possession of the mortgage from King, and it is claimed that Somerville was, by reason of his reliance upon the possession of the mortgage by King, led to advance his money. But by his own testimony, and the admissions of his counsel on the taking of the evidence, it appears that Somerville did not act upon the possession of the mortgage by King as evidence of his ownership. On the contrary, Somerville himself testified that on March 25, 1893, before he first took the mortgage as collateral security for a loan, he caused a search to be made to ascertain whether King had assigned the mortgage to some one else, and afterwards caused another search to be made before he absolutely purchased it. The representative of Somerville in making these searches made a mistake, and overlooked the assignment to Mott, though it was then properly recorded; and, when he had reported the record all right, Somerville, relying on this statement, and not on King's possession of the mortgage (which he apparently did not accept as evidence of ownership), parted with his money. The cause of Somerville's loss was therefore not Mott's omission, but the blunder of Somerville's own lawyer, who failed to discover and report the record of the previous assignment when he made his search. The mere coincidence that Mott had not obtained possession of the mortgage from King, and that King succeeded in cheating Somerville into accepting a second assignment, will not sustain an estoppel. The act or omission of Mott must have created an apparent condition of facts, which Somerville accepted as true and relied upon, and because of this acceptance and reliance he must have parted with his money. From the circumstances shown, Somerville was not relying on the condition created by Mott's omission (if the latter was, indeed, responsibly at fault at all), but upon his own lawyer's mistaken search of the records. An estoppel is worked, not because the loss to the party injured was a succeeding event to the act or omission of the party to be estopped, in dealing with the subject-matter of the transaction, but because the act or omission of the party to be estopped was the moving cause which led the party injured to do the act resulting in the loss. There must have been a relation of cause and effect, by which the injury and consequent loss to the injured party were the result of the previous misconduct of the party to be estopped. The party setting up an estoppel must show that he relied on and was misled by the conduct imputed to the party to be estopped. *Magie v. Reynolds*, 51 N. J. Eq. 118, 26 Atl. 150.

It was claimed that, at the time he approached Somerville, King was the apparent owner of the bond and mortgage; but I have been unable to discover in the testimony taken that this fact came to Somerville's notice, or that he acted on any such apparent ownership in King. King was not one of the mortgagees. No assignment to him was proven to have been exhibited to Somerville. The latter testifies that King came to him with "two bonds and mortgages," but he nowhere states that he ever saw any assignment of them to King, whereby he appeared to be the owner. No such assignment to King appears to have been noted or marked as an exhibit in this cause. The only evidence in the case that King was the owner of the Hartman mortgage is contained in the admissions of the record of the assignment to him from the mortgagees set out in the bill and answer. But if this record is appealed to as a notice that King held the title to this mortgage as a justification for Somerville's purchase of it, that same record, at the very time of Somerville's purchase, gave him notice that King was not the owner of the mortgage, because he had already, a year before, assigned it to Mott, and the latter assignment was then recorded. Whatever of fault was imputable to the complainant because of his omission to secure possession of the mortgage was, however, certainly cured by his recording of his assignment. The estoppel is claimed because it is alleged Mott permitted King to appear to be the owner of the mortgage, whereby Somerville was misled. The recording by Mott of his assignment long before Somerville acted is hereinafter shown to have been full notice to Somerville that Mott was the holder of the mortgage.

The defendant Somerville also insists that he took the mortgage from King for value paid; that he had no notice of Mott's assignment, which he claims is a mere latent equity, in no way binding upon him. There is no dispute that Somerville did act in good faith in the purchase of this mortgage from King, that he had no actual notice of Mott's previous assignment, and that he paid value for the mortgage when he took it. To maintain his claim that he had no notice of the assignment to Mott, he declares that the statute (Revision, p. 708, § 32; 2 Gen. St. p. 2108, § 32) which provides for the recording of assignments of mortgages prescribes only that the record "shall be notice to all persons concerned"; and he insists that "persons concerned" means only those concerned at the time of the placing of an assignment on record, and, applying this construction to this case, he concludes that, as Somerville had no interest in the mortgage at the time Mott recorded his assignment, the record of it was no notice to Somerville when he accepted his assignment, a year afterwards. That bonds and mortgages and their transfers are not governed by the same rules as commercial paper has been declared by our courts. *Conover v. Van Mater*, 18 N. J. Eq. 484. It is also established that an assignee of a mortgage

acquires no rights superior to those of his assignor, and holds the mortgage subject to defenses that exist against it in the hands of the mortgagee. *Atwater v. Underhill*, 22 N. J. Eq. 606, and cases cited. But this rule has been declared to be limited to the saving of those defenses which the mortgagor or those who have succeeded to his rights may have against the mortgagee, and not to extend to the protection of undisclosed equities created in favor of strangers by the mortgagee or holder. *Redfern v. Ferrier*, 1 Dow, 50; *Murray v. Lylburn*, 2 Johns. Ch. 443; *Lozey v. Simpson*, 11 N. J. Eq. 255; *Woodruff v. Institution*, 34 N. J. Eq. 178. The reason given is that the mortgagor or owner of the mortgaged premises is known, and of equities between the mortgagor or owner of the property and the mortgagee or holder of the mortgage, such as partial payment of the mortgage, etc., an intending assignee of the mortgage may obtain knowledge by applying to the mortgagor or owner of the mortgaged premises. This is common usage, and acknowledgments that the principal and interest are unpaid, and that there are no defenses, are frequently taken from the mortgagor or owner, under the name of "declarations of no set-off," preliminary to accepting the assignment of a mortgage, in order to bind the mortgagor or owner against such possible defenses; but no amount of diligent inquiry would enable an intending assignee of the mortgage to ascertain what agreements touching the mortgage debt or security the holder of the mortgage may have made with other persons than those in privity with him, and, if equities so arising might be asserted against an assignee who had no notice of them, "no assignment," says Lord Eldon in *Redfern v. Ferrier*, *ubi supra*, "could ever be taken with safety." It is therefore held to be necessary that actual or constructive notice must be shown to have been given to such an assignee, to make his holding of the mortgage subject to such latent equity. In the present case *Somerville* claims that the previous assignment to Mott, while it may have been effectual as between King and Mott, was as to him an equity of this class; that he had no actual notice of it, and that the statute above quoted is not applicable to give him constructive notice; and that his rights in the mortgage under his subsequent assignment are unaffected by it. The recording of assignments of mortgages was provided for in this state by the act of 1853 (*Pamph. Laws*, p. 241). This act authorized the recording of assignments of mortgages, and declared that "such recording shall be notice from the time such assignment is left for that purpose, to all persons concerned that said mortgage is so assigned." In 1863 (*Pamph. Laws*, p. 267) an additional act was passed, declaring that mortgages and all writings containing any agreement for the payment of money should be assignable, that the assignee might sue thereon in his own name, that set-offs against the assignee should be allowed, and that "leaving the assignment in proper

office to be recorded shall be notice of the assignment of the mortgage." These statutes were consolidated in the Revision of 1877, p. 708, §§ 32-34. In the Revision the provision as to notice by the record of the assignment is that "such recording shall be notice from the time such assignment is left for that purpose to all persons concerned, that the said mortgage is so assigned; and the assignee of any mortgage by an assignment or assignments not recorded, shall be bound by the proceedings and sale in any foreclosure suit against any previous holder." The language of this act expressly provides that the record of the assignment shall be notice "to all persons concerned." The statute prescribes the effect which the record shall have in the future. It is thereafter a warning without limit of time. The warning is to all persons concerned, and the words of the act do not limit the class to persons concerned at the time of the recording, else the act would have been expressed as notice to all persons then concerned. Under the law existing when these statutes were passed, providing for the recording of assignments of mortgages, there was no method whereby the assignee could give notice of his newly acquired rights to those who were or might be interested in the property, save by successive actual notices to each person who had or might receive an interest. On the other hand, possible purchasers of the property or of the mortgages against it, holders of previous mortgages who desired to foreclose, holders of subsequent mortgages who wished to redeem, owners who wished to pay interest,—in short, all who either were or might be concerned in the liens against the mortgaged premises,—were embarrassed for want of some means whereby they might certainly know who were the holders of the mortgages against it. The statute making the record of an assignment notice to all concerned accomplished this end in the simplest and most easily understood method. It provided a public place where all might go to obtain this information. It was intended to relieve against the difficulty of giving actual notice of the change of ownership of the mortgages,—not to any special class of persons, but to all who might be interested in the mortgaged premises at any time after the date of the record. That this was the proper understanding of the purpose of the statute is shown by its universal acceptance in common usage. All orders for searches include a direction to look for the record of assignments of mortgages. All foreclosures are based upon such searches. Intending purchasers of the mortgaged premises or of the mortgages depend upon them. The defendant *Somerville* himself, in this very matter, when about to take an assignment from King, twice obtained such searches to be made. As Mott's assignment had at that time been recorded for over a year, a proper search would have brought actual notice to *Somerville* that Mott was assignee of the mortgage.

The construction of the statute by the weight

of the cases which discuss the question is in accordance with the popular acceptance of the meaning of the act. I am referred to *Kamena v. Huelbig*, 23 N. J. Eq. 80, as sustaining the defendants' view that the notice by the statutory record, to all persons concerned, of the assignment of a mortgage, did not include a second assignee of a mortgage. That case held that no notice was required to the second assignee, and that he took the bond and mortgage subject to all equities. The learned chancellor in his opinion did say that assignments of mortgages "are not required to be recorded, except as to the mortgagor to protect him in payments"; but that case turned upon its own peculiar equities, and did not discuss the effect of a record as notice, when actually made. The assignee undoubtedly has his option whether to record or not. He may be satisfied that notice of his assignment is not needed, or that all who may be concerned are notified; and he may, if he likes, omit to record, and take this risk. But the question now under consideration is, who are notified by the record, if made? In *Rose v. Kimball*, 16 N. J. Eq. 185, there was a dispute between two parties who each claimed to be assignee of a mortgage. The complainant's assignment was first made and recorded. The defendant's was taken after this record. Chancellor Green held that, admitting that the defendant paid value for it, "he took it with constructive notice of the assignment to the complainant." *Stein v. Sullivan*, 31 N. J. Eq. 411, was a contest between two successive assignees of the same mortgage. Chancellor Runyon held that the recording of the assignment to the complainant's assignor prior to the making of the assignment to the defendant was constructive notice to the latter, under the operation of section 32, Revision, p. 708,—the recording statute now under consideration. Notice "to all persons concerned" was held notice to a second assignee of the mortgage. In this case it was also declared that the possession of the mortgage was not sufficient to give to one who buys it from the person in possession of it (who was the apparent owner) a valid title as against the real owner, whose title to it is a record. The law imposed on the intending purchaser the duty of examining the records to ascertain who owned the mortgage, and the real owner was protected in his ownership by the record of his assignment. This case is, on this point, precisely applicable to the case now before this court.

It must be held that the defendant Somerville was notified of the previous assignment to the complainant, Mott, on the 5th day of February, 1892, when the latter's assignment was recorded. The mortgagor and Mrs. Hartman, the devisee of the mortgagor, and the German Hospital, the devisee of Mrs. Hartman, likewise had constructive notice from the date of that record as their several interests successively came to them. The payments of either principal or interest made before that date to King were well made, and are saved

by the statute (section 34, Revision, p. 708; 2 Gen. St. p. 2109), as Mott's notice to Mrs. Hartman of his holding of the mortgage was about coincident in point of time with his recording of his assignment. Mott's holding is as collateral security for the payment of King's debt to him. The mortgage stands for such of its principal sum as remained due on February 5, 1892, with interest from that date, to secure the debt of King to Mott. If there be any surplus of value in the mortgage over Mott's debt which it was assigned to secure, the surplus belongs to Somerville, by virtue of his subsequent assignment of the mortgage from King. I will advise a decree in accordance with the views above expressed.

BARNABY v. BRADLEY & CURRIER CO.
(Court of Errors and Appeals of New Jersey.
July 5, 1897.)

MECHANIC'S LIEN—TIME FOR FILING—CHANGE IN STATUTE.

Act March 14, 1895, shortening the time for filing mechanic's lien from one year to four months after completion of work, and repealing all acts inconsistent therewith, and made to take effect immediately, does not apply to a case where the work has all been done before passage of the act; the act relative to statutes of March 27, 1874 (section 3), providing "that the repeal of any statutory provision * * * shall not affect or impair any act done or right vested or accrued * * * before such repeal shall take effect; but every such act done or right vested or accrued * * * shall remain in full force and effect * * * as if such statutory provision * * * had remained in full force," with the exception "that where the practice or procedure for the enforcement of such right * * * shall be changed, actions shall be conducted as near as may be in accordance with such altered practice or procedure."

Error to circuit court, Union county; before Justice Van Syckel.

Action by the Bradley & Currier Company against Annie E. Barnaby to enforce mechanic's lien. Judgment for plaintiff. Defendant brings error. Affirmed.

Charles E. Hill, for plaintiff in error.
Charles L. Corbin, for defendant in error.

DEPUE, J. The Bradley & Currier Company, the plaintiff below, filed a claim under the mechanic's lien law for work and materials furnished for the erection and construction of a building situate in the county of Union. In the suit to enforce the lien, the builder, Frank A. Barnaby, did not file a plea, but Annie E. Barnaby, the owner, appeared, and filed the statutory plea, averring that the debt was not a lien upon her property. The work performed and the materials furnished for which the lien was claimed were done and furnished under a contract dated June 2, 1894. The work was commenced on the 10th of July, 1894, and completed February 20, 1895. The lien claim was filed on the 15th of February, 1896, and the summons was issued on that day. At the time the contract in question was made the lien law in force was the act of March 27,

1874, by the thirteenth section of which one year from the furnishing of the materials or performing the labor for which the debt is due was prescribed as the time within which the claim should be filed. Revision, p. 671. The lien claim filed in this case was filed within the year, in conformity to this statute. By the act of March 14, 1895, several of the sections of the mechanic's lien law of 1874 were amended, among which was section 13. By that section as amended it was provided that no debt should be a lien by virtue of this act unless a claim is filed within four months of the last work done or materials furnished for which such debt is due, nor shall any lien be enforced by virtue of this act unless the summons in the suit for that purpose shall be issued within 90 days of the last work done or materials furnished in such claim. 2 Gen. St. p. 2074. The lien in question in this case, although filed within the time limited by the act of 1874, was not filed within the time prescribed by the act of 1895. By the act of 1895 all acts and parts of acts inconsistent therewith were repealed, and the act was made to take effect immediately.

The only question presented by the bill of exceptions is whether the act of 1895, with respect to the time within which the lien was required to be filed, shall be permitted to control in this case. The learned judge before whom this case was tried instructed the jury that the act of 1895 did not deprive the plaintiff of its right to file its claim within one year from the time the work was completed. This instruction is the subject-matter of the assignment of error in this case. It is not disputed that, as a general rule, a statute which is amended is thereafter, for all acts subsequently done, to be construed as the statute stands after the amendments are introduced. *Farrell v. State*, 54 N. J. Law, 421, 24 Atl. 725. Nor is it denied that the legislature may pass statutes of limitation which shall apply to existing contracts if a reasonable time within which to bring suit is allowed. The question to be considered is the effect of the third section of the act relative to statutes of March 27, 1874, which is in these words: "That the repeal of any statutory provision by this act, or by any act of the legislature hereafter passed, shall not affect or impair any act done or right vested or accrued, or any proceeding, suit or prosecution had or commenced in any civil cause before such repeal shall take effect; but every such act done or right vested or accrued, or prosecution had or commenced, shall remain in full force and effect to all intents and purposes as if such statutory provision so repealed had remained in force, except that where the course of practice or procedure for the enforcement of such right or the prosecution of such suit shall be changed, actions then pending or thereafter commenced shall be conducted as near as may be in accordance with such altered practice or procedure." 3 Gen. St. p. 3194. A provision of like character was

comprised in the Revision of 1846, but was limited to the repeal of statutory provisions by the repealing act reported by the revisers. 1 Rev. St. p. 675, § 2. This was the statute that was construed by this court in *Warren R. Co. v. Town of Belvidere*, 35 N. J. Law, 584-587. In the Revision of 1875 the statute of 1845 was extended to acts thereafter to be passed, and the legislative intent was made clearer by the exception which was added, with respect to "the course of practice or procedure for the enforcement of such right or the prosecution of such suit," and the provision that "actions then pending or thereafter to be commenced should be conducted as near as may be in accordance with such altered practice or procedure." This statutory provision preserves intact from future legislation rights vested or accrued under existing legislation, except "where the course of practice or procedure for the enforcement of such right or prosecution of such suit shall be changed." This exception refers to practice or procedure in the conduct of the suit, and not practice or procedure which directly affects the right which the statute was designed to protect. *Wilson v. Herbert*, 41 N. J. Law, 455-457. A like construction has been given to the fourth section, which relates to criminal prosecutions and actions for penalties. *State v. Crusius*, 57 N. J. Law, 279-282, 31 Atl. 235. The rule prescribed by this statute as the fundamental rule for the construction of statutes will prevail, except where the legislature has, either in express language or by implication so strong as not to be resisted, indicated the legislative purpose to supersede this rule of statutory construction. The work done and materials furnished for which this lien was filed had all been done and furnished before the act of 1895 was passed. By the statute in force when the contract was made and the work done, the debt for labor performed and materials furnished for the erection of the building became a lien on such building, and on the land whereon it stands, and such lien, by force of the statute itself, and without any claim being filed, was continued for one year from the furnishing of the materials or performing the labor for which the debt was due. To give to the act of 1895 the effect of limiting the time for which the statutory lien of the prior act should continue without the claim being filed would deprive the plaintiff of a right with respect to its debt which it had when its contract was made and the work was done. The language of the third section of the act concerning statutes is: "That the repeal of any statutory provision * * * shall not affect or impair any act done or right vested or accrued * * * before such repeal shall take effect; but every such act done or right vested or accrued * * * shall remain in full force and effect to all intents and purposes as if such statutory provision so repealed had remained in full force." The exception is "that where the practice or procedure for the enforcement of such right * * * shall be

changed, actions shall be conducted as near as may be in accordance with such altered practice or procedure." The plaintiff's lien for its debt accrued under the act of 1874, and by force of that act the lien was continued without a claim being filed for a term which did not expire until some time after the lapse of the limitation prescribed by the act of 1895. It is undeniable that the act of 1895 cannot, in any sense, be regarded simply as establishing a course of practice or procedure in actions for the enforcement of a right which accrued under the preceding act. If applied in this suit, the act of 1895 would affect and impair, and even destroy, a right of the plaintiff which accrued to it under the preceding act, within the meaning of the third section of the act relative to statutes. The judgment should be affirmed.

TODD v. TODD.

(Court of Chancery of New Jersey. June 8, 1897.)

DIVORCE—CONDONATION OF ADULTERY.

One who admits that, after being informed of his wife's adultery, and believing it, he occupied the same bed with her the night after charging her therewith, and for several nights thereafter occupied the same room with her at a house other than theirs, and, as she claims, had intercourse with her, will be held to have condoned her offense.

Suit by Charles A. Todd against Minnie Marie Todd for divorce. Dismissed.

John L. Semple, for petitioner. Henry I. Budd, Jr., for defendant.

GREY, V. C. (orally). I will dispose of this case now. The situation proven is this: The complainant in the case was engaged as a boat captain, and his business required his frequent absence. The defendant is a woman of about 30 years of age. Taking all the proofs together, and notwithstanding her denial, she has, in my opinion, been shown to have been guilty of adultery according to the charge alleged in the bill. This condition of adulterous conduct on the part of the wife (the defendant) was brought to the knowledge of the complainant by the narrative of various persons, not with the detail which has been presently on this hearing proven, but with sufficient accuracy and credibility of statement to lead the complainant to believe it to be true. Whether the statements which were made to him were full and final exhibitions of fact is of comparatively little importance if the condition of fact existed, and the statements, whether they were slight or in full detail, were sufficient to make him believe that that condition existed. He did believe that condition existed, because, immediately that he found it out, the first thing that occurred to him, or the first thing as to which he took any action, was that he should recover from his wife the building association stock which represented the accumulation of moneys sent by him to her, and standing in her

name. He went to see his wife, and without saying anything to her as to the information he had received that she had been unfaithful to him, he obtained her to make over to him, or to his control, by writings which he procured her to execute, these shares of the building association stock. After that had been done, he made known to her the facts which had come to his knowledge of her adulterous conduct. It is perfectly plain to me that he had at this time all of the knowledge which put upon him full responsibility for his subsequent acts in relation to his wife which the law places upon a man who knows that his wife is guilty of adultery; that is, he had received such evidence of his wife's sin that he had believed it to be true, and he had predicated his own actions on that belief, and that is as far as any man gets if he has the visible evidence of his own eyes. All that he could do to show he believed it was to accept it as true, and predicate his action upon it. So we come to the consideration of the additional element in the case with this precedent question settled. The wife (I will not discuss the details of it, because I am satisfied of the proof) has been shown to have been guilty of adultery, and enough information has been brought to the husband to satisfy him of the existence of that fact, and for him to act upon it. The law undoubtedly is that the party setting up condonation of an offense of this character must, asserting the affirmative of an issue, establish it by carrying the burden of the proof. But that burden may be aided in the first place by the presumption to which the facts proven may give rise, and it may be shifted by the character of the proofs which are submitted. It does not necessarily always remain on one side. The circumstances surrounding the acts of condonation were these: The wife was absent from her own house at the time when the husband charged her with adultery. On the very night that he charged this upon her he occupied the same house with her, the same room with her, and slept in the same bed with her. Neither reason nor explanation is given for this act of the husband. This man was evidently not one of those persons who would be filled with horror at the information suddenly brought to him that his wife had been unfaithful to him, because, when he met her, the first thing he thought of was, not his wife's breach of her marriage vow, but the consequent loss to him if she should insist upon her legal right to maintain the ownership of the building association stock. So the subsequent relations of these parties are not to be judged from the standpoint of a husband filled with horror by such a wife's wickedness. It must be put upon an entirely different plane. A manly character would in all probability never have been found in the same house with the woman who had committed such an offense, save to denounce her; but this man was able to occupy not only the same house, but the same room and the same bed, with his unfaithful wife. Irrespective of the obligation upon the party defendant asserting

condonation to carry the burden of proof, the complainant husband himself has, under his own oath, admitted the fact that on this very occasion when he made known to his wife his knowledge and belief in her faithlessness, he occupied not only the same house and the same room, but slept in the same bed. He adds the additional fact that he did not take off his clothes, and he denies that at these times he had any sexual intercourse with her. She testifies he had, and, while I place very little reliance upon her credibility when she denies what I regard as proven to be true,—the fact of the adultery,—yet even a person who has committed perjury may tell the truth. It is not necessarily a lie because she narrates it, and the truth of her story must be ascertained by estimating its probability when all the surrounding circumstances are considered. If a man—a stranger—and a woman had occupied the same room and the same bed for a whole night, would any court accept his statement that he did not take off his clothes as a refutation of the natural inference which would be drawn that the transactions between those people were such as would justify a belief in a connubial, or at least a copulative, relation? But when this husband got into bed with that wife he got into bed with a woman whose person he had enjoyed. He felt entirely free to make any approaches to her that he might like, and obviously he was not repelled by the knowledge of her wrongdoing, else he would not have been there at all; so that he must be presumed to be a person who came to that degree of intimate relation with that woman on that occasion, not deterred by his knowledge of her previous unfaithfulness, else it is impossible to believe that he would have been in such a place with her. When it is admitted by him that he did take such a place of intimate relationship, and occupy during the whole night the same room and the same bed with his wife, the inference naturally to be drawn attends upon the proof, and the court would consider this as sufficient proof of sexual connection until some satisfactory explanation is given. But this is not all. He admits that he occupied the same bed for one night, but, he says, with his clothes on; but immediately afterwards, with all the knowledge that he had of the unfaithfulness of his wife, he admits that he occupied for several nights the same room. She says that on two of those occasions they had sexual connection. He denies that fact, but admits that he occupied the same room, and declares that he slept on the floor, and that he did not on those occasions sleep in the same bed. There is no explanation given why he should have occupied the same room night after night with this woman of whose misconduct he had such knowledge. No statement is made which repels the inference that this intimate association was a willing renewal of their connubial relations, with knowledge by the husband of the wife's wrongdoing. There is no statement or pretense of any compulsion operating upon the husband to induce

this conduct. Here is a man who is in the habit of caring for himself, of bunking in his boat, sleeping wherever he might happen to be, as is the custom of those engaged in the dredging and steamboat business. He was not a strange countryman who slept in his own house every night, and did not know where else in the city, except at his brother's, with his disgraced wife (where the latter cohabitation took place), he could find harbor. This is the case of a man who could readily find harbor for himself elsewhere, for a steamboat captain, thrown on his wits, could readily have found a resting place anywhere, had he cared to do so. If the recreant wife pursued him, that only called his attention to the more needed caution in the conduct of his relations to her; but, notwithstanding that fact, not only on the first night, when he reproached her with her misconduct, and slept in her bed, but afterwards, for several nights, of his free choice, he continued to sleep in this woman's room. While it cannot be said that the wife's testimony alone has carried the burden of the proof, it can be said that the admitted circumstances of this husband's relations with this woman, after he had undoubted knowledge of her offense, are such that the court, in accepting their truth as stated by the complainant, is compelled to the belief that sexual intercourse did take place between the parties notwithstanding his denials of that fact. I do not see how I can avoid that inference. Besides the inherent incredibility of the complainant's story of his conduct while spending these nights with his wife, his manner and appearance while on the witness stand led me to hesitate to accept his statements as to his continence on the occasions referred to. The words that he used descriptive of his conduct did not accord with the impressions made by his personality. While there has been proof of the act of adultery, there has also been proof, in my opinion, that after the knowledge of the fact of adultery the husband has so acted towards the wife that a condonation has been established. I will therefore make an order that the bill be dismissed, with costs.

BIRBECK INVESTMENT, SAVINGS &
LOAN CO. OF AMERICA v.
GARDNER et al.

(Court of Chancery of New Jersey. June 12, 1897.)

SHERIFF'S FEES—FORECLOSURE—ADJOURNMENT OF
SALE.

1. A sheriff continued a foreclosure sale because of an alleged insufficient bid, and, at the adjourned sale, bid in behalf of a third person a much larger amount, and the property was sold to the bidder at the first sale at a greatly increased price. *Held* that, though the increase of the price would increase the fee of the sheriff, it was his duty to adjourn the sale,—Gen. St. p. 2111, providing for confirmation of foreclosure sales only where the court is satisfied that the property has been sold at the best price,—and the sheriff is entitled to fees for the adjournment as based on the increased price.

2. Where a sheriff sells land in foreclosure without making a seizure, he is not entitled to \$3.50 given by 2 Gen. St. p. 1456, for serving a writ against lands and making inventory and return.

Suit by the Birbeck Investment, Savings & Loan Company of America against Clara B. Gardner and others. Motion to retax sheriff's fees. Granted in part.

Charles B. Hughes, for the motion. Joseph N. Tuttle, for sheriff, opposed.

PITNEY, V. C. This is a motion to retax the sheriff's fees on a foreclosure sale. The principal contest was over the amount of commissions. The execution was for over \$9,000. When the premises were first exposed for sale the solicitor of the complainant bid \$2,000, and, no one bidding any more, the deputy sheriff conducting the sale stated in a low tone to the bidder that the premises were worth a good deal more, and that he must bid more, or that he would adjourn the sale for a better bid. The solicitor protested, declining to bid more. The sheriff, who was near by, was called in, heard what the solicitor had to say, and adjourned the sale. On the adjourned day the solicitor made the same bid, and the deputy increased the bid, and, when asked the name of the bidder, gave the name of Stephen Crilly, of New York. The solicitor charged him with fictitious bidding in order to increase his fees. The deputy persisted, bid the property up against the solicitor to \$5,000, whereupon the solicitor bid \$100 more,—\$5,100,—and it was struck off to the complainant. The sheriff has charged commissions on \$5,100. The solicitor claims that the property should have been struck off to him on the first day, and that the bidding by the deputy for Mr. Crilly was a mere device to increase the amount of the sheriff's fees. The affidavits on the part of the sheriff show the property to be worth much more than \$5,000, and that he was authorized by Mr. Crilly to bid that sum for it. There is no proof that the sheriff hunted up Mr. Crilly and induced him to bid, or that he was a mere irresponsible figurehead for the sheriff. He swears that he was acquainted with the property and authorized the bid. The fact that the solicitor was willing to bid \$5,100 rather than let the premises go, and the fact that the sheriff, if he did so, was able to get a responsible party to make the bid of \$5,000, indicates that the property was of sufficient value to make it bring that much in cash at sheriff's sale. For, under the circumstances, the sheriff would have been personally responsible for Crilly's bid if the property had been struck off to him. And that brings us face to face with the statute of March 12, 1880 (2 Gen. St. p. 2111), which provides for confirmation of sales by sheriffs under foreclosure proceedings, and that the sale "shall not be confirmed unless the court is satisfied, by evidence, that the property has been sold at the highest and best price that the same would then bring in cash, and such evidence may be

in the form of affidavits." It has been held that this act was not intended to apply only to cases where there was likely to be a decree for deficiency, but to all sales. *Insurance Co. v. Gould*, 84 N. J. Eq. 417; *Railroad Co. v. Scranton*, Id. 429; *Safe-Deposit Co. v. Jenkins*, 40 N. J. Eq. 451, 2 Atl. 13; *Bethlehem Iron Co. v. Philadelphia & S. S. Ry. Co.*, 49 N. J. Eq. 356, 23 Atl. 1077. I think it may be safely said that the policy of the law is that every encouragement shall be given to sheriffs and other officers to obtain the largest price they can for property sold by them. In the conduct of sales, with that object in view, sheriffs are not altogether subject to the control and direction of the plaintiff or complainant in the writ. The control which that party has over the writ does not extend so far as to enable him to compel the sheriff to sacrifice property at a sale. Other persons may be, and usually are, interested,—infants, lunatics, and others,—who, by reason of absence or other circumstance, are unable to look after their interests. If, then, the sheriff or other officer having the responsibility of conducting a sale under a judicial writ or order sees that a sacrifice is about to be made, which may be avoided by an adjournment, it seems to me that, in the absence of other controlling circumstances, it is not only his right, but his duty, to adjourn the sale. How else can he make the usual affidavit that the property brought the highest and best price that it would bring in cash? This right and duty of the sheriff are not affected by the circumstance that an increase of the price will increase his fees. It may be that one object in making sheriff's fees in such cases measurably dependent upon the amount realized from the sale was to incite the officer's diligence and care in the direction of procuring the best prices attainable. If, then, the evidence in this case warranted the conclusion that the sheriff induced Mr. Crilly to bid, I am far from sure that it would affect the result. I think the charge for adjournment and commissions must stand.

The only other objection is to the item of \$3.50 for levy and return. In this case there was no levy or inventory to be made, and none was made. The writ was a special fieri facias to sell certain lands therein described, and certain shares of stock therein specified, held by the complainant as collateral, and in its possession. The certificate of stock was handed to the sheriff, or put within his reach, by the solicitor, for the purpose of sale and delivery. In fact, there was and is in such cases no necessity for the issuance of a writ of fieri facias. All sales by order of the court of chancery of specific property already within the reach of the court may be made by a master, as in partition cases, by a mere order or decree of sale. The word "levy," in our legal nomenclature, imports an actual seizure by manual caption of goods and chattels, accompanied by an inventory of the same, and, in the case of land, a description thereof, and

no more. It is true that the word, in its broader sense, may include the whole process of making the money mentioned in the writ by seizure of the goods, making a description of lands, advertising them for sale, selling them, and collecting the money. But in practice it has been distinguished from an advertisement and sale, and has been confined to the actual seizure of the property, either by taking manual possession, or by statutory proceeding, or, in case of land, making a description thereof, where the property is incapable of manual caption. This abundantly appears by a perusal of the various judicial deliverances upon the subject of proceedings under execution, as found in the reported cases which are collected in Stew. Dig. pp. 531, 582, 534, and his Supplement, pp. 300, 301. And see Nelson v. Manufacturing Co., 45 N. J. Eq. 594, 17 Atl. 943; Delaney v. Martin, 51 N. J. Law, 148, 16 Atl. 189. And in the fee act (2 Gen. St. pp. 1446, 1448) the sheriff is allowed a fee for "serving" a writ of execution, another for "advertising," and still another for "selling" under it. By the service here mentioned is meant the levy or seizure and making the inventory of the goods and lands seized, as distinguished from the sale of the same. This distinction has run through all the acts, from the act of June 13, 1799 (Revision 1816, p. 488), the Revision of 1846, p. 464, and that of 1877. But the counsel for the sheriff relies upon the act of April 18, 1891 (2 Gen. St. p. 1456), by which the sheriff is allowed \$3.50 "for serving every writ against goods or lands and making an inventory and return." The "serving" here provided for is the same "serving" provided for in the original act before quoted; and the fee is made \$3.50, instead of \$1, presumably on account of the smallness of that sum for making a seizure and an inventory. It certainly does not cover the advertisement and sale, for he is allowed for each of those separately, and has charged for them in this case. I do not think that the act just cited enlarges the scope of the old act, but simply increases the amount of the charge, so that the charge is, in my judgment, allowed for a seizure and inventory. None such were made in this case, and therefore the charge of \$3.50 must be stricken out; but, as the complainant failed in his principal contention, it will be without costs.

LEE et al. v. HUBSCHMIDT BUILDING & WOOD-WORKING CO. et al.

(Court of Chancery of New Jersey. June 21, 1897.)

FIXTURES—BETWEEN MORTGAGOR AND MORTGAGEE.

Machines purchased by a corporation, and adapted to the business which it is organized to carry on,—“a general building and wood-working business,”—and placed by it in its mill, and fastened to the building to a certain extent, and not moved about from place to place in actual use, are fixtures.

Suit by James H. Lee and others against the Hubschmidt Building & Wood-Working Company and another. Heard on bill, answer, and proofs. Decree for complainants.

Thomas N. McCarter, Jr., for complainants. John B. Humphreys and George P. Rust, for defendants.

PITNEY, V. C. This bill is filed by a mortgagee of real estate to enjoin waste upon the premises. The question is as to whether certain machinery in a building on the premises was a part of the realty, or was personalty, and not subject to the mortgage. The machinery consists of a boiler and engine, shafting leading therefrom, a tenoning machine, a molding machine, a planer, a cross-cut saw, a lathe, a joiner, and a dado machine. These machines were all intended to be used in the preparation and manufacture of rough lumber into various forms and articles used in house building. The defendant corporation was organized on the 12th of October, 1893. In the certificate of incorporation the purposes for which it was organized are stated as follows: “The object for which the said company is formed is to conduct a general building and wood-working business, to buy lands, and to erect thereon buildings for manufacturing purposes, and machinery necessary and incident thereto.” The principal stockholders are two brothers by the name of Hubschmidt, who were carpenters and builders, and before the organization owned a lot with an ordinary carpenter shop upon it, and immediately after the organization of the company conveyed this lot and carpenter shop to it, and then proceeded to equip it with the machinery in question, which is adapted to carry out the objects of the corporation, namely, “to conduct a general building and wood-working business.” The cause was first brought before the court upon an application for an injunction, on bill, answer, and ex parte affidavits, which resulted in an interim restraint. Afterwards the parties submitted the cause, as on final hearing, upon the pleadings and the affidavits and exhibits for proof. The answer, though not called for under oath, is sworn to, but for present purposes cannot be considered as evidence, since a replication was filed. With regard to the extent to which the machinery was fastened to the building or the earth the affidavits are, in some respects, meager, but they show that the boiler was merely set upon a solid foundation upon the ground. The engine was fastened to wooden timbers or sills previously sunk in the ground, and then fastened and imbedded in broken stone. The shafting ran from the engine, under the floor of the carpenter shop, and the belting and gearing came up through the floor to the different machines that were located in the room, as convenience required, and the machines were fastened to the floor and to the beams

in the ordinary way that such machines are fastened, by screws and bolts and braces. The allegation in the affidavits annexed to the answer is that the machines, including the engine, are rather light affairs, and that the fastening was simply to keep them steady, to prevent them from jarring and jumping about when in motion. Under the case of *Blanke v. Rogers*, 26 N. J. Eq. 363, unexplained by subsequent cases, I should have said that they were not fixtures. But that case has been explained, and its application limited, by the recent case of *Feder v. Van Winkle*, in the court of errors and appeals, reported in 53 N. J. Eq. 370, 33 Atl. 360. I refer particularly to the language of the court found on pages 372-375, 53 N. J. Eq., and pages 399, 400, 33 Atl. There is no doubt that the machines here in question may all be taken away and set in another building; but with regard to that quality, Justice Van Syckel, at top of page 373, 53 N. J. Eq., and page 399, 33 Atl., remarks that that is not conclusive that they are not fixtures. He says: "A steam engine, to take on the qualities of a fixture, need not be made specially for the building in which it is planted. It may, like any other piece of mechanism, be removed, and used with equal advantage in any other establishment for which it will furnish sufficient power." And further on he says: "There must be actual annexation with an intention to make a permanent accession to the freehold, but it is not necessary that there be an intention to make the annexation perpetual." Then adds this significant remark: "The intention must exist to incorporate the chattels with the real estate for the uses to which the real estate is appropriated, and there must be the presence of such facts and circumstances as do not lead to, but repel, the inference that it is intended to be a temporary annexation." Then he says that in *Blanke v. Rogers* the machines there "were movable in the building, and were moved about at the convenience of the owner, and run from different parts of the shafting." He points out that the same was true of the machines in question in the case of *Insurance Co. v. Semple*, 38 N. J. Eq. 575. Then we have the case of *Spelden v. Parker*, 46 N. J. Eq. 292, 19 Atl. 21, also in the court of errors and appeals. Speaking of the implements in that case, Justice Van Syckel, in *Feder v. Van Winkle*, says: "Not one of the implements involved appeared to have been specially adapted to the place in which it was used. Some were set in the earth, and all could have been removed and applied to the prosecution of a like business elsewhere." "The decision," he says, "must rest upon the facts that the appliances were actually annexed; that they were adapted to and used in the business for which the realty was held by the owner; that a common purpose was to be promoted by attaching the chattels to the freehold; that the just inference was that the annexa-

tion was intended to continue so long as the business was prosecuted on those premises, and that the enterprise was intended to be permanent in the sense in which that term is used in business transactions,—permanent, as contradistinguished from temporary." Applying those principles to this case, I come, not without some hesitation, to the conclusion that the articles in this case are a part of the realty. The period of time for which this company was organized was 50 years. It deliberately purchased these machines, which were adapted to the business which it was organized to carry on, to wit, "a general building and wood-working business," and proceeded to place them in this building. They were all fastened to the building to a certain extent. None of them were moved about from place to place in actual use, and these circumstances lead to the just inference "that the annexation was intended to continue so long as the business was prosecuted on those premises, and that the enterprise was intended to be permanent in the sense in which that term is used in business transactions." It is true that the defendant the manufacturing company, and their assignee, Kevitt, to whom they have attempted to convey these articles of machinery, declare positively that it was not their intention to annex them to the freehold, but I cannot take such declaration as sufficient to overcome the just and necessary inference to be drawn from the circumstances above stated. I will advise a decree for an injunction, to continue until the complainants' mortgages are paid and satisfied.

In re LIVINGSTON'S WILL.

(Prerogative Court of New Jersey. June 22, 1897.)

WILL—VALIDITY—TESTAMENTARY CAPACITY.

1. Mere ignorance by testatrix of the kind or amount of her property will not invalidate her will, but only ignorance resulting from a mental incapacity to comprehend the kind and amount thereof.

2. Testatrix being capable of making a will, and no fraud having been practiced on her by which she was misled into signing what she did not want to, and she having had every opportunity to know the contents, it is immaterial that the will so drawn varied from her instructions therefor.

Appeal from orphans' court, Morris county: Cutler, Judge.

In the matter of the probate of the will of Anna H. Livingston. From a decree admitting to probate her will of March 15, 1896, Charles W. Hunt and others appeal. Affirmed.

Stephen H. Little, for appellants. Alfred Mills and P. B. Pierson, for respondent.

REED, Vice Ordinary. The record sent up shows the following transactions before the surrogate and orphans' court: On September

28, 1896, Henry De Peyster, who was named as executor in the will probated, filed a petition with the surrogate of Morris county applying for probate of that instrument. On September 18, and again on December 5, 1896, Charles W. Hunt filed a caveat against its admission to probate. On December 5, 1896, the said Charles W. Hunt, and on December 14, 1896, Cornelia De Peyster Black, Emily M. Lovell, and Louisa E. Pitman, filed petitions applying for the probate of an earlier will of Anna H. Livingston, which will, it was alleged, had been executed on March 25, 1889, with a codicil executed February 11, 1892, and in which will the petitioners had been named as legatees, and which will, it was alleged, had been destroyed. On December 7, 1896, Wilson De Peyster, one of the legatees under the will of March 15, 1896, filed a caveat against the admission to probate of the alleged will of 1889 and codicil of 1892. Citations seem to have been issued by the surrogate in the matter of the caveat of Charles W. Hunt against the admission of the will of 1896 for the appearance of parties before the orphans' court on December 7, 1896. Citations were also issued in the matter of the caveat of Wilson De Peyster to the admission to probate of the former will and codicil,—some for appearance of parties before the same court on Tuesday, December 22, 1896, and others for appearance on January 12, 1897. On January 12, 1897, the hearing began upon the issue raised by the caveat of Hunt to the will of 1896. That this was the issue then tried clearly appears from the transcript of the evidence taken in the cause, as well as the transcript of the orphans' court returned in this appeal. I mention these facts because of an insistence made by the counsel of the caveators against the will of 1896, and of the proponents of the will of 1889, during the trial in the court below, and now repeated in this court. This insistence is that upon this hearing it was within the power of the orphans' court not only to refuse probate of the will of 1896, but to grant probate of the will of 1889 and its codicil. Assuming that the orphans' court had the power to admit to probate a destroyed will, I think it was entirely within the power of that court to have consolidated the two proceedings so intimately related, and to then have taken testimony to be used upon both proceedings. The court could certainly have done so with the consent of all parties, but there was no such consent to this course of action, and the court refused to regard the proceeding as one for the trial of the validity of the first will and codicil. In this I think the court was clearly right. But, whether right or wrong, the judicial conduct does not affect the decree now questioned, unless the court was in error in admitting the will of 1896 to probate. If the last will is a valid instrument, it revoked the previous will and its codicil. I may, however, remark that the due execution of the will of 1889 and codicil

of 1892 seems to have been provable because the existence of such a will, duly executed, was an important bit of testimony, in two aspects. It was material—First, in establishing the footing of the caveators who would have taken under its provisions, if valid; second, in showing a previous intention of the testatrix to benefit the caveators, which intention was frustrated by the later will. Inasmuch as the attack upon the later will was made upon the ground of the mental incapability of the testatrix to execute a will in 1896, her previous expression of an intention, the diverse of that expressed in the later will, was evidential upon the question of her sanity when the last instrument was executed. But the proof of the execution of the former will seems to have been proffered, not for that purpose, but for the sole purpose of having it admitted to probate, and in the light of the offer the proffer was overruled. That will, however, seems to have been used in the trial, as if executed, as freely as if it was in evidence for all the purposes for which it would have been useful if properly proved. Its terms are set out in the papers before me, and I will so use it. I will now proceed to consider the question in respect to the validity of the will of 1896.

The testatrix was 89 years old when she executed this will. The insistence of the counsel for the caveators is that her mind was sound when she made the codicil on February 11, 1892, but that soon after that date she had a severe attack of pneumonia, which prostrated her physically, and so affected her mentally that in 1896 she was deprived of testamentary capacity. It is not disputed that during the last four years of her life the testatrix was physically disabled in several respects. She was a little hard of hearing. She had incipient cataracts, so that she could not read, but could see sufficiently to play games. She had trouble with her throat, so that she could not articulate distinctly, and had some difficulty in swallowing her food. She was also subject to spells of prolonged drowsiness, which, however, did not amount to coma. On the other hand, it is proved by her attendant physician, her relatives, and by several disinterested witnesses who visited her at intervals up to the time of her death, that the testatrix, for a lady of her age, was very intelligent, of quick mental perception and vivacious temperament. She had traveled much and read much, and when, by her physical infirmities, she was secluded from the world and shut off from reading, she enjoyed the visits and conversation of her friends and relatives, and listened to the reading of the newspapers and books, amused herself with games, and propounded conundrums, and like trifles, to which any person confined to the narrow world in which she was compelled to live, however intelligent, would naturally resort. She enjoyed the repetition of sermons heard by a friend of hers. She engaged in the discussion of books. She was intelligently interested in current affairs,

about which she loved to hear. Indeed, the testimony is so destitute of any substantial attack upon her sanity or mental ability that it is difficult to deal in detail with the point urged against her testamentary capacity. The testimony of the two medical experts produced by the caveators was based upon a hypothetical case which omitted so many elements of fact, as I find them to exist, as to render their opinions absolutely worthless. The only other important witness is Mrs. Chadwell, who denies the mental capability of the testatrix. Her opinion is based upon the playfulness of the nurses towards the testatrix, the reticence of the testatrix when the witness visited her, her difficulty in eating, her interest in a doll, and her economy in dress, followed by more profuseness of expenditure. But all these points, when viewed in the light of the other testimony, seem of little importance. Her throat trouble made eating difficult and talking onerous. The doll was one brought in by one of her attendants, and attracted the interest of the testatrix by its peculiarity. The endearing terms used by her attendants, as well as by her relatives, towards her, indicated nothing beyond the fact that she was an invalid, affectionate and amiable, and physically required kindly offices. In the face of the overwhelming testimony that all these things were the incidents of the invalid physical condition of the testatrix, and of the secluded world in which she was compelled to live, and of the affectionate relations between her and her nurses and kindred and friends, and in face of the testimony that, upon all current affairs in which an intelligent lady is interested, she was acute, bright, and companionable, the incident of the doll, and the endearing words and ways of the nurses and friends, seem trivial.

It is said that she did not comprehend the extent and character of her property, but left its management and the payment of her bills in the exclusive charge of Henry De Peyster, one of the legatees. But she was a widow, and had for years left the management of her property to others. She undoubtedly knew the estimated value of her property, and that was all that was essential in making a will of the general character of this instrument. In leaving the management of her estate to the confidential care of a business relative, she did what most women unacquainted with business affairs would naturally do. But it is not ignorance of the kind or amount of property owned by the testatrix which invalidates her will, but ignorance resulting from a mental incapacity to comprehend the kind and amount of such property. That this lady, if she did not, could have comprehended the nature of her estate, is to my mind indisputable.

It is said, again, that her instructions were not followed in drafting the will; that her express wish was that the grand nephews and nieces should share alike, and the grand

nephews and nieces should take their parents' share; and that the will, as drafted and executed, does not carry into effect that wish. I do not see, however, why the will does not effect that purpose. But, whether it does or not, if she was capable of making a will, and there was no fraud practiced upon her by which she was misled into signing what she did not wish to sign (and there is no proof of fraud in this case), it would not matter what variation there may be between the instructions and the executed instrument. Now, that she had every opportunity afforded her of knowing the contents of that instrument seems entirely clear. Every reasonable precaution was taken that the testatrix should understand its provisions. It was executed in the presence of the family physician, who says that he slowly read the will to her. He says he asked her if she wished to make that will, and she replied that she did. He says he asked her why; she replied that she particularly wished to remember her nurses, Carrie and Mary. She then mentioned her nephews and nieces, and said she wanted them to share alike. She mentioned no one by name, except Carrie and Mary. The doctor says, "I repeated the question a number of times, so that I was perfectly satisfied that she knew just exactly what she wanted to have done." Wilson De Peyster, to whom she gave her instructions for the will, and who had it drawn by his lawyer, says that before he handed the will to her he asked her to repeat her instructions, which she did; that he then read the will slowly over to her, and then gave the will to her, and on the next day (March 15th) it was executed. He says that about an hour after she executed this will she told him that she had made a will several years ago. In the evening she said to him, "I want you to tell Henry [De Peyster, her nephew and business agent] to look among my papers for my old will, and either bring it down, or give it to you to bring down." The will was actually in the custody of Frank Lord, the nephew of her old business manager, who had died. He, upon a written order from the testatrix, delivered it up. The will was brought to Morristown, and in the presence of Dr. Pierson, who came by direction of the testatrix, it was destroyed. Now, what induced her to change her mind in regard to the disposition of her property, between February 11, 1892, and March 15, 1896, I do not know. That the change of her intention was not the vagary of an insane or imbecile mind, I am sure. That the change of intention was not produced by fraud or undue influence, I am equally sure. The decree below, admitting this will to probate, should be affirmed. In respect to the cross appeal from that part of the decree of the orphans' court which allowed counsel fee to the caveator, I will affirm such allowance, but no counsel fee to the counsel of the caveator will be allowed in this court.

HOOKER v. HOOKER.

(Court of Chancery of New Jersey. June 24, 1897.)

DIVORCE—JURISDICTION—RESIDENCE.

Under a statute requiring two years' actual residence to confer jurisdiction in proceedings for divorce, where a wife, being a resident of New York, comes to New Jersey on abandonment by her husband, but with no idea of making it her home, she does not become a resident of the state, so that two years thereafter she can maintain a bill for divorce.

Petition by Jennie F. R. Hooker against Walter H. Hooker for a divorce. From the order of the master refusing the petition on the ground of the failure of petitioner to establish a residence in New Jersey two years preceding the filing of the petition, the petitioner appeals. Affirmed.

Isaac S. Taylor, for petitioner.

PITNEY, V. C. I have carefully examined this case, and the argument of the counsel for the petitioner, and come with some regret to the conclusion that the conclusion of the master was right, and that the petitioner had not been a resident of this state two years when her bill was filed. Residence, for the purpose of divorce, in New Jersey, means domicile; and it is of the utmost importance in this case, because, without such domicile, there is no jurisdiction, there having been no personal service within the jurisdiction. The husband and wife never lived in New Jersey before the marriage, and were both residents of New York. They were married in New York, and the initiatory desertion took place in New York, only two or three months after the marriage. Shortly afterwards the complainant came to New Jersey. She was a young woman. Her parents reside in New York. She came here simply to avoid the mortification resulting from her contact with her old friends and acquaintances, and to recuperate from the nervous prostration due to the outrageous conduct of her husband. It is plain, from her own testimony, and from that of her mother, that when she first came here she had no idea of making New Jersey her home or changing her domicile. She came here on the 20th of November, 1894, and the bill was filed on the 23d of November, 1896. It is possible that at some time during those two years she did determine to make New Jersey her home, but that determination, if it ever was made, certainly was not made two years before the bill was filed.

HAMILL v. INVENTORS' MANUF'G CO.
et al.

(Court of Chancery of New Jersey. June 28, 1897.)

COVENANT OF WARRANTY—MORTGAGES—ESTOPPEL.

A grantor is not estopped by his covenant of warranty from enforcing an existing mortgage on the property which is afterwards assigned to

him, it having been expressly understood when the deed was made that the property was sold subject to such mortgage, and the consideration having been agreed on with that understanding.

Bill by C. Frank Hamill against the Inventors' Manufacturing Company and others. Complainant moves to strike out so much of the answer as reserves exceptions, and denies combinations and confederacy, against the provisions of rule 214; also to strike out the entire answer, and for a decree that the mortgage of complainant is a prior lien to that of defendant Blake. Denied.

The bill is filed by Hamill to foreclose a mortgage made to him on March 14, 1894, by the Inventors' Manufacturing Company, the then owners of the mortgaged premises. The bill then sets out that the premises were formerly owned by Jesse Lake and Daniel L. Risley, and that they, while such owners, on April 16, 1883, gave a mortgage thereon to Sommers, Robinson, and Frambes, to secure the sum of \$325; that afterwards, on September 13, 1888, Messrs. Lake and Risley sold the mortgaged premises to the Inventors' Manufacturing Company, by a deed containing a covenant of general warranty; that on April 1, 1892, Sommers, Robinson, and Frambes assigned the above-mentioned mortgage to Lake, one of the former owners, who had joined with Risley in selling the mortgaged premises to the Inventors' Manufacturing Company. On March 14, 1894, the Inventors' Manufacturing Company executed a mortgage to the complainant, which mortgage is being foreclosed by the present suit. On August 17, 1893, Mr. Lake, the then holder of the first-mentioned mortgage, assigned the same to Mr. Blake. The bill claims that the mortgage of complainant made on March 14, 1894, is superior in rank to the previously executed mortgage for \$325, executed on April 16, 1883. The theory upon which this claim rests is that Lake had given a general warranty deed to the Inventors' Manufacturing Company; that he afterwards bought this mortgage, which was an incumbrance upon the premises when he gave his deed; that, by force of his covenant, he would have been estopped from enforcing the mortgage against the grantee under that deed; and that he is now estopped from setting it up as an incumbrance against the second mortgagee, who holds in privity with the original grantee. The answer to the bill, while admitting the order of the creation of the incumbrances, and the execution of the deed and assignments, as stated in the bill, sets up that the mortgage by Risley and Lake to Sommers, Robinson, and Frambes was a purchase-money mortgage, and was on record when Hamill made his loan to the Inventors' Manufacturing Company, and took his mortgage. It further asserts that the property was conveyed by Risley and Lake to the Inventors' Manufacturing Company, subject to the Robinson mortgage, and that, although the mortgage was not mentioned in the deed, it was expressly understood by and between the grantors and grantees that the property was

sold subject to the said mortgage, and that the purchase money agreed upon between the parties thereto was with that understanding.

C. L. Cole, for the motion. Allen B. Endicott, opposed.

REED, V. C. (after stating the facts). The first objection taken to the answer must prevail, as this part of the pleading is prohibited by rule 214. The general motion to strike out the entire answer, as containing no defense to the facts set up in the bill, raises a question of importance. The ground upon which the mortgage by Lake to Blake (which will hereafter be called the "Blake mortgage") is sought to be subordinated to the mortgage made to Hamill by the Inventors' Manufacturing Company (which mortgage will be called the "Hamill mortgage"), as has been already stated, is that, this mortgage having come to the hands of Lake, who had warranted to his grantee, the Inventors' Manufacturing Company, the title of the mortgaged premises, the court will, for the purpose of preventing circuity of action, refuse to Lake the right to sell the property to pay this mortgage, when it appears that the Inventors' Manufacturing Company can turn around and recover the amount of the mortgage by an action upon Lake's covenant of warranty. It is insisted that the assignee of Lake and the mortgagee of the Inventors' Manufacturing Company stand in the same position as the original parties. The cases cited in support of the first contention are *Van Riper v. Williams*, 2 N. J. Eq. 407, *Bank v. Pinner*, 25 N. J. Eq. 405, and *Stiger v. Bacon*, 29 N. J. Eq. 442, to which may be added the cases of *Woodruff v. Depue*, 14 N. J. Eq. 168, *White v. Stretch*, 22 N. J. Eq. 76, and *Dayton v. Dusenbury*, 25 N. J. Eq. 110. In each of these cases a purchase-money mortgagee was foreclosing his mortgage, and he had conveyed the mortgaged premises with covenants against incumbrances, while a previous incumbrance remained upon the property. It was held that, in a suit to foreclose his mortgage, he must liquidate the previous incumbrance, or that there should be deducted from the amount due him a sum equal to the amount of the existing incumbrance.

Now, while neither of the mortgages in the present case are purchase-money mortgages, still the principle upon which the court acted in the cases mentioned is thought by counsel to control in the present instance; for the action of the court in those cases was based upon the principle of avoiding circuity of action. The question is whether the application of this principle will reach the result insisted upon by the counsel of Hamill. It is to be observed that it is the Blake mortgage which was the incumbrance upon the property at the time that the covenant of warranty was executed by Risley and Lake, and that neither Lake nor his assignee, Blake, is foreclosing the mortgage, or bringing an action in ejectment to obtain possession of the mort-

gaged premises. It is to be observed, further, that the covenant in the deed of Lake and Risley to their grantees of the mortgaged premises is a covenant of warranty of title only. Of this covenant there is no breach until there is an actual or constructive eviction. No right to sue for its breach accrued, or would accrue, until Blake or his assignee took steps in respect to this mortgage which would end in the eviction of the owners of the equity of redemption from the mortgaged premises. It is true that, in the cases cited, it does not appear that, at the time the purchase-money mortgage was foreclosed, there was in operation any proceeding to enforce the previous incumbrance. The incumbrances were either prior mortgages, municipal assessments, judgments, or tax liens. But in each of these cases, among the covenants given by the foreclosing mortgagee, was a covenant against incumbrances, which covenant was broken as soon as made; and so the right of action against the mortgagee upon his covenant had accrued at the moment when he began his foreclosure suit. This circumstance is not alluded to as a ground of decision in those cases, nor will it entirely reconcile this line of cases with other cases in this court. I allude to those cases in which it has been held that, in a suit to foreclose a purchase-money mortgage, it cannot be successfully set up that the mortgagee had sold the property with covenants, and that there was an outstanding claim of title, or defect of title, or even an incumbrance. This doctrine was laid down in the leading case of *Shannon v. Marsells*, 1 N. J. Eq. 413, decided by Chancellor Vroom. In that case there was a covenant of warranty. The chancellor said: "When there is a mere allegation of an outstanding title or incumbrance, the court will not interfere, but leave the party to his remedy on the covenant. But when there is an eviction, or even an ejectment, brought, the court will interfere. In this case the first mortgagee is prosecuting his claim (this was the mortgage which constituted the incumbrance), all the parties are here, and justice can be done." The doctrine laid down in this case was followed in the case of *Van Waggoner v. McEwen*, 2 N. J. Eq. 412, in respect to an alleged outstanding claim to part of the premises, where there had been no eviction and no action was pending. The same doctrine was also held in *Long's Adm'r v. Long*, 14 N. J. Eq. 462, and in *Hille v. Davison*, 20 N. J. Eq. 228. In *Jaques v. Esler*, 4 N. J. Eq. 461, the deed contained covenants of warranty and seisin, and the foreclosure of a purchase-money mortgage was stayed until the determination of an ejectment suit which had been already brought by one claiming a paramount title. So the rule is entirely established that the allegation of an outstanding title is no defense in a suit to foreclose a purchase-money mortgage, unless there is an eviction or an action to evict actually pending. And this doctrine has been applied to the

existence of an incumbrance, even when there was a covenant against incumbrances. In *Glenn v. Whipple*, 12 N. J. Eq. 50, where there was a covenant against incumbrances, a claim of dower in the mortgaged premises was held to be no defense in a suit to foreclose. In the present case, as already remarked, the mortgage which is being foreclosed is not the mortgage which, if enforced, would cause a breach of the covenant of warranty. Blake, the assignee of the last-mentioned mortgage, is quiescent. He has neither brought an action of ejectment nor a suit to foreclose. In this condition of affairs, no action would lie against Risley and Lake, by their grantees, the Inventors' Manufacturing Company, for breach of the covenant of warranty. It would seem, therefore, that the doctrine upon which the first group of cases was decided will not support the present insistence, that in this suit to foreclose the last mortgage the first or Blake mortgage should be subordinated to the Hamill mortgage.

But it remains to consider whether the result sought does not follow from another view of the posture of affairs presented by the pleadings, in view of another rule, which had its origin in the desire of courts of equity to prevent circuity of action. The query suggested is whether, when the interest of the mortgagees in the Blake mortgage fell into the hands of Lake (a joint covenantor with Risley in the grant to the Inventors' Manufacturing Company), the mortgagee's interest did not pass to the Inventors' Manufacturing Company, under the rule that if a man grant land with warranty, and afterwards acquires a title, this after-acquired title inures to the benefit of the grantee. *Gough v. Bell*, 21 N. J. Law, 157; *Moore v. Rake*, 26 N. J. Law, 574; *Brundred v. Walker*, 12 N. J. Eq. 140; *Vreeland v. Blauvelt*, 23 N. J. Eq. 483; *Matthiessen & Wiechers Sugar-Refining Co. v. Mayor, etc.*, 26 N. J. Eq. 247. Under the doctrine of estoppel, which precludes the grantor or his privies from asserting an after-acquired title against a grantor and his privies, it would seem that Lake was estopped from foreclosing his equity of redemption in the land which he had conveyed to the Inventors' Manufacturing Company. It is true that a mortgagee's interest is of an anomalous character. By itself it cannot be conveyed, and a deed made by Lake to the Inventors' Manufacturing Company of his interest as mortgagee would have passed nothing. *Devlin v. Collier*, 53 N. J. Law, 422, 22 Atl. 201. Nevertheless, I think that his acquired lien, accruing by his purchase of the mortgage, coalesced with the equity of redemption; and they became merged by reason of the covenant of warranty, and thus conferred a complete title upon the Inventors' Manufacturing Company. The rule that a covenant of warranty ipso facto passes an after-acquired title of the grantor to the grantee originally arose from the doctrine already mentioned, viz. the avoidance of circuity of actions. *Moore v. Rake*, supra. And

in this instance the inchoate counter rights of the covenantee to sue the covenantor upon his warranty of title, and of the covenantor to foreclose the mortgage upon the property of the covenantee, affords a conspicuous instance for the application of the rule. If this view is correct, then, the covenant of warranty being one which ran with the lands, the right to sue for any subsequent breach went to the second mortgagee; or, what amounts to the same thing, the after-acquired title of the Inventors' Manufacturing Company was included in the second mortgage executed by it. The only doubt regarding the correctness of the last statement arises from the peculiar character of the mortgagee's interest, already mentioned, which obtains to its full extent in this state. It is here held not to be an estate at all, and that the mortgagee gets no title, except such as may be accorded to him for the purpose of collecting the debt for which the mortgage stands as security. For this purpose, he can gain possession of the mortgaged premises, after the maturity of the debt, by an action of ejectment; but, for all other purposes, the legal title is in the mortgagor. Now, in England, where the legal estate passes to the mortgagee, all covenants which run with the land go to the mortgagee. The mortgagor is stripped of all right to sue upon any covenant of his grantor. Inasmuch as the position of the mortgagor and mortgagee is here entirely reversed, it would seem that the right to sue here was reserved entirely to the mortgagor. But the true doctrine is probably that both are entitled to sue so far as such suit may be necessary to protect their respective rights. This was the rule laid down by Chief Justice Shaw in *White v. Whitney*, 3 Metc. (Mass.) 83; and, although the interest of the mortgagee in Massachusetts is more analogous to his interest under the law of England than to his interest under ours, yet the reasoning of Chief Justice Shaw in that case would seem to be entirely applicable to the respective interests of mortgagor and mortgagee here. This rule seems to have the approval of a number of adjudications in this country, collected in the notes to the *Spencer Case*, 1 Smith, Lead. Cas. marg. p. 160. It would also seem that Blake, the assignee of the mortgage, must stand in the shoes of his assignor. He took the mortgage subject to all equities between the mortgagor and his privies and the mortgagee and his grantees. Nor do I think that it matters that the mortgage became the property of one only of the two grantors to the Inventors' Manufacturing Company. The two grantors were joint covenantors, and were liable to be sued jointly for the entire damages for the breach of the joint covenant. On principle, then, if the title or interest came to either, it would pass to their grantee.

But, assuming all this to be correct, the question presented is not yet decided. A further question remains whether the answer does not contain a statement which, if true,

is a complete avoidance of the estoppel springing out of the covenant. This statement is that, when the property was conveyed by Risley and Lake to the Inventors' Manufacturing Company, it was expressly understood that it was sold subject to the Blake mortgage, and the consideration was agreed upon with that understanding. It was held in the case of *Pitman v. Conner*, 27 Ind. 337, that a covenant of warranty was not broken by the existence of an incumbrance which the grantee agreed to pay as part of the consideration for the property. The doctrine so announced seems to violate the rule that a deed cannot be varied by parol; for it is difficult to see how, in the face of a covenant of warranty to title, the grantee can be evicted by the enforcement of a previously existing incumbrance, merely because he verbally agreed that this should not be covered by the warranty. But the provability of a similar parol agreement was recognized by the court of errors in this state in the case of *Bolles v. Beach*, 22 N. J. Law, 680. In that case a deed was given with full covenants, and there was at the time a mortgage upon the property for \$1,000. The grantor, who was the obligor upon the bond for the security of which the mortgage was given, was compelled to pay the amount of the bond and mortgage. He afterwards brought suit against the grantee for the recovery of the sum which he had paid, and it was held that he was entitled to prove an agreement by the grantee, made at the time of the sale, that the grantee would discharge the \$1,000 upon the premises; the grantee retaining so much of the consideration money as was necessary for that purpose. The court evaded the estoppel arising from the covenants, upon the ground that the agreement was merely collateral to the deed. In *Wilson v. King*, 23 N. J. Eq. 150, it was held in this court that a parol undertaking of a grantee to pay a mortgage upon the premises conveyed would be enforced against him, although his deed contained full covenants.

Now, if the grantor, by virtue of such an agreement, retains a right to recover what he has paid to discharge a previously existing incumbrance, and if the incumbrance can be enforced against the grantee, then a court of equity would certainly refuse to recognize a right in the covenantee to sue upon the covenant of warranty, when it appeared that the breach of such covenant sprang entirely from an incumbrance which the plaintiff had bound himself, by a provable and proved agreement, to pay off; and this whether such agreement is to be regarded as collateral to the deed itself or not. The covenant, so stripped of its vigor in this respect, could not be efficient to pass to the grantee and covenantee any interest in the incumbrance, although it subsequently became the property of the covenantor. In my judgment, if the statement in the answer is true, the Blake mortgage retains its priority. The motion to strike out the answer is refused.

STRICKER et al. v. PENNSYLVANIA R. CO.

(Court of Errors and Appeals of New Jersey.
June 28, 1897.)

MALICIOUS PROSECUTION—EVIDENCE—MALICE—
PROBABLE CAUSE—FALSE IMPRISONMENT—
REFUSAL TO PAY FARE.

The plaintiffs purchased tickets for passage on defendant's railway from New Brunswick to Perth Amboy, via Rahway, the connecting point for Perth Amboy by a branch road. It was Sunday evening, and the tickets were bought after the agent had informed plaintiffs that the last train left for Perth Amboy at 9:36, that being the last train for the day going in that direction. Upon their entering the train, the conductor punched their tickets, and informed plaintiffs that the train did not stop at Rahway, but did stop at Metuchen, an intermediate station; that he thought they could make their train at Elizabeth, which was the next station beyond Rahway, and the extra fare would be 16 cents. This they refused to pay, and the conductor thereupon informed them that he would put them off if they did not pay. This was before reaching Metuchen. They did not alight at the latter station, but pursued their journey to Elizabeth, without the payment of the additional fare, although the same was repeatedly demanded, with threats to remove them from the train, or arrest them in case of noncompliance. The plaintiffs knew that Rahway was the connecting point for their destination, and had traveled that route several times before. When the train arrived at Elizabeth, the conductor again demanded the extra fare, and, payment being again refused, he ordered the arrest of plaintiffs by police officers, under sections 18 and 19 of "An act respecting railroads and canals" (2 Gen. St. p. 2671). The plaintiffs were locked up for the night, and at the hearing the next morning, before a magistrate, were discharged, and thereupon they sued the defendant company for damages, for malicious prosecution. Upon the trial, at the close of the plaintiffs' case, a nonsuit was granted by the trial judge. To this ruling exception was taken, and the same was brought up for review by writ of error. *Held*: (1) That as the declaration was in form one for malicious prosecution, and did not contain a count for false imprisonment, the proofs must show that the arrest was made maliciously and without probable cause; and, the evidence failing to disclose the latter element of proof, the nonsuit was right. (2) That regarding the action as one for false imprisonment, as it was treated by the trial judge and by counsel on the argument, still the nonsuit must be sustained, because it was the duty of the plaintiffs, under the law, to have either left the train at Metuchen, and then looked to the company for damages for the alleged misdirection, or to have paid the additional fare from Rahway to Elizabeth; and, having failed to do either, they became liable to arrest by the conductor, under said statute, for the offense of knowingly and willfully proceeding in a carriage of a railroad company beyond the distance to which the fare had been paid, without previously paying the additional fare for the additional distance, and with intent to avoid the payment thereof.

Magie, C. J., and Collins, Dixon, Garrison, and Bogert, JJ., dissenting.

(Syllabus by the Court.)

Error to supreme court.

Actions by Joseph E. Stricker and another against the Pennsylvania Railroad Company. Judgments of nonsuit, and plaintiffs bring error. Affirmed.

James Parker, for plaintiffs in error. Alan H. Strong, for defendant in error.

HENDRICKSON, J. This writ brings up for review a judgment of nonsuit which was granted at the trial of a supreme court issue at the Union circuit. This and the case of Richard A. Pelletier against the same defendant, arising out of the same transaction, were tried together by agreement of counsel, and were so argued in this court. The plaintiffs brought suits against the defendant for damages for malicious prosecution, charging that by its conductor and agent on one of its cars, without any reasonable or probable cause of complaint against the plaintiffs, it falsely and maliciously charged said plaintiffs with attempting to defraud said defendant, by traveling in a carriage of said defendant from Rahway to Elizabeth without paying fare, and with intent to avoid payment of said fare, in violation of the law of this state, and required certain police officers to arrest the plaintiffs upon such charges, without process, and that said police officers did, in compliance with such requirement, imprison the plaintiffs in the city of Elizabeth, and keep and detain them there in prison, without any reasonable and probable cause whatsoever, for a long space of time, etc. The declaration further alleged that, in truth and in fact, the said defendant, at the time of making such arrests, had not any reasonable or probable cause of complaint against the plaintiffs, and that defendant then and there well knew that the plaintiffs had not been guilty of traveling from Rahway to Elizabeth without paying their fare, or with intent to avoid paying their fare, and had not violated any provision of the statute of this state in such case made and provided; and that thereby plaintiffs say that, by reason of said arrest and imprisonment, maliciously and without probable cause, so by said defendant procured and accomplished, the said plaintiffs were then and there, not only hurt, etc., but also greatly exposed and injured in their credit and circumstances; and after setting forth the hearing of the charge before the magistrate the next morning, and their acquittal and discharge, they claim damages against the defendant. The defendant filed the plea of the general issue.

Upon the trial, the following facts, briefly stated, were proved by the plaintiffs and their witnesses: The plaintiffs, on Sunday, February 3, 1895, went from Perth Amboy, their place of residence, with a sleighing party, to New Brunswick, and in the evening started to return home by rail. With that purpose in view, they went to the depot at about 9 o'clock in the evening, and were informed by the ticket agent that the next train for Perth Amboy left at 9:36, and bought tickets for that place, which had printed on them the words "Via Rahway." In point of fact, the 9:36 was the last train on Sunday evenings, and was scheduled not to stop at Rahway, but did stop at Metuchen,

an intermediate station. The plaintiffs entered a car of the 9:36 train, and, upon its leaving New Brunswick, the conductor approached them, and, upon receiving their tickets, punched and marked them, and returned them to the plaintiffs. The conductor thereupon informed plaintiffs that the train did not stop at Rahway, but did stop at Metuchen, and that the next stop after that was Elizabeth, a station beyond Rahway, and that, if plaintiffs wanted to go to Perth Amboy, they could get their train at Elizabeth, and the difference in the fare would be 16 cents, adding 10 cents thereto for the excess ticket, which was redeemable for the latter amount. One of the plaintiffs answered, "I refuse to pay it," and the conductor said, "I am going to put you off somewhere." This was before reaching Metuchen. The plaintiffs did not leave the train there, but proceeded with it, the conductor returning three or four times before reaching Elizabeth, and vainly demanding of the plaintiffs the additional fare, under threats of putting them off the train or arresting them at Elizabeth if they did not pay. The regular route from New Brunswick to Perth Amboy was by changing cars at Rahway, and proceeding thence by a train from New York, which came from the opposite direction; and this the plaintiffs knew. Upon the arrival of the train at Elizabeth, the conductor again demanded of the plaintiffs the extra fare, under threat of arrest, which they refused to pay, and thereupon the arrest was made by the police officers, by order of the conductor, about 10 o'clock in the evening; and the next morning, about 9 a. m., after complaint and hearing before the magistrate, the plaintiffs were discharged, as stated in the declaration.

The authority of law under which the conductor assumed to act will be found in 2 Gen. St. N. J., p. 2071, §§ 18, 19, which provide as follows:

"Sec. 18. That if any person travel or attempt to travel in any carriage of any railroad company, or of any other railroad company or party using any railway, without having previously paid his fare, and with intent to avoid payment thereof, or if any person, having paid his fare for a certain distance, knowingly and willfully proceed in any such carriage beyond such distance, without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof, or if any person knowingly and willfully refuse or neglect, on arriving at the point to which he has paid his fare, to quit such carriage, every such person shall for every such offence forfeit to the company running the train whereof such carriage shall be part, a sum not exceeding five dollars, which fine shall be imposed with costs by any justice of the peace before whom such person shall be brought on complaint made on oath or af-

firmation, and after summary hearing of the facts and circumstances, or on admission of the party.

"Sec. 19. That if any person be discovered in committing or attempting to commit any such offence as in the preceding enactment mentioned, all officers and servants, railway police, and other persons on behalf of the company, or such other company or party as aforesaid, and all constables and peace officers, may lawfully apprehend and detain such person until he can conveniently be taken before some justice of the peace or until he be otherwise discharged by due course of law."

At the close of the plaintiff's evidence the counsel of the defendant moved for a nonsuit, on the ground that the plaintiffs must prove that they were arrested and prosecuted without any probable cause, and maliciously. The learned judge who presided did not treat the action as a suit for malicious prosecution, but as one for false imprisonment, and proceeded to dispose of the motion from that aspect of the case, and held that, under the facts proven and the statute above recited, the conductor was justified in arresting the plaintiffs, and granted a nonsuit. It seems to me, however, that the plaintiffs, having not only set out in the declaration an unlawful arrest and imprisonment, but having added thereto the averment that the arrest was made maliciously and without probable cause, their action became in fact one for malicious prosecution; and, there being no separate count for false imprisonment, they were required, in order to sustain the action, to prove the truth of these allegations. This principle is laid down by this court in *Case v. Railroad Co.*, 37 Atl. 65. The syllabus reads: "If the plaintiff fails to prove the cause of action alleged in his declaration, but proves a different cause of action, a nonsuit is not erroneous, in the absence of a motion to change the narr." It clearly appears, I think, that the plaintiffs failed to show that the conductor of defendant's train, in making the arrest complained of, acted without any reasonable or probable cause, as alleged in the declaration. The facts alleged are such as would certainly warrant a reasonable man in the belief that the plaintiffs were guilty of the offense charged in the statute; and such a belief in the actor, thus engendered, is what I understand to be probable cause for the action complained of. When the facts are undisputed, the question of probable cause is one for the court. 2 Greenl. Ev. 454; *Bell v. Railroad Co.*, 58 N. J. Law, 227, 33 Atl. 211; 2 Thomp. Trials, 1613. And my conclusion is that, the plaintiffs' proof having failed in this particular, the nonsuit was justified for that reason, and must therefore stand.

But viewing the case as a prosecution for false imprisonment, as it was treated by the trial court and by the counsel on both sides in the argument here, I fail to see that the trial judge erred in this ruling. The act before referred to requires proof that the passenger,

having paid his fare for a certain distance, did knowingly and willfully proceed in such carriage beyond such distance, without previously paying the additional fare, for the additional distance, and with intent to avoid payment thereof. The legality of this ruling is challenged on the ground, as alleged, that the statute under which the plaintiffs were arrested is a penal one, and, as such, must be strictly construed, and that the case is not within the letter of the statute, for the reason that the intent to avoid the payment of the fare is either not shown, or became a question for the jury. It must be admitted that this is a penal statute, and that in general such statutes must be construed strictly; but it is equally well settled that this rule is not violated by adopting the sense of the words which best harmonizes with the object and intent of the legislature, and that the whole context of the statute must be construed together. 2 Elliott, R. R. p. 710. This was the ruling of Chief Justice Marshall in *U. S. v. Wiltberger*, 5 Wheat. 76, and of Judge Swain in *U. S. v. Hartwell*, 6 Wall. 385, the former saying: "The intention of the legislature is to be collected from the words they employ: Where there is no ambiguity in the words, there is no room for construction."

The question, then, is, do the circumstances of the present case render the plaintiffs amenable to this statute, when construed according to the rules thus laid down? In the application of the facts, it may be well to first state the rules of law by which passengers must be governed in traveling upon railroads, where they have taken a wrong train, as in this case, through alleged misdirection of a ticket agent of the company. The Messrs. Elliott, in their valuable treatise on Railroads, have formulated from the decisions the correct rule of law in that particular in this wise: "The conductor cannot decide from the statement of the passenger what his verbal contract with the ticket agent was, in the absence of the counter evidence of the agent. * * * The law settled by the great weight of authority * * * is that the face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the company. The reason for this is found in the impossibility of operating railways on any other principle, with a due regard to the convenience and safety of the rest of the traveling public, or the proper security of the company in collecting fares. The conductor cannot decide from the statement of the passenger what his verbal contract with the ticket agent was, in the absence of the counter evidence of the agent. The passenger must submit to the inconvenience of either paying his fare or ejection, and rely upon his remedy in damages against the company for the negligent mistake of the ticket agent. 4 Elliott, R. R. § 1504. Now, the only explanation or excuse given by the plaintiffs for refusing to pay their fare from Rahway to Elizabeth, between which points they traveled admittedly without

any ticket, is because they say that, before entering the car, they asked the ticket agent at New Brunswick at what time the next train left for Perth Amboy, and the agent replied 9:36, and that, upon receiving this information, they bought their tickets. The occasion spoken of being Sunday, when the laws of the state permit fewer trains to be run than on week days, it became more particularly the duty of the plaintiffs to consult the schedules of the company both as to the times and stopping places of the trains. That the plaintiffs had been careless as to this seems to appear from some statements of Mr. Stricker on cross-examination. He admitted he had fallen asleep in the waiting room, and that the baggage master awakened him, and asked him where he (plaintiff) wanted to go, and he (plaintiff) replied, "Metuchen," and that he had intended leaving on the previous train; that the baggage master then told him the train had gone, and, when asked by plaintiff the time the next train left told him at 9:36. This rendition of the matter might throw some doubt upon the allegation of the plaintiffs that their taking the last train that night was entirely due to a misdirection of the ticket agent; but we must assume, for the purposes of this case, that their statements in this particular are correct.

It seems to be clear, from what had been stated, that the conductor was acting within the line of his duty when, after punching and marking plaintiffs' tickets, he gave to plaintiffs the information hereinbefore related. That they had no legal right whatever to defy the rules and regulations of the company with regard to their mode of travel, and the payment of their fare upon that train, because of what may have happened between them and the ticket agent at New Brunswick, is equally well established. And yet, after receiving the information they did from the conductor before reaching Metuchen, they remained in the train, and the inference from this act, as well as from their other acts and conversations both before and after leaving Metuchen, seems conclusive that they had, before leaving the latter station, determined they would proceed in that train beyond the distance called for by their tickets without previously paying the additional fare for the additional distance, and with intent to avoid such payment. This apparent determination of the plaintiffs, as the sequel showed, they carried out to the letter. That they did so knowingly and willfully, in the sense implied by the statute, is a conclusion fully warranted from the circumstances. It is true that it was developed in the cross-examination of Mr. Stricker that the latter, in one of the altercations the plaintiffs had with the conductor when demanding their fare, said to the conductor that he (Stricker) wanted transportation from New Brunswick to Perth Amboy; that he did not care if he (the conductor) carried plaintiffs to Brooklyn, via the Annex, and brought them back again; that was his (the conductor's) business, but he (Stricker) would not pay the

extra fare. But the insistence, if so made, had no basis of support either in law or reason, and cannot be viewed as other than a mere pretext for resisting a well-known regulation of the company as to the payment of fare by passengers. My conclusion is that the conductor was justified in making the arrest of the plaintiffs at Elizabeth, and that the action for false imprisonment could not be sustained. The construction here given to the act in question finds support in the opinion of the supreme court, delivered by Mr. Justice Van Syckel, in *Harris v. Railroad Co.*, 58 N. J. Law, 282, 33 Atl. 799. I will vote to affirm the judgment below.

MAGIE, C. J., and COLLINS, DIXON, GARRISON, and BOGERT, JJ., dissent.

DARLING v. CLEMENT.

(Supreme Court of Vermont. Orange. Jan., 1897.)

SLANDER—WORDS ACTIONABLE PER SE—PLEADING—SPECIAL DAMAGE.

1. Words charging the stealing of lumber are actionable per se, though used in such connection as to show that by lumber was meant wood taken from defendant's land.

2. The plain and natural signification of words fix the meaning in slander.

3. A count in slander is bad for duplicity where it declares upon three sets of words, spoken at different times on the same day, to the same persons, concerning plaintiff's intemperance, his insolvency, and his failure to prevent boys under his control from committing larceny.

4. Imputations of intemperance, and that plaintiff failed to prevent boys in his care from committing larceny, where plaintiff is engaged in the business of keeping and teaching boys, are actionable, without allegation of special damages and colloquium of business.

5. Charges of insolvency, where there is no special damage alleged, are not actionable in favor of one engaged in the business of keeping and teaching boys.

6. Words charging plaintiff with the failure to prevent boys in his control from committing larceny are not actionable per se, as they do not impute criminality.

7. Words imputing the insolvency of a stock dealer, who also buys and sells farm produce, are actionable, without allegations of special damage and colloquium of business.

Exceptions from Orange county court; Ross, Chief Judge.

Action by Eugene R. Darling against O. C. Clement for slander. From an order adjudging the first and second counts of plaintiff's petition insufficient, plaintiff brings exceptions. From an order adjudging the third count sufficient, defendant brings exceptions. The judgment with reference to the first count reversed. Judgment that the second count was insufficient, and the third count sufficient, affirmed.

Darling & Darling, for plaintiff. R. M. Harvey and John H. Watson, for defendant.

ROWELL, J. The words declared upon in the first count are: "I will sue him (innuendo, the plaintiff) for stealing lumber from my

land. One day Gene Darling wanted some wood; so he ordered Mel. Dickinson to get some. Mel. asked Darling where he should get it. Darling said, 'Down by Clement's, near the swamp.' Then Mel. said, 'If you want to get wood from Clement's place, you better get some one else to get it.' Then Darling said, 'That is all right; we often get wood from there' (innuendo, meaning and insinuating thereby, and by the hearers understood to mean and insinuate, that the plaintiff had been guilty of stealing wood from the lands and premises of the defendant). It is claimed that this language is not actionable *per se*, for that the words, "I will sue him for stealing lumber from my land," are so qualified by the subsequent words that, taking them together, they do not impute larceny, but only a trespass, as they must be understood to mean wood growing and not cut down, and therefore not the subject of larceny; and that, as there is no prefatory averment diverting the meaning to a felonious taking, the innuendo is too large, as it undertakes such diversion, which is beyond its function. On the other hand, some claim is made that the subsequent words stand by themselves, and are not the reason of the former speech, nor any diminution of it, but merely in addition to it. It is true, when the actionable quality of the words arises from circumstances extrinsic of them, a prefatory averment is necessary to show that such circumstances existed, and to connect the words with them. But when the actionable quality inheres in the words themselves, and does not arise from extrinsic circumstances, no prefatory averment is necessary. The innuendo may then ascribe the meaning claimed, and it is for the jury to determine the truth of the innuendo if the words are capable of the meaning ascribed. *Van Vechten v. Hopkins*, 1 Am. Lead. Cas. (4th Ed.) 140. Here, we think, the actionable quality inheres in the words themselves, taken together, and that no extrinsic facts are necessary to develop the imputation of larceny. At one time, before Lord Holt's day, the rule in actions of slander was that the words should be construed in *mitiori sensu*, the object being to discourage litigation. Afterwards, in some of the cases, it was said that the words should be taken in *malam partem*, the policy being to afford legal remedy, and thereby prevent violent redress. But the rule now is that the words are to be taken in their plain and natural meaning, and to be understood by courts and juries as other people would understand them, and according to the sense in which they appear to have been used, and the ideas they are adapted to convey to those who heard them; that is to say, the ordinary signification of the words and the understanding of the hearers fix the meaning in slander. *Van Vechten v. Hopkins*, 1 Am. Lead. Cas. (4th Ed.) 131.

Now, the natural and most obvious meaning of the word "steal" is the felonious tak-

ing of property, or larceny. But it may be qualified by accompanying words, so as to show that such was not the meaning. Thus, to say of me, "He stole apples from my trees," imputes a trespass, not larceny, and the words are not actionable; otherwise to say, "He stole apples from my bin." But the word "stealing," in the language here declared upon, is not thereby qualified so as to take away the *prima facie* imputation of larceny, which he (defendant) may disprove by bringing forward matters of fact to show that such was not the imputation. The stealing of wood from the lands and premises of the defendant is the imputation alleged. One definition of the word "wood" is "the hard substance of a tree or shrub as cut for use." This is its most common meaning. The old maxim is, "*Arbor dum crescit, lignum cum crescere nescit*;" a tree while it grows, wood when it cannot grow,—that is, when it is cut down. Thus, in *Minors v. Leeford*, Cro. Jac. 114, the court thought the words, "Thou hath stolen a tree," not actionable, for "*arbor dum crescit*"; while in *Lo v. Sanders*, Id. 166, the words, "Thou hath stolen my wood," were held actionable, for "*lignum cum crescere nescit*." "You stole my boxwood, and I can prove it," are actionable, for they may be understood to impute felony. *Baker v. Pierce*, 2 Salk. 695, but better reported in 6 Mod. 237. Short's Case, Noy, 114, is this: "Thou hast stolen my timber" are actionable, for they shall not be intended of trees growing, for by the whole court, they are then timber trees. In *Drake v. Whiteacre*, Style, 24, the words were, "Margaret Whiteacre (innuendo, the plaintiff) did steal my wood, and I will send her to Bridewell." After verdict for the plaintiff, it was moved in arrest that the words were not actionable, for doubtful words as these ought to be taken in *mitiori sensu*, and "wood" here might be understood standing wood, and not wood cut down, and so it could not be theft, but a trespass. On the other side, it was answered that "wood" should be understood wood cut down, and not standing, and, being coupled with the words, "Margaret Whiteacre is a thief," which are felonious words, they should be interpreted equally felonious. *Ayrye v. Higgins*, 2 Rolle, 380, was cited to prove it, where it was adjudged that the words, "He is a thief, and hath stolen my corn," should be understood of corn cut down, and not standing, and therefore actionable. Rolle, J., said it was a strong case that the action would lie; but he arrested judgment till it was moved again, when the court held that the first words were actionable, but whether coupled with the other words they were actionable the court was divided,—Bacon against the action, and Rolle for it. In *Phillips v. Barber*, 7 Wend. 439, the words, "You have stolen my wood," were held actionable. We hold, therefore, that the first count is good.

The second count is bad for duplicity. It declares upon three sets of words, spoken at

different times on the same day, to the same persons, concerning different subjects, namely, the plaintiff's habitual intemperance, his lack of riches, with many creditors, and his knowing that certain boys in his care and control were accustomed to steal defendant's apples, and not trying to stop them. The plaintiff's trade and business and his fitness therefor are not, as claimed, the subject of the words, though they may have been their object, although they are not connected therewith by averment or implication. Whether it would have been proper, had the different sets of words related to the same subject, to join them in one count, we need not decide. That was held proper in *Hoyt v. Smith*, 32 Vt. 304. But no case goes the length of holding that words spoken at different times, imputing different charges, can be thus joined.

It is claimed that this count is also defective, for that the words alleged are not actionable, there being no special damage alleged, unless they were spoken of the plaintiff in relation of his trade and business; and that, in order to make them actionable on that account, it must be alleged that they were so spoken. But such an allegation is not necessary if the natural and reasonable tendency of the words is to injure the plaintiff in his trade and business. *Lumby v. Allday*, 1 *Crompt. & J.* 301; *Miller v. David*, L. R. 9 C. P., at page 125; *Burtch v. Nickerson*, 1 *Am. Lead. Cas.* (4th Ed.) 90. The count avers that, before and at the time in question, the plaintiff owned and occupied a valuable place in Corinth, known as "Maplewood Farm," and that divers wealthy men of New York City had been and were used and accustomed to intrust and commit the care of their minor sons to him, for the purpose of having them boarded and instructed by him at said "Farm" during the summer season, whereby he had made great gain and profit. The words alleged are: "When he could not suck his mother any more, he sucked the rum bottle, and has been sucking it ever since (innuendo, that plaintiff was and is addicted to intemperance in the use of intoxicating liquor). He brings these boys here, and he gets a high price for boarding them, and he pretends to be rich; but I can count twenty-five people in Cookville that he owes money to, and, if he should die to-day, there would not be a cent left to pay his debts (innuendo, that plaintiff is not a person of good credit among his neighbors). These boys come up here year after year, and steal my apples, and he knows it, and does not try to stop it, but he won't bring them much longer (innuendo, that plaintiff allowed said boys, while under his control, to commit larceny)." Do these words, or any, and which, of them, have a natural and reasonable tendency to injure the plaintiff in his business of boarding and instructing said boys? *Bayley, B.*, said in *Lumby v. Allday*, above cited, that every authority he could find either showed the want of some general requisite, as honesty,

capacity, fidelity, etc., or connected the imputation with the plaintiff's office, trade, or business; and therefore, he held, to say of a clerk of a gas company, "You are a fellow, a disgrace to the town, unfit to hold your situation, for your conduct with strumpets," was not actionable, because the imputation did not imply the want of any qualities that such a clerk ought to possess. So, to say of staymaker, in his trade, that his business does not keep him, but the prostitution of a woman in his shop, is not actionable, for it was considered that the words did not touch him in his business, but were only a general imputation on his moral character. *Brayne v. Cooper*, 5 *Mees. & W.* 249. But, if the words impute some quality the natural tendency of which is to impair the plaintiff's professional or business character, as insolvency to a merchant, or drunkenness or immorality to a clergyman, they are actionable, and there need be no colloquium of the profession or business. *Stanton v. Smith*, 2 *Ld. Raym.* 1480; *Jones v. Littler*, 7 *Mees. & W.* 423; *Chaddock v. Briggs*, 13 *Mass.* 247.

Concerning the imputation of habitual intemperance, as to which the innuendo is good, it needs no argument to show that its natural tendency is to injure the plaintiff's character in respect of the business in which he was engaged, for it implies the want of sobriety, —a quality that the keeper and teacher of boys ought to possess. But such cannot be said to be the natural tendency of the words innuendoed to impute bad financial credit to the plaintiff among his neighbors, for they do not touch him in his said business, nor imply the want of any quality that the conductor of such a business ought to possess. It is not like imputing insolvency or want of credit and responsibility to one to whom, in the prosecution of his business, credit is of importance, for such an imputation would necessarily tend to injure him in his business; but here it does not appear that credit was of importance to the plaintiff, and the character of the business is not such as to imply it.

The words about the boys stealing apples are not actionable per se, as claimed, as amounting to a charge of "being privy and consenting to a larceny," for they are not susceptible of imputing criminal complicity in the matter. Neither a mere presence, nor presence combined with a refusal to interfere or with concealing the fact, nor a mere knowledge that a crime is about to be committed, nor a mental approbation of what is done, while the will contributes nothing to the doing, will create guilt. There must be something further, some word or act; or, in the language of *Cockburn, C. J.*, one, to be a party in another's crime, "must incite, procure, or encourage the act." 1 *Bish. New Cr. Law*, *633. But these words touch the plaintiff in his character of teacher, as they clearly import that he is not a suitable person to have the care and instruction of boys, because he

is so indifferent to their moral welfare that he does not even try to restrain them from the commission of crime; and, as they show on their face that they were spoken of him in said business, they are actionable, without colloquium of the business or the allegation of special damage.

The third count alleges that the plaintiff was engaged in buying and selling horses, cattle, sheep, and other live stock, and hay, grain, and other farm produce, and other articles, and that the defendant, contriving to injure him in that business, said of him that "he pretends to be rich, but I can count twenty-five people in Cookville that he owes money to, and, if he should die to-day, there would not be a cent left to pay his debts." This language clearly imports that the plaintiff was insolvent, and it is actionable without colloquium of the business or allegation of special damage, as its natural and necessary tendency is to injure the plaintiff in said business; for, although there is no averment that pecuniary credit and responsibility are of importance to him therein, yet it is of such a character that they necessarily must have been of importance to him, as much as they are to a merchant, and the precedents for imputing bankruptcy to a merchant or other trader do not contain such an averment. But the declarations in some of the cases do, as in *Lewis v. Hawley*, 2 Day, 495, where it was held actionable, without special damage being proved, to say of a drover, whose business it was to buy cattle, drive them to market, and sell them, that he was a bankrupt, and not able to pay his debts. 9 Eng. Ruling Cas. 13. In *Davis v. Ruff*, Cheves, 17, it was held that words impugning the solvency of a person, and affecting his credit, were actionable, though not spoken of him in relation to his trade or business. But there was an allegation of special damage.

The demurrer is general to all the counts by enumeration, and special to the second and third. It is equivalent, therefore, to separate demurrers to each count. This is important only as affecting the form of judgment. The judgment that the first count is insufficient is reversed, the demurrer thereto overruled, and that count adjudged sufficient. The judgment that the second count is insufficient, and the third count sufficient, is affirmed. Both parties excepted, and the plaintiff has prevailed to the extent of obtaining a reversal as to the first count. This entitles him to costs in this court. Cause remanded.

CALEDONIA FIRE INS. CO. OF SCOTLAND v. TRAUB et al.

(Court of Appeals of Maryland. June 23, 1897.)

CHANGE OF VENUE—INSURANCE—PROOF OF LOSS—INSTRUCTIONS—SPECIAL INTERROGATORIES.

1. Right to remove a case to another court (Const. art. 4, § 8) is waived by a stipulation, in consideration of forbearance to press case to

trial at once, that it shall be tried, if at all, in the court where it is pending, at least where no new cause supervenes.

2. It may be inferred that an insurance company denied its liability on grounds other than absence of the preliminary proof of loss, where it offered to pay insured a certain sum in settlement of what it conceded to be due, and on rejection of this offer demanded appraisal and arbitration under the terms of the policy, which was entered on, and then offered to pay the amount of the award.

3. There is no inconsistency in giving an instruction stating what might be recovered if facts be found showing a valid award, and one stating what might be recovered if the facts showed there was no valid award; the evidence being conflicting as to validity of award.

4. There is no error in refusing to submit an indefinite interrogatory, or one as to matter which is immaterial, or about which there is no dispute, or about which there is no evidence.

5. That refusal to submit special interrogatories may be reviewed, the record should show that they were propounded before argument to jury was begun.

Appeal from circuit court, Carroll county.

Action by Julius Traub & Bro. against the Caledonia Fire Insurance Company of Scotland. Judgment for plaintiffs. Defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, PAGE, and BOYD, JJ.

James Hewes, Chas. T. Reifsnider, and Chas. T. Reifsnider, Jr., for appellant. Clabaugh & Roberts and Benj. Rosenheim, for appellees.

McSHERRY, C. J. For the third time the pending case has been brought to this court. The other appeals are reported in 80 Md. 214, 30 Atl. 904, and in 83 Md. 524, 35 Atl. 13. Each time the insurance company has been the appellant, and each time the company has contested and assailed a judgment entered upon a verdict rendered against it by a different jury for substantially the same amount of money. On the former appeals the law of the case was fully discussed and finally settled, and there are but few new questions presented for decision now. The suit was instituted upon a policy of insurance against loss by fire. The appellant company is the underwriter and the appellees are the insured. The stipulations contained in and indorsed upon the policy are, as is generally the case, quite numerous; but it will not be necessary, in considering the questions now involved, to set forth any of these provisions at length; and, as two of them alone are invoked as defenses to the action, their legal effect, rather than their exact phraseology, is all that need be stated. The ordinary requirement that the insured shall within 60 days after the happening of a loss by fire furnish the insurer with the formal proof of loss, and the other equally usual stipulation enjoining that, in the event of a loss occurring, and in the event of a disagreement arising between the insurer and the insured respecting the amount of that loss, the controversy should be submitted to arbitrators and an umpire,

whose finding, or a finding by a majority of whom, should be conclusive upon the parties, are the only provisions with which we are at all concerned. It is not disputed that a fire happened during the period covered by the policy sued on, and that a part of the stock in trade owned by the appellees and insured under the policy was damaged, and a part was entirely destroyed. Notice of the fire was at once given by the appellees to the agent of the appellant, though no formal proof of loss was then or ever afterwards furnished. The appellant's adjuster, however, in a few days, visited the scene of the fire, took possession of the premises, held control thereof for 19 days, and instructed the appellees to make up an inventory of their stock, showing the amount thereof lost and the amount damaged. The adjuster participated in this work, and upon its completion, and without exacting from the appellees the proof of loss required by the policy, offered to settle the appellees' claim for indemnity under the policy by the payment of \$316, insisting that that sum fully reimbursed the insured the amount of their loss by the fire. The appellees promptly refused to accept that offer, and, the adjuster being unwilling to pay more, demanded that an arbitration under the second of the two stipulations referred to in the beginning of this opinion should be entered into. Accordingly the appellees and the appellant each selected an arbitrator, and the two arbitrators chose an umpire, and the three then proceeded to make up an inventory and appraisal of the loss and damage. They met on May 4, 1893, and on subsequent days, and the two arbitrators, seemingly without much difficulty, agreed upon valuations of the goods not totally destroyed, but were widely separated in their estimates respecting the property wholly burned, or, as it is described in the record, "out of sight." Whether they had so far disagreed as to authorize the umpire to decide and determine between them is one of the controverted questions of fact. On the 9th of May, Rosenfield, the arbitrator selected by the appellees, notified the other arbitrator and the umpire that he would not be able to be present or participate in the valuations the next day in consequence of business engagements elsewhere; and when, on the 10th, he learned that the other arbitrator and the umpire had gone back to the scene of the fire, presumably to complete the valuation, he sent a telegram suggesting that they proceed no further until they could communicate with Reinhart, who was acting as the friend and adviser of the appellees. Notwithstanding the absence of Rosenfield, Burnbacker, the other arbitrator, and Baetjer, the umpire, went on with the valuation, and on the following day—the 11th—the umpire gave his decision with respect to the goods "not in sight," and he and Burnbacker signed an award fixing the amount of the loss at \$1,043.06; but Rosenfield refused to unite there-

in. Acting upon the assumption that the award was invalid, and that it was invalid because the two arbitrators had not so far finally disagreed as to allow the umpire to determine between them the value of the goods totally destroyed, the appellees brought the pending suit, claiming that there was due to them a sum largely in excess of the amount named in the alleged award, and the appellant denied any liability beyond that sum.

The present record contains four bills of exception. The first relates to a ruling of the trial court refusing to remove the case to some other court for trial; the second has reference to the admissibility of evidence; the third brings up the rulings on the prayers for instructions to the jury; and the fourth was taken to the refusal of the court to submit to the jury certain interrogatories to be passed on by them.

If the question raised in the first exception involved merely a naked refusal on the part of the circuit court to transmit, upon the formal application of the appellant, the record of proceedings to some other court, for the trial of the cause in the latter tribunal, the judgment appealed from would necessarily have to be reversed. The right of a party in a civil cause, upon suggestion in writing, supported by affidavit that he cannot secure a fair and impartial trial in the court where the action is pending, to have the record transmitted to some other court, is secured by section 8, art. 4, of the constitution of Maryland. But the right thus given is not one that cannot be surrendered. It is a right which a party may or may not avail of or assert, precisely as the right to a trial by jury in civil proceedings where the amount in controversy exceeds five dollars, though guaranteed by section 6, art. 15, of the constitution, may, by agreement, be relinquished. Both are rights accorded by the organic law to suitors, but suitors are under no compulsion to assert or to insist on either; and consequently parties may voluntarily waive the one or the other or both, if they elect to do so. Now, we find in the record that a written agreement dated May 20, 1893, was filed in the cause, stipulating, in consideration of the appellees forbearing to press the case to trial at that time, that the case should be tried in the circuit court for Carroll county if tried at all, and expressly waiving the right of removal. This paper was signed by the attorneys for the appellant and by its agent or adjuster. The appellees performed their part of the agreement, and did not press for a new trial, but permitted the case to go over. Subsequently,—that is, on the 16th day of November, 1896,—long after the appellant had secured the benefit of the postponement which it sought under the agreement of May, 1893, it made application to remove the case, and filed an affidavit dated October 13, 1896. This motion for a removal was at once denied, but no exception was taken or reserved. On the 11th of February, 1897, the appellant obtained leave to withdraw from the files this affidavit of October 13, 1896. Im-

mediately thereafter the same affidavit was refiled as of February 11th, and the circuit court again refused to remove the case to another jurisdiction, and this last refusal is the error complained of in the first bill of exceptions. We discover no error in this action of the court.

The right of removal was not given to be used for the purpose of defeating the ends of justice, but with a view to promote and subserve them. It is difficult to escape the conviction that prior to the execution of the agreement of May, 1895, an application for a removal was about to be made by the appellant merely to avoid being forced into a trial when not prepared to proceed; and so, when the agreement not to press for trial was signed, the appellant not only forbore to make a motion for a removal, but distinctly and unequivocally stipulated not to remove the case at all. The agreement of May, 1895, was not only a promise that the application should not be made during the May term of 1895, but obviously and in terms it had relation to the future as well. The attempt to have the case removed in February, 1897, on the strength of the affidavit used unsuccessfully the preceding November, was on its face an effort to evade the prior ruling of the court on the same subject, and was a palpable endeavor to revive a right which had been validly and unconditionally waived and relinquished. The right to remove being a right that may be waived (*Seth v. Chamberlaine*, 41 Md. 194), and a waiver having been actually agreed to upon a sufficient consideration, the right or privilege could not be reasserted, unless, perhaps, in the event of some new cause supervening; but of the existence of such new cause there is neither claim nor pretense. We have heretofore held that the waiver of a right to a trial by jury in a civil case, when once made, was irrevocable (*Lanahan v. Heaver*, 77 Md. 605, 26 Atl. 866), and we see no reason for deciding that a similar unqualified waiver of the right to remove should have any less efficacy. The terms of the waiver are broad, comprehensive, and prospective. They do not relate to any particular period of time, but are emphatic in declaring that the case, if tried at all, shall be tried in the circuit court for Carroll county. They contain nothing from which it can be inferred that it was the intention of the parties to limit its operation to the term of court during which the agreement was entered into. (*Woodruff v. Munroe*, 33 Md. 157. If the right or privilege of removal can be waived at all (and this is not now debatable), then the waiver may be made absolute, unconditional, and perpetual. Had it been the design of the parties to limit the waiver to a particular term of court, apt words ought to have been employed to effect that end; but, as the litigants had the power to make the waiver unrestricted, and as the language they have employed constituted just such a waiver, they must be held to the letter and the spirit of their contract, and must abide by its provisions.

The second exception needs no discussion. On the appeal decided in 83 Md. 524, 35 Atl. 18, we held that the question propounded to the witness Reinhart was proper; and the same question to the same witness is again brought up, together with the answer thereto, by the second exception. On the former appeal the answer of the witness was not set out in the record; in this it is. The question having been once determined to be admissible, there is no occasion to say more respecting it.

The third exception embodies the prayers. The appellees' first and fifth prayers were granted, while all of those presented by the appellant, except its last, or eighth, were rejected. The legal principles announced in the appellees' first prayer have been twice passed on by this court in this case. There is no necessity for reviewing or restating them. It is now, however, insisted that there was no legally sufficient evidence adduced to support one of the hypotheses of this instruction. The instruction deals with the doctrine of waiver as applicable to the proof of loss. It sets forth hypothetically sundry facts, and then proceeds as follows: And if the jury shall further find that the defendant company "denied its liability on other grounds than the absence of proof of loss, then the jury are at liberty to find from the evidence that the defendant company waived the necessity for a preliminary proof of loss." A special exception was filed below to the effect that there was no evidence to show that the appellant had denied its liability on grounds other than the absence of the preliminary proof of loss. This is the sole ground of objection not covered by the former decisions in this case. We think there was sufficient evidence to go to the jury upon this question of fact. The evidence was not, indeed, direct, nor was it explicit in the sense of proving a formal refusal distinctly based on other grounds; but it was circumstantial, and possessed quite enough probative force to justify the inference which the jury were given liberty to draw, and which they in fact did draw. There had been an offer by the company to pay to the appellees the sum of \$816 in full of their loss; and this, too, not by way of compromise, but in settlement of what was conceded by the company's agents to be due. This offer to pay was a clear admission of liability, at least to that amount, notwithstanding proofs of loss—a preliminary requisite to the creation of any liability at all—had not been furnished. Then, again, when this offer was rejected, an appraisal under the terms of the policy was demanded by the company, and was entered upon, and, as the company insists, was validly made and completed. According to the witness Reinhart, he had several interviews with Hewes, the adjuster, and the latter never made any demand "for preliminary proofs of loss, but offered to pay the amount of the award." The amount of the alleged award was \$1,043.08. Here, then, were two offers to pay two distinct sums, though no proof of loss had been furnished,

and the company refused to pay more than the amount of the award, not because it owed nothing, and not because no proof of loss had been furnished, but obviously because it denied its liability to a greater extent. If it denied its liability beyond the amount of the award by admitting its liability up to that sum, then, manifestly, it denied liability on another ground than the absence of the proof of loss. To a certain extent it admitted its liability. Beyond that it denied all liability, and denied it not because there had been no proof of loss furnished, but because it contended that no such sum as was claimed by the insured was due. If it denied liability because it insisted that the whole of the sum claimed was not due, then its denial of liability on that ground was a denial of liability on a ground other than the want of preliminary proof of loss. A conceded and unconditional willingness to pay a particular sum in settlement of a loss under the policy, but a refusal to pay a larger sum therefor, is a distinct and unequivocal recognition of a liability to pay something, and a liability to pay anything where no proof of loss has been furnished could only arise where the proof of loss had been dispensed with. Hence a refusal by the company to pay a larger sum than the one which it offered to pay cannot be considered as the assertion of a nonliability to pay any sum at all, and must logically be attributed to some other ground than the one which, if unwaived, could relieve of all liability, and therefore must be predicated of some other cause than the mere failure to furnish preliminary proof of loss. This conclusion is an inference of fact which the jury were at perfect liberty to draw from all the evidence before them, and consequently it cannot be said that there was no legally sufficient evidence from which they might rightfully find that the refusal of the appellant to pay the loss sustained by the appellees was founded on other grounds than the mere omission to supply the preliminary proof of loss. There being no other objection to the prayer than the one just discussed, there was no error committed in granting it.

The appellee's fifth and the appellant's eighth prayers are claimed to be in conflict, and it is accordingly insisted that there was error in granting the fifth instruction. We do not so read these two instructions. They present opposite theories of the case predicated of contrary conditions of fact, but this circumstance by no means places them in a position of antagonism. As we have said in an earlier part of this opinion, the question as to whether there had been such a disagreement between the appraisers or arbitrators on the subject of the value of the goods totally destroyed as to authorize the umpire to decide and determine between them, was one of the controverted facts in the case; and therefore one of the facts to be found by the jury. If the jury had found that the award made up by one of the arbitrators and the umpire was an award made after the arbitra-

tors had finally failed to agree, then the award was valid and binding, and limited the amount recoverable by the insured to the sum ascertained by the award. But if, on the other hand, the jury found, as well they might, and as in point of fact they manifestly did, that the award relied on had been made up, agreed to, and signed before there had been a final and fixed disagreement between the arbitrators, then there was, upon well-settled principles, fully recognized and explicitly announced in the decision of this case reported in 83 Md. 524, 35 Atl. 13, no such award as was binding upon either party, and therefore no such award as would or could limit the right of the appellees to recover a sum in excess of or greater than that named in the paper relied on as an award. The fifth instruction granted at the instance of the appellees simply permitted a recovery of a sum in excess of the amount set forth in the so-called "award," if the jury found the existence of the facts which, when found, showed that no award had been legally made; while the eighth instruction of the appellant restricted the right of recovery to such sum as was named in the award, if the jury should find such facts as, under the law announced in this particular prayer, warranted the legal conclusion that there had been a valid and binding award. There was, consequently, no conflict or inconsistency between these instructions. The hypotheses of each were different, and the conclusions had necessarily to be either that the award was or was not valid, just as the facts from which the one or the other conclusion might have been adduced were found by the jury to exist.

There is no error predicable of the rejection of the other prayers of the appellant. The first, second, and third were properly refused, because there was no evidence to support their several hypotheses. The fourth, fifth, sixth, and seventh are substantially the same as the eighth; and, as the latter was granted, and fully covered every proposition sought to be presented by the others, there was no error in refusing to grant these rejected prayers. Had they been granted, they would simply have repeated in different forms the eighth instruction.

The fourth exception, bringing up for review the refusal of the court to permit eight interrogatories to be submitted to the jury, presents no ground for a reversal of the judgment. The first interrogatory submitted an inquiry about which there was no dispute whatever. That Rosenfield sent the telegram referred to in this interrogatory was conceded; certainly it was not denied either by him or by any one else. The second, third, and fourth interrogatories were properly withheld from the jury because there was not a particle of evidence which could possibly furnish the jury with an answer to them. Had they gone to the jury, and had they been answered, the answers would have been wholly speculative and conjectural. Interrogatories, to be sub-

mitted to a jury, must not only be material, but they must be founded on the evidence; and where there is no evidence which will enable the jury to respond to them it is error to propound them at all. Though it would have been undoubtedly competent for the appellant to show that the failure of the appraisers or arbitrators to reach a conclusion was due to the misconduct or bad faith of the appellees or their agent, Reinhart, or their appraiser, Rosenfield, still it would have been manifest error to ask the jury to respond to interrogatories framed upon that theory when there was not a spark of evidence before them on that subject. Whether there was or was not an award, as propounded in the fifth interrogatory, was a question of law dependent on various facts. Only questions of fact can be referred to a jury. The sixth and seventh interrogatories were wholly immaterial, and were, therefore, properly refused. It did not make the slightest difference whether the stock of goods was accurately set down in an inventory taken by Traub and his clerk, Keefer, unless the inventory referred to threw some light on the value of the goods at the time of the fire. Now, as the evidence showed that more than one inventory had been taken by Traub and Keefer, the interrogatory, in not pointing specifically to any particular one of them, was vague, indefinite, and misleading. It was equally immaterial whether the appraisers took an accurate account of the stock in trade owned by the appellees. If an award was legally made, then the award was binding; if no legal award was made, then the paper writing which purported to be an award was of no value, and the estimates made by the appraisers were merely estimates of the value of the goods that were left after the fire. The eighth interrogatory asked the jury to find something that the award, if it was an award, disclosed on its face; and, if it was not an award, the answer sought would have been wholly immaterial. The alleged award spoke for itself, and purported to be for the exact sum claimed to have been ascertained by the umpire and one appraiser. If valid, it was binding; if invalid, it did not prevent a recovery for a larger amount. Its validity was a question of law dependent on the facts presented in the appellees' fifth and the appellant's eighth instructions, and the eighth interrogatory could not possibly have elicited any response from the jury that would have reflected in the most remote way upon the validity or the invalidity of the alleged award.

There is, however, another reason why the court was right in rejecting these special interrogatories. We have heretofore held in *Traction Co. v. Appel*, 80 Md. 603, 31 Atl. 964, and *Railroad Co. v. Cain*, 81 Md. 105, 31 Atl. 801, that special interrogatories which it is designed shall be answered by a jury must be propounded at least before the argument of counsel to the jury is begun, and that, unless presented by that time, they cannot be submitted at all. The record before us does not show

when these interrogatories were presented. The fourth bill of exception states that they were presented after the court had ruled on the prayers, but whether before or after the arguments to the jury had commenced is not disclosed. It may be, for aught that appears to the contrary, that they were rejected because not propounded in due time; and, unless the bill of exceptions shows that they were submitted in proper season, we cannot assume that they were. A ruling will not be reversed unless error is apparent, and, as it does not appear that these interrogatories were presented in time, we would be justified in affirming the ruling in the fourth exception upon the ground that the record does not affirmatively show that the questions were submitted in time. We find no errors in the record. The judgment will accordingly be affirmed, and this somewhat protracted litigation will thus be brought to a conclusion. Judgment affirmed, with costs above and below.

SHARTZER v. MOUNTAIN LAKE PARK ASS'N OF GARRETT COUNTY.

(Court of Appeals of Maryland. June 22, 1897.)

EJECTMENT—EQUITABLE DEFENSE—PLEADING—PARTITION SALE—DISTRIBUTION OF PROCEEDS—ESTOPPEL—WARRANT OF RESURVEY—MOTIONS—RULINGS—REVIEW.

1. In ejectment, where defendant, under Code, art. 75, § 83, files a plea "for defense on equitable grounds," he must set out "the facts which entitle him to such relief," and not the evidentiary papers on which he relies for proof.

2. A bill for the sale of the realty of W. H., deceased, alleged that he died seised of, or equitably entitled to, in his own right, a large estate, including certain tracts the title papers for which were in the possession of S., executor of J. H., deceased. There was a prayer that S. might answer, and produce all title papers which were in the possession of J. H., deceased, for any lands owned by W. H. at his death, and that the real estate of W. H. might be sold by a trustee for partition. S. and the residuary legatees of J. H. answered by their solicitors, and trustees were appointed to sell the property. By one of their reports the trustees showed that they had sold certain lots, that a part of the purchase money was paid, and that the balance would be paid on ratification of the sale. After ratification the proceeds were distributed, S. and the residuary legatees being among the distributees. The legal title to the lots was in J. H. *Held*, that the purchaser had the right to rely on the order of the court as emanating from a competent jurisdiction, since the suit was in part for the sale of lands to which W. H. was equitably entitled.

3. Since the facts must or should have been known to the solicitors who were intrusted with their interests in the cause, S. and the residuary legatees were chargeable with knowledge thereof.

4. Having permitted the sale to be ratified and the purchase money to be paid, S. and the residuary legatees, after 13 years, could not question the legality of the sale, to the prejudice of those who had given faith to the fair inferences from their conduct.

5. In ejectment, a warrant of resurvey was properly directed where it was a question of fact, on which the parties joined issue, whether the land in controversy was within the lines of a certain tract.

6. Where the record does not show the grounds of motions made to strike pleadings, it will be presumed on appeal that the rulings of the lower court on the motions were correct.

Appeal from circuit court, Garrett county.

Ejectment suit by John Shartzter, substituted trustee, against the Mountain Lake Park Association of Garrett County. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, and RUS-SUM, JJ.

W. C. Devecmon, Ed. H. Sincell, and B. A. Richmond, for appellant. Thos. J. Peddicord, Gilmor S. Hamill, Fred. W. Story, and R. W. Baldwin, for appellee.

RUS-SUM, J. Edward Hoyer, trustee under the will of John Hoyer, in whose place the appellant was substituted, instituted an ejectment suit in the circuit court for Garrett county, to recover from the appellee possession of a tract of land known as "Lot No. 858" of the military lots west of Ft. Cumberland. The appellee obtained an injunction to restrain the prosecution of the suit, which, being heard on bill, answers, and testimony, was dissolved, and an appeal taken to this court, by which the order dissolving the injunction was affirmed, on the ground that, under article 75, § 83, of the Code, the same matter which was made the ground of complaint in that case could be interposed in this as an equitable defense. *Association v. Shartzter*, 83 Md. 10, 34 Atl. 536. The case came on for trial at the September, 1896, term, at which time the appellee filed its plea "for defense on equitable grounds," and its disclaimer as to so much of lot No. 858 as lies south of the Baltimore & Ohio Railroad tracks, as laid down on the plats filed by the surveyor. To the equitable plea the plaintiff demurred, which was overruled by the court. Three exceptions were taken by the appellant: (1) To the refusal of the court to strike out the order of September 26, 1894, directing a warrant of resurvey to issue, and the return of the surveyor under said warrant; (2) to the refusal of the court to strike out the equitable plea of the defendant; and (3) to the ruling of the court granting the motion of the defendant to strike out the plaintiff's replication on equitable grounds. The judgment being for the defendant, the plaintiff appealed.

The demurrer to the defendant's plea for defense on equitable grounds will be first considered. This plea is, at best, a loose statement at large, without any view to the extrication of the facts in controversy. After attempting to set out the substance of the bill of complaint in No. 840 Equity, in the circuit court for Allegany county, and the appointment of trustees to sell the real estate therein referred to, it proceeds to set forth at length the report of sales made by

the Messrs. Gordon as trustees; the orders of ratification, nisi and final; the report of the auditor; the deed from the Messrs. Gordon, trustees, to J. C. Alderson,—and then concludes by averring that George Smith, of A., executor of John Hoyer, deceased, and Edward Hoyer, John Hoyer, of William, David Hoyer, and Daniel J. Hoyer, the residuary legatees of John Hoyer, deceased, were all parties to the said cause; that they did not object to the ratification of the sale, but allowed the same and the auditor's report to be finally ratified, and took the purchase money obtained for and distributed as the price of lot 858, which is the land in controversy. This mode of pleading requires the court to review, collate, and consider these papers, in order to extract the points and arrive at the selection of the point to be decided. It violates that rule of pleading which requires the avoidance of obscurity, and, instead of setting out the facts which entitle the defendant to relief, which is required in a plea for defense on equitable grounds, it spreads on the record the evidentiary papers on which the defendant relies to prove the facts constituting an equitable estoppel. Code, art. 75, § 83. But, while the plea is defective, and the judgment must on that account be reversed, yet, as the cause was fully argued, it is proper that we should decide the question involved, in order that there may be an end of litigation between the parties.

The conceded facts which we have extricated from the confused record sent to this court are: That in a cause in the circuit court for Allegany county, known as "840 Equity," a bill of complaint was filed, charging, among other things, that William W. Hoyer was at the time of his death seized of, or equitably entitled to, in his own right, a large and valuable real estate in Allegany county (now set off in Garrett county) among which was a large tract called "Western Canal Convention," and several other large and valuable tracts of land the names of which were unknown to the complainants, the patents or other title papers for which were in the possession of George Smith, of A., executor under the will of John Hoyer, deceased. The prayer of the bill was that the said George Smith might answer the bill fully, and also exhibit and produce all patents or other title papers which were in the possession of John Hoyer, deceased, for any lands owned by William W. Hoyer at the time of his death; that the real estate of William W. Hoyer might be sold by a trustee, and the proceeds divided among those entitled thereto; and for general relief. George Smith, of A., executor of John Hoyer, deceased, and Edward Hoyer, Daniel J. Hoyer, John Hoyer, of William, and David Hoyer, residuary legatees of John Hoyer, appeared and answered the bill, and trustees were appointed to sell the property. By the eleventh report of sales made by the Messrs. Gordon,

trustees, it appears that on the 7th day of September, 1881, they sold certain specifically named military lots, and forty-eight and sixty $\frac{60}{100}$ one hundredths of lot No. 858, all of which lots and parts of lots lie within the lines of a tract of land known as "Western Canal Convention" and "inside of the old inclosure known as the 'Hoye Pasture,'" to J. C. Alderson for the sum of \$2,145.44, and that Alderson had paid \$50 on account of the purchase money, and would pay the balance on the ratification of the sale. The proceeds of sale were, after its ratification, distributed by an auditor's account, which was finally ratified December 29, 1881; the said George Smith, and the said residuary legatees, being among the distributees. It is contended on the part of the appellant (1) that, the legal title to the land in controversy being in John Hoye, the sale of it by the Messrs. Gordon, as trustees for the sale of the real estate of William W. Hoye, was null and void, and that, although George Smith, executor of John Hoye, and his residuary legatees were parties to said cause, and received a portion of the proceeds, they are not estopped from claiming the land unless it be shown that they received it knowing it to be such, since no estoppel arises from one's silence concerning the title to land where he is in ignorance as to his own title; (2) that, as to real property, the party claiming to have been influenced by the conduct or declarations of another must show that he was not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge.

The correctness of these propositions as abstract principles of law is one question, and their applicability to the case before us is quite another. The proceedings in the circuit court for Allegany county, known as "840 Equity," were for the sale of the real estate of William W. Hoye for the purpose of partition. The court undoubtedly had jurisdiction of the subject-matter of the suit, which included the sale of the land to which William W. Hoye was equitably entitled, as well as that of which he died seised. George Smith, of A., the executor of John Hoye, who was also trustee under his will, and the residuary legatees of John Hoye were parties, and appeared and answered by solicitors. The trustees appointed in that cause sold the property as of the estate of William W. Hoye, and reported the sale to the court, and that Alderson, the purchaser, had paid \$50 of the purchase money, and would pay the balance on the ratification of the sale, and the sale was finally ratified. Under these conditions Alderson had the right to rely on the order of the court as emanating from a competent jurisdiction. *Long v. Long*, 62 Md. 62. The parties to the cause may not have personally known the facts, but they were known to their counsel, or must from nature have been known to them, or ought to have been; and the appellant, and the residuary leg-

atees under the will of John Hoye, as to such matters, are held as affected by the actual or constructive knowledge of their solicitors intrusted with their interests in the cause, unless they could show that they were victims of fraud practiced on them by their solicitors, which in this case is not supposable. *Prestman v. Mason*, 68 Md. 92, 11 Atl. 764. Nor was there on the records of Allegany county anything that would lead a prudent man to doubt the regularity of the court's order. The deed, which the appellant contends was notice of the legal title in John Hoye, conveyed several tracts of land for the nominal consideration of \$100; and, since the bill was filed for the sale of the real estate to which William W. Hoye was equitably entitled, as well as that of which he was seised, and as George Smith of A., the executor of John Hoye, who was also trustee, was vested with the legal title, and with full power to sell all his real estate at public or private sale, and the residuary legatees individually being parties to the proceeding, and represented by solicitors of ability and integrity, the purchaser had a right to believe that so much of lot 858 as was sold was land to which William W. Hoye was equitably entitled. The court having had jurisdiction over the subject and the parties, "the erroneous or improvident exercise of it, in a manner not warranted by the evidence before it, whether that be in respect to the construction of written instruments or deductions drawn from unwritten proof, the errors, however apparent, are not to be corrected at the expense of the purchaser." *Long v. Long*, 62 Md. 62.

Again, the fourth account of the auditor in 840 Equity shows that the residuary legatees of John Hoye were awarded their respective proportions of the proceeds of sale as heirs at law of William W. Hoye, and that a large sum was distributed to the said George Smith; and by his thirty-second account, passed in the orphans' court for Allegany county, December 29, 1884,—more than three years after the sale,—George Smith, executor of John Hoye, deceased, accounted for \$1,473.83, received from the proceeds of sale in 840 Equity, as of the estate of his testator, which was distributed to the residuary legatees under the will of John Hoye. Whether that distribution was correct or incorrect as to the amount received by the residuary legatees does not concern this case. Having authority under the will of John Hoye to sell and convey all his testator's real estate at public or private sale, and being a party to 840 Equity in the capacity of executor, and knowing, as he must have known, of the sale of lot 858 by the trustees to Alderson, the presumption is that George Smith fully discharged his duty as executor, and that, in receiving the proceeds of sale, he obtained all that his testator's estate was legally entitled to receive. Without the consent of George Smith, executor, and of the residuary legatees of John Hoye, the sale of this land to Alderson as the property of William W. Hoye would not have been ratified, nor the purchase money paid.

Having permitted that to be done which would not otherwise have been done, the appellant, as successor of Smith in the trust under the will of John Hoyer, or the residuary legatees through him, cannot now, after the lapse of nearly 13 years, be heard to question the legality of the act thus sanctioned, to the prejudice of those who have given faith to the fair inferences from their conduct. And it makes no difference whether it be said that this conduct amounts to a ratification or an election, or requires the application of the doctrine of equitable estoppel. Story, Eq. Jur. § 1546; Beach, Mod. Eq. § 1093; Funk v. Newcomer, 10 Md. 301; Pressman v. Mason, 68 Md. 89, 11 Atl. 764; Long v. Long, 62 Md. 71, 72; Strosser v. City of Fort Wayne, 100 Ind. 443; Hayward v. Bank, 96 U. S. 611.

These views are not in conflict with the opinion of this court on the former appeal between these parties. We have seen that the proceedings in 840 Equity, and the conduct of all the parties thereto who were interested in the land in controversy in this case, tends to show that William W. Hoyer was seized of or equitably entitled to so much of lot No. 858 as was sold to Alderson. The admissions of the parties, as disclosed by the record, were the most convenient and available and reliable means of acquiring information as to the title, and he was justified in completing his purchase.

The motion to strike out the order directing a warrant of resurvey to issue, from the refusal of which the first exception is taken, was properly overruled. The record shows that the appellee pleaded not guilty, and took defense on warrant, and that afterwards leave was given to file additional pleas, under which was filed the plea for defense on equitable grounds. The report of sales made by the trustees alleges that the land in controversy is contained within the lines of "Western Canal Convention," which concededly was the property of William W. Hoyer. This is denied by the appellant, and, being a fact in issue, which could be settled only by a resurvey, the warrant properly issued.

The record does not disclose the grounds of the motion made by the plaintiff to strike out the equitable plea of the defendant, nor of the motion made by the defendant to strike out the plaintiff's equitable replication, which are referred to in the second and third exceptions, and therefore we must conclude that the rulings of the court on these motions were correct. As to the second exception the motion was, substantially, a renewal of the demurrer, and asked the court to review its ruling thereon, after plaintiff had announced that he "stood on the demurrer," and was clearly within the court's discretion, from the exercise of which no appeal will lie. As to the third exception, and regarding the motion as in the nature of a demurrer to the plaintiff's equitable replication, it is sufficient to say that the occurrences in the lifetime of William W. Hoyer, and all the allegations of the equitable replication that refer to the time of death of John Hoyer and

William W. Hoyer and the residence of George Smith, of A., and Daniel J. Hoyer, and to the legal title to lot 858, and to the transactions between J. C. Alderson and George Smith, of A., as executor of John Hoyer, deceased, as to other lots and under another contract, were not material issues in the cause, and tended to confuse the jury. If, as we have seen, George Smith, of A., executor of John Hoyer, and trustee under his will with power to sell his real estate, and the residuary legatees of John Hoyer have, as the equitable replication admits, permitted the estates of William W. Hoyer and John Hoyer to be lumped and mixed together, and the proceeds of the sale of lot No. 858 was a portion of the fund so distributed, and they received the money, neither the plaintiff nor the residuary legatees can now be allowed to speak, because conscience requires them to be silent. We think the court was right in ordering the equitable replication to be stricken out. However, as the court below erred in overruling the demurrer to the plea for defense on equitable grounds, the judgment must be reversed. Judgment reversed, with costs, and new trial awarded.

KERR v. URIE.

(Court of Appeals of Maryland. June 22, 1897.)

MARRIED WOMEN—NATIONAL BANK STOCK—OWNERSHIP AND PERSONAL LIABILITY.

1. Where one residing in Maryland subscribes for stock of a national bank of another state, and then transfers it to his wife, also a resident of Maryland, she becomes owner thereof, and is subject to stockholders' liability, under Rev. St. U. S. § 5152, without regard to the laws of the other state relative to contract by married women.

2. A person appearing on the books of a national bank to be absolute owner of stock is subject to stockholders' liability, though holding it as trustee.

Appeal from circuit court, Kent county.

Action by Henry H. Kerr, receiver of the City National Bank of Quannah, Tex., against John D. Urie. Judgment for defendant. Plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BOYD, ROBERTS, and FOWLER, JJ.

James A. Pearce, for appellant. John D. Urie, in pro. per.

FOWLER, J. The question presented by this appeal is whether a married woman residing in this state is capable of holding stock in a national bank located and doing business in the state of Texas, and, if so, whether she is liable as such stockholder, under the personal liability provisions of section 5152 of the Revised Statutes of the United States. Whatever difficulty may surround this question arises, we think, more from the manner in which it is presented in this case, than from any other cause, for it can hardly be supposed that at this day, when, by the law

of most all the states, a married woman may contract as a feme sole in respect to her separate estate, she is without dower to subscribe for or become the transferee of the stock of a national bank. The learned author of Cook on Stock, Stockholders and Corporation Law (section 250) expresses the opinion that, without doubt, a married woman may become the transferee of such stock. Certainly, a feme sole may be such a stockholder, and would undoubtedly be subject to all the personal liabilities imposed by section 5152. And, if this be so, what would be the effect of her marriage upon her right to hold bank stock? Would she be any the less a stockholder after than before her marriage? There is certainly nothing in the acts of congress which can be held to exclude married women from the privilege of owning this class of valuable personal property.

The question before us is thus presented: It appears from the agreed statement of facts that in April, 1891, the defendant, John D. Urie, purchased for the benefit of his infant daughter (a child four years old) 10 shares of the capital stock of the City National Bank of Quannah, and that his wife requested the certificate therefor should be placed in her name, which was accordingly done. The bank having called upon Mrs. Urie to pay into its surplus \$250, she was unable to do so, and the defendant (her husband) agreed to, and did, furnish the money the bank had called for, provided the stock in question should be transferred to him, to be held for the benefit of their infant child, as Mrs. Urie had held it in the first instance. The original certificate which had been issued to her was accordingly surrendered, and another was issued to the defendant, in February, 1892, which he subsequently transferred to her at her request, and in consideration of \$123.10 paid to him by her. It is admitted that this transfer is bona fide and for value. The assignment by the defendant was to his wife as attorney, and the certificate was so drawn, but it appears by the agreed statement of facts that the stock was issued to and held by Mrs. Urie personally, as shown by the stub of the stock book. The bank having become insolvent, a receiver was duly appointed, who has instituted suits against the stockholders of said bank to enforce the personal liability provided by section 5152. But instead of suing Mrs. Urie, who, according to the books of the bank, is the holder of the stock, suit has been brought against her husband, upon the theory that his transfer of the stock to her is void, not, however, by reason of any fraud or irregularity in the transfer, but upon the sole ground that Mrs. Urie, being a married woman, is incapable of being a stockholder. Such a proposition at first blush would seem to be altogether untenable, nor do we think this first impression has been overcome by any argument we have heard. It is too late at this day to regulate the property rights of married women by the

ancient common law of England. That has been abrogated in this country almost universally, and, as Mr. Cook says, married women may doubtless in all the states become transferees of bank stock, and the learned counsel for the appellant is forced to admit that, if the law as thus laid down is to prevail his proposition must fail.

If the question before us had arisen out of a contract conceded to be a Maryland contract, we think there could not have been any doubt as to the legality of Mrs. Urie's holding for, under our statute, all the property, real and personal, belonging to a woman at the time of her marriage, and all property which she may acquire by purchase, gift, grant, devise, bequest, descent, or in course of distribution, she shall hold for her separate use, etc. There can be no doubt, therefore, that where a married woman is in possession of bank stock before she is married, or which after marriage, came to her, as provided by the statute, she would hold it as her separate property, as provided by the Code. The fact that her power of disposition may be limited makes her none the less a stockholder. But it is said the contract is not a Maryland contract, but is a contract made in Texas, and that, therefore, the rights of the parties must be determined by the law of the latter state. And this contention is based upon the proposition that a subscription made in one state to capital stock of a corporation which exists in and carries on its business in another state is a contract to be performed in the latter state, and is governed by the laws of that state. While this general proposition may be conceded, yet it must be remembered that the contract we are considering is not the contract of subscription, but the contract by which the defendant transferred to his wife the stock already subscribed for by her. It would seem to follow, if the contention of the appellant be correct, namely, that Mrs. Urie has no legal capacity to subscribe for or hold the stock, that the original contract of subscription which was made by her and in her own name, although the money was furnished by her husband, was null and void; and therefore no liability ever arose under section 5152, and hence the defendant never incurred any liability thereunder, unless the mere fact that he furnished the money to pay for the stock would make him so liable; and this cannot be, because the liability under section 5152 attaches only to persons who are stockholders either in their own right or in some representative capacity, not exempted by the express terms of that section. But, be this as it may, we have already said the question now before us is the validity of transfer of the stock by the defendant to his wife. By means of this contract of transfer which was made in this state by two citizens of this state, and therefore to be governed by the laws of this state, the defendant, in good faith and for value, assigned, and, we think, had a right (no creditor of his objecting) to thus assign

it. The contract was complete when the transfer was made, and his ownership of the stock, which is conceded, carried with it, according to the weight of authority of the later decisions, the right to make the transfer, because stock is characterized by the same features as other forms of personal property. Nor was it essential to the transferee's equitable title that she should have a new certificate issued to her. It was said by Davis, J., in the leading case of *Railroad Co. v. Schuyler*, 34 N. Y. 81, "that the nonproduction and surrender of the certificate at the time of transfer is not fatal to the title of the transferee. It is only essential to the safety of the corporation." And in *Railway Co. v. Sewell*, 35 Md. 238, it is said that when shares are assigned, although not made on the books of the corporation, title passes to the assignee. In later cases (*Brick Co. v. Mall*, 65 Md. 96, 97, 3 Atl. 286; *Swift v. Smith*, 65 Md. 435, 5 Atl. 534; and *Noble v. Turner*, 69 Md. 524, 16 Atl. 124) it was held that such a title is an equitable title, giving to the transferee the right to enforce actual entry of the transfer upon the books of the corporation, and thus to convert the equitable into a legal title. We conclude, therefore, that by virtue of the transfer in Maryland, and without regard to the laws of Texas, Mrs. Urie became the equitable and real holder of the stock in question; and, if this be so, no question as to her powers of disposition, or as to whether she is or is not capable under the laws of Texas to make contracts, can arise in this case, for the liability of a stockholder arises not under any law of Texas, which it is contended has not been proven in this case, but under the act of congress. And the contracts which it is claimed she is liable on are not her contracts, but the contracts of the bank. *Witters v. Sowles*, 35 Fed. 641; Rev. St. U. S. § 5152. The right to be a stockholder is given to her by the law of the state where she resides, and her rights and liabilities, as such, are provided by the acts of congress. But if we could, without proof, say what is the law of Texas, it would be found, upon this question, the same substantially as ours. "All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, * * * shall be the separate property of the wife." Rev. St. Tex. art. 2967.

The case of *Keyser v. Hitz*, 133 U. S. 151, 10 Sup. Ct. 290, was relied on by the defendant to show that his wife, and not he, was the real holder of the stock in question, and that, therefore, she was the proper defendant in this suit. Assuming that she had a right to hold the stock under our state law, this case is, we think, conclusive authority upon the controlling question before us. In delivering the opinion of the court, Harlan, J., said: "The only persons holding shares of national bank stock whom the statute exempts from personal responsibility are executors, administrators, guardians, and trustees. See Rev. St. U.

S. § 5152. It is not for the courts, by mere construction, to recognize exemptions which congress has not made. The hardship that may result where the ownership of national bank stock by a married woman is subject to the common-law rights of her husband in respect to its alienation cannot control the interpretation of the statute. Such considerations are more properly for the legislative department." In *Re Reciprocity Bank*, 22 N. Y. 15, Comstock, J., expressed the same view, and said that the law in regard to the imposition of personal liability of stockholders ought to be so construed as to maintain it in its integrity, and that to hold married women exempt from its provisions would go far to defeat its policy.

The appellant, however, contended that, admitting that Mrs. Urie was authorized to hold the stock, beneficially she did not so hold it, but in fact held it as attorney, agent, trustee, or in some representative capacity. But it is clear from the evidence that she either holds as self-appointed attorney or trustee for an infant of tender years, for an undisclosed principal, as appears by the certificate, or personally and beneficially, as appears by the stub of the stock book of the bank. In neither event do we think she can evade the personal liability of a stockholder. If persons were allowed to subscribe for stock in a national bank or in any other corporation where a personal liability attaches, either as attorney for an unnamed principal, as self-appointed trustee for some unnamed cestui que trust, or as attorney for an unnamed infant of tender years, and, when called upon to pay the debts of the bank to the extent of the stock so subscribed, could escape by simply declaring that they represented in some capacity those who are legally or otherwise incapacitated, the law would be a dead letter, and the creditors of these associations, which are found in great numbers in every state, would be deprived of the only certain means provided by law for the payment of their claims. But, in addition to this, it is well settled upon authority that one assuming to act as Mrs. Urie has acted becomes personally bound. The infant not being liable, liability attaches to the person who makes the subscription; and, if that person has transferred the stock to one capable of taking and holding it, the liability passes to the latter. *Cook, Stock, Stockh. & Corp. Law*, § 67. The only safe rule on this subject is that, when stock is held in a representative capacity, it should be noted on the stock book of the bank; and, if a person appears there as absolute owner of the stock, he will not generally be permitted to deny it. If he claims to be trustee, and does not disclose it, he is guilty of laches, for which others should not suffer. "The settlement of the affairs of an insolvent bank would be rendered a matter of great expense and delay if persons who appeared on the books of the bank as individual stockholders were permitted to relieve themselves by proving that they held the stock in a representative capacity.

Davis v. Weed, 44 Conn. 569; *Browne*, Nat. Bank Cas. 110. But this court has disposed of this question in the same way in *Magruder v. Colston*, 44 Md. 356. Thus, "if creditors must look beyond the legal title, as exhibited by the books of the bank, they can never know against whom to proceed." Mrs. Urie, as we have seen, was, according to the books of the appellant bank, the absolute owner of the stock. Having concluded that Mrs. Urie is the holder of the stock in question, it follows that the plaintiff's prayers were properly refused. The rulings of the court upon the defendant's prayers and upon this demurrer to his plea are not before us. Judgment affirmed.

WARTH v. BRAFMAN et al.

(Court of Appeals of Maryland. June 22, 1897.)

WITNESS—COMPETENCY—CONVERSATION WITH DECEDENT.

Code, art. 35, § 2, declaring that, whenever the contract in issue was made with an agent, the death of the principal shall not prevent a party from being a witness, provided such agent shall be living and competent to testify, allows the party who contracted with the agent to testify to a conversation with the agent's deceased principal, the agent being alive.

Appeal from Baltimore city court.

Action by Apollonia Warth, executrix of Albin Warth, against Abraham Brafman and others, formerly trading as A. Brafman & Sons. Judgment for defendants. Plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, ROBERTS, and BOYD, JJ.

Howard Bryant, for appellant. W. Pinkney Whyte, for appellees.

BRYAN, J. Apollonia Warth, executrix of Albin Warth, brought an action against Brafman et al., trading as A. Brafman & Sons. The verdict and judgment being against her, she has appealed. The cause of action was a contract relating to a machine for cutting out clothing alleged to have been made by Henry Warth, in the year 1890, as the agent of Albin Warth, who died in May, 1892. The contract was not in writing. It may be stated in general terms that the contested question of fact in the case was whether the verbal contract embraced the terms of a written instrument which was offered in evidence. Henry Warth testified that it was based on this writing, and that it embraced its terms. Max Brafman, one of the defendants, testified to the direct contrary. It is entirely unnecessary to state the details of the testimony, as we are concerned solely with a question of the admissibility of evidence, which is presented by the only exception taken at the trial. The cutting machine was set up at the place of business of the defendants. In the course of his testimony, Max Brafman testified that a few months afterwards he had a conversation with Albin Warth. The plaintiff objected to the

admission of this conversation, but the court admitted it in evidence, whereupon the plaintiff took an exception. The conversation was as follows: "I met Mr. Warth. I said, 'Well, the machine is at work.' 'How does it run?' 'All right. But,' I said, 'one thing don't seem to be agreeable.' 'What is that?' I said: 'Your son wants a contract or agreement, or something of that character, signed, binding ourselves for seven years to carry the thing on,—understand?—and that whether we have any use for it or not.' I told him we didn't propose to sign it. I told him so. He said: 'What is the use of you bothering about the matter? Whatever you do in the matter, I know you will do right; and I guess you will be in business 20 years longer, and as long as you are in business you will want the machine.'" If the contract had been made with the deceased, the witness would not have been competent to testify. But the second section of article 35 of the Code leaves no doubt on this question. It enacts that "whenever the contract or cause of action in issue and on trial was made or contracted with an agent, the death or insanity of the principal shall not prevent any party to the suit or proceeding from being a witness in the case; provided such agent shall be living and competent to testify." No critical analysis, however subtle, can render the meaning of this clause in any degree obscure. The agent who made the contract and the principal on the other side are placed on terms of exact equality. Each is a competent witness, and each can be heard to testify to any fact or circumstance which, under the rules of evidence, would be admissible under the issues joined in the cause if testified to by any other competent witness. Their competency is not restricted by the statute to any particular phases of the controversy, but they stand as ordinary witnesses sworn to testify in the case. It is nothing to the purpose that Brafman testified to declarations made by the deceased. If these declarations had been testified to by a witness not a party to the suit, it is not supposed that any one would have contended that the witness was not competent to prove them. And Brafman in this case is made by the statute a witness, in the same manner and to the same extent as if he had not been a party to the suit. The alleged conversation with the deceased had some tendency to contradict Henry Warth, and was therefore admissible in evidence on the testimony of a competent witness. We approve of the ruling of the court below. Judgment affirmed.

COCKEY et al. v. PLEMPER et al.

(Court of Appeals of Maryland. June 23, 1897.)

AMENDED OR SUPPLEMENTAL BILL—NOTICE TO DEFENDANTS.

1. Notice must be given defendants in the original bill to answer an amended or supplemental bill, where it introduces new matter which affects their interest.

2. One cannot, by amended or supplemental bill, take a position inconsistent with that of the original bill.

Appeal from circuit court of Baltimore city.

Bill by William L. Cockey and others against Charles A. Plempel and others. Decree for defendants. Complainants appeal. Remanded.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Hyland P. Stewart, for appellants. John K. Cowen, E. J. D. Cross, Hugh L. Bond, Jr., Rich & Bryan, and Thomas E. Brady, for appellees.

ROBERTS, J. This is a creditors' bill, filed by the appellants against the appellees, to recover the proceeds of a policy of insurance on the life of Colgate O. Cockey, for the sum of \$5,000, in the Equitable Life Assurance Society of the United States. The bill charges that said Cockey was in his lifetime indebted to the appellants in various sums of money, and, being so indebted, on the 27th of June, 1889, made a deed of assignment for the benefit of his creditors to Milton W. Offutt. On the 31st of May, 1899, said Cockey was the owner of said policy in said society, payable at his death "to his heirs and assigns," and on that day he assigned said policy to the appellee Plempel to secure him, as alleged, from any loss or damage he might incur in becoming surety in an injunction bond filed in a suit instituted in the circuit court of Baltimore city by said Cockey against Howard B. Shipley. It is alleged that there was a written agreement in duplicate, entered into between said Cockey and said Plempel about the time of the assignment of said policy, in the nature of a defeasance of the same, to take effect when Plempel should be protected from loss or damage as surety in said bond, which defeasance, however, was not secured. On the 8th of October, 1890, Cockey died, and the proceeds of said policy, amounting to \$5,000, were paid by said company to said Plempel as assignee, which, it is charged, he divided equally between Mrs. Colgate Cockey, the widow of said Colgate O. Cockey, deceased, and himself. The bill also charges that it was the duty of said Plempel, after reimbursing himself the loss which he had sustained as surety on said injunction bond, to pay the balance to Mr. Offutt, trustee, for the benefit of the creditors of said Cockey, and that said trustee stood by and "allowed the same to be paid over by said company" without effort on his part to secure said balance for the benefit of the trust which it was his duty to protect; that Mrs. Cockey was entitled to no part of said money as against the creditors of her said husband, whose claims had all accrued prior to the assignment of said policy to Plempel. The foregoing statement of facts presents the appel-

lants' case as made by their original bill, and sufficiently indicates the nature of the relief sought. The bill was answered by Offutt, trustee, and separate pleas to said bill were filed by Plempel and Mrs. Cockey. After filing exceptions to said pleas, which were subsequently withdrawn, replication was filed, and an order of court to take testimony obtained. On the 9th of November, 1894, the appellants, with leave of the court, filed "an amended and supplemental bill" against the Equitable Life Assurance Society, in which all the defendants named in the original bill are omitted, and charging that, since the filing of the original bill, they have ascertained that the assignment of said policy to Plempel by Cockey was on its face a conditional assignment, and that said society paid said policy in violation of said condition, and, further, that even though said assignment was absolute on its face, said society had information, before it paid over the money to Plempel, that the same was not in fact absolute, and, having thus paid said money without warrant or authority, it should be required, in justice and equity, to pay the same to the persons legally entitled to receive it. The amended and supplemental bill, together with the interrogatories filed with the same, were on the 19th of December, 1894, answered by the said society, and on the same day replication to the answers to the original and to the amended and supplemental bills was filed. In pursuance of an order of court passed on the 10th of July, 1894, as stated by the examiner before whom the testimony contained in the record was taken, it appears that certain testimony was taken at various times, between the day last named and the 30th of September, 1895, the time when the testimony was closed. Nearly all of the testimony was taken prior to the filing of the "amended and supplemental bill," and to the filing of the answer thereto.

This statement presents substantially the facts which go to make up the contention of the appellants, and exhibits with sufficient particularity the state of the pleadings which we are called upon to consider. There is nothing in this case to justify the utter confusion which pervades this record, but it is now too late to remedy its present plight. We have here an original bill, and in the same case "an amended and supplemental bill," with new allegations materially different from the averments contained in the original bill. In the first bill we have three defendants, who have been served with notice, and have either answered the bill or filed pleas thereto. The amended and supplemental bill filed prays for service of the writ of subpoena against the new defendant only, the assurance society, but entirely ignores the defendants named in the original bill, and fails to call for service of process or publication against them, or any of them. From the character of the amendment made by the amended bill, it is very clear that the

original defendants were necessary parties to such bill; but they could not, from the very nature of the amendment, be required to answer or plead to the same until they had been notified of the amended bill by service of process or publication. Equity Rule 30 (Code, art. 16, § 150) provides that, "where amendment is made and new facts are introduced, and the case is thus varied in any material respect, the defendant shall be at liberty to answer anew, or to plead, or demur to the bill as amended, within such time as the court or judge thereof may prescribe, after notice of the amendment made; and notice may, in all cases, be given by service of a copy of the bill as amended upon the defendant, or upon his solicitor, if there be one; or it may be by subpoena." *McKim v. Odom*, 3 Bland, 430; *Neale v. Hagthorp*, Id. 570. In the last case, the chancellor very properly says: "Where the defendant has answered, and the plaintiff then amends the bill, introducing new matter, he is entitled to answer such new matter, because an amended bill is part of the original bill, and the defendant's answer thereto is part of his original answer, and consequently the defendant is as much bound to answer the amended bill as to answer each portion of the original bill itself." Whether the bill in its form be an amended or a supplemental bill, if it introduces new matter, and is thus materially varied, it must be answered. Mr. Lube, in his *Equity Pleadings* (137, 138), after discussing the nature and effect of supplemental bills, says: "In general, the supplemental bill must pray that all the defendants must appear and answer to the charges it contains." To the same effect are *Story, Eq. Pl. § 343*; *Mitt. Eq. Pl. (by Jeremy) 76*. This view appears to be in accordance with the settled practice in this state, subject, however, to the exceptions hereinafter noted. *Alex. Oh. Prac.* 271. The provisions of the act of 1892 (chapter 654) afford no relief to the appellants' case, and are in no sense applicable to the questions raised by this appeal. It is unquestionably true that when a defendant in an original bill has filed his answer to said bill, and an amendment is made which in no respect affects the interest of such defendant, or when the only object sought to be gained is the making of a new party, no just cause can be assigned requiring the defendant to file a new or second answer. *Fitzhugh v. McPherson*, 9 Gill & J. 70; *Calwell v. Boyer*, 8 Gill & J. 149.

It is, however, contended on the part of the appellants that the "amended and supplemental bill" does not introduce new facts," and does not "vary in any material respect" the case made by the original bill, and it is therefore argued that the bill does not require notice to be given of the amendment. In this we cannot concur. To maintain this view may impose hardship upon the appellants in this case, but it is no part

of our duty to provide special rules for particular cases. Those who seek the benefit and protection of the law must accept it through its recognized channels, according to its settled rules. The state of case which we have been considering leads irresistibly to the conclusion that the allegations and prayers for relief contained in the original bill are wholly inconsistent with the facts stated in and the relief sought by the amended and supplemental bill. Under the original bill a decree is prayed for against Plempel and Mrs. Cockey on the ground that Plempel got the proceeds of the insurance policy from said society, and divided the same with Mrs. Cockey, who, it is claimed, was entitled to no part thereof. In the amended and supplemental bill the converse of this proposition is to be found, in this: that it is alleged that said society has never paid said money to any one authorized to receive it, but that it should be required to pay it to some such person. We think this position untenable because of the inconsistent character of the averments contained in the two bills. Mr. Bigelow, in his work on *Estoppel* (page 362), says: "A party cannot, either in the course of litigation or in dealings in pais, occupy inconsistent positions; and where one has an election between several inconsistent courses of action, he will be confined to that which he first adopts,"—and again, on page 601: "If parties in court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of courts of justice would in most cases be paralyzed, the coercive process of the law, available only between those who consented to its exercise, could be set at naught by all. But the rights of all men, honest and dishonest, are in the keeping of the courts, and consistency of proceeding is therefore required of all those who come or are brought before them." The appellees, other than the assurance society, claim that they were never properly before the court on the amended and supplemental bill, but they were unquestionably fully before it on the original bill. After a careful examination of the pleadings and the testimony contained in the record we think the court below were clearly right in holding that the amended and supplemental bill against the assurance society should be dismissed, but we think the appellants are entitled to relief as to the appellees Plempel and Mrs. Cockey; but we have failed to discover, in the pleadings or in the proof offered, anything to justify a decree inculcating Offutt, trustee. A different state of case is presented when we come to consider the relations of Plempel and Mrs. Cockey to the transactions which the original bill outlines and the testimony establishes. We entertain no doubt as to the liability of these appellees. Plempel's conduct throughout this proceeding has been such as to cast grave doubt upon his sincerity and good faith. He has failed and refused to treat his connec-

tion with the assignment of said policy and its proceeds with fairness and frankness, but has sought to cloud and mistify all of his transactions pertaining to the same.

Since the filing of the record of this appeal in this court, the appellants have moved to amend the proceedings by striking out the assurance society as a defendant and appellee. This motion is made in pursuance of section 36, art. 5, of the Code, and provides the only method in which this case can be disposed of upon its merits. If the amended and supplemental bill be dismissed, the case can be heard upon the original bill; but in the present state of the pleadings it will be impossible to make any satisfactory disposition of the case. Such a course will embarrass the proceeding, and remove many of the obstacles which have seemed to clog the further progress of the case. Mrs. Cockey's part was played by others, and she is entirely free of any charge of moral wrongdoing; but she is yet legally responsible to make return of such part of the proceeds of said policy as came to her hands. There is nothing in the case which directly or indirectly suggests a right in her to receive or apply to her own use any part of said policy as against the rights of her husband's creditors.

In conclusion, we are of the opinion that the orders appealed from should neither be affirmed nor reversed, but the cause should be remanded for further proceedings under section 36, art. 5, of the Code, as relief may be given and decree passed accordingly. Cause remanded for further proceedings under section 36, art. 5, of the Code.

RITTER v. ETCHISON.

(Court of Appeals of Maryland. June 22, 1897.)

REGISTRATION CASE — APPEAL — BILL OF EXCEPTIONS — LIMITATIONS — QUALIFIED VOTER — ABSENCE FROM COUNTY — DOMICILE.

1. Under Acts 1896, c. 202, providing, with reference to appeals in registration cases, that exceptions may be taken and appeals allowed as in other cases, and that "all such appeals shall be taken within five days," the bill of exceptions may be presented and signed in accordance with the general practice regulating appeals, if the appeal is taken within the five days.

2. Acts 1896, § 23, provides that, in determining whether any person is a resident of any voting precinct, it shall be presumed that, if he is shown to have acquired a residence in one locality, he retains the same until it is affirmatively shown that he has acquired another. R. was a resident and voter of M. county October 28, 1895, and voted at the general election in November. He removed with his family to Washington, D. C., in the fall of 1895, and filed an affidavit that he did not intend to change his residence, but had a fixed purpose to return within six months preceding the election in November, 1896, and did return about April 15, 1896. There was evidence that R.'s principal place of business was in Washington, and that he occupied his Maryland home only a portion of each year,—from April to November. Held, that R. was entitled to registration as a qualified voter in M. county.

Appeal from circuit court, Montgomery county.

Petition by Elias H. Etchison against Frederick W. Ritter, Jr., and the board of registry for the Ninth election district of Montgomery county, to have Ritter's name stricken from the list of qualified voters of the district. From an order in favor of petitioner, defendant Ritter appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, and PAGE, JJ.

Alvan T. Tracy and Ashley M. Gould, for appellant. Edward C. Peter, C. W. Prettyman, and Bowle F. Waters, for appellee.

BRISCOE, J. On the 21st of October, 1896, the appellee, Elias H. Etchison, filed a petition in the circuit court of Montgomery county to have the name of Frederick W. Ritter, Jr., stricken from the lists of qualified voters of the Ninth election district of that county, on the ground that he had never acquired a legal residence, and ought not to be included in the lists of registered voters, "as he is not, and never was, a legal, qualified voter of Montgomery county," in the state of Maryland. And it is from an order of court directing Ritter's name to be stricken from these lists that this appeal has been taken.

The first question arises upon a motion to dismiss the appeal because the bill of exceptions was not presented and signed within five days from the date of the judgment. It is admitted, however, and it so appears from the record, that the final judgment was passed on the 27th of October, 1896, and the appeal therefrom was entered and filed on the 31st of October following, which was within the five days required by the statute. The express provisions of the statute relating to the right of appeal in registration cases, are that: "Exceptions may be taken to any ruling of the court at the hearing of any such petitions, and appeal allowed to the court of appeals, as in other cases. All such appeals shall be taken within five days from the date of the decision complained of, and shall be heard and decided by the court of appeals as soon after the transmission of the record as may be practicable." Acts 1896, c. 202. It is also admitted and agreed by the parties to the cause "that the bill of exceptions was presented, signed, and filed in accordance with the statutes and practice of this state, unless said statutes require the presentation, signing, and filing of the same within five days from the date of the judgment; said bill not having been presented, signed, or filed within said five days"; the bill of exception appearing to have been signed nunc pro tunc on the 27th of October, 1896. There is nothing in the statute regulating appeals in registration cases which requires exceptions which have been taken and reserved at the hearing to be signed within five days. If the appeal is taken within the statutory period, this is sufficient, if the exceptions are presented and signed in accordance with the general practice

regulating appeals, as in other cases. *Association v. Grant*, 41 Md. 563; *Miller v. Murray*, 71 Md. 61, 17 Atl. 939. The case of *Plummer v. Wilson*, 73 Md. 472, 21 Atl. 322, relied upon by the appellee, is clearly distinguishable from this. In *Plummer's Case* the appeal itself was not taken within the period of five days, and the language used there must be construed as applicable to the facts of that case. The motion to dismiss must be overruled.

We come now to the evidence to prove residence. Ritter testified that some time prior to the year 1888 he moved from the city of Pittsburgh, in the state of Pennsylvania, to Washington City; that shortly afterwards he purchased property at Washington Grove, Montgomery county, and erected a dwelling thereon; that he claims this as his only and true home, and for a portion of each year he has occupied this dwelling house with his family; that, under the provisions of the assessment laws of the state, he has made returns of his personal property for taxation; that he moved to the city of Washington on or about the 29th of October, 1894, and occupied a dwelling house owned by his wife, but made the affidavit required by the act of 1890, and returned with his family to Maryland on or about the 1st of April, 1896. He further testified that he was refused registration on the 16th of September, 1895, but on appeal to the circuit court of Montgomery county it was ordered and decreed by the court that he was a resident of the state of Maryland, and a qualified voter of the Ninth election district of Montgomery county; that under this order, which remains unreversed, he was registered and voted at the general election in November, 1895. He further testified that he again removed with his family, on the 26th of October, 1895, to Washington City, to secure medical treatment for a member of his family, but made the affidavit required by the act of 1890, and returned with his family to his home on or about the 1st of April, 1896, where he now resides with his family. There was proof on the part of the petitioner tending to show that Ritter's principal place of business was in the city of Washington, and that he had occupied his Maryland home only a portion of each year,—from April to November. We think, under the facts of this case, that the appellant was entitled to be registered as a qualified voter, and the circuit court of Montgomery county committed an error in rejecting the prayer which so declared. It is specially provided by the twenty-third section of the act of 1896 that, in determining whether any person is or is not a resident of any voting precinct, it shall be presumed that, if a person is shown to have acquired a residence in one locality, he retains the same until it is affirmatively shown that he has acquired a residence in another locality. Ritter was a resident of the state, and a voter in the Ninth election district of Montgomery county, on the 28th of October, 1895, under the decision of the circuit court of Montgomery county, and voted at the general election held in the state

in the year 1895. The affidavit which he made before the clerk of the circuit court of Montgomery county was to the effect that he did not intend to change his residence, but that he had a fixed purpose to return within six months preceding the November election; and it further appears that, in accordance with this intention, he actually did return on or about the 15th of April, 1896. Being, then, of opinion, under the facts of this case, that the appellant was entitled to be registered as a qualified voter, the order of court passed on the 27th of October, 1896, will be reversed, and the cause remanded, to the end that the appellant's name may be placed on the registry books of the Ninth election district of Montgomery county. Order reversed, cause remanded, and costs to be paid by Montgomery county.

NORTHERN CENT. RY. CO. v. MEDAIRY.

(Court of Appeals of Maryland. June 23, 1897.)

RAILROAD COMPANIES — ACCIDENT AT CROSSING — EVIDENCE — PRECAUTIONARY MEASURES — NEGLIGENCE.

1. In an action for personal injuries at a railroad crossing, the case should have been taken from the jury where there was uncontradicted testimony that the usual signals were given, and lookout kept, as the train approached; that the electric signal bell at the crossing was ringing; and that the engine could have been seen 385 feet from a point which plaintiff passed before stepping on the track.

2. Plaintiff's testimony that she looked when and where she should have looked, and saw nothing, was unworthy of consideration, and should not have been submitted to the jury.

3. Under Code, art. 23, § 194, providing that county commissioners may notify a railroad company to place a flagman at a crossing outside the corporate limits of a city, if the commissioners believe such crossing dangerous, the failure of the company to voluntarily place a flagman at a crossing does not constitute negligence.

4. The fact that a railroad train was behind time, or that there was a curve at that point, was not evidence of negligence in approaching a crossing.

Appeal from circuit court, Carroll county.

Action by Maud Medairy, by her mother and next friend, Annie R. Medairy, against the Northern Central Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, PAGE, BOYD, BRISCOE, and FOWLER, JJ.

Bernard Carter, William Grason, and Jas. A. C. Bond, for appellant. John I. Yellott and Clabaugh & Roberts, for appellee.

FOWLER, J. This is an action to recover damages for injuries alleged to have been sustained through the negligence of the defendant, the Northern Central Railway Company, by Maud Medairy, a young girl. She sues by her mother and next friend. At the close of the plaintiff's case, the defendant asked the court to take it from the jury, because, as was contended, no legally sufficient evidence had

been offered to show negligence on the part of the defendant or its agents. But the prayer was refused. We are of opinion it should have been granted, because we are unable to discover in the record any evidence legally sufficient to support the verdict of the jury. The first witness called by the plaintiff to testify as to the facts of the accident is Albert Cramer. His testimony is as follows: "I am employed by the Northern Central Railroad, and am the engineer of the train that killed one of these young ladies, and crippled the other. My train is known as a second-class train, a fast freight train. We were running about 20 miles an hour, our schedule time. Our only stops were to take water. We were three minutes late that night at Phoenix, and I was not trying to make up time, but just used my schedule time. I blew my whistle for the crossing, and the engine bell was rung. The engine bell was rung after I sounded for the crossing. I blew for the crossing at the whistling post, about a quarter of a mile below." On cross-examination witness testified as follows: "I left Baltimore that afternoon, the 9th of December, at 5:40. I blew my whistle for this crossing at the whistling post, which is about a quarter of a mile from the crossing, and is nearer to Baltimore than the water tank mentioned in the evidence. The fireman rang the bell. I kept a lookout to see if I could see anything, and I passed the engine of the other train coming south, at the water tower. I was on the lookout all the way up, and the first I saw of these girls was just about the time I struck them. I saw the packages going in the air, but I could not tell whether I had hit them or not. I always keep a lookout, especially around a station. These girls must have been about the outside rail. I blew 'Down brakes' and stopped as quick as I could." The only other witness who was examined by the plaintiff to show how she was injured was the plaintiff herself. She said she lived at Phoenix, and had been working at the factory there for about three years. On December 9, 1895, in the evening, when it was quite dark, she and her sister were going to visit a neighbor on the west side of the railroad. "While we were crossing the bridge, we heard the south-bound train whistle for Phoenix, and we walked to the end, nearly, of the bridge, and stopped until the train passed; and we walked up and down the track, and listened, and we heard no noise except what the down train made, and we saw the crossing clear, and we started to cross, and I remember we got over the first rail, and I knew no more." The bridge which the witness mentions is a part of the public road which crosses the railroad at this point, and the west end of the bridge is several feet east of the track which is used for the north-bound trains. The plaintiff could not tell how long she stood on this bridge, waiting for the south-bound train to pass; but she said, when it passed, she looked up and down the road, and saw nothing, and heard nothing except the noise of the train that

was going down. She was unable to state the distance from the point where she stood on the bridge to the railroad track where she was struck, nor could she say how far down the railroad she could see a train coming at the time when she looked. From this testimony it is not only evident that there is no proof of any act of negligence on the part of the defendant, but there is positive proof contained in the testimony of the witness Cramer, which is uncontradicted, that the proper and usual signals were given, and the proper lookout kept up, as the train approached the station. The plaintiff does not undertake to say that the electric signal bell at the crossing was not ringing as she approached the track. She says she did not hear it, and that, if it did ring, she did not remember hearing it. In point of fact, the bell was ringing, as is shown by the overwhelming proof of defendant's witnesses. Nor does the plaintiff nor any other witness say that the whistle did not blow, nor that the engine bell did not ring. The only noise she heard, she says, was that made by the south-bound train. She says that she stood near the end of the bridge next to the railroad, and that she looked before attempting to cross, and saw nothing; and yet, according to the evidence of her own witness Allen, she could have seen the engine at the switch-signal post, which is 385 feet distant from the point from which she appears to have been when she looked. If she had seen the engine even half that distance away, she certainly could have avoided stepping on the track, and, if there was a point in her walk from the bridge to the track from which she could see down the track far enough to avoid danger, it was her duty to look then and there. But assuming, as was contended, that the plaintiff looked when and where she should have looked, and, as she says, saw nothing, such testimony, as we said in the recent case of *Traction Co. v. Helms* (not yet officially reported) 36 Atl. 119, is unworthy of consideration, and should not therefore be submitted to the jury.

What we have said disposes of the case, and it will be seen that we are of opinion that the plaintiff has not only failed to offer any legally sufficient proof of negligence, but one of her own witnesses, the engineman, Cramer, proved that the usual signals of warning were given by him and the fireman as the train approached the station.

In addition to what we have said, perhaps, we should correct what appears to be a misapprehension as to the scope of the decision of the court in the case of *Railroad Co. v. Owings*, 65 Md. 502, 5 Atl. 329. In the case before us the court below was asked to and refused to instruct the jury that they could not infer any negligence on its part from the fact that it did not have a watchman or flagman at Phoenix's station crossing. The plaintiff proved and relied upon this fact as an act of negligence. *Owings' Case* was cited to support this ruling of the court below, but it will appear from an examination of that case that a

prayer like the one refused below in this case was conceded, and, of course, not considered here. The language on which the appellee bases her contention will be found in a quotation from the opinion of the supreme court of the United States in the case of *Improvement Co. v. Stead*, 95 U. S. 161. It is as follows: "The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell; and this caution is especially applicable when their sound is obstructed by winds and other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if an unslackened speed is desirable, watchmen should be stationed at the crossing." It could not have been, and was not, intended thus, without even referring to it, to reverse the previous well-considered decision of this court in the case of *State to use of Foy v. Philadelphia, W. & B. R. Co.*, 47 Md. 85, in which it was said that the law does not impose the obligation upon a railroad company to station persons at every crossing of a public road to warn travelers of approaching trains; and the following language of *Bramwell, B.*, and the case of *Stubley v. Railway Co.*, L. R. 1 Exch. 13, was quoted, as follows: "Need there be any one to warn persons of a train which they can see so far off, that, if they only take the trouble to look out for it, it cannot overtake them in crossing?" Nor does the fact that the train was behind time (*Foy's case*, *supra*), nor that there was a curve in the railroad at that point, afford any evidence of negligence (*Railroad Co. v. Pumphrey*, 72 Md. 85, 19 Atl. 8). But now the duty of railroad companies in this state in respect to the protection to be given the public at public crossings is regulated by statute. Code, art. 23, § 194. "Whenever the several railroads of this state operated by steam shall cross any public highway at grade outside the corporate limits of cities, and any such highway shall be believed to be of such character as to render the passage of locomotives and trains thereon dangerous to life and property, it shall be the duty of the commissioners of the county in which such point of crossing shall be located to notify the company owning or operating the railroad at such point," if, after certain proceedings, they shall so determine, either to place a flagman at such crossing, or a system of electric alarm bells, or to erect safety gates or change the grade crossing.

If, as a number of respectable witnesses testified, the crossing at Phoenix is believed to be, or, in their opinion, is, dangerous, and the safety of persons crossing there demanded more than the ordinary and usual signals, ample means are provided by the statute for the protection of the rights of the public, as well as those of the company. The defendant appears to have realized the fact that at this crossing it was its duty to exercise more than ordinary care, for it adopted without notice from the county commissioners, so far as the record discloses, one of the three expedients,—an electric

signal bell, provided by that person at the fortional protection at dangerous such portions der these circumstances, and, in view of the statutory provisions and the previous decisions of this court, it would be impossible for How say that the failure of the defendant to place a flagman at this crossing constituted negligence. For the error committed on the prayer to grant the defendant's first prayer, without regard to the other questions presented by this appeal, the judgment appealed from must be reversed. Judgment reversed, without awarding a new trial.

HEYWARD v. SANNER.

(Court of Appeals of Maryland. June 22, 1897.)

SLANDER—PRIVILEGED COMMUNICATIONS—INQUISTION OF DAMAGES AFTER DEFAULT.

Legal malice is conclusively settled by a default in an action of slander, where the words are actionable per se; and hence, on an inquiry of damages after the default, the words cannot be held privileged by reason of the circumstances under which it is shown they were spoken.

Appeal from superior court of Baltimore city.

Action by John B. Sanner against James F. Heyward to recover damages for slander. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, ROBERTS, PAGE, and BOYD, JJ.

George D. Penniman, for appellant. J. J. H. Metnick, for appellee.

PAGE, J. The plaintiff below was a conductor on one of the cars of the City & Suburban Railway Company in the city of Baltimore. It was his duty, when fares were collected, to register them by a device called an "indicator," and to account each day for the number shown by the register. It is alleged in the narr. that, after having been wrongfully discharged from the service of that company, he became a conductor on the cars of the Lake Roland Elevated Railway Company, which also operated a line of street cars in the same city; that while so employed the defendant falsely and maliciously, with intent to injure the plaintiff, spoke and published in the presence of the superintendent of the Lake Roland Company and of other persons "the false and defamatory words following, namely: 'Put Sanner (meaning the plaintiff) off the road (meaning that the said superintendent should discharge the plaintiff from the employ of the said Lake Roland Elevated Company). He (meaning the plaintiff) had twenty-five on the indicator and thirty-six in the car (meaning thereby that the plaintiff, as conductor, etc., had collected thirty-six fares, etc., and noted only twenty-five fares on the indicator, and that the plaintiff had wrongfully embezzled the other eleven fares, and intend-

off and went back, and City & Suburban Railing on the same day." by reason away and the plaintiff was discharged from the to find, on the company, and was otherwise plank in. The appellant, having failed him had, the appellee obtained a judgment by sake! Later on, an inquisition of damages was taken before the judge at large. The defendant appeared by counsel, and evidence on both sides was taken. Among other things, there was testimony to the effect that at the time the words were spoken a Mr. Fredericks was the general manager of the Lake Roland Company; that the road of that company had been purchased by the City & Suburban Company, and until the merger of the two roads was completed he was remaining in control of the former road, and under the arrangement was "in a general way, subject to the orders" of the appellant, who was the general manager of the City & Suburban road; that the plaintiff was discharged by him by reason of the words set out in the declaration, which were spoken to him "over the telephone," in the ordinary course of business. At the close of the testimony the defendant prayed the court to rule "that in considering the question of the conversation between Mr. Heyward and Mr. Fredericks, as officials of the same railway system, that it was proper for Heyward, in telling Fredericks to discharge Sanner, to give to Fredericks the reason which led him (Heyward) to direct Sanner's discharge, and that said statements were privileged." The court having refused so to rule, the defendant excepted, and the propriety of the action of the court is the only question we are called on to determine.

That a judgment by default fixes the liability of the defendant and establishes the right of the plaintiff to recover some amount, to be afterwards determined by an inquisition of damages, cannot now be questioned. This court has said in the case of *Green v. Hamilton*, 16 Md. 329, that a judgment by default, "if regularly entered, is as binding as any other, as far as respects the power and jurisdiction of the court in declaring that the plaintiff is entitled to recover, though the amount of the recovery in some cases remains to be ascertained by a jury." Like every other judgment, it is conclusive of every fact necessary to uphold it. *Freem. Judgm. § 330*, and authorities there cited; *Cooper v. Roche*, 36 Md. 565; *Davidson v. Myers*, 24 Md. 565. The words set out in the narr., when taken in connection with the circumstances under which they were spoken, as set forth in the colloquia and innuendoes, amounted to an imputation of the crime of embezzlement, and are, therefore, actionable in themselves. *Garrett v. Dickerson*, 19 Md. 447. The utterance of them, therefore, in the presence of other persons, without other attendant circumstances, carried with them the implication of legal malice. *Long v. Eakle*, 4 Md. 458. But the malice thus implied is only that which is the essential element in an action for slander or

libel, and is "not malice in the ordinary sense of hatred or ill will against the person of whom the defamatory words are spoken." *Negley v. Farrow*, 60 Md. 177. In that case the article published was held to be libelous per se, and, its publication having been established, the only question was the amount of damages. "In estimating these," the court says, "they [the jury] were to consider whether it was published maliciously and wantonly for the purpose of injuring the character and reputation of the plaintiff, or as editors of a newspaper, honestly commenting upon the official acts and conduct of the plaintiff, and in the belief of its truth." It would seem to follow from this statement of the law that upon the inquisition it was proper for the defendant to prove, if he could, that the words were spoken without express malice; that is, without the purpose of injuring the character and reputation of the plaintiff. Such proof, if satisfactory to the jury, would be effective to relieve the defendant from the imposition of punitive or vindictive damages. But if, in thus repelling the idea of express malice, there should be testimony from which, if there were no judgment, the jury could find the communication to be privileged, yet the defendant could not be entitled to a ruling declaring it to be privileged, because by the judgment the question of legal malice has been definitely settled against him. To rule, under these circumstances, the words were privileged, is equivalent to an instruction that there is no legal malice, although the judgment by default conclusively settles that there is. This is the necessary result, because the legal effect of declaring the words to be privileged is to repel the presumption of malice of any kind arising from their utterance. *McBee v. Fulton*, 47 Md. 427. In other words, to so rule would be to declare the defendant was justified in speaking the words, and, if he was, there could be no recovery at all, since malice, express or implied, is a necessary ingredient in an action of slander. *Dicken v. Shepherd*, 22 Md. 418. This could not be done in this case, because, as we have said, the legal malice is conclusively settled by the judgment. The court below committed no error in rejecting the prayer. Judgment affirmed.

WESTERN MARYLAND R. CO. v. KEHOE. (Court of Appeals of Maryland. June 22, 1897.)

RAILROADS — ACCIDENTS AT CROSSINGS — NEGLIGENCE — PROVINCE OF JURY — ACTION FOR INJURIES — INSTRUCTIONS.

1. Plaintiff's buggy was struck at a railroad crossing by a car which was switched on the main track. Plaintiff slackened speed on approaching the crossing, and looked and listened, and heard or saw nothing. The night was dark, and there was no light enabling him to see the approaching car. No bell was rung, or other signal given. Plaintiff fell from his buggy within the roadway, near or on the side track. The brakeman on such car saw the horse's head, and heard something fall. He rode the car until it

got to the train, when he returned to the crossing, but plaintiff was run over by cars on the side track before the brakeman could get him off. *Held*, that the questions of negligence and contributory negligence were for the jury.

2. The court properly refused to charge that the brakeman in charge of the cars which ran over plaintiff was not bound to anticipate the likelihood or possibility of plaintiff or of any one lying on or between the tracks, 8 or 10 feet beyond the crossing, or lying on or between the rails on the crossing, and that it was not negligence for said brakeman or any other employé not to have looked for or seen plaintiff lying at such a point.

3. It also properly refused to charge that plaintiff, in order to establish his case, having proven that as he was approaching the tracks, and when about 2 feet from the main track, a box car was moving slowly on said track across the road, and that before his buggy reached said track the car passed half way across the street in front of him, and was still moving slowly in the same direction, and that there was light enough to enable a person on the rear end of a car, at a distance of some 35 feet, to see a buggy as it approached the crossing, and having testified that he slowed down his horse to a walk when 20 feet from the track, and no proof having been offered that there was anything to prevent his seeing the car, it was his duty to stop and wait until the car passed; and as it appeared from the facts as proven by him that, if his buggy was struck by said car, it was struck while swerving from the middle of the road, plaintiff could not recover.

4. There being evidence that plaintiff was seen by defendant's servants on the track where he was thrown by their negligence, and that after he was seen there was time to avoid injuring him by their exercise of reasonable care, it was not error to refuse to charge that plaintiff could not recover if the bell was being rung, and it could be heard by persons driving along the road from a point several hundred yards away all the way to the crossing, and that the light of the moon was sufficient to enable such persons to plainly see the box car on the main track as soon as, and before, they got within 60 feet of the tracks.

5. Nor was it error to refuse to charge that plaintiff could not recover if at the time of the accident the moon was still nearly two hours high, and the light sufficient to enable one approaching the crossing to plainly see so large an object as such box car, as well as other cars near the crossing, for a considerable distance, and in time, by the exercise of due care, to have avoided a collision with said car.

Appeal from circuit court, Harford county.

Action by Lawrence Frank Kehoe against the Western Maryland Railroad Company for personal injuries caused by defendant's negligence. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, ROBERTS, and BOYD, JJ.

Charles Marshall, J. M. Marshall, Wm. L. Marbury, C. Bohn Slingluff, and Wm. H. Harlan, for appellant. Randolph Barton, Jr., Redmond C. Stewart, D. G. McIntosh, and S. A. Williams, for appellee.

BRYAN, J. This is the second appeal in this case. The opinion of the court in the former appeal is reported in 83 Md. 434, 35 Atl. 90. The decision then delivered, as a matter of course, settled the law on the questions involved for all subsequent litigation in the case. The evidence, in some particu-

lars, is different from that given at the former trial. We will refer to such portions of it as it is necessary to consider for the determination of the questions now presented. The plaintiff testified that he lived near Howardsville, in Baltimore county; that on the 30th day of July, 1896, in company with two younger brothers, after driving to several places of resort, at some of which he drank considerably, on his way home he drove along Seven-Mile Lane to the place where it crosses the Western Maryland Railroad; that his two brothers were 20 or 30 yards ahead of him; that he slowed down to a walk, looked, and listened, but did not hear or see anything; that the night was pretty dark; he saw no car, and did not hear any alarm bell, or anything of the sort; that as you approach the crossing a large storehouse and cedar tree would strike your eye to the right before you reach the railroad track; that beyond the railroad to the right, towards Sudbrook Park, there is a growth of wood; that any cars on the track would be between him and the shade of the wood; that he started his horse across the track, and she (a mare) made a jump; he tried to stop her, and something struck his buggy on the right-hand side; that was the last thing he remembered, until next day, when he found himself in bed at his father's house, with his leg cut off; that the mare which he was driving was gentle,—a lady could drive her; that he had been drinking beer and whisky; that he had frequently drunk more, and it had never made him drunk. On cross-examination he said that he judged by the sound that his brothers were 20 or 30 yards ahead; that he could not see them. Thomas Kehoe, one of the plaintiff's brothers, testified that when they reached the railroad it was half past 9 o'clock at night, or ten; that he and his brother Bart were in one buggy, and the plaintiff in another; that they (Bart and himself) stopped at the railroad, but did not see or hear anything, and they went across; that the night was very dark; that at the railroad they heard no bell nor whistle, saw no light displayed, noticed none in any of the houses, nor any flagman, nor any light on the lamp-post; that he knew the plaintiff's horse; it was gentle. On cross-examination he said it was rather dark; that the moon had been shining, but it was about down, and it was rather cloudy. O'Boy testified that he was one of the crew of a freight train of the Western Maryland Railroad on the night of the accident, and was on the west end of the car as it was drifting on the main track towards the train standing east of the crossing, when the car struck a man's buggy right on the crossing,—a little on the east side; that the car was half over when the buggy was struck; that he saw a horse's head, and saw something fall out, that he took to be a cushion; that he did not hear any bell ringing; that, when the car drifted down until it was against the train, he got

off and went back, and found the plaintiff lying on the track, with his face up, further away east of the crossing than he expected to find him; he seemed to be closer to the planking when he fell; that when he saw him he cried out, "Stop them cars, for God's sake!" that the car was west of the crossing, and that he tried to pull the plaintiff away, but could not, and was himself struck on the shoulder; that plaintiff was run over before he could get the plaintiff off; that he is still in the employment of the railroad; that it was a dark night, and he was on the end of the car further away from the crossing, and the light was with him, and when the buggy was struck the light was sitting on the coupling block in the center of the car; it was a box car, and higher than he could reach from where he stood,—eight or nine feet. On cross-examination he testified that the length of his car was 30 feet,—one of the small Western Maryland cars; that he saw the first buggy go by at a rapid rate; he was a car and a half away when he heard a buggy, and he tried to wind the brake chain, but it would not work, and the car ran on the crossing, and he saw a horse's head on the south side of the car; that he had heard the sound of a horse's hoofs, but did not hear anything else; that he had to look around and see the length of a car when he saw the horse's head; that the horse was going at a good gait, not walking; that the plaintiff fell about 5 feet east of the crossing, towards Baltimore; that "we [meaning brakemen] can stop three loaded cars, with a couple of good brakes, in forty or fifty feet"; that he could stop a single empty car much quicker; that when he went to Kehoe the car which ran over him was a car length off; that he found a broken flask by the side of the track, and there was a stain of liquor, which he supposed to be whisky. On re-examination he testified that, if the buggy had come straight down the county road, it would have struck the car. Sapp testified that he took beer with plaintiff about 9 o'clock on the night of the accident, and that the plaintiff was then "all right"; that the plank crossing between the railroad tracks was not the full width of the county road, and that there was a space of eight feet on each side of the plank crossing within the limits of the county road. There was other testimony tending to show that the county road was 30 feet wide, and that when plaintiff was run over he was lying within its limits. There was also other testimony that the plaintiff's horse was gentle. Several witnesses testified to the good character of the plaintiff for sobriety, and two physicians who attended him testified that in their opinion he could not have been intoxicated at the time of the accident. Atwood testified that he was a surveyor and civil engineer, and that he had made a plat representing the railroad station. He described the measurements on the plat. On

cross-examination he testified that a person stopping on the county road 20 or 30 feet from the crossing, going in the direction which the plaintiff was driving, could see towards the west (the opposite direction from Baltimore) about 500 feet; that there was nothing to prevent him from seeing the track, or anything on the track, from that distance. He did not say that he could see that distance on the night of the accident, at the time it occurred; and he seems to have known nothing about the accident, or whether the night was light or dark. This testimony was before the jury, and it rested exclusively in their judgment whether they would believe it or not. If the plaintiff slackened his speed on approaching the crossing, and looked and listened, and heard nothing and saw nothing; if the night was very dark, and there was no light in such a position as would enable the plaintiff to see the approaching car when he looked; and if no bell was rung, or other signal given,—he certainly was guilty of no negligence in attempting to cross the railroad track. And if, under these circumstances, he was struck by the car, and thrown in an unconscious condition to the ground, and run over by another car under the circumstances described by O'Boy, the defendant was certainly responsible for the injury inflicted upon him. The evidence on these points was very materially contradicted by the testimony on the part of the defendant. But most undoubtedly the case could not be withdrawn from the jury on that account. The court cannot decide between opposing witnesses. The jury must determine questions of fact, and as said in *Trust Co. v. Corner*, 2 Gill, 427, "no action of the court should control the exercise of their admitted right to weigh the credibility of evidence." If the jury believed the evidence, it was competent for them to draw the inferences which we have mentioned. We shall refer to this matter again in another portion of this opinion, but we may as well say that it is no part of our purpose to make an abstract of the evidence, but merely to refer to such portions of it as will illustrate the prayers in the case.

The evidence for the defendant stated that an extra freight train, running without scheduled time, coming from Baltimore, arrived at the Howardville station about 10 o'clock on the night in question; that the train stopped about a car's length on the east, or Baltimore, side of the crossing; that the engine was cut off, and it pulled up beyond the crossing, and was then backed into a siding on which five cars were standing; that the conductor of the train took the first and last car, and threw one of these cars on the main track, and let it run down towards the train, which remained standing to the east of the crossing; this was a box car; that three gondola cars were put back on the side track. Wildersin, the conductor, testified that, as he came down the siding towards the crossing with the engine

and one car, he heard the brakeman cry out that a man was run over; that he passed over the crossing and found him; that he was lying on his back, about eight feet on the Baltimore side, very close to the clearance post; that he was on the siding, with one leg over the siding track, towards the main track; that he (the witness) was about 125 feet from the crossing when he heard a team cross over; heard the team coming at a rapid rate, and looked around, and the team went over, and he made a shift, and cut O'Boy off with the car, and when he got down there witness heard the rumbling of another team; that he heard a crack, and he rode the car down and coupled it up, and Brakeman Keefer cut the three cars off, and rode them in on the siding, and that when the witness came down there was nothing to be seen of the team; that he supposed, from the way they were rattling, that the teams were driving at a gallop; that it was a partly moonlight night; that there was a little moon, but that witness could see plainly from where he was at the switchboard to front end of his train, where he left it standing, east of the crossing; that the brakeman who had charge of the three cars which were running down the side track had a light in his hand; that the brakeman (O'Boy) who had charge of the car running down the main track also had a light,—a regular railroad lantern; that the bell was ringing and the whistle sounded as the train approached Howardville from Baltimore; that the cars, as they were shifted down the main track, might have been moving 3 or 4 miles an hour; that they were started from the switch-post, which was 150 feet from the crossing; that when the plaintiff was picked up there was a whisky bottle lying beside him; the whisky was running down over the switch plate. On cross-examination the witness stated that the bell was ringing while they were pushing out, but was not ringing while the locomotive was not in motion; that Keefer could stop the gondola car at any moment after he used his hands on the brake. Dotterer testified that he was a fireman on the freight train from Baltimore; that he was ringing his bell all the time the shifting of the cars was going on; that there was light enough for him to see the main portion of the train east of the crossing, and there was nothing to prevent any one coming down Seven-Mile Lane from seeing the cars and engine on the main track and switch at the distance they were from the crossing. Norman testified that he was the engineer of the extra freight train; that the box car ran down the main track at the rate of 3 or 4 miles an hour; that after the box car had about reached the crossing they sent the three cars down the switch; that the switch was 175 feet from the crossing, and that he could see the train east of the crossing, that it was a tolerably fair night, and an object as large as a box car could be plainly seen at that distance; that the moon might

have been an hour and a half high, or something like that; that he did not think that the moon was down; that it may have been behind woods; that "it would be so from where we were" (in the words of the witness). Keefer, the brakeman, testified that he did not cut off his cars from the engine until O'Boy, with the box car, had passed the clearance post below the crossing, and he himself saw that the cars had passed the post; that the cars under his charge were gondola cars,—one loaded with lime, and two which were empty; that he was standing between the loaded car and an empty car, with the empty car ahead of him and two behind him; that any one coming down the public road who stopped within 20 feet of the crossing could have seen both the box car and the three cars in charge of the witness; that the bell had been ringing, but did not know whether it rang all the time. On cross-examination he said that he could have seen anything on the track 10 feet ahead of the car, that when he was standing between the first and second cars, as he approached the crossing, he was standing on the bumper, and he set the lantern down on the bumper, where his feet were. Baker, the station agent, testified that he lived about 60 feet from the crossing, on the north side of the railroad; that as he was preparing for bed his attention was drawn to a noise like the running of horses and vehicles; that after the buggies went past his window he heard a crash. He stated some particulars after the occurrence of the accident. He stated, also, that the moon was shining, with an occasional cloud; the moon was possibly an hour and a half or two hours high. On cross-examination he said that there was no provision for a light at the crossing; that there was a lamp-post at the corner of his house; that oil was provided for a lamp there, which would throw light across to the platform; it is used only until the last train, about 9 o'clock, when it is put out. He also stated that he saw the open gondola car passing down, with the lime in it; that after he heard the crash he heard a voice cry out, "Stop those cars!" that he was unable to say whether the lime car was going down at the time. Smith testified that he lived on the south side of the railroad; that he saw an object on the side track, and cars moving down the side track towards it; he looked until the cars ran over it; when he first saw the object the cars were 15 or 16 feet from it; that he heard the cry, "Stop the cars!" just before they ran over the object; that he did not see who gave the call; that there was then no one near the object on the track; that, if any one had been there, he could not have failed to see it. There was also evidence tending to show that the plaintiff's buggy ran against the danger-signal post; that any one could see the track either way for a long distance, and the cars on it, the only obstacles being Smith's house and Baker's house, both of which are a considera-

ble distance "back from the track," as a witness expressed it; that the plaintiff's horse was not gentle. Norman testified that Smith's house was 75 or 100 feet from the side track, on the south side of the railroad.

We have made citations from the evidence with perhaps unnecessary fullness, but we wished to show with distinctness the grounds which supported the hypothetical propositions stated in the different prayers. There were other contradictions in the testimony, but we think that the various points in the exceptions are sufficiently covered by what we have stated. Notwithstanding the contradictions and contrarieties in the evidence, it was competent for the jury to find that the freight train was not running on scheduled time; that, when the train supposed to be the last one had passed at about 9 o'clock, the light at the corner of Baker's house had been put out; that, when the plaintiff reached the railroad, he slowed up, looked, and listened; that the night was dark, and his view was obscured by the darkness and by the shadow of the woods; that no bell was ringing at that time; that the engine and cars were then not in motion; that the headlight of the engine was in an opposite direction from him; that no light was visible on the cars which came down the main track and the siding; that the plaintiff then proceeded to cross the track on the public road; that, while on the main track of the railroad, he was struck by the freight car in charge of O'Boy, and thrown on the siding in a helpless condition, at a point within the limits of the county road; that this car had no light which was visible to the plaintiff; that the car started at a distance of 175 feet from the crossing, and came down at the rate of 3 or 4 miles an hour, and passed this distance in about half a minute; that O'Boy was at the further end of the car away from the crossing; that the plaintiff had good reason to suppose that the passage over the track was free from danger, and that when, after looking and listening, he saw no indication of danger, his attention was naturally directed ahead of himself and buggy; that his horse probably saw the car an instant before it struck the buggy, and swerved away from it to the east; that O'Boy gave no signal or notice of any kind as he ran over the crossing; that he saw something fall from the buggy; that after his car reached the train, about a car's length east of the crossing, he returned, and found the plaintiff lying on the track; that he cried out "Stop them cars, for God's sake!" that, when he went to Kehoe, the cars coming down the switch were a car's length distant; that plaintiff was then in a helpless condition; that O'Boy's cry to stop the cars was heard by Baker at his house, 60 feet distant, and by Smith, 75 or 100 feet distant, on the south side of the railroad; that Keefer could have seen anything on the track 10 feet ahead of the car if he had looked; that he could have stopped the cars at any moment; that he did not look at the siding ahead of

him, and that he had a lantern, but the light was not visible ahead of him, and no bell was ringing on his cars; that his cars ran over the plaintiff, and inflicted serious injury upon him; that, when O'Boy heard the noise of a buggy, he tried to wind the brake chain, but it would not work. And the jury might have found that, after the plaintiff was seen in a perilous position by O'Boy, the servants of the defendant could have prevented the accident by the exercise of reasonable care and diligence. We are far from intimating that we should have drawn these inferences from the evidence if it were within our duty to find the facts. As a matter of course, the jury might have drawn inferences the reverse of those which have been stated, and might have concluded that the plaintiff rushed recklessly and foolishly into danger. But it was a question which it was their duty to decide.

We can now see how the court below was required to decide on the prayers. The defendant's fourth prayer was in these words: "Defendant prays the court to instruct the jury that defendant's brakeman Keefer, who had charge of the cars which ran over the plaintiff, was not bound to anticipate the likelihood or possibility of the plaintiff or of any one lying on the tracks or between the tracks, eight or ten feet beyond the crossing, or lying on or between the rails upon the crossing; and it was not negligence for said brakeman or any other employé of the company not to have looked for or seen the plaintiff lying at that point." The proposition contained in this prayer is absolute and unconditional. It is not qualified by facts in evidence showing, or tending to show, how it occurred that the plaintiff was on the tracks at the time. It does not state nor leave the jury to find whether the plaintiff was on the track unlawfully or negligently, nor whether he was thrown there in a helpless condition by the negligent act of a servant of the defendant, nor whether he was actually seen there by one of the defendant's servants, who was at the time engaged in the discharge of his regular duty. There was evidence bearing on all these questions, which it was the duty of the jury to consider and pass on. Yet, notwithstanding any conclusion which the jury might draw respecting them, the prayer maintains that the defendant was not chargeable with negligence in regard to a failure to see the plaintiff lying on the track. This meant, of course, and the jury would so infer, that the plaintiff could not recover for injuries then and there inflicted upon him. It would have been an error to withdraw from the jury the evidence which we have mentioned, and the prayer was properly rejected.

The fifth and eighth prayers of the defendant required the court to decide that the plaintiff was shown by the undisputed evidence to be guilty of contributory negligence. We have sufficiently shown our opinion on this question.

The defendant's ninth prayer was in these words: "The plaintiff, in order to establish

his case, having proven that as he was approaching the railroad tracks, and when about twenty feet from the main track, a box car was moving slowly on said main track, across the county road, easterly, towards the city of Baltimore, and that, before his buggy had reached said main track, the car had passed halfway across the road in front of him, and was still moving slowly in the same direction, and that there was light enough to enable a person on the rear end of the box car, a distance to some thirty-five feet, to see a buggy as it approached the crossing, and the plaintiff having testified that he slowed down his horse to a walk when twenty feet from the track, and no proof having been offered that there was anything to prevent the plaintiff from seeing the box car as it was moving on the track, not more than twenty feet away from him, it was the duty of the plaintiff, before attempting to cross said railroad tracks under such circumstances, to stop his buggy, and wait until the box car upon which the witness O'Boy was riding had passed over the crossing; and inasmuch as it appears from the facts in the case, as proven by the plaintiff, that, if his buggy was struck by said car, it was struck while swerving from the middle of the road, and then passing over the tracks directly in front and around the end of the approaching car, the plaintiff is not entitled to recover in this case, and the verdict of the jury must be for the defendant." The prayer maintains that the court could decide that the facts stated in it were proved, and that they were not for the consideration of the jury. We have already stated the evidence offered by the plaintiff, and the inferences which the jury were authorized to draw from it. It tended to show, among other things, that he stopped at the railroad, and that he then could see no indication of danger, for the reasons mentioned, and that he then started across the track, and that, while he was proceeding to cross, he was struck by a car which had started 175 feet distant, without a light visible to him, and which passed over the space in about half a minute. This prayer was properly rejected.

The tenth and twelfth prayers may be considered together. They were as follows: (10) "If the jury shall find that, during all the time that the cars were being shifted as described in the testimony, the bell of the locomotive was being rung, to warn persons approaching the crossing of the presence of the cars, and that this bell could be heard by persons driving along the county road from a point several hundred yards away all the way to the crossing, and that the light afforded by the moon, which was nearly two hours high, was sufficient to enable such persons to plainly see the box car upon which the witness O'Boy was riding as soon as they came abreast of the front of Baker's house, and for some distance before reaching

said house, then the plaintiff is not entitled to recover in this case, and the verdict of the jury must be for the defendant." (12) "That if the jury find from the evidence that, at the time the accident happened, the moon was still nearly two hours high, and the light amply sufficient to enable any one approaching Howardville crossing, along the county road, to plainly see so large an object as the box car upon which the witness O'Boy was riding, as well as other cars near the crossing at that time, from a considerable distance, and in time, by the exercise of due care, to have avoided a collision with said car, then the plaintiff is not entitled to recover in this case, and their verdict must be for the defendant." Each of these prayers asserts that, upon the finding of the facts enumerated in them, the verdict must be for the defendant; and this must be the result, irrespective of the finding upon any other facts whatsoever. But the evidence could not be withdrawn from the jury which tended to show that the plaintiff was thrown on the track, within the limits of the county road, by the negligence of a servant of the defendant, and was seen there by said servant, and that, after he was seen, there was time to avoid injuring him, by the exertion of reasonable care on the part of defendant's servants. The jury had a right to find these facts, and, if they did, the verdict ought to have been against the defendant. Consequently, the prayers in question were properly rejected.

We have considered the prayers granted in behalf of the plaintiff, and see no error in them. The verdict and judgment were in favor of the plaintiff. The questions in the case are not free from difficulty, but we have given them our best consideration, and have found no error in the rulings of the court below. Judgment affirmed.

CHASE et al. v. CHASE et al.

(Supreme Court of Rhode Island. July 15, 1897.)

DEEDS—CONSIDERATION—AGREEMENT TO SUPPORT—ABANDONMENT—CANCELLATION OF INSTRUMENTS—LACHES—WHAT CONSTITUTES—WAIVER—WILLS—RIGHTS OF DEVISEES—LIFE ESTATES.

1. Where a grantee agreed to live with and care for the grantor during his life in consideration of the conveyance, the fact that the grantor removed from the house in which the parties lived to a cottage near by, which he had built for greater convenience and retirement, and also for securing a lodging room on the lower floor, did not show an abandonment of the contract, or that the conveyance was without consideration.

2. The mere failure to formally plead laches is not a waiver of it.

3. Mere lapse of time within the statutory limit does not constitute laches so long as the parties are in the same condition.

4. Deceased devised his estate to his wife during her life, with remainder to complainants, and afterwards conveyed land in consideration of an agreement of the grantee to support him during life. *Held*, that a bill to set aside the deed because of deceased's mental incompetency might be

maintained by complainants before the expiration of the life estate.

5. Where the conveyance was procured by deceased's wife, and after his death she remained in possession under a lease for life given by the grantee to her and deceased when the conveyance was made, it was a further reason why the life estate did not preclude the bringing of the bill by complainants.

6. A grantor mentally incompetent conveyed land in consideration of the grantee's agreement to live with and support him during life. The grantor's mental condition and the conveyance were known to his relatives, but they took no steps to have him placed under guardianship, and made no objections to the carrying out of the agreement for support until 17 years after the conveyance, and 14 years after the grantor's death. The agreement for support necessarily narrowed the field in which the grantee could follow his profession, and during its continuance he earned much less than he had earned before; but after the grantor's death he was able to earn more than he did before the contract was made. No fraud was charged against the grantee in procuring the conveyance. *Held*, that a bill by the grantor's heirs to set the conveyance aside because of such mental incompetency would be dismissed because of laches, though complainants offered to pay the grantee for services rendered by him under the contract.

Bill by Sarah C. Chase and others against Alfred W. Chase and others to set aside a conveyance. The issues were found in favor of complainants, and respondents moved for a new trial. Bill dismissed.

Darius Baker and P. J. Galvin, for complainants. Wm. P. Sheffield, for respondents.

STINESS, J. In August, 1877, Joseph Freeborn was the owner of real estate consisting of about four acres of land and a dwelling house in Middletown, where he then lived with his wife, both being elderly people, and the husband paralytic. They had no children, and wished to have some one come to live with and care for them. To this end, after like efforts with others had failed, he proposed to the respondents, then living in Brooklyn, Conn., to give them a deed of the property if they would go there to live and attend to him and his wife as long as either should live. The proposition was accepted, a deed was made reciting the consideration as above, and a lease for life was given to both said Joseph and Harriet Freeborn. Pursuant to this arrangement, the respondents went to live with Mr. and Mrs. Freeborn. Mr. Freeborn died in May, 1880, and his widow, Harriet Freeborn, continued to live upon the place until her death, in October, 1893. During this period of 16 years the respondents remained upon the place in execution of the contract, and attending, more or less, to the wants of the aged people. In October, 1894, the complainants, children of the devisees of Joseph Freeborn, brought this bill to set aside the conveyance, upon the grounds that Joseph Freeborn was mentally incompetent to make the contract, and that the respondents did not properly care for said Freeborn and his wife; so that, the services being valueless, there was a failure of consideration for the deed. Before the death of Mr. Freeborn, he and his

wife removed from the house in which the respondents lived, to a small cottage near by, which he had built for greater convenience and retirement, and also for securing a lodging room on the lower floor. So far as appears, this was the voluntary act of Mr. Freeborn, who attended solely to its erection. We do not see in this fact, as is claimed by the complainants, a practical abandonment of the contract, nor such evidence of a failure of consideration as to avoid it upon that ground. If the aged couple preferred to be more by themselves than they could be in the larger house, with another family, and to avoid the necessity of going up and down stairs, they had the right to remove to the cottage. If such a course best suited them, and accorded with the requirements of care and comfort which they wanted, there would be no failure of duty on the part of the respondents on this account.

Issues of fact were framed, to be tried by a jury, whether Joseph Freeborn was of sufficient mental capacity to understand the nature and consequence of his act in giving the deed of August 16, 1877, to the respondents, and whether he was so influenced by said Harriet Freeborn that the transaction was not his free and voluntary act. These issues were found in favor of the complainants, and the respondents moved for a new trial upon the ground that the verdict was against the evidence. On hearing this motion this court suggested the question whether, in view of the apparent laches of the complainants, they could maintain their bill; and this is the question now before us. Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but when a court sees negligence on one side and injury therefrom on the other it is a ground for denial of relief. The rule as thus stated is recognized in the following citations: In *Wollaston v. Tribe*, L. R. 9 Eq. 44, Lord Romilly said: "Great stress was laid on the lapse of time; but I think nothing of that, because all the persons interested are in the same state now as they were then. If there had been any dealing which had altered the state of matters, that might have raised a question; but there is nothing of the sort." See, also, *Daggers v. Van Dyck*, 37 N. J. Eq. 130. Sir Barnes Peacock said, in *Lindsay v. Hurd*, L. R. 5 P. C. 221: "The doctrine of laches in courts of equity is not an arbitrary or technical doctrine. Where it would be

practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect, he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material." In *Haff v. Jenney*, 54 Mich. 511, 20 N. W. 563, Cooley, C. J., said: "No doubt the relationship is a fact to be considered, and it might well be accepted as an excuse for some delay, not only because of the natural repugnance to making a charge of fraud against a near relative, but also because it might with some reason be hoped that such a fraud would, on reflection, be abandoned, and the fruits of it not claimed. But the delay in this case has been quite beyond what can be excused on any such grounds as these. Jenney, so far as we are informed, has never failed to claim the benefits of the arrangement made in 1868, and the parties now complaining have, for a period longer than that prescribed by statute for barring suit upon any personal demand, abstained from making any effective protest. One could never feel a safe reliance in his conveyances if, after such a lapse of time, they could be suffered to be attacked on a stale claim of fraud. The suggestion in the brief that the complainant, rather than the defendant, has been injured by the delay through the death of witnesses, is a begging of the question. We cannot know this; we can only know that there has been delay until of necessity the facts have become obscure or the proof of them lost; but whether this would tend to the prejudice of one party rather than the other is a matter of conjecture merely. It is sufficient to justify a denial of relief that the moving party is responsible for the delay." In that case there had been a delay of 12 years in moving to set aside a deed.

In applying these principles, which are so equitable as to commend themselves by mere statement, we find the following facts in the record: Assuming, for the purposes of this opinion, that Joseph Freeborn was non compos at the time of making the deed, his condition was known to the complainants, and also the fact of the deed, and the undertaking of the respondents to care for him and his wife during their lives. It was no secret, but was freely talked about among the relatives. The relatives of Joseph Freeborn took no steps to have him placed under guardianship, nor made any objection to the continuance of the arrangement at his death, but acquiesced in it, by their silence at least, until the whole term of service had been completed. The complainants deny the application of the doctrine of laches on the following grounds: First, that it is waived by not pleading it. While it is true that the respondents have not formally pleaded laches, they have shown

the facts upon which it must depend. They have asserted the making of the contract, and the execution of it, all in good faith, as well as the competency and understanding of Mr. Freeborn in making it. We know of no waiver on their part. It is a defense which may be taken at any time. It is true that when the court came to consider the case, and saw the apparent injustice of setting aside a deed after services rendered for 16 years, when the respondents could not be put in statu quo, we suggested that this question be first disposed of. But that makes no waiver by the respondents. Second, that mere lapse of time within the statutory limits does not constitute laches. To this we agree, as we have already stated. Third, that there has been no laches. In 1856, Joseph Freeborn made a will, in which he devised his estate to his wife during life, with remainder to two brothers and a sister. In view of this, the complainants argue that they could not assert their right to the estate until the death of the widow, in 1893, who by the will was a life tenant, and so there has been no laches on their part. We do not assent to this. When the testator died, the rights of two of these complainants vested as children of devisees, and the third devisee was then living, whose right vested in his children, three of the complainants, within five years from the death of the testator. All of these parties in interest knew that the respondents were going on in execution of the contract. It was their duty to do something to apprise the respondents that they denied their right under the contract, and that they claimed the title to the land. We see no reason why they could not have maintained a bill to set aside the deed then as well as now. They had vested interests, and the life estate under the will was in no way connected with title under this deed.

The cases cited by the complainants to sustain their position are quite different from this one. Thus, *Kirwan v. Kennedy*, Ir. R. 3 Bq. 472, was a bill by a remainder-man, in tail, against the administratrix of a life tenant for an accounting to recoup the inheritance out of his assets for a part of the inheritance which had been sold under a mortgage on account of a default of the life tenant to pay interest. Although the sale had taken place 30 years before, the court held that no accounting could have been demanded until the death of the life tenant determined who was entitled to it. The interests in remainder were contingent and expectant; a very different thing from vested interests, as in this case. *Orthwein v. Thomas*, 127 Ill. 554, 21 N. E. 430, is a complicated case, in which the facts do not very clearly appear, but what we find is this: That the land in question was accretion from the Mississippi river; that the riparian estate had belonged to a Mrs. Osborn, and after her death to her husband for life; that he had platted streets upon it, but, being river flats, it had not been in the possession of

any one until 10 years after his death, from which time Orthwein and his grantor had been in possession of it. In this suit Orthwein filed a cross bill setting up his title, and the town of Brooklyn claimed that he was guilty of laches in asserting his title. But the court said: "Being in possession, appellant might safely lie by until his possession was invaded or his title attacked." The distinction between such a case and the present is apparent. In *Salter v. Bradshaw*, 26 Beav. 161, the complainant, who had sold a reversion 40 years before, was allowed to redeem it under the English rule that the burden of establishing that a full price has been given for a reversion lies upon the purchaser. The case bears lightly, if at all, upon the question before us. But, aside from all this, the complainants cannot justify delay by reason of the life tenancy, because the widow was not in possession as life tenant under the will, but under the lease. Indeed, the complainants charge in their bill, and seek to prove by testimony, that she was the promoter of the scheme,—the one who "planned and arranged it," and who exerted the influence upon her husband to bring it about. The lease being a part of this transaction, and she, if the charge be true, a participant, her life estate could in no way preclude a proceeding to set it all aside.

We think that the doctrine of laches applies in all the phases of the case. Witnesses must have passed away in 16 years who could have testified to the condition of Joseph Freeborn when the deed was made, and surely the testimony of the parties whether they were satisfied with their care, they being the ones to determine, is altogether gone. Meanwhile the complainants, relieved of the burden of caring for their aged relatives, allow the respondents to go on until both of the old people have died, and then they seek to upset the arrangement, and get the property themselves. They say, "We can do equity, because we can pay the respondents for what they did." But clearly an allowance for board and sewing and use of carriage and general and special services and attendance, such as can now be recalled, would fall far short of equitable compensation. We cannot know—indeed, we can hardly believe—that the service would have been undertaken on such a basis of payment. Sixteen years is a long part of a man's life to be given to the execution of a contract. What opportunities may have been lost by being tied to one place, and to the care of those who proposed to reward the service in another way, no one can tell. The respondent Alfred W. Chase was a school teacher, and this arrangement necessarily narrowed the field in which he could follow his profession. Up to the death of Mr. Freeborn, he got very much less than he had before he made this contract. After his death—probably on account of a considerable release from the care required—he was able to go further from his house, and to earn, on

the average, a little more than he received 15 or 20 years before. But, even if he earns more now, he cannot be put back where he was before, and it is not for us to conjecture whether he is better or worse off than he might have been. Through all those years these complainants, and those from whom they make their claim, stood by, without objection, allowing the respondents to spend their time and labor in expectation of the promised reward. No fraud is charged against them. The contract was not one of their seeking. If Joseph Freeborn was imposed upon, the bill charges that it was done by his wife, and not by these respondents. Under these circumstances it would be inequitable that the complainants may set aside the deed by paying the respondents for so many meals, at so much apiece, and charges of that kind. They were silent when they should have spoken; and, even if the verdict of the jury as to Joseph Freeborn's mental incompetency was correct,—which there is strong reason to doubt,—they have slept too long upon their rights to enforce them now, when we cannot do so without the possibility of doing injustice to the respondents. We think, therefore, that the bill should be dismissed.

PEABODY et al. v. WESTERLY WATERWORKS et al.

(Supreme Court of Rhode Island. July 7, 1897.)

EQUITY PLEADING—MULTIFARIOUSNESS—LICENSES—TRANSFER—MUNICIPAL CORPORATIONS—LIMITATION OF INDEBTEDNESS—CONSTITUTIONAL LAW—INEQUALITY OF BENEFITS—CORPORATIONS—RIGHTS OF STOCKHOLDERS.

1. A bill is multifarious where all complainants seek as taxpayers to enjoin defendant town from purchasing the plant of defendant waterworks company, and one complainant further seeks as a stockholder in said company, to enjoin the sale on the ground of inadequacy of price.

2. The fact that the right granted by the legislature of Connecticut to the Westerly Waterworks to maintain a portion of its plant in that state is merely a revocable license specially conferred on the company, is no objection to the purchase of the company's plant by the town of Westerly, as authorized by Act May 26, 1897.

3. Act May 26, 1897, authorizing the town of Westerly to hire \$200,000 for the purchase of a waterworks system, and to issue its notes and bonds therefor, constitutes the special statutory authority to the town required by Gen. Laws, c. 36, § 21, to incur an indebtedness to that extent in excess of the amount of the indebtedness as limited by law.

4. Where the statutory authority of a town to purchase waterworks and the vote of the town to do so contemplate the acquisition of the works for the entire town, and not merely for the fire district therein, the purchase would not be enjoined on the ground that taxpayers of the town residing outside the fire district will in no manner be benefited by the waterworks, and are, therefore, not liable to be taxed for its purchase.

5. The sale of the entire property of a corporation will not be enjoined at the instance of a stockholder, in the absence of proof of unfairness, oppression, or fraud, where the sale was authorized by a vote of more than 1,100 out of a total of 1,350 shares.

Bill by Thomas Peabody and others against the Westerly Waterworks and others. Dismissed.

N. F. Dixon, John W. Sweeney, and Thomas A. Peabody, for complainants. Ropes, Gray & Loring, R. W. Boyden, Francis Colwell, and A. B. Crafts, for respondents.

PER CURIAM. This is a bill to enjoin the town of Westerly from purchasing the property of the Westerly Waterworks. The complainants are taxpayers of the town, and one of them is also a stockholder in the Westerly Waterworks. The bill sets forth not only causes of suit which concern the complainants as taxpayers, but also, in so far as the complainant Peabody is concerned, a cause of suit which relates to him as a stockholder in the Westerly Waterworks, and in which that corporation alone of the several respondents is interested. We think that the bill, in thus combining causes of suit not common to both the complainants, and with one of which only one of the respondents is concerned, is multifarious, and consequently demurrable. The grounds of appeal, in so far as it is a bill in favor of taxpayers, are: (1) That the proposed purchase by the town is *ultra vires*. (2) That the Westerly Waterworks cannot sell, nor the town acquire, that portion of the plant of the former, with its appurtenances, rights, privileges, and franchises, situated in the towns of Stonington and North Stonington, in the state of Connecticut. (3) That by the purchase the town of Westerly would incur an indebtedness in excess of 3 per cent. of its taxable property, without having obtained special statutory authority, as required by Gen. Laws R. I. c. 36, § 21. (4) That the town of Westerly cannot purchase the Westerly Waterworks at the expense of the town, to be paid for by a tax levied on all the taxable property of the town, because such action would be in conflict with Const. R. I. art. 1, §§ 2, 5, 10, 16, and with article 14, § 1, Const. U. S. Amend., the property of the complainant Sweeney and of other taxpayers outside of the limits of the Westerly fire district being in no manner benefited by the waterworks, and therefore not liable to be taxed therefor.

1. As to the claim that the proposed purchase and sale are *ultra vires*, it is necessary only to refer to the act of the general assembly of May 26, 1897, expressly authorizing the Westerly Waterworks to sell, and the town of Westerly to purchase, all or any of the lands, water, water rights, estates, real, personal, or mixed, property contracts, franchises, rights and privileges of the former, and whether situated, held, enjoyed, or exercised by it within or without the state of Rhode Island.

2. The claim that the waterworks cannot sell, nor the town acquire, that portion of the plant of the former situated in the towns of Stonington and North Stonington, Conn.,

rests on the assumption that the right granted by the legislature of Connecticut to the waterworks to construct and maintain that portion of its plant in that state is merely a revocable license specially conferred on the waterworks. Granting this to be true, it is not to be assumed that the legislature of Connecticut will arbitrarily revoke the license because of a change of ownership from the waterworks to the town. No reason is shown why the ownership of the plant by the town of Westerly instead of by the waterworks should be deemed objectionable by the legislature of Connecticut. Moreover, the charter of the Westerly Waterworks expressly provides for a sale of its plant to the town, and it is not improbable that that provision was known to the legislature of Connecticut when it granted the license and the possibility of such a sale was contemplated in granting the license.

3. The act of the general assembly of May 26, 1897, authorizes the town of Westerly to hire the sum of \$200,000 for the purpose of purchasing, acquiring, building, or constructing a system of waterworks, and of improving and adding to the same, and to issue its notes or bonds therefor. The town is thus granted special authority to borrow the sum of \$200,000, and has, therefore, the statutory authority required by Gen. Laws R. I. c. 36, § 21, to incur an indebtedness to that extent in excess of 3 per cent. of its taxable property; and though the town has incurred, as appears by the affidavits filed, other liabilities under a contract made by it for a system of waterworks of its own, it does not appear that its present indebtedness, or that its indebtedness in the future outside of the \$200,000 specially authorized, will at any time exceed the 3 per cent. limit imposed by the statute.

4. We see no constitutional objection to the proposed action on the ground of inequality of benefits to be derived by taxpayers resident in different parts of the town. It is assumed by the complainants that only those who are residents within the limits of the Westerly fire district will be benefited by the purchase. The authority, however, to the town to make the purchase, and the vote of the town, contemplate the acquisition of a waterworks system for the town, not merely for the fire district; and we cannot assume that its benefits will not be extended beyond the limits of the fire district as rapidly as can reasonably be done.

In so far as the bill relates to the rights of the complainant Peabody as a stockholder, it proceeds on the ground that a majority of the stockholders of the waterworks are disposing of its property at a price which he thinks inadequate. The action of the company has been taken by a vote of more than 1,100 out of a total of 1,850 shares. There is no proof of any unfairness, oppression, or fraud in such action. The case as presented is simply that of a stockholder who differs from a

large majority of his fellow stockholders as to the expediency of a sale. No reason is shown for the intervention of the court.

We see no ground for the continuance of the *ex parte* injunction, and, in accordance with the stipulation of the parties that the hearing on the question of injunction should have the same effect as a hearing on the bill, the bill is dismissed.

PARSONS v. TILLEY et al.

(Supreme Court of Rhode Island. June 21, 1897.)

EVIDENCE—DECLARATIONS OF AGENT.

In trespass for unlawful seizure under execution of plaintiff's property, evidence as to what property the agent of plaintiff demanded of defendant was inadmissible, where he had no authority to make any demand, but was simply authorized to take her goods from the place where she had stored them, and ship them.

Action by Ella C. Parsons against William Lovie Tilley and others. Verdict for plaintiff. Petition for new trial denied.

Wm. P. Sheffield, for plaintiff. C. A. Ives, for defendants.

TILLINGHAST, J. This is an action of trespass, and is brought to recover damages for the taking and carrying away of certain household goods and other personal property alleged to belong to the plaintiff. The defendant Tilley, who was a deputy sheriff in Newport, attached the property in question, under the direction of the defendant Cottrell, in an action brought by said Cottrell against Joseph F. Parsons, the plaintiff's husband, and subsequently caused most of said property to be sold at auction; and thereafterwards the plaintiff, who claimed that the property belonged to her, brought this action. The trial resulted in a verdict for the plaintiff for \$600, and the defendants now petition for a new trial on the grounds (1) that the court erred in certain rulings hereinafter specified; and (2) that the damages assessed by the jury are excessive.

At the trial of the case, the plaintiff having testified as to her ownership of the property in question, and also that she sent her brother-in-law, Mr. A. D. Parsons, from Boston to Newport to get the property for her, defendants' counsel asked the defendant Cottrell what articles said A. D. Parsons demanded of him. This question was ruled to be inadmissible by the court, on the ground that it had not been shown that the plaintiff authorized him to make demand for the goods, but that she simply sent him to get the goods from a certain room in a building in Newport, where they were stored, of which room her attorney, Mr. Sheffield, held the key; to which ruling the defendant duly excepted. We think the ruling was correct. It was not within the scope of Parsons' authority to make any demand upon the de-

fendants for said goods, or to make any admissions as to the ownership thereof which would be binding upon plaintiff. He was simply authorized to take the goods from the place where they had been stored by plaintiff, and ship them to her.

The defendants also offered in evidence, on the strength of plaintiff's testimony as to sending her brother-in-law to Newport for the goods in question, a letter from him to the defendant Cottrell dated September 13, 1896, for the purpose of showing that the plaintiff did not at that time make any claim to the property in question. The court ruled that the letter was inadmissible, and the defendants excepted. An examination of the letter shows that said A. D. Parsons was acting for his brother, the plaintiff's husband, and was attempting to obtain the clothing of the latter from the defendant's possession; and no evidence was offered at the trial to connect the plaintiff, Mrs. Parsons, in any way with the sending of the letter, or even with knowledge that it had been sent. It was therefore clearly inadmissible. The exceptions are overruled.

The defendants' counsel makes no point in his brief that the damages are excessive. But, even assuming that he intends to rely upon this as a ground for new trial, we are not satisfied that the damages are so clearly excessive as to warrant the court in disturbing the verdict of the jury. Petition for new trial denied, and case remitted to the common pleas division at Newport, with direction to enter judgment on the verdict.

ISLAND SAV. BANK v. GALVIN.

(Supreme Court of Rhode Island. June 25, 1897.)

ACTION ON NOTE—DEFENSES.

In an action on a note, a plea that plaintiff permitted property on which it held a mortgage as security to be sacrificed at the mortgagee's sale for much less than its value, which was enough to pay the amount due on the note, was good on demurrer.

Action by the Island Savings Bank against Catherine Galvin, executrix.

W. P. Sheffield, Jr., for plaintiff. C. A. Ives, for defendant.

PER CURIAM. The plea sets up, by way of equitable defense, that the plaintiff permitted the partnership property, on which it held a mortgage as security for the note in suit, to be sacrificed at the mortgagee's sale, through the action of its treasurer, Edward Newton, to the end that said Newton might purchase the property for greatly less than its fair market value, which was more than enough to pay the amount due on the note. The demurrer admits these allegations. We think that the defense is good, in that it sets up an equitable estoppel founded on the conduct of the plaintiff, whereby a deficiency

has arisen, which the plaintiff was the means of creating. *Innes v. Stewart*, 36 Mich. 285; *In re Collins*, 17 Hun, 289; *Society v. Stevens*, 63 N. Y. 341. Demurrer overruled, and case remitted to the common pleas division for further proceedings.

RITT v. DODGE.

(Supreme Court of Rhode Island. June 24, 1897.)

MORTGAGE BY DOWRESS—VALIDITY—ESTOPPEL.

1. A mortgage by a dowress before the dower had been assigned conveys no title to the premises.

2. A mortgage by a widow before dower is assigned is not a "conveyance of the property of a married woman," within Pub. St. c. 166, § 4, relating to the covenants of a married woman, and she is neither bound nor estopped by those in the mortgage.

Action by Charles Ritt against William R. Dodge. Judgment for dowress.

Chas. A. Ives, for plaintiff. Saml. R. Honey, for defendant.

PER CURIAM. As the court understands the agreed statement of facts, the entire title claimed by the plaintiff is based on the mortgage given by John Sinnot and Mary A. Sinnot, his wife, to Edward C. Schaefer, dated December 28, 1885. At that time the title to the property was in the heirs of Thomas J. Lynch, and the only interest of Mrs. Sinnot was an unassigned right of dower. A dowress can convey her dower interest before dower has been set off to the terre-tenants only. *Weaver v. Sturtevant*, 12 R. I. 537; *Maxon v. Gray*, 14 R. I. 641. The mortgage therefore conveyed no title whatever to the premises.

As the mortgage was not a conveyance of the property of a married woman, it is not within the provision of the statute (Pub. St. R. I. c. 166, § 4) relating to the covenants of a married woman as to her own property then in force, and hence she is neither bound nor estopped by them. *Mason v. Jordan*, 13 R. I. 193. The court is therefore unable to see that the plaintiff has any title. As, however, the mere statement of facts is not entirely clear, the court will withhold its judgment until satisfied that the facts as above stated are correct.

In re VOTER'S CERTIFICATE.

(Supreme Court of Rhode Island. Sept. 29, 1896.)

ELECTIONS—CERTIFICATE VOTERS.

1. The board of canvassers should place on the voting list the name of one who has resided in a town more than six months prior to an election, and who has filed a certificate of his registration in another town in the year last past, in view of Gen. Laws, c. 7, § 7, providing that "the proof of the registry of a person in a town other than

that in which he shall offer to vote shall be the certificate of the town clerk of the town in which he is registered."

2. In view of Const. art. 7, § 1, providing that a properly registered voter "shall have a right to vote in the election of all civil officers and on all questions in all legally organized town or ward meetings," the board of canvassers should place the name of such voter on the voting list of the town, not only for general elections, but also for elections of town officers.

Answer by the supreme court to a question of the governor concerning the construction of the election laws.

To His Excellency, Charles Warren Lippitt, Governor of the State of Rhode Island and Providence Plantations:

We have received your excellency's communication of the 17th inst., submitting for our opinion a question raised by the town council of Johnston, as follows: "A voter of the state comes to this town, and has resided here for more than six months prior to an election. He files a certificate of his registration in another town or city in this state in the year last past. Must the board of canvassers place his name upon the voting list of this town? And, if so, shall the name be placed on the list for general elections only, or must it be placed on the list for the election of town officers as well?"

Assuming that the certificate of registration referred to in the question is the certificate of the town clerk of the town in which the name of the voter is registered, as provided by Gen. Laws R. I. c. 7, § 7, we are of the opinion that it is the duty of the board of canvassers, in the circumstances set forth in the question, to place the name of the voter on the voting list of the town, not only for general elections, but also for elections of town officers. Such a voter is clearly qualified to vote by section 1 of article 7 of the amendments to the constitution, and the only restriction upon his right to vote is that contained in the proviso to section 1 of article 7, viz. that he shall not be allowed to vote in the election of the city council of any city, or upon a proposition to impose a tax, or for the expenditure of money, in any town or city.

CHARLES MATTESON.

JOHN H. STINESS.

PARDON E. TILLINGHAST.

GEORGE A. WILBUR.

HORATIO ROGERS.

WILLIAM W. DOUGLAS.

DONNELLY et al. v. McNANLY et al.

(Supreme Court of Rhode Island. Dec. 29, 1896.)

APPEAL—CLAIMS AGAINST DECEDENT.

Gen. Laws, c. 215, § 6, providing for an appeal from the decree of the probate court confirming the report of the commissioners, repeals that part of Pub. Laws, c. 186, § 18, providing for an appeal from the judgment of the commissioners.

Appeal from probate court.

Appeal by Margaret Donnelly and others from a decree in favor of David McNanly and others. Motion to dismiss denied.

Charles M. Page and Franklin P. Owen, for appellants. Patrick J. McCarthy, for appellees.

PER CURIAM. We think that the appeal was properly taken from the decree of the municipal court confirming the report of the commissioners, rather than from the judgment of the commissioners; the provisions of Pub. Laws R. I. c. 186, § 18, having been changed in this respect by Gen. Laws R. I. c. 215, § 6. The petition to dismiss is denied.

NATIONAL EXCH. BANK v. GALVIN.

(Supreme Court of Rhode Island. June 25, 1897.)

APPEAL—JUDICIAL DISCRETION—REVIEW.

1. Gen. Laws, c. 233, § 21, providing that the court may, on motion of defendant, order other parties to be made defendants, gives the court a judicial discretion, which can be reviewed.

2. Where an executrix, who was sued jointly with a certain company, moved to have a third party made defendant, on the ground that he and decedent were partners in such company, as such third person, as surviving partner, would be primarily liable, the motion should be granted.

Action by the National Exchange Bank against Catherine Galvin. Verdict for plaintiff. Petition for new trial granted.

Wm. P. Sheffield, Jr., for plaintiff. Chas. A. Ives, for defendant.

PER CURIAM. The notes in suit were made and declared on as original promises by Daniel Galvin, the defendant's intestate, jointly with the Newport Laundry Company. At the trial in the common pleas division the defendant moved that Patrick Horgan be summoned in as a co-defendant, on the ground that the Newport Laundry Company was a co-partnership, of which he and Daniel Galvin were members. The court denied the motion. Though the statute (Gen. Laws R. I. c. 233, § 21) provides that the court may, on motion of a defendant, order other parties to the contract to be made defendants, we think that this implies a judicial, and not an absolute, discretion, and, hence, that it is reviewable. The statute was evidently intended to give a right to the defendant in a proper case. In the present case the representative of Daniel Galvin cannot be charged for a partnership debt on which he was jointly liable till the plaintiff shall have first exhausted the partnership estate. Gen. Laws R. I. c. 233, § 17. In this state of facts, Horgan, as surviving partner, is primarily liable. We think, therefore, that the motion should have been granted. Defendant's petition for a new trial granted, and case remitted to the common pleas division for further proceedings.

CLEAVER v. LENHART.

(Supreme Court of Pennsylvania. July 15, 1897.)

CONTRACTS IN RESTRAINT OF TRADE—CONSIDERATION—COMPLETED SALE.

1. A contract in restraint of trade, without consideration, is void.

2. A completed sale of a business is not a sufficient consideration for a subsequent contract by the seller not to engage in the same business in the vicinity within a certain time.

Appeal from court of common pleas, York county.

Action by Frank O. Cleaver against Oliver J. Lenhart for breach of a contract dated June 29, 1895, and providing that, in consideration of the purchase by Cleaver from Lenhart of two certain creameries, said Lenhart agrees that he will not engage in the milk or butter business within five miles of either of said creameries for three years. There was a compulsory nonsuit at the close of plaintiff's evidence. A motion to take off the same was denied, and plaintiff appeals. Affirmed.

E. D. Ziegler and E. Dean Ziegler, for appellant. E. D. Bentzel and J. S. Black, for appellee.

GREEN, J. The consideration of the original contract, dated June 6, 1895, for the conveyance and sale of the creameries therein described, was the sum of \$5,950 in money, which was to be paid for the properties. Nothing was said in that contract about any restriction upon the seller, Lenhart, in the conduct of the same business at any time or place. He did not become subject to any duty or obligation to abstain from carrying on the same business thereafter, and hence he was at perfect liberty to do so if he chose. It cannot, therefore, be said, that it was any part of the consideration of the contract that Lenhart should not engage in the same business in the future. That contract was consequently completed—performed—when the conveyances were made and delivered and the money paid according to its terms. It necessarily follows that when the second agreement was made, on the 29th of the same month of June, there was nothing left of the first agreement which could operate as a consideration of the second. There is practically no dispute as to the law in regard to this class of contracts. The agreement in suit is a contract in partial restraint of trade. As such, under all the authorities, it must, as one of its essential elements, be founded upon a good and sufficient consideration. In *Keeler v. Taylor*, 53 Pa. St. 467, Woodward, C. J., delivering the opinion, said: "The general rule is that all restraints of trade, if nothing more appear, are bad. This was the rule laid down in the famous case of *Mitchel v. Reynolds*, 1 P. Wms. 181. But to this general rule there are some exceptions,

as, if the restraint be only particular in respect to time or place, and there be a good consideration given to the party restrained. * * * The cases are fully collected in Smith's note to *Mitchel v. Reynolds*, 1 Smith, Lead. Cas. 712; and from them it will be seen that all such contracts, to be good at law, must be founded in a valuable consideration, must be reasonable, and must impose no general restraint upon trade and industry." The same doctrine was repeated in *Gompers v. Rochester*, 56 Pa. St. 194, where Thompson, C. J., said: "Agreements in restraint of trade generally are void. They are not so when limited in time, or partial in their operation, and when there is a sufficient consideration." And again, in *Harkinson's Appeal*, 78 Pa. St. 196, Mercur, J., said: "It must be borne in mind that agreements in restraint of trade generally are void. To give validity to them, they must be limited in time, or partial in their operation, and be supported by a sufficient consideration." Thus, it will be seen that in all these utterances the necessity of a sufficient or valuable consideration is expressed as a requirement additional to the other requirements as to time and place. In all the cases it is also held that the restraining condition must not be involved in any doubt or uncertainty, and all the elements necessary to its validity must appear affirmatively. An instance of this kind appears in the case of *Hall's Appeal*, 60 Pa. St. 458. It was a written agreement of sale of the stock and good will of an undertaking business in Philadelphia for \$3,000, and the restraining condition did not appear in the writing, though there was a blank of seven lines left in the instrument, which, it was contended, was left for the insertion of such a condition; and there was some verbal testimony of that kind, and also that the seller had said it was unnecessary to have a written agreement to that effect, as he did not intend ever to go into business again in Philadelphia. There was also some other verbal testimony to similar declarations of the seller made afterwards. The case was a bill for an injunction to restrain the seller from again engaging in the same business in Philadelphia. Williams, J., delivering the opinion, said: "We have no doubt of the validity of such a contract as is alleged in the bill, if founded on a sufficient consideration, or of the power of the court to restrain its breach by injunction. Our doubt in this case arises from the insufficiency of the proof to establish the existence of the alleged agreement. It cannot be inferred from the sale of the good will of the business, and it is expressly denied in the answer. The sealed agreement between the parties given in evidence by the plaintiff contains no stipulation or covenant on the part of the defendant either to retire from the business, or not to resume it again in the city of Philadelphia, and in this respect

it fully corroborates and sustains the answer." The judge then shows that the verbal testimony was insufficient to establish the restraining condition, and he proceeds thus: "As the alleged agreement is in restraint of trade, its existence should be established by clear and satisfactory evidence. In order to justify the court in restraining its breach by injunction. There should be no doubt or uncertainty in regard to its terms, or the consideration upon which it was founded." Other cases are to the same effect as all of the foregoing, but it is not necessary to cite them.

In the present case there is no doubt about the terms of the restraining agreement. It is sufficiently specific as to time and place within which the restraint is to be operative. But it has no consideration to support it. The previous sale being complete in all respects, the duty of the parties on both sides was clearly defined, and the obligation to perform it was comprehended within its express provisions. The agreement in restraint was no part of its terms, and there was no obligation on the part of Lenhart to restrain his operations thereafter. It was held in *Wimer v. Overseers*, 104 Pa. St. 317, that, where a legal obligation exists, a cumulative promise to perform it, unless upon a new consideration, is a nullity. Hence the obligation of Lenhart to perfect the sale under the first agreement, and the obligation of Cleaver to comply with its terms, could not be a consideration for the restraining agreement of the subsequent date. The latter paper was a mere voluntary agreement in restraint of trade, and as such cannot have legal sanction. The assignments of error are all dismissed. Judgment affirmed.

TRADER et al. v. LAWRENCE et al.
(Supreme Court of Pennsylvania. July 15,
1897.)

REVIVAL OF JUDGMENT—DEFENSES.

On *scire facias* to revive a judgment, payment before a previous judgment of revival cannot be shown, though such revival was confessed under duress.

Appeal from court of common pleas, Fayette county.

Scire facias to revive a judgment by William H. Trader, for the use of James M. Newcomer and others, against Abigail Lawrence and Messmore Lawrence, her husband. Judgment for plaintiff, and defendant Messmore Lawrence appeals. Affirmed.

T. B. Searight and Edward Campbell, for appellant. E. H. Reppert and G. D. Howell, for appellees.

PER CURIAM. The original judgment in this case was entered in 1882 against Abigail Newcomer, a widow, and her brother, Thomas Sessler, who was surety. In 1883 the

judgment was assigned to the present plaintiffs, who are children of Mrs. Newcomer. In 1887, she, having before that married Messmore Lawrence, together with Sessler, confessed judgment of revival for \$1,068. In December, 1891, Mrs. Lawrence and her husband confessed a judgment of revival of the last judgment, and in December, 1896, the present writ of scire facias was issued to revive the last judgment entered in 1892. To this writ of scil. fa. Mrs. Lawrence makes no defense, but expressly disclaims all defense by writing filed, and agrees that judgment may be entered against her for \$1,804.92. Her husband, however, interposes a defense to the effect that the confession of judgment in 1891 was procured by means of duress and threats, and alleges that the debt was paid by the application of the proceeds of sale of certain coal underlying the land of Mrs. Lawrence, which sale was made in November, 1890. As the facts which constitute the alleged payment in this mode transpired before the last revival of the judgment, the learned court below refused to admit the testimony offered to establish the payment, on the ground that only payment after the last revival could be admitted under the uniform decisions of this court. Of these one of the most recent is Campbell's Appeal, 118 Pa. St. 128, 12 Atl. 290, where we said: "The only defense to a scire facias to revive a judgment is a denial of its existence, or proof of a subsequent satisfaction or discharge. *Dowling v. McGregor*, 91 Pa. St. 410. And in such proceeding the merits of the original judgment cannot be inquired into,"—citing a number of cases. The case of *Monroe v. Monroe*, 93 Pa. St. 520, cited for appellant, was not a scil. fa. to revive, but was a feigned issue upon the original judgment to try the question whether it had been obtained by fraud. It is therefore inapplicable to the present case. The case of *Killinger v. Reidenhauer*, 6 Serg. & R. 580, is not at all in point. It was a scil. fa. on a mortgage, in which the defense was directly made that it was given to defraud the wife of her dower. We are clearly of opinion that the defense submitted in this case and in this proceeding cannot be sustained. It seems that there was at one time an application to open the original revived judgment of 1892, but it was refused by the court, and no appeal was taken from the action of the court below to this court, and nothing further seems to have been done in the court below. We are unable to sustain the assignments of error, and therefore the judgment is affirmed.

IN RE LACKEY'S ESTATE.

(Supreme Court of Pennsylvania. July 15, 1897.)

CLAIMS AGAINST DECEDENT—IMPLIED CONTRACT—FAMILY RELATIONS.

Acceptance by a woman of a devise of a house on condition that "she provide a home"

therein for her uncle creates a family relation between her and such uncle, which excludes an implied contract to pay for nursing and other personal services rendered by her to him.

Appeal from the decree of distribution of orphans' court, Chester county.

Proceedings for the distribution of the estate of William W. Lackey, deceased. From a decree of distribution on the report of an auditor, allowing the claim of Eleanor Campbell, Walter Lackey, executor and residuary legatee, appeals. Reversed.

O. Wesley Talbot, for appellant. Butler & Windle, for appellee.

WILLIAMS, J. The decree appealed from was based upon the report of an auditor. This report was wanting in clearness. The learned auditor made no distinct findings or law or fact, as ought always to be done, and his conclusions must be gathered from a general examination of his report. It came before the orphans' court on exceptions, and was confirmed, not in consequence of a definite approval of findings made by the auditor, but, in the language of the orphans' court, because "we are unable to say the auditor has reached a wrong conclusion in the distribution of this estate." Such a decree of confirmation is not entitled to the same consideration that it would be if it rested on an approval of definite findings of fact and law made by the auditor. The general features of this case are, however, easily gathered. W. W. Lackey, the decedent, lost his wife many years ago. For several years before his death he seems to have had no home of his own, but to have resided with his unmarried sister, Sarah, in a house owned by her. She died in 1890, but she provided for her brother by her will. She devised her house and lot to Miss Campbell, her niece, on condition that she should provide her brother William W. Lackey a home there so long as he lived. Miss Campbell had been a member of her aunt's family for several years. She knew the age, the infirmities, and the general condition of her uncle William, and she accepted the devise subject to its conditions, with full knowledge of what they might require. After her aunt's death she succeeded her as the head of the household, and maintained towards her uncle the same relation which her aunt Sarah had done while living. If there was any considerable change in his condition, or in the care needed by him, after his sister's death, it does not appear from the evidence; and the duty of showing it, and the particulars in which it consisted, was on her. By her acceptance of the devise she had undertaken to furnish her uncle a home at the house, and such care as the home relation implies. This was the price to her at which the house was put, and her acceptance of it at the price shows that she considered it to be a reasonable one. But, whether reasonable or not, she elected to pay it when she

accepted the house subject to it, and ought not to hesitate about discharging the obligation in good faith. In December, 1890, Lackey went to Philadelphia for the treatment of some disease of one of his eyes. He spent several weeks in a hospital, during which his eye was removed, and he was provided with a glass eye. When sufficiently recovered, he returned to his home with Miss Campbell, in the house which had belonged to his sister, where he remained for over two years, and until his death, in 1893. He was able, according to the evidence, to be about the town of West Chester, to visit his acquaintances at their places of business, and to a considerable extent to wait upon himself, until within a few days of death. He paid five dollars per week for his board during all this time, and contributed towards the family laundry bills in proportion to his share of the work done. At the time of his death he was but a single week in arrears upon these bills. In the face of the provision in the will, and the circumstances now adverted to, a claim was presented against his estate, which is the subject of the present litigation. The first suggestion made by the claimant of the existence of any claim on her part against her uncle was in a postscript to a letter written by her to the executor in January, 1894. The claim then made was that the decedent had at one time given her a bond called the "Steelton Bond" for \$600, which she had afterwards returned to him at his request, relinquishing her control over it. She said she had to pay interest on about the same amount of money, and needed the interest upon the "Steelton Bond" with which to pay it, and would regard this arrangement as a satisfaction of all her claims against her uncle's estate. The amount of her demand seems to have been next stated before the auditor, where it had undergone a complete change in its character and amount. As presented before the auditor, it was a demand for \$10 per week, in addition to what had been regularly paid to her by the decedent, for the whole time he had been with her after his return from Philadelphia and down to the day of his death. This time she had computed as 129 weeks. The auditor found that this demand should be allowed because the claimant was a niece, and not a daughter, of the deceased. From this fact he argued that the family relation did not exist between them, and that she might safely contract with him for his care. He infers that a contract was made between them, because of what transpired in relation to the "Steelton Bond," about which there is no evidence whatever; and because, in the language of the auditor, "nothing appeared which rebutted the presumption of a contractual relation between appellee and decedent respecting the services rendered." He did not find that the decedent needed any considerable additional attention after his return from Philadelphia, nor that he ever

said one word indicating that he had agreed to pay, or expected to pay, or had the remotest idea that his niece expected him to pay, any additional sum of money for either board or care. The serious question in this case received very little attention before the auditor. When and how did the relation which the claimant assumed towards her old uncle, when she accepted her aunt's devise of the house to her, subject to the provision in favor of the decedent, terminate, and when and how did a new one begin? The family relation was clearly created by the aunt's will and the acceptance of the house under it. When did this family relation cease? The maintenance until the decedent's death was the condition on which the title to the house was vested in her. She was bound to provide a home for her uncle so long as he lived, not in the almshouse, nor in any other place than the house she took from her aunt upon this express condition. When did he cease to be at home in this house? The claimant can only recover upon an express contract. When was such contract made? Then, but not till then, the position of the decedent ceased to be that of a member of the household, and became that of a mere lodger, paying for everything he received, and liable to have the services he received suspended entirely, or raised in price, at the mere will of the claimant. No facts have been found that support the decree rendered by the learned auditor; and as we cannot adopt his presumptions, which rest on mere conjecture, there is nothing left for us but to reverse the decree. It is accordingly reversed, and the record remitted for further proceedings.

C. & C. ELECTRIC CO. v. ST. CLAIR et al.
(Supreme Court of Pennsylvania. July 15, 1897.)

PROMISSORY NOTES—DEFENSES—PARTNERSHIP—
RECEIVERS—JUDGMENTS—PARTIES—AMEND-
MENT OF PLEADINGS.

1. It is no defense to an action on a note signed by defendants individually as joint makers that they are partners, and that there has been appointed for the firm a receiver, who is in charge of its affairs.

2. Where a statement in assumpsit against two defendants jointly failed to allege the fact that the sheriff's return as to one defendant was nihil habet, and the attention of the lower court was not called thereto, the supreme court would permit the allegation to be supplied by amendment nunc pro tunc on appeal by the other defendant from a judgment against him alone.

Appeal from court of common pleas, York county.

Assumpsit by the C. & C. Electric Company against Stuart St. Clair and John D. Allen on a promissory note signed by defendants individually as joint makers. Before plaintiff's statement was filed, the sheriff returned the summons nihil habet as to defendant

Allen, but the statement failed to allege that fact. Defendant St. Clair filed an affidavit of defense, which set out no defense to payment of the note, but alleged that a partnership existed between himself and Allen, and that a receiver had been appointed for the firm, who was in charge of its affairs. Judgment was entered against defendant St. Clair alone, and he appeals. Affirmed.

Following are the assignments of error: "(1) In entering judgment against Stuart St. Clair and in favor of plaintiffs for want of a sufficient affidavit of defense. (2) In making absolute the rule for judgment for want of a sufficient affidavit of defense against Stuart St. Clair, one of the defendants, for \$1,521.95, with interest from March 16, 1896, St. Clair having been summoned and appeared, though the statement filed was against both defendants as if both had been summoned or appeared. (3) In directing judgment to be entered against Stuart St. Clair, he alone having been summoned, while the plaintiff's writ and statement is against both defendants, without noticing in the statement that Allen, the other defendant, was not served."

H. L. & G. G. Fisher, for appellant. A. N. Green and J. S. Clark, for appellee.

STERRETT, C. J. Defendant's averments as to the partnership between him and John D. Allen, the other joint maker of the note in suit, and the appointment of a receiver, etc., are not only too vague and indefinite, but they are also immaterial. It is not denied that the two defendants, St. Clair and Allen individually, are the joint makers of the note in suit; nor is it claimed that, as such joint makers, they have any meritorious defense to the payment thereof. If there be a receiver of the alleged firm, regularly appointed and qualified, and he is in any wise interested in this suit, he is doubtless competent to protect the interests thus committed to his care; but, so far as appears, he has no possible interest therein that can be made available to the defendants in this case, or either of them.

The only properly assigned error that is worthy of even passing notice rests on the bald technicality that plaintiff's statement contains no reference to the fact that the sheriff's return as to the defendant John D. Allen is "nihil habet," etc. If the attention of the court below had been called to this at the proper time, an amendment would doubtless have been allowed, and the statement made to conform to the fact as shown by the record. There is no reason why it should not be done now, with the same effect as if it had been done then. The amendment suggested by plaintiff company's counsel is accordingly allowed, and made nunc pro tunc. The only ground, technical or otherwise, on which the validity of the judgment against this appellant can be ques-

tioned, being thus disposed of, the judgment against him, impleaded with John D. Allen, not served, etc., is affirmed.

HUMMEL et al. v. KISTNER et al.
(Supreme Court of Pennsylvania. July 15, 1897.)

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS—GIFTS—EXPLANATORY EVIDENCE.

1. Declarations made by a client to his attorney while the latter is drawing a deed of conveyance for the client as grantor, and openly in the presence of the grantee, are not privileged as to the grantee.

2. The rule prohibiting, without explanatory evidence, large gifts to persons occupying confidential relations with the donor, does not apply where a daughter makes personal solicitations for conveyances to her, especially where her brothers and sisters have already received similar deeds.

Appeal from court of common pleas, Snyder county.

Bill by Ed. M. Hummel, Harry W. Hummel, and John L. Cooper against Annie C. Kistner and H. U. Kistner, her husband. From a decree dismissing the bill, complainants appeal. Affirmed.

The following is a short abstract of the bill: "The bill alleged: That John Hummel died April 7, 1896, intestate, leaving no widow, but two sons, Edwin M. and Harry W., and two daughters, Emma A., wife of John L. Cooper, and Annie C., wife of H. U. Kistner. That on January 23, 1895, he owned a property in Selin's Grove, called the 'Keystone Hotel,' worth about \$6,500, and on that day assumed to convey the same, in consideration of one dollar and natural love and affection, to his daughter Annie C. Kistner. That on May 6, 1895, he owned two several tracts of woodland, one worth about \$300, and the other worth about \$30, and on that day assumed to convey the same, in consideration of one dollar for each tract, and natural love and affection, to his said daughter Annie C. Kistner. That on May 7, 1895, he was the owner of a one-sixth interest in a mortgage on land in Northumberland county, which interest was worth \$1,000, and on that day assumed to assign the same, in consideration of one dollar, to his said daughter Annie C. Kistner. That in 1895 he owned personal property worth about \$500, all of which he assumed to assign, by bill of sale dated the 29th day of August, 1895, upon no valid or valuable consideration, to his said daughter Annie C. Kistner. That during the year 1895 he owned two shares of bank stock worth about \$250, which, during that year some time, he assumed to assign, upon no valid or valuable consideration, to his said daughter Annie C. Kistner. That he died indebted to his said two sons and to his son-in-law John L. Cooper as follows: To Ed. M., on a judgment single bill dated May 7, 1894, for \$1,200; to Harry W., on a single bill dated September 6, 1893, payable three months after his death, with interest from date, for \$4,000; to John L. Cooper, on a promissory

note dated —, for \$1,000, payable —. That neither John Hummel during his life, nor any one since his death, ever made any payment on account of any of the said notes. That, by the conveyances, assignments, and transfers, John Hummel divested himself of his entire estate, leaving nothing out of which payment of the said notes can be obtained; that said conveyances, etc., are fraudulent in law, and were made by John Hummel, and accepted by the defendant, in collusion to hinder the collection of the said indebtedness. That the defendants have attempted, and are attempting, to convey, sell, transfer, and encumber the said property, with the effect and intent of removing it from the reach of the plaintiffs and preventing the collection of their said notes. Praying, first, for a preliminary injunction, etc., and, second, that said conveyances, etc., be adjudged void, etc."

The answer admitted the transfers mentioned in the bill, but denied fraud therein, and alleged that they were for a valuable consideration. It also averred transfers by deceased to the several complainants, and alleged that said several transfers, including those to defendant, were made by deceased as a distribution of his estate among his children in his lifetime, and that, if the debts claimed by complainants were established, then each of deceased's children should contribute an equitable proportion towards their payment.

The following are the only assignments of error necessary to be set out, viz.: "(5) The court erred in admitting defendants' offer of testimony against plaintiffs' objection, as follows: 'Harvey E. Miller, recalled on behalf of the defendants, and examined in chief: By Mr. Hower: * * * Mr. Potter: We want to ask one question before we put in an objection. You are an attorney at law, and you were employed by Mr. Hummel as his attorney? A. Yes, sir. Mr. Potter: We object that he is incompetent to testify as to what occurred, on the ground of his communications being confidential, and they cannot be divulged except by the consent of the client. Mr. Hower: We offer to prove by this witness that at the time he was preparing the deed of John Hummel to Annie C. Kistner, for the Keystone Hotel property, he said to Mrs. Kistner and to them, in the room where it was being transacted, that he had made deeds to the other parties for their shares of his property, and it was no more than right but that he should make this deed to Mrs. Kistner. This is offered for the purpose of showing that he was distributing his property among his children. Mr. Ulrich: Plaintiffs' counsel object because the witness has already testified that he was an attorney at law, and that John Hummel was his client in the matter proposed in the offer, and therefore any communication made by John Hummel to him is privileged, and the witness is incompetent to reveal the same in court. Also object to the offer because any declaration made by John Hummel in the absence of the plaintiffs, his cred-

itors, cannot be evidence against them. The declaration which it is attempted to prove will be a self-serving declaration made by John Hummel, and would not be evidence against the plaintiffs, who were his creditors at the time, and who were not present. Q. By Mr. Potter: Were these communications made to you as an attorney while in the business of executing this deed? A. They were made during the drawing of the deed; yes, sir. By the Court: We think we will receive it under objection. (The plaintiffs except, and bill sealed.)" "(17) The court erred in not finding, as a fact, that Mrs. Kistner occupied a relation of trust and confidence to John Hummel, in that she transacted his business, disbursed his moneys, collected his rents, made her home with him, and accompanied him on his business errands, as shown by the evidence; and that, therefore, it was incumbent upon her to prove conclusively that the property she claims was conveyed to her for a lawful purpose; that John Hummel was capable, and executed the conveyances, transfers, and assignments to her with full knowledge and comprehension of their contents and effect; and that, she not having done so, the conveyances to her were to be treated as constructively fraudulent."

A. W. Potter, Chas. P. Ulrich, and J. Simpson Kline, for appellants. George B. Reimensnyder, for appellees.

PER CURIAM. It is impossible to read the testimony in this case without attaining the conviction that the several deeds and conveyances made by John Hummel to his children, including Mrs. Kistner, were made and intended by him as a distribution of his estate in his lifetime. The values of the several properties conveyed were nearly equal, and the facts and circumstances attending the preparation and execution of the several deeds are absolutely convincing that such was his purpose. The learned court below has so found as a fact, and we entirely approve of the finding. The declarations of the deceased to the scrivener who wrote the deed for one of the properties to Mrs. Kistner were not privileged, being made in the presence of both parties to the transaction. As a matter of course, there was nothing in the testimony to justify a finding of fraud in the execution of the deeds, and the court has so found. Neither is there anything sufficing to bring the conveyances to Mrs. Kistner within the rule which prohibits large gifts to persons occupying confidential relations with the donors, without explanatory evidence. As a daughter of the donor, Mrs. Kistner might make personal solicitations for conveyances to her, especially as her brothers and sisters had already received similar deeds, without being required to furnish explanatory testimony. We are entirely satisfied with the disposition of the case made by the learned court below. Decree affirmed, and appeal dismissed, at the cost of the appellants.

MADDEN et al. v. PENN ELECTRIC LIGHT CO. et al.

(Supreme Court of Pennsylvania. July 15, 1897.)

FOREIGN CORPORATIONS—INTERNAL MANAGEMENT—VENUE.

The leasing by a corporation of the use of its property and franchises for an inadequate rental is, in respect to the depreciation of its stock thereby, a matter of the internal management of the corporation; and hence a stockholders' bill to compel the taking of bids for such lease, and the appointment of a master to manage the corporation, must be brought at the corporation's domicile, not in the state where the property and franchises are situate.

Appeal from court of common pleas, Philadelphia county.

Bill by James Madden and others against the Penn Electric Light Company and others. There was a decree dismissing the bill on demurrers sustained thereto, and plaintiffs appeal. Affirmed.

James W. M. Newlin, for appellants. Samuel B. Huey, for appellee Edison Electric Light Co. Francis D. Lewis and Charles E. Morgan, Jr., for appellees other than Edison Electric Light Co.

DEAN, J. The Penn Electric Light Company is a New Jersey corporation, with at first a capital of \$100,000, divided into shares of the par value of \$1 each, which was afterwards increased to \$200,000, and subsequently still further increased to \$1,000,000. The city of Philadelphia, by ordinance, granted it the right to occupy by conduits, for electric lighting, about 13 miles of its streets, extending from the Delaware to the Schuylkill, and from Race to South streets, and at the same time authorized it to lease its conduits to others. In the beginning of July, 1887, the Electric Trust of Philadelphia, another of defendants, when the capital stock was as yet only \$200,000, purchased, for the sum of \$160,000, a controlling interest in the stock. On the 14th of same month, at the instance of the purchaser, the Penn Electric Light Company rented to the Edison Electric Light Company, another of defendants, the use of all its conduits for the term of 48 years, at the rate of 55 to 35 cents per annum for each lamp used, determined by the number of lamps used up to and over 24,000. It is not clear, from the contract, whether the use was exclusive. We are inclined to the opinion that the contract only excluded such other use as would materially interfere with the operations of the Edison Company. The Penn Company had contracted a debt of \$50,000 to the Electric Trust Company, which is being paid off at the rate of \$500 per year out of the annual rentals, but no dividends have as yet been realized by the stockholders. A minority of them (these plaintiffs), on the 7th of January, 1896, filed this bill against defendants. They aver a fraudulent increase of the capital of the Penn Electric Light Company by defendants, in the amount of \$500,000, and the issue of full-paid certificates therefor to

George S. Vickers, for worthless patents; the issue of 100,000 shares to William Cohlman for worthless patents; that this was a fraudulent device, concocted by Vickers, Cohlman, and the promoters of the company, for their own personal benefit; that all the increases of capital were unlawful and fraudulent, and the certificates filed by the officers in the state of New Jersey of the vote for such increase were false; that all these facts were known to the Electric Trust and the Electric Light Company at the date of their contracts with the Penn Electric Light Company; that said contracts were dishonest attempts by said two companies to promote their own interests, to the great prejudice and loss of the stockholders of the Penn Electric Light Company, of whom plaintiffs are a part, and that they (the said plaintiffs) are bona fide purchasers of said stock, with no knowledge of the fraudulent issue; that the Penn Electric Light Company is, and has been for years, insolvent, and has no assets except its income from the rentals of its conduits to the Edison Company, and this will not pay its fixed charges; that plaintiffs are in peril from demands of creditors of said company, and may be called upon for assessments upon the stock held by them. They therefore pray, according to an amended bill, that it be decreed (1) that the conduits shall be used by all persons desiring to use the same, upon such terms as shall be fixed by the court; (2) that it be ordered that bids be invited by the Penn Company for the extension and use of its conduits; (3) that it be decreed that the management of the Penn Company is fraudulent and collusive as to its stockholders, and that relief be afforded by the appointment of a master to enforce the prayers for relief; (4) general relief. The defendants demurred to the bill, on the ground that the matters complained of related wholly to the internal management of a foreign corporation, and therefore the jurisdiction was exclusively in the courts of New Jersey. The court below, without filing an opinion, sustained the demurrer, and dismissed the bill. The plaintiff afterwards asked leave to amend the bill, leaving out the averments as to fraudulent issue of stock held by the Electric Trust, and the prayer that the Edison Company contract be canceled. On this application, however, the court took no action; but as the object of the amendment seems to have been to avoid the charge of multifariousness in the bill, on which the court below may have based its decree, we will here, for the purposes of review, treat the amendment as having been made, and consider only the question as to whether the relief prayed for is a matter of which a Pennsylvania court will take jurisdiction.

The Penn Electric Light Company is a New Jersey corporation, created by another state, and subject to the corporation laws of that state. Its organization, corporate functions, who shall become members, what are their rights as members, are all questions for New Jersey courts, because questions of local law.

Therefore they require local administration. The contract with the Edison Company, the bill assumes, granted the exclusive use of the conduits to that company, which was not within the corporate power of the Penn Company to grant. Assuming that the grant was exclusive, what was the scope of the corporate power conferred by the state of New Jersey? We must at once turn to the local law of New Jersey for answer. Next it is asked that a decree be made that bids be invited for the extension and use of its conduits; next, that the management shall be declared collusive and fraudulent, and be placed in the control of a master to be appointed by the court. This involves the corporate management of a foreign corporation by a Pennsylvania court. It seems to us it would be without warrant in either reason or authority. While visitatorial and remedial powers are conferred upon our courts over corporations of this state, and they can, under certain circumstances, properly exercise these powers, as to foreign corporations it has been directly decided otherwise. In *Morris v. Stevens*, 6 Phila. 488, Justice Sharswood, sitting *ad nigrum*, held that a stockholders' bill could not be maintained against a foreign corporation, mainly on the ground that to do so would lead to a conflict of jurisdiction. He refers to Judge King's decision in *Bank v. Adams*, 1 Pars. Eq. Cas. 534, where it was held that even a creditors' bill to compel payment of subscription to stock was not sustained; much less would a stockholders' bill lie, for the Pennsylvania resident has no right to call upon the courts of his own state to protect him from the consequences of a voluntary membership in a foreign corporation. By the very act of membership, he intrusted his money to the control of an organization owing its existence to, and governed by, the laws of another state.

It is argued by appellants that the visible, tangible property of a foreign corporation situate within this state confers local jurisdiction, and therefore, as the conduits are in Philadelphia, our courts have jurisdiction. Without doubt, courts of equity in Pennsylvania have, under our act of assembly of April 6, 1859, jurisdiction to enjoin unlawful acts by such corporations; to enforce performance of contracts in this state with third parties; in short, have general jurisdiction in equity; but they have no jurisdiction as to their internal management. What constitutes internal management is well defined by Stone, J., in *Mining Co. v. Field*, 64 Md. 154, 20 Atl. 1039: "Where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation; and in case of a foreign corporation our courts will not take jurisdiction." Here the plaintiffs (stockholders) accuse the corporate management with disregard of the rights of the whole body of stockholders, for whom the cor-

poration is trustee, in making unwise and reckless contracts which depreciate and render valueless their stock. The wrong complained of is not from the violation of a contract with them, but want of fidelity to duty in their fiduciary relation springing from the nature of the organization. In substance, the averment is that, at the office of the company in the state of New Jersey, the management, in violation of their official duty, entered into a contract to be performed in Pennsylvania, whereby the stockholders suffer. This, plainly, strikes at the internal management of the company. The existence of the wrong must be ascertained, and the remedy applied, according to the laws of the domicile. The decree is affirmed.

BRUCH v. CITY OF PHILADELPHIA. (Supreme Court of Pennsylvania. July 15, 1897.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—CONTRIBUTORY NEGLIGENCE—QUESTIONS OF FACT.

Plaintiff was injured at night by stepping into a narrow hole in the pavement about four feet long. He had no knowledge of the defect, but there were electric lights within 100 yards thereof. There was evidence that the light which he was facing so dazzles the eyes of the traveler that he cannot see the pavement in front of him. Plaintiff testified that previous to the accident he "wasn't doing anything; only walking along"; and was not "looking out in any way round or about" him, but was "minding my own business"; that he did not see the hole until he fell into it, and that one "could see it by looking at it carefully." Held, that the question of his contributory negligence was one of fact.

Appeal from court of common pleas, Philadelphia county.

Trespass by Thomas Bruch against the city of Philadelphia. From a judgment for defendant, plaintiff appeals. Reversed.

William Embury and Jos. R. Embury, for appellant. Leonard Finletter and Alex. Simpson, Jr., for appellee.

DEAN, J. On the night of the 12th April 1894, the plaintiff, while walking on the pavement of the west side of Kensington avenue, in Philadelphia, on his way to his home, stepped into a hole, fell, and was seriously injured. The hole was about four feet long, narrow, irregular or crescent shaped, and had been in the pavement for three months. Plaintiff was 54 years of age, with sense of sight unimpaired. There were electric lights at Clearfield street and Indiana avenue, both 80 to 100 yards distant from where he fell. There was also a lamp on the same side of the street, about 44 yards off, but it did not clearly appear this was lighted that night. A witness who resided on the same side of the street, near the place of accident, testified that on walking in the direction plaintiff was going the electric light was under an awning, and so dazzled the eyes of the traveler that he could not see clearly in front of him, and especially could not see the pavement. Plaintiff had never walked on that side of the street before. He alleged his in-

jury was caused by the city's negligence in not maintaining a reasonably safe sidewalk, and brought suit for damages. The case was referred to George De B. Myers, Esq., under act of 1874, to find the facts and apply the law, who, after hearing all the evidence, found: (1) The negligence of the city caused the accident; (2) the evidence did not show contributory negligence on part of plaintiff; (3) that plaintiff had sustained damages to the amount of \$2,750, and so reported to the court. On exceptions to the report, the court approved the finding of the referee as to negligence of city, but dissented from that which declared the plaintiff free from contributory negligence, and accordingly set aside the report, and entered judgment for the city. From that judgment, plaintiff appeals.

The referee was appointed under the act of May 14, 1874. We have held in *City of Philadelphia v. Linnard*, 97 Pa. St. 249, that his power is the same to all intents and purposes under such appointment as that of a judge, who, under the act of April 22, 1874, by agreement finds the facts and determines the law of the issue. The referee's findings of fact, then, are as conclusive as the verdict of a jury. If, under the evidence of plaintiff in this case before a jury, the trial judge would have been bound to direct a compulsory nonsuit, or to peremptorily direct the jury to find for defendant, then the court below properly entered judgment for defendant; but, if the question of contributory negligence would have been for the jury, then the court committed error in setting aside the report. *Bradlee v. Whitney*, 108 Pa. St. 362. The learned judge of the court below was of opinion plaintiff's own evidence disclosed a case of contributory negligence, and for that reason set aside the report. The evidence on which the court found one way and the referee another is as follows: "Q. What were you doing as you walked along that night? A. I wasn't doing anything; only walking along. Q. Were you looking out in any way, round or about you? A. No, sir; minding my own business. Q. Did you see the hole? A. No, sir; not till I fell into it. I seen it then. Q. How do you mean? A. When I got up I seen it. Q. Could you see it? A. Oh, yes; you could see it by looking at it carefully." Here we have two entirely competent and impartial tribunals placing antagonistic interpretations upon the same language. The interpretation put upon this testimony by the court is: First, that by plaintiff's own admission he was not looking where he was going; and, second, that the exercise of ordinary care in the use of his eyes would have disclosed the hole, and he would have avoided stepping into it. If this were the only interpretation that could be put upon this language, or if it were, manifestly, the only reasonable one, the conclusion of contributory negligence on part of plaintiff was warranted, and the settled law would have barred a recovery. But the wit-

ness says positively he was not looking around or about him. If he had been looking across the way, or gazing up at the stars,—that is, looking around or about him,—he certainly would not have been exercising the ordinary care required of a foot traveler. What was he doing? He says, "minding my own business." That business, just then, was to look where he was going, and that degree of care is all the law required. But, as a further admission of negligence, on which the judgment of the court is based, he said he did not see the hole until he fell into it; when he got up, he saw it; and then he could see it by looking at it carefully. This is the identical experience of the most careful man who has met with such an accident. In the exercise of ordinary care, he does not see a peril, otherwise he would avoid it. He falls into an excavation, crawls out, and by looking carefully, with all his senses quickened by the mishap, he sees and realizes the cause. By the exercise of extraordinary care before the accident, he might have discovered that which was not ordinarily observable. But the public, walking on the pavements of a large city, are not bound to exercise extraordinary care. Care according to the circumstances is all the law enjoins. They have the right to assume the pavements are reasonably safe, and that they, by the ordinary use of their eyes, at an ordinary pace, can safely walk on them. While we will not undertake to say the interpretation put upon plaintiff's testimony by the learned judge of the court below was clearly a wrong one, we are of opinion it was not clearly the only one of which it was susceptible, and was not clearly the right one; hence the evidence would have been for the jury, if that method of trial had been adopted, and, the referee having been substituted for the jury, his finding of fact is conclusive on defendant. *Ely v. Railway Co.*, 158 Pa. St. 233, 27 Atl. 970. The authorities cited by appellee are unquestionably the law, but they do not touch the question on which the case turns. No precedent can control a jury or referee in determining what a witness means when he uses language warranting distinct and opposite inferences. They must determine his meaning not only from his words, but from his manner, and all the surrounding circumstances, and find whether he was careful or careless. Therefore the judgment is reversed, the finding of fact by the referee adopted, and judgment is now entered for plaintiff on his report.

IN RE WILHELM'S ESTATE.

(Supreme Court of Pennsylvania. July 15, 1897.)

ASSIGNMENT FOR CREDITORS—RIGHT TO INTEREST—SALE OF FLEDGE.

1. A debtor made an assignment to one who held his note secured by certain stocks as collateral, and a judgment for the amount of the note,

which was a first lien on his estate. The creditor sold the stock collateral. *Held*, that on sale of the stock, which it held as pledgee, and not as assignee, it was bound to apply the proceeds at once, and could not, after converting the stock into money, hold the money as collateral, and allow interest to run on the notes.

2. On sale of real estate by the assignee discharged of liens, under an order of the court, the assignee received the proceeds in trust for the lien creditors; the balance after payment of the others to be distributed among the general creditors. *Held*, that such assignee could not hold the money as assignee after confirmation of the sale, and, as creditor, recover interest on his debt pending distribution.

Appeal from court of common pleas, York county.

In the matter of the estate of J. S. Wilhelm. Isabel S. Wilhelm and Sarah H. C. Wilhelm, creditors, appeal from an allowance of the account of the Commonwealth Guarantee, Trust & Safe-Deposit Company. Reversed.

J. W. Latimer and Geo. S. Schmidt, for appellants. Geo. E. Neff and Henry C. Niles, for appellee.

FELL, J. The facts which are important in considering the question raised are briefly these: In 1893 J. S. Wilhelm made an assignment of all of his property for the benefit of his creditors to the Commonwealth Guarantee, Trust & Safe-Deposit Company. The trust company at the time of the assignment held his promissory note, payable on demand, for \$15,000; and, as collateral security for its payment, it held certain stocks, and a judgment for \$15,000, which was the first lien on his real estate. The company sold the stock collateral, and realized from its sale, June 5, 1895, the sum of \$1,662.08, which was applicable to the debt secured by the note. As assignee it sold the real estate, by direction of the court, discharged of the lien of judgments. The sale was confirmed September 5, 1895, and the amount realized was more than sufficient to pay in full its judgment of \$15,000, with interest; and the balance went in part payment of the judgments of the appellants, who were subsequent lien creditors. The company made no application of the amount received from the sale of the stocks, or of the amount realized by the sale of the real estate; and before the auditor it claimed and was awarded interest in full on its note to the date of distribution, March 17, 1897. The appellants, who are subsequent lien creditors, concede the right of the company to receive full payment of the original note; but they claim that the amount realized from the sale of the stock collateral should have been credited on the note on the day of its receipt, and that the amount applicable to the payment of the collateral judgment should have been credited on the note on the day of the confirmation of the sale of the real estate, thus reducing the amount of the original claim on those dates, and stopping the running of interest. The company sold the stock

held as collateral, not as assignee, but as pledgee. Its power under the terms of the pledge was to sell, and to apply the proceeds to the payment of the note. This power it exercised, and it was bound to apply the proceeds at once. It could not, after converting the stock into money, hold the money as collateral, and allow interest to run on the note. The power to sell was that it might pay the note, and when it sold, and received the money, its claim, to that extent, was extinguished. The real estate was sold discharged of liens by the assignee, not under its general powers as assignee, but by virtue of an order of court granted in pursuance of the provisions of the act of February 17, 1876, for the interest of all parties, and it received and held the proceeds in trust for the lien creditors, in the order of the priority of their liens; and, secondly, as to any balance after the payment of liens, for the general creditors. The creditors whose liens were discharged were required to look to the fund, and interest on their claims ceased on the date of the confirmation of the sale. *Carver's Appeal*, 89 Pa. St. 276; *Brownsville, D. & D. Bank's Appeal*, 96 Pa. St. 347. But they were entitled to their money on the confirmation of the sale and the payment to the assignee. *Brownsville, D. & D. Bank's Appeal*, supra. The whole fund realized from the sale did not pass to the assignee to await the audit and the order of distribution among all the creditors. That part of it apportionable to liens which had been discharged was demandable by the creditors entitled to it. This has been the uniform ruling as to sales under the act. In the opinion in *Tomlinson's Appeal*, 90 Pa. St. 224, it is said, "The payment of so much of the purchase money as will be sufficient to satisfy the liens devested by the sale should be required at the time of the confirmation of the sale or soon thereafter." And in *Burkholder's Appeal*, 94 Pa. St. 522, it was held that, where time had been given for the payment of the installments of purchase money, the interest thereon should be divided pro rata among the lien creditors. The later act of June 10, 1881, requires the assignor to accept the receipt of a lien creditor who may become a purchaser for the amount which the record shows him entitled to receive. The money apportionable to the collateral judgment held by the trust company was received by it in 1895. It was payable to it as a lien creditor at once. There was no denial of the validity of its judgments, or dispute as to the priority of its lien. It received the money for its own use, and, as a trustee for all of the creditors, it was required, in their interest, to apply it to the discharge of its debt at once. The assignments of error relating to this subject are sustained. In the computation of interest on the claim of the Commonwealth Guarantee, Trust & Safe-Deposit Company, the amount received by it from the sale of stock held as collateral, and so much of the amount receiv-

ed from the sale of the real estate as was apportionable to its collateral judgment, should have been credited as of the dates of their receipt, and it is now directed that this be done. The order of the court is reversed, and it is directed that distribution be made in accordance with this opinion.

CARLISLE GAS & WATER CO. et al. v. CARLISLE WATER CO.

(Supreme Court of Pennsylvania. July 15, 1897.)

MUNICIPAL CORPORATIONS—WATERWORKS.

Where a borough, as authorized by the special act of April 19, 1853, incorporating a water company, took stock in such company, and appointed three persons who, with others appointed by the stockholders, constituted the management thereof, and such company thereafter constructed adequate waterworks, such works are within Act 1874, § 34, providing that, when waterworks "have been constructed by any municipality," other waterworks cannot be constructed in said municipality without the consent of its authorities.

Appeal from court of common pleas, Cumberland county.

Bill by the Carlisle Gas & Water Company and William Henderson, Jr., a taxpayer, for himself and other taxpayers, against the Carlisle Water Company, for an injunction. There was a decree for plaintiffs, and defendant appeals. Affirmed.

M. E. Olmsted and J. E. Barnitz, for appellant. John Hays and W. F. Sadler, for appellees.

DEAN, J. The parties to this suit are not correctly given in appellant's paper book and history of the case. In both, the plaintiff and defendant are the two corporations; and the only party litigant, while in fact joined with the Carlisle Gas & Water Company as plaintiff, is a taxpayer of the borough of Carlisle, and presumably a representative of other taxpayers. Therefore we must assume that the complainants represent both the private and municipal corporations' interests, so far as the latter can be represented by one of its members, undisputably acting for himself and others in a like situation.

The court below enjoined defendant from occupying the streets and highways of the borough without the consent of the council, on the authority of *White v. City of Meadville*, 177 Pa. St. 643, 35 Atl. 695, and *Metzger v. Borough of Beaver Falls*, 178 Pa. St. 1, 35 Atl. 1134. Whether this issue is determined by the principles announced in those cases depends on the facts. If, by the state and municipal legislation, under which the Carlisle Gas & Water Company was created and operated from April 19, 1853, the date of its incorporation, down to October 3, 1895, the date of defendant's incorporation, the first-named company became a part of the property of the municipality for the performance of a municipal function specially conferred by the legis-

lature, then the borough must be deemed to have exercised its power, as concerns a supply of water to the public. It cannot be compelled by mandamus to duplicate municipal action which has been completely performed once, and has accomplished and is accomplishing its purpose. We do not intimate what the sovereign power—the commonwealth—might authorize a subordinate territorial division to do, or enjoin it to do, in this particular. We speak only of what has been authorized up to this time. Under the act of 1851, the borough had authority to light the streets, and provide a supply of water for the inhabitants. As early as October 14, 1852, it, by authority of councils, took steps to provide water. A committee was appointed, with authority to employ an engineer to make surveys, plans, and estimates of cost. Nothing further was done directly by the borough for six months thereafter. On April 19, 1853, the Carlisle Gas & Water Company, one of plaintiffs, was incorporated by special act of assembly. Section 12 of that act provides: "That it shall be lawful, and the borough authorities may, in its corporate capacity, subscribe for any number of shares of the stock of the said company, and to enable it to do so, the said borough is hereby authorized to borrow from time to time any amount of money not exceeding the amount subscribed, and to pledge their property and franchises for the repayment of the same, and if the said borough of Carlisle shall subscribe and take one-third or more of the said capital stock which shall be subscribed for the completion of the said work or works, the town council of the said borough shall annually appoint three managers of the said company, and in that event the election of all other stockholders shall be confined to the president and five managers, and other stockholders shall alone have power to vote at elections and meetings." About three-fourths of the voters then petitioned councils to subscribe for one-third of the capital stock. Accordingly, by ordinance of June 2, 1853, a subscription of \$25,000 was authorized, on the condition that the whole capital stock should not exceed \$75,000, or be increased so that the borough would be deprived of its one-third representation in the board of managers. On these conditions, the company accepted the subscription. A president and five managers were elected by the company, and three were appointed by the borough councils. In the same manner, the board has since (a period of more than 40 years) been kept up. The condition on which the borough subscription was made has been observed. The capital has not been increased. By the charter, the power of the company to borrow money was limited to \$50,000. When the works were finished, it was heavily in debt, and without credit. In this state of affairs, the borough subscribed for \$35,000 more of its stock, and, in payment, issued to the company its bonds in that amount, the company agreeing to provide for the annual in-

terest on the bonds, and secure payment of the principal by a mortgage upon its property and franchise. The agreement was carried out. The company provided for the interest, and paid the principal. Then the borough surrendered the \$35,000 of stock. As its power to increase its capital by issue of new stock was, under its agreement with the borough, limited to \$75,000, and its power to borrow, under the law, to \$50,000, for 18 years, the company was compelled to expend all its net earnings in improving and extending its works, so that no dividends could be paid. It follows that the \$25,000 invested by the borough must now equal in cost more than double that amount. To obtain authority, by amendment of its charter, to furnish light, the company, in 1888, accepted the provisions of the new constitution, and, to carry out the additional power and purpose, further expenditure was involved, the whole sum, from the beginning, amounting to \$230,000. The capital stock, however, paid in, has stood at \$62,500, and there is a debt of \$48,000. The increase in cost of improvements has been provided for, except this indebtedness, out of earnings. During all the years the plant has been operated, the borough's representatives on the board took an active (often an initiatory) part in the management, voted for new extensions for reaching the public, improvements for purifying the water, and in all respects acting with the authority of a municipal part owner of the plant.

The act of 1853, incorporating the company, authorizes it to introduce "into the borough of Carlisle a sufficient supply of gas and pure water." The borough act of 1851 empowered the borough "to light the streets, and provide a supply of water for the inhabitants." It is obvious, from the facts stated, that neither corporation was of sufficient financial ability to exercise singly the power conferred. Therefore, under the legislation designed for that purpose, they united their strength, and accomplished fully the object; for, whatever conflict there may be in the testimony, the decided weight of it shows that, with 14 miles of mains, pipes, pumping stations, and filter plants, the public have a sufficient supply of pure water. Such a combination as was made in this instance, in the absence of legislative authority, would have been ultra vires as to both; for there is no implied authority in a municipal corporation to share its government, by regularly elected councilmen, with the directors of a private corporation; nor in a private corporation, whose business must be conducted by the directors elected by the stockholders, with the representatives of a municipal corporation. But section 12, before quoted, of the water company's charter, expressly authorizes this hybrid organization, and operation by virtue of it. Under the act of 1851 and its supplements, the borough could have either constructed its own waterworks, or have contracted with a private corporation for a supply of water. Under this act of 1853, it

is authorized to join a private corporation in the business; not in the capacity of a stockholder alone, its power and representation thereafter to be determined by a majority of the stockholders, but it is given for the future a fixed representation, one-third, not subject to change by the two-thirds majority; and this one-third, or three managers, are not to be elected by the whole body of stockholders, but are to be appointed by the municipality, the latter to have no vote in the election of the other six. We admit, if, as argued by the learned counsel for appellant, the borough had been merely authorized to subscribe for stock in a private water company, as many municipalities were, about that time and prior thereto, authorized to subscribe for stock in railroads and turnpikes, that mere authority would not have changed the character of the corporation, and made it a mixed municipal and private one. But here there was more than authority to invest the taxpayers' money. The investment was to be followed by municipal government in expenditure and management, by a fixed representation, appointed by the municipality, over which appointment the stockholders of the corporation had not the least control. Neither could the municipality exercise any control, as stockholders, in the appointment of the other six managers. They had more than the rights of stockholders in the appointment of three managers. They had none whatever in the appointment of the other six. It was, apparently, the intention to create in the borough an undivided one-third ownership of the works. Clearly, to this extent, by express legislative authority, they were borough waterworks. But whether an authorized municipal partnership in waterworks, or an authorized municipal fractional ownership in a corporation to supply water to the borough, it takes this water company out of the list of exclusively private corporations, and, to a certain extent, constitutes it a public or municipal institution.

The defendants, an exclusively private corporation, now claim the right, under the general corporation act of 1874, to also supply the borough of Carlisle with water, and for that purpose asserts the right to enter upon its streets and alleys, to dig trenches, and lay its water mains alongside those, laid in part, at a large expense to the taxpayers, by the borough itself. Section 34 of the act of 1874, under which defendant is incorporated, reads as follows: "That nothing in this section contained shall authorize a company incorporated under the provisions of this act to construct gas or water works within the limits of any municipality, when gas or water works shall have been constructed by said municipality, without the lawful consent of the authorities thereof." The manifest intention of this provision is to protect municipalities that have expended their money in supplying their inhabitants with water from the destruction of such investments by competitive corporations. And, even if the expenditure has not been made by the erection of works exclusively under municipal control,

the contribution made in this case, in the manner and under the authority given, was, to the extent of the expenditure, a construction of municipal waterworks. The case is therefore within the spirit of the statute, if not within the exact words, and is controlled by the principles laid down in *White v. City of Meadville* and *Metzger v. Borough of Beaver Falls*, supra; and the decree of the court below should be affirmed. It is affirmed accordingly, at costs of appellants.

KENDALL et al. v. McCLURE COKE CO.
(Supreme Court of Pennsylvania. July 15, 1897.)
COURTS—JURISDICTION—COMITY—ASSIGNMENT FOR
BENEFIT OF CREDITORS—ESTOPPEL TO
CONTEST ASSIGNMENT.

1. The question whether a creditor residing in Pennsylvania is, by participation in an assignment for the benefit of creditors made in that state, and valid under its laws, estopped to proceed against lands in other states included in the assignment, on the ground that it is invalid in such states, is to be determined by the Pennsylvania courts, though the validity of the assignment elsewhere involves the *lex rei sitæ*.

2. A creditor is estopped to proceed against lands in another state included in an assignment for the benefit of creditors, on the ground that the assignment is invalid under the laws of that state, where he took part in consultations of creditors, with the assignee, obtained leave to except to the assignee's account, and proved his claim.

Appeal from court of common pleas, Lebanon county.

Bill by Henry T. Kendall and another, assignees of Robert H. Coleman and wife for the benefit of creditors, against the McClure Coke Company. There was a decree dissolving a preliminary injunction and dismissing the bill, and plaintiffs appeal. Reversed, and decree directed.

Grant Weldman, Jr., Geo. F. Baer, and John G. Johnson, for appellants. Thomas H. Capp and Lewin W. Barringer, for appellee.

DEAN, J. The plaintiffs are assignees of Robert H. Coleman, who, on 8th August, 1893, made a general assignment for the benefit of creditors. An appraisement of all the assigned estate was filed in Lebanon county on 27th December, 1893. It amounted to nearly three millions of dollars, and embraced all the property of assignor in Pennsylvania, also considerable real estate and personal property in Savannah, Ga., and Jacksonville, Fla. The defendant, the McClure Coke Company, is a Pennsylvania corporation, and at the date of the assignment was a creditor of the assignor in the sum of \$124,904.78. Its agent attended meetings of the creditors held after the assignment to advise with the assignee as to the management and conversion of the assets into cash for the benefit of the creditors. To the first account filed by the assignees, the defendant filed exceptions, whereupon the court appointed an auditor to hear the exceptions, and make distribution to and among the cred-

itors. The defendant appeared before the auditor, proved its claim, and was heard on the exceptions to several items of the assignees' account. It was also heard by the court of common pleas of Lebanon county on other matters touching the assigned estate. Defendant then, while proceedings for distribution were still pending in Lebanon county, commenced suit by attachment in the courts of Georgia and Florida, and sought to appropriate in payment of its debts land lying in those states, and embraced in the deed of assignment. The assignees then filed this bill to restrain defendant from further proceedings in those courts, on the ground that by becoming a party creditor to the assignment in Pennsylvania, and accepting benefits thereunder, it was estopped from instituting proceedings ignoring the assignment in other jurisdictions. The court below awarded a preliminary injunction, which it afterwards, on hearing, dissolved. From that decree we have this appeal by plaintiffs.

The court below was of opinion that the deed of assignment passed title to the assignee to all the personal property of the assignor, without reference to its location, because it is well settled that such property passes by the law of the domicile of the owner. It is well to note here that, although defendant had seized personal property on its attachment in Florida, afterwards it formally released it; so that question is not a subject of contention. But, as to the attachments levied on land in those two states, the defendant contended the assignment, although recorded there, was not executed and recorded in conformity with the laws of those states, and therefore passed no title to the assignee, thereby leaving the real estate subject to seizure by any creditor of the assignor. The court below, while not undertaking to determine the validity of the assignment and record in Florida and Georgia, nevertheless held that was a question to be determined by the *lex rei sitæ*, and, although the assignment was good in the state of its execution, it declined to determine whether it was an effective conveyance under the laws of those states, believing that was a question properly determinable by the courts of those states. We are of opinion that under the admitted facts the rule of comity which prompted the decree was carried too far, and further than the authorities warrant. For our present purpose it may be admitted that the deed of assignment was not executed and recorded in Florida and Georgia with the formalities required by the statutes of those states to make it effective there; but that is not the question here. The assignor is a citizen of this state, and the creditor is a Pennsylvania corporation. The creditor goes out of this state to a foreign jurisdiction to seek an advantage over other creditors by invalidating an assignment of property, not because it is not good here, but because it is not good there.

If it succeed, it withdraws that much property from the grasp of the trustee for all the creditors. Further, the same creditor has presented and proved its claim under the assignment here, embracing the very property it seeks to appropriate in the foreign jurisdiction; has been heard on every question it chose to raise in the court of the domicile. If it had not sought the jurisdiction of our courts to enforce its demand, and had not made itself a party creditor to the assignment, it is doubtful, on the authorities, whether comity would have suggested a relinquishment by our courts of jurisdiction; for the subject-matter of the litigation—the assignment—and the persons of the litigants are within our jurisdiction. We do not, however, decide this point, because it is not necessary to a decision of the cause. But, clearly, whether a Pennsylvania creditor, under a Pennsylvania assignment, has, by positive unequivocal acts here, estopped itself from denying the validity of the assignment, is not a question which comity demands should be referred to the court of another state for adjudication. What significance had the acts of defendants here? The assignment was of record. It purported to convey, and did convey, under the Pennsylvania statute, to the trustee for all the creditors, the very property now attached. The defendant had both constructive and actual notice of this. It takes part in the consultation of creditors with the assignee, gets leave from court to file exceptions to the account *nunc pro tunc*, and presents and proves its claim. Every act was a distinct affirmation that the title to all the assigned property had vested in the trustee. "Where a creditor does an act affirming the assignment, his election is made, and he is estopped from afterwards impeaching it." *Burke's Estate*, 1 Pars. Eq. Cas. 470. In *Gulterman v. Landis*, 1 Wkly. Notes Cas. 622, the court below ruled that by participating in creditors' meetings after an assignment, and by advising with the assignee, the creditor estopped himself from questioning its regularity; and this decision was affirmed by this court. In *Groves v. Rice*, 148 N. Y. 227, 42 N. E. 684, the court says: "By such conduct I think the plaintiff estopped himself from thereafter setting up the invalidity of the assignment. Having recognized it for the purpose of gaining some advantage, he could not, in conscience, turn around, and assert its invalidity." We think it clear that if defendant were attempting to question the validity of the assignment under the laws of this state, it would be held to have estopped itself from denying it by its unequivocal acts affirming it. Why, if the same acts estopped the creditor here, should he not be estopped from denying it elsewhere? If equity would close his mouth here, his mere removal to another jurisdiction does not open it to effect the same result. It is just as unconscionable to assert in Georgia the invalidity of the assignment

as to assert it in Pennsylvania. But it is argued by appellee, if the assignment in Pennsylvania cannot pass lands in other states where the conveyance does not conform to the laws of the situs, then by the assignment the property is not subject to the claims of the general creditors, and the defendant, in levying his attachment upon it, impairs no right of any creditor under the assignment; and, further, to restrain the attaching creditor is to, in effect, decide a question of foreign law, which the weight of authority holds should be decided by the foreign courts.

As before noticed, without inquiry as to whether, under the laws of Florida and Georgia, the title to the lands in those states passed to the assignee, for the purposes of this case we assume it did not; but this creditor, by the most significant acts and assertions of record, averred it did pass, and then took all the benefit possible from affirming the validity of the assignment. Whether it passed or not, it cannot now say it did not. What acts on the part of a corporation creditor of this state, under an assignment here, shall, in equity, constitute an estoppel, is a question for the courts of this state; for the creditor voluntarily made itself a party to the assignment,—voluntarily adopted the assignee as its trustee in the management and conversion of the very assigned property it now seeks to appropriate. The decree of the court below is reversed, and it is directed that an injunction issue against defendant restraining it from further prosecuting its said attachments and suits in the courts of Savannah, Ga., and in the courts of Jacksonville, Fla., and from doing any act or thing to hinder, delay, or interfere with the said assignees in the control and management of the estate and effects hereinbefore described, and from in any way seeking to procure or secure to itself any greater benefit or interest out of said estate and effects than shall represent its pro rata share of the distribution of the estate and effects of Robert H. Coleman under the said assignment to and among the creditors entitled thereto. It is further ordered that appellee pay the costs.

MILLER v. LEHIGH COUNTY.

(Supreme Court of Pennsylvania. July 15, 1897.)

PARTIES—WAIVER—TRESPASS AND CASE—DISTINCTION.

1. Where one was brought in as a party by alias summons duly served, and appeared by counsel, and pleaded to issue, though under protest, and went to trial on the merits, he could not afterwards claim that he was not duly a party, and bound by the proceedings.
2. Since the procedure act of May 25, 1887 (P. L. 271), has abolished all distinctions, so far as they relate to procedure between trespass and case, there may be a recovery in trespass against a county for damages resulting to plaintiff's

property from the raising of the grade of a highway in front thereof in making approaches to a county bridge.

Mitchell, J., dissenting.

Appeal from court of common pleas, Lehigh county.

Trespass by Sarah A. Miller against the Allentown & Bethlehem Rapid-Transit Company and others to recover damages resulting to plaintiff's property from the raising of the grade of the highway in front thereof in making approaches to a bridge built by defendant Lehigh county. From a judgment in favor of plaintiff against the county, the latter appeals. Affirmed.

In the court below this was originally an action of trespass against the Allentown & Bethlehem Rapid-Transit Company alone to recover damages for injury to plaintiff's property. On March 16, 1895, an affidavit was filed that a mistake was made in the bringing of the suit in the names of the parties defendant, and the court then allowed the record to be amended by adding the Lehigh Valley Railroad Company, the county of Lehigh, and the township of Whitehall as co-defendants with the said Allentown & Bethlehem Rapid-Transit Company, and an alias summons issued against the parties so made co-defendants, and which was duly served upon them. A new statement of cause of action was then filed, and a rule to plead entered, and all the defendants pleaded under protest. At the trial, under the direction of the court, a special verdict was found by the jury, setting forth all the essential facts necessary for the determination of the questions of law raised in this case. Upon this special verdict the court afterwards, on motion and after argument, on January 6, 1896, ordered judgment to be entered in favor of the plaintiff and against the county of Lehigh for the amount of damages found by the jury, but providing specially that the plaintiff should not recover costs incurred prior to the issuing to the said alias summons, and for serving said alias summons only on the county commissioners. At the trial the court instructed the jury that the plaintiff, under the evidence, could not recover against any of the defendants except the county of Lehigh, and the case was submitted to the jury against the county alone. Counsel for the county requested the court to instruct the jury that, under the evidence and the pleadings, there could be no recovery against the county, which was refused.

After the county had been brought in as a party, plaintiff filed the following new statement of cause of action, to wit: "Sarah A. Miller, the above-named plaintiff, by John Rupp, her attorney, complains of the above-named defendants, which were summoned to answer the plaintiff of a plea of trespass, and says that the said defendants, jointly and severally, heretofore, to wit, on or about the 1st day of January, A. D. 1893, and on divers other days and times, both before and

since that date, and up to the time of the bringing of the above suit, at the county aforesaid, by and through their officers, agents, superintendents, supervisors, commissioners, servants, and employes, with force and arms, broke and entered the close of the plaintiff, of which the plaintiff was then and there seised and possessed, the said close being a messuage, tenement, and tract of land situate in the township of Whitehall, county of Lehigh, and state of Pennsylvania, bounded on the east by the river Lehigh, on the west by Lehigh avenue, on the south by land now or late of James Fuller, and on the north by a public road known as 'Bridge Street,' and then and there took forcible and actual possession of the said messuage, tenement, and tract of land, being the close aforesaid, and from that time, and up to the time of the bringing of this suit, have held and kept, and still do hold and keep, actual and forcible possession of the said land, and then and there did build, construct, and maintain, and still do maintain, on the same, railroad tracks, walls, embankments, buildings, and other structures for the use and operation of railroads and running electric railroad cars thereon, and hitherto have prevented and deprived, and still do prevent and deprive, the plaintiff from the use, occupancy, possession, and enjoyment of the said messuage, tenement, and tract of land, being the close aforesaid, in as full, free, and uninterrupted a manner as she had a right to hold, occupy, and possess the same, and other wrongs to the plaintiff then and there did, to the great damage of the plaintiff, to wit, the sum of fifteen thousand dollars. And the said plaintiff further complains of the said defendants, and says that the said defendants, on or about the 1st day of January, A. D. 1893, and on divers other days and times before and since that date, and up to the time of the bringing of this suit at the county aforesaid, with force and arms, by and through their officers, agents, superintendents, supervisors, commissioners, servants, and employes, the close hereinbefore described, being the said messuage, tenement, and tract of land, did break and enter with horses, carts, wagons, shovels, picks, spades, and other implements and machinery, and did haul and carry, throw and deposit, upon said messuage and tract of land, large quantities of earth, stone, gravel, cinder, and other foreign substances, and then and there did fill up the same, and throw up large and high embankments on the northern and western parts of said messuage and tract of land, and thereby did, to a very great extent, destroy and depreciate the value of a certain valuable dwelling house theretofore being thereon and erected upon said messuage and tract of land, and render the same uninhabitable, whereby said messuage, tenement, and tract of land, being the close hereinbefore described, became greatly depreciated in value, and other

wrongs to the plaintiff then and there did, to the great damage of the plaintiff, to wit, the sum of fifteen thousand dollars. And the said plaintiff further complains of the said defendants, and says that the said defendants heretofore, to wit, on or about the 1st day of January, A. D. 1893, and on divers other days and times, before and since that date, and up to the time of the bringing of this suit, at the county aforesaid, with force and arms, by their officers, agents, superintendents, commissioners, supervisors, servants, and employes, filled up, elevated, and raised the grade and bed of the public road or highways running along the northern and western sides of the plaintiff's messuage and lot or piece of ground, being the premises and close hereinbefore mentioned and described, and also the grade of the county bridge across the river Lehigh at that point, the said public roads and highways being known respectively as 'Bridge Street' and 'Lehigh Avenue,' and by so filling up, elevating, and raising the grades of said respective streets or highways, and of said county bridge across the river Lehigh, and changing the grades thereof from the grades thereof theretofore established by law, raised a high embankment along and upon the northern and western sides of the plaintiff's messuage and lot of ground, being the premises aforesaid, and filled and threw in and upon the said premises of the said plaintiff large quantities of stone, earth, ground, and other foreign substances, the raising and throwing up of said embankments, and raising, elevating, and changing of the grades of said respective public streets and highways, to wit, Bridge street and Lehigh avenue, and of said county bridge across the river Lehigh, from the grade theretofore established by law, and filling up said streets or highways, being permanent structures, whereby ingress and egress to and from said premises of the plaintiff, being the premises aforesaid, and the said public streets or highways, has been interfered with and destroyed, and the proper drainage of the water on said streets or highways has been interfered with and destroyed, and the water from the same is forced and drained into and upon the premises of the said plaintiff, being the premises aforesaid, whereby the said defendants, by the several injuries and trespasses hereinbefore complained of, did, to a very great extent, injure, destroy, and depreciate the value of the plaintiff's premises, being the said messuage and lot of ground, and the dwelling house and other buildings thereon erected, hereinbefore mentioned and described, and other wrongs then and there did, to the great damage of the plaintiff, to wit, the sum of fifteen thousand dollars. And the said plaintiff says that, by the several wrongs and injuries herein alleged to have been done to her by the defendants, she, the said plaintiff, has sustained great damage, to wit, the sum of fifty thousand dollars,

for the recovery of which, with costs, this suit is now brought."

The assignments of error are as follows, viz.: "First. The court erred in overruling the first point of the county of Lehigh, as follows: 'Under all the evidence, the verdict must be in favor of the defendant the county of Lehigh. Answer. Negatived.' Second. The court erred in overruling the fourth point of the county of Lehigh, as follows: 'There was no evidence of any joint liability or tort, and the defendant the county of Lehigh being simply added and brought in after the inception of the suit, there can be no verdict against the said county of Lehigh. Answer. Negatived.' Third. The court erred in charging the jury as follows: 'A question has been raised before the court, and the ruling of the court has been requested, as to whether in this action there can be a recovery against the county of Lehigh because the county of Lehigh was not sued in the beginning, and because the transit company was sued for what would have been an unlawful act on its part if it had done what was alleged, to wit, the filling up and the entering on the plaintiff's property. This point we decide against the county, and we instruct you that if the plaintiff has suffered injuries by reason of that which you can consider on that point you can find against county of Lehigh. I instruct you that there can be no finding here against the transit company, nor against the township, nor against the Lehigh Valley Railroad. The county of Lehigh before verdict excepts to the charge of the court and the answers to points, and for it a bill is sealed.'"

O. J. Erdman and Thos. F. Diefenderfer, for appellant. John Rupp and Marcus C. L. Kline, for appellee.

GREEN, J. The learned counsel for the appellant, with entire candor, concede that if the plaintiff suffered damage, and had brought an action of case instead of an action of trespass, the county would be responsible. This was certainly ruled by this court in *Chester Co. v. Brower*, 117 Pa. St. 647, 12 Atl. 577. But they contend that no recovery can be had in an action of trespass, and they complain that the county was brought in by way of amendment, not having been made a party at the inception of the suit. So far as the amendment as to parties is concerned, it is not before us, because no assignment of error has been made on that ground. But the county was brought in by means of an alias summons duly served, and appeared by counsel, and pleaded to issue, and went to trial on the merits. Thereafter it could not be claimed that the county was not duly a party and bound by the proceedings. We do not concede that the amendment was not properly granted, but it is not necessary to discuss the question, for the reason above stated. The only matter seriously discussed by the appel-

lant is the right to recover in the present form of action. It must be conceded that there would have been much force in the appellant's contention prior to the passage of the procedure act of May 25, 1887 (P. L. 271), abolishing all distinctions between trespass and case. But in the case of *Duffield v. Rosenzweig*, 144 Pa. St. 520, 23 Atl. 4, we held that the effect of the act of 1887 was to abolish the distinctions between these actions, and that a recovery might be had in either form. Mr. Justice Clark, delivering the opinion, said: "We are of opinion that perhaps an action of trespass, technically so called, could not have been maintained, but by the act of May 25, 1887 (P. L. 271), the distinctions theretofore existing between actions of trespass, trespass on the case, and trover, so far as they relate to procedure, were abolished, and, although the plaintiff's statement sets forth his claim as in trespass, we cannot, in view of the provisions of the statute, distinguish in the form of the procedure one from the other. If the facts establish his right to recover in either form, therefore, he is entitled to judgment." It is true in the present case the action is in trespass, but the injury is consequential, and therefore at common law the remedy should have been in case. But the act of 1887 was intended to, and did, effect a radical change in the common law upon this subject, and, as held in the above-cited case, a recovery may be had in the action of trespass, although the injury sustained was formerly remediable only in case. As to the fact and quantum of the injury, the verdict is conclusive. The assignments of error are not sustained. Judgment affirmed.

MITCHELL, J. (dissenting). I am unable to concur in this judgment. It sanctions a change which is not an amendment at all, but a substitution of a new cause of action against a new party—a perversion of the statutes of amendment going far beyond any precedent however liberal. It is no answer to say that the county appeared, and thereafter is estopped from denying that it was a proper party. It had no choice in the matter. It was served with an alias summons, and pleaded under protest after the court had overruled its objection to being made party by the so-called amendment. These facts appear on the face of the record, and are brought before us by the second assignment of error. The appellant may be liable for damage done to plaintiff, but that fact should be ascertained by a proper action properly brought against it.

JACKSON et al. v. PHILADELPHIA TRACTION CO.

(Supreme Court of Pennsylvania. July 15, 1897.)

RAILROADS — INJURY TO PASSENGER — EVIDENCE.

In an action for injuries to a woman by falling from an open street car, the evidence for

plaintiff was that the car collided with a cart, and passed on rapidly, not being under control, and that after it had gone about 230 feet, and the speed had been slackened, plaintiff fell from the side of the car; there being no evidence of any jerk of the car, or other cause for her fall. For defendant, two passengers testified that, just before she fell, plaintiff was standing, though she had been warned to keep her seat. *Held*, that a binding instruction for defendant should have been given.

Appeal from court of common pleas, Philadelphia county.

Actions by Abbie E. Jackson and by George M. Jackson, her husband, against the Philadelphia Traction Company, for personal injuries to said Abbie E. Jackson, which actions were consolidated. Judgment on a verdict for plaintiffs, and defendant appeals. Reversed.

At Nineteenth and Walnut streets, a block or two before the car reached the scene of the accident, the motorman got off the car—an open, summer one—to turn a switch, and a carriage ran over his foot. There was no evidence who was to blame for this occurrence. He stepped back again upon the car, and, when asked whether he was hurt, replied to both the conductor and a sergeant of police, who was upon the front platform, "Oh, nothing serious," and went on. At Twentieth street the plaintiff got on. Just afterwards the motorman sank down on his knees, overcome by pain. The conductor stopped the car, and in a moment the motorman revived. He then went on again. As the car approached Twenty-Second street and the curve leading around to the north upon that street, the motorman fainted, and fell upon the front platform. A cart coming south on Twenty-Second street was just crossing the track. This the car struck, throwing it out of the way, throwing the sergeant of police off the car, and also bending the controller. The car was then stopped by the conductor. In the effort to stop it, he had first made his way to the front platform, and had there been unable to stop the car because of the bent controller. He had then rushed back to the back platform and pulled off the trolley pole, stopping the car in less than a block. The plaintiff was then seen lying in the street a few feet back of where the car stopped.

Thomas Leaming, for appellant. A. W. Horton, for appellees.

GREEN, J. The body of Mrs. Jackson was found lying on the street at the intersection of Sansom and Twenty-Second streets, Philadelphia, where the accident occurred, and it was there that she fell from the car. This was testified to by her husband, who was riding in an express wagon on Sansom street, west of Twenty-Second, and about 75 feet distant, when, as the car passed up on Twenty-Second, crossing Sansom, he saw a woman fall from the car. This is what he said: "I saw the car coming at full speed, and about the center, as near as I could judge,

of Sansom street, I saw a lady go out the side; and Mr. Rothfuss, that was sitting on the seat alongside of me, says to me, 'Look at that woman go out of the car.' I says, 'Yes; she has got a bad fall.' * * * Q. What did you see? A. I saw the lady go out of the— fall out of the car sideways. * * * I saw the car going up Twenty-Second street, north on Twenty-Second street, at, I should judge, at about its full speed, and I saw a woman fall out of the car on the east side." Peter Rothfuss, who was with Jackson in the express wagon, said: "I was sitting on the front of the wagon, and was looking towards Twenty-Second street, and I saw the car flying past, and, as it did, I says, 'Look at that car; there goes a lady out'; and I saw the lady falling towards the eastern side of the street." There was some other evidence to the same effect, which it is not necessary to repeat. So that it was proved by the plaintiff's witnesses, and denied by none, that the place where Mrs. Jackson fell from the car was at the intersection of Sansom and Twenty-Second streets, and that must be taken as an established fact. This being so, it is also a demonstrated fact that she was not thrown from the car by the collision of the car with the cart and mule, which occurred at the curve from Walnut street into Twenty-Second street. It was admitted on the trial that the distance from Walnut street to Sansom street is 230 feet. The car traveled that distance over a straight track, without any obstruction or collision of any kind, until it was stopped above Sansom street at about one-third of the distance between that street and Chestnut, the whole distance between those streets being also 230 feet. The contention that the plaintiff Mrs. Jackson was thrown off the car by the sudden stop is entirely untenable, because she fell off before the car stopped, while it was still in motion. The witness Thomas Smith testified that he stepped off the car just at Sansom street, while it was still in motion, and just as he stepped off he heard a crash of breaking glass, and, looking around, saw the plaintiff lying in the street. The car was then going at moderate speed, and stopped above Sansom street, as before stated. The injury to Mrs. Jackson was due solely to her falling or moving from the car. The only witnesses examined for the plaintiff as to her falling from or leaving the car were herself, her husband, and Peter Rothfuss, who was with her husband. She testified that she knew nothing about it; that, the next thing she knew after the collision, she was lying in the street, and some one asked her if she was hurt. The witness Rothfuss was asked: "Q. State all that you observed in reference to the woman from the time you first saw the car until the accident had happened. A. I just merely saw the lady falling out of the eastern side of the car, and the basket going in the middle of the track, and the bottles broke. She had a basket, and I saw the basket falling down, and

her after it." Her husband testified as before stated, and, in substance, his testimony was the same as that of Rothfuss. No other witnesses examined for her saw the fall, or saw her at all on the car. Upon all the testimony on her behalf, there is nothing to show how her falling from the car was induced, or why she fell. On the part of the defendant, however, there were two witnesses, both of them passengers, who saw her after the collision, and before the fall, and at the instant before the fall. One of them (Thomas Smith) was asked: "Q. At what time, if at any time, did you see this lady who was finally injured? A. When I was standing on the footboard, I looked towards the rear of the car, and saw this lady standing up between two seats, standing on the floor of the car, with a market basket on her arm. Q. And what, if anything, did you say, or did you hear anybody else say, to her, between Walnut and Sansom streets? A. I heard somebody warn her,—tell her to sit down, to keep her seat. Q. What did she do, if anything, that you observed, after that? A. After that, I faced forward, and stepped off into the street. Just as my foot touched the street, I heard a crash behind me, looked around, and the lady was in the street with her basket lying in the street. Q. A crash of what? A. A crash of breaking glass." The other witness, William R. McAdam, also a passenger, was asked: "Q. Did you see this lady, the plaintiff here, or any other ladies on that car, do any particular thing? A. I saw a lady in front of me, and after we passed the corner of Chestnut— Q. Walnut street? A. Twenty-Second and Walnut streets. I think the lady was standing up. Q. What did she do? A. I did not take any particular notice at that time. Q. What did you see her do afterwards? A. I did not see her do anything. I was not watching her then. Q. What part of the car was she standing on? A. Immediately in front of her seat. It seemed as if she had just raised up. Q. Did you notice anything about a basket, or anything that she had? A. Not until afterwards; no. Q. Did you hear any noise, or hear anything, in connection with the lady or her basket? A. Nothing at all, until the car was nearly stopped. Q. What did you see then? A. I saw the lady lying on the pavement on the east side, to the east of the car, and near her was lying her basket. Q. What did it have in it, if anything? A. It had glass in it. I could not tell, because the lid was on it; but I could tell from the rattling of the glass, the broken pieces, that there was glass there. Q. Did your car strike anything at all, do you know, after it left the corner of Walnut street, except the cart which had been struck? The Court: There is no evidence that it did, is there? Mr. Horton: No; we do not contend that it did." These five persons—the plaintiff, her husband, Rothfuss, Smith, and McAdam—are all the witnesses who testify to the fact of the fall. It must be borne in

mind that the plaintiff was in the car, uninjured, and in no more danger of injury than any other passenger, after the car had left Walnut street, and after the collision with the cart. The effect of whatever occurred on Walnut street, and up to and after the collision, had transpired, and no one was injured. The rapid progress of the car had been arrested, and it was under control. The injuries inflicted by the collision did not affect the plaintiff. At the moment of her fall the car was in quite moderate motion, and stopped entirely within two or three of its own lengths. How, then, is it possible to hold the defendant responsible in damages for the plaintiff's fall? Where is there any evidence of negligence which caused her fall? Neither she nor any of her witnesses gave any explanation as to how or why it occurred. They do not prove any act of negligence by which it was occasioned. It is of no consequence to inquire as to the action of the motorman or conductor on Walnut street, or at or before the collision, because those matters had all passed, and the plaintiff was uninjured. So far as the testimony on her side of the case goes, nothing but the fact of her fall was proved. No evidence was given of any act or omission which induced her fall. But, when the testimony of the other two witnesses is examined, there is no difficulty in accounting for the fall. They both say that she was standing on her feet on the floor of the car, and one of them says she had a market basket on her arm. She had already testified that when she entered the car on Walnut street she took the end seat on the north side of the car, and all the witnesses who spoke of the subject said the car was an open one, with the seats running lengthwise across the car. There was no contradiction of the testimony of the defendant's witnesses as to her standing position just before she fell. We have, then, upon the undisputed testimony, the case of a woman loaded with a market basket, who, having been sitting at the end of the seat of an open car, and being warned to resume her seat, not heeding the warning, suddenly falling from the car, and thus receiving her injury. A perfectly rational and natural cause of her falling is thus shown by testimony which fully accounts for it, and which is entirely undisputed. Had she remained seated as she was after she entered the car, and as the other passengers did, she would not have been injured. She was in an exposed position, where she might fall if she stood on her feet, but nevertheless she did so, although she was warned to resume her seat, and of course she took the risk of the consequences. We are quite unable to discover any negligence of the defendant which produced her fall, but we do see abundant testimony, entirely uncontradicted, which not only accounts for her fall, but establishes her own contributory negligence as the cause of it. Entertaining these views of the testimony, we are of opinion that a binding in-

struction should have been given to the jury to find a verdict for the defendant, as requested by the defendant's fifth point. Judgment reversed.

GARDNER et al. v. KEIHL.

(Supreme Court of Pennsylvania. July 15, 1897.)

PLEA IN ABATEMENT—FORMER ACTION PENDING—STATUTES—TRANSITORY ACTION.

1. The pendency of a prior action is the subject of a plea in abatement, and not of a motion to quash the second writ.

2. A plea in abatement alleging that a prior suit was pending when the second writ was issued, and not when the plea was called, is bad.

3. 21 Jac. I. c. 12, relating to actions against public officers, is not a part of the law of Pennsylvania.

4. An action of trespass against the sheriff is transitory, and not local.

Appeal from court of common pleas, Elk county.

Trespass by J. K. Gardner and W. H. Hyde, surviving partners as Hall, Gardner & Co., against Jesse Keihl. Summons quashed, and plaintiffs appeal. Reversed.

Harry Alvan Hall, G. A. Jenks, F. J. Maffett, and B. J. Reid, for appellants. C. H. McCauley and W. W. Ames, for appellee.

MITCHELL, J. It is to be regretted that the court below did not give us the benefit of its reasons for quashing the writ. Two grounds are set up by the defendant: First, that plaintiffs had a suit pending and at issue in Clarion county for the same cause of action at the time this suit was brought; and, secondly, that the cause of action is local, and not transitory.

As to the first ground, the judgment must be reversed for irregularity. The pendency of a prior action is the subject of a plea in abatement, not of a motion to quash the second writ. But as a plea in abatement the matters set up in the petition to quash would be insufficient, for they only allege that the first suit was pending when the second writ was issued, and not as is necessary when the plea was pleaded. *Toland v. Tichenor*, 3 Rawle, 320. Even if pending at the time the petition to quash was filed, the authorities are that plaintiff might discontinue the first suit, and reply that there was no such action pending. *Findlay v. Keim*, 62 Pa. St. 112. Leave to discontinue the first action, even nunc pro tunc as of a date prior to the second writ, was within the discretion of the court of Elk county, and the court of Clarion had no jurisdiction over that matter. The order quashing the writ was therefore irregular and void in any point of view, and must be reversed.

But the order was erroneous in substance as well as in form. The claim that the cause of action is local cannot be sustained. It is conceded that the action of trespass is transitory, and that this suit must fall within the general rule unless the fact that it is against the sher-

liff for an act done in the conduct of his office makes it an exception. But such exception can only be established by statute, or such reasons of public convenience as will compel the courts to declare it as part of the policy of the state. The only statutory authority adduced in this case is the act of 21 Jac. I. c. 12. This act does not in terms apply to actions against sheriffs, and it is not entirely clear that it has been construed to include them. It is not necessary to go into this question, however, as the act is not in force in this state. No instance of its application has been found by the industry of the learned counsel for the defendant, and it is not included in the list of English statutes reported as in force by the judges of this court. 3 Bin. 595. It is true that this omission is not conclusive against the statute, but it raises a presumption of very great weight. The report, as said by so eminent a lawyer as Mr. Binney, in printing it in his third volume, "deserves to be placed by the side of judicial decisions, being the result of very great research and deliberation by the judges, and of their united opinion. It may not, perhaps, be considered as authoritative as judicial precedent; but it approaches so nearly to it that a safer guide in practice, or a more respectable, not to say decisive, authority in argument, cannot be wanted by the profession." That is the view that has always been taken by this court, and, in citing any of the British statutes as ground of judgment, it has been considered sufficient to refer to that report as authority for their continuance as part of the law of the state. See *Finney v. Crawford*, 2 Watts, 294; *Kline v. Jacobs*, 68 Pa. St. 58; *Savage v. Everman*, 70 Pa. St. 315; *Frisbee's Appeal*, 88 Pa. St. 144; *Carson v. Cemetery Co.*, 104 Pa. St. 575. And though in *Warren v. Steer*, 118 Pa. St. 529, 12 Atl. 264, by a much to be regretted decision, an act reported by the judges was held no longer in force, and parties in ejectment were deprived of a most convenient and much-needed remedy, yet it was put on the express ground that the English statute had, since the report of the judges, been superseded by acts of our own on the same subject. The presumption against a statute by its omission from the report is not, of course, so strong as the presumption in its favor by its affirmative inclusion; but it is still of very great weight, and it is especially so in the present case, as the judges included the very next and one other section of the same act, showing that the act had passed under their consideration. In the absence of anything in the case to overcome the prima facie correctness of the judges' report, the presumption must prevail.

Nor do we find any sufficient grounds of public policy to make an exception in favor of the sheriff. No doubt, it is inconvenient to him to be sued out of his own county, but that is an inconvenience common to every citizen who, in leaving his home temporarily for business or pleasure, runs the risk of the personal service of a writ in trespass in another

jurisdiction. Moreover, the inconvenience is to the sheriff personally much more than to the citizens of his bailiwick, if indeed the latter have any appreciable interest in the matter at all. On the other hand, the public inconvenience might be very great if a defaulting sheriff at the end of his term could hold the aggrieved parties at defiance by simply moving across the county line. Judgment reversed and writ reinstated.

KELLEY et al. v. KELLEY.

(Supreme Court of Pennsylvania. July 15, 1897.)

WILLS—CONSTRUCTION—RIGHTS OF DEVISEES— MISJOINDER OF PARTIES—EJECTMENT.

1. Testator devised to two of his grandsons certain premises at the death of their mother, and provided that if either of the grandsons should die before their mother, or before they arrived at the age of 21 years, then the one living should possess and hold the farm, and in case both died before their mother, or before arriving at the age of 21 years, leaving no issue, then the property should descend to certain persons named. One of the grandsons died before his mother, at the age of 35 years, leaving a widow and children. The other grandson died after his mother, leaving a widow and children. Held, that the children of the son dying before his mother were entitled to a one-half interest in the farm.

2. The misjoinder of plaintiffs cannot be first urged on appeal.

3. Where plaintiffs' writ served on defendant averred a wrongful detention of possession of land from plaintiffs, the sheriff's return and defendant's plea of general issue were prima facie evidence of adverse possession, so that plaintiffs were not bound to affirmatively prove actual ouster.

Appeal from court of common pleas, Luzerne county.

Action by Lydia E. Kelley and others against Rachel Kelley. Judgment for defendant, and plaintiffs appeal. Reversed.

William S. McLean and T. D. Shea, for appellants. John T. Lenahan and James L. Lenahan, for appellee.

DEAN, J. This issue is an ejectment for a farm or tract of land known as the "Gould Farm," in Plymouth township, Luzerne county. It was part of the estate of Ezra Howard, who died in 1862, leaving to survive him a widow and two married daughters, and the children of a deceased daughter. One of the three, Harriet, was married to Thomas Kelley. When her father died, she had two sons living. One, Joseph B., when his grandfather made his will, in 1859, was 12 years of age; the other, George M., 9. Among other bequests in Ezra Howard's will is the following: "I also give and bequeath to my two grandchildren, Joseph Kelley and George Kelley, sons of Thomas and Harriet Kelley, all that farm known as the 'Gould Farm,' together with the dwelling house and all and severally the outbuildings belonging thereunto, lying in the township of Plymouth, county of Luzerne, and state of Pennsylvania, at the death of

their mother, Harriet Kelley; and I also further ordain and bequeath that my daughter Harriet Kelley, wife of Thomas Kelley, shall have, hold, and possess the whole of the above farm, with all the rights and title I now possess, during the term of her natural life; then, and not till then, shall my grandchildren Joseph and George Kelley aforesaid possess and enjoy the same; and furthermore, if in case either of my grandchildren Joseph and George Kelley shall die before their mother, or before they arrive at the age of twenty-one years, then the one living shall possess the whole of the above farm, and in case both die before their mother, or before they arrive at the age of twenty-one years, leaving no issue, then I ordain and bequeath the whole of the above-described property to my grandchildren Loretto Gould, Sarah Gould, Anna Gould, Orange Gould, and Elijah Gould, sons and daughters of Thomas and Hannah Gould aforesaid, and to my two grandsons, Ezra and Sharp Snyder, being seven in number, share and share alike." Joseph Kelley died in 1882, before his mother, at the age of 35 years, leaving a widow, to whom he was married after he came of age, and children. The mother died in 1886. George M. died after his mother, leaving a widow and children. They are in possession of and claim the Gould Farm, to the exclusion of the widow and children of Joseph, these plaintiffs, who bring ejectment for the undivided half. Decision of the issue was submitted, under the act of 1874, to the judge of the common pleas, who, under his interpretation of the clause in the will just quoted, entered judgment for defendant; and plaintiffs appeal, assigning for error the conclusion of law by the court.

What was the intent of the testator, as expressed in his will? We must ascertain his intent from his words, but in so doing we must adopt the sense in which he used the words; that is, if, in the use of certain words, he attributed to them a meaning different from the lexicographer's definition, we must adopt the testator's meaning. The educated man or lawyer might have chosen different words, and a wholly different collocation of them, to express the same intent; but this is not controlling, if the intent be manifest, though that intent is not in exact accord with technical definition. But few wills drafted by illiterate men, as was this one, could be carried into effect according to their real intent, if interpreted strictly by pedagogic rules. And, in arriving at the true meaning of such language as is used in this will, we must take into view the surroundings of the testator at the date of his will, the objects of his bounty, and the character and value of his estate.

It is apparent from a perusal of this will that the first thought was of his wife. He intended that during her life she should be made as comfortable as his estate warranted. Then the second and the dominant thought is equality of distribution among his children and

grandchildren per stirpes, as nearly as possible. Mary Snyder, one of the daughters, at the date of the will was dead, leaving two children. These were devised what would probably have been their mother's share had she been living. To his living daughter Hannah Gould he devised a farm, subject to a life estate in her aged mother. To his two grandsons Joseph and George Kelley, sons of his daughter Harriet, he devised the farm in dispute, subject to a life estate in their mother. Up to this point it is all plain sailing, but then comes troubled water. It occurs to testator that it will be 12 years before one of these boys becomes of age, and 9 years before the other reaches the same period. What if one should die before coming of age, and his mother still be living? Then the father, Thomas Kelley, comes into enjoyment of the son's estate. Looking through the whole will, there is a manifest intention to exclude this son-in-law from any participation in the property. He devises to his daughter Hannah Gould, absolutely, a farm, leaving open to her husband, Thomas Gould, all his rights as tenant by the curtesy, or under the intestate laws; but in the provision for Harriet he effectually shuts out her husband from all claim. It then occurring to testator that the death of either grandson, before 21, the mother still living, will give to Thomas Kelley, the father, an interest, he undertakes to guard against that result, and says, in case either "shall die before their mother, or before they arrive at the age of twenty-one years, then the one living shall possess the whole of above farm." The contingency did not happen. By the juxtaposition and grouping of the words in the paragraph, the contingency intended to be provided for was a disposition of the estate in case of death of one of the devisees during minority; and to carry out the intent the three events, death of one, minority, and survivorship of the mother, must concur. And, while the intent would have been indisputable if the conjunctive "and" had been used, yet the use of the disjunctive "or" in that connection does not obscure or pervert it. In fact, taking the whole paragraph, the intent is plain, by the use of either conjunction, or without either. That express contingency which he sought to anticipate and provide for did not happen. There was not the death of either during minority. He was not thinking of a provision disposing of the estate after majority, and in that immediate connection says nothing on that subject; for he had already provided for that in the preceding part of the clause, devising them an absolute estate, subject to the life estate of their mother. If the testator could have foreseen that neither of his grandsons would die during minority, no such provision would have appeared in his will, for, as it has turned out, it is useless.

Then comes the second thought. He has provided for one contingency,—the death of either before 21, the mother living,—by devolving the whole estate upon the surviving brother. But another contingency occurs to him. Sup-

pose both should die before 21, their mother surviving; then the father, Thomas Kelley, would come into a still larger portion of his estate. He seeks to further guard against this result, and says: "In case both die before their mother, or before they arrive at the age of twenty-one years, leaving no issue," then the estate shall go to collateral relatives. To save, if possible, such an undesirable result, he adds one more obstacle, "leaving no issue." Although it was improbable that boys under 21 would marry and have children before that age, still it was a possibility; and to exclude the father, and make the contingency of their share falling to cousins who had already been provided for more remote, he adds another condition. To give effect to this intent, four events must concur: The death of George before 21; the death of Joseph before 21; failure of issue as to both; survivorship of the mother. As in the first provision, each event must concur with the others before the particular intent can be given effect. This contingency, in the mind of the testator, thus expressly provided for, never did happen. They did not both die before 21, without issue, leaving surviving their mother. The provision, so far as it affects the distribution of the estate, might as well have been left out. Both sons reached the age of 21 years. Nothing in the will divests their estate after that happens. It is theirs absolutely, subject only to the life estate of the mother. Joseph died at the age of 35 years, leaving a widow and children, his mother being still living. Therefore his undivided interest in the farm then passed under the intestate laws, and after the death of Joseph's mother his children were entitled to possession.

No other interpretation of this paragraph of the will can be adopted without leading to unreasonable conclusions, and, however illiterate may have been this testator, an entirely reasonable intent is obvious. Nor does his mode of expression to any great degree obscure his intent. To give the word "or" the effect urged by appellee and adopted by the court below leads to this conclusion: If the sons marry, have issue, and die before 21, their mother surviving, such issue shall inherit their father's estate; but if they reach the age of 21, then marry and die, leaving issue, their mother surviving, the estate shall not go to such issue, but to their cousins. The testator had no such absurd intent; yet this, if appellee's interpretation be adopted, would have been the result, if the mother had survived both sons. The children of both would have been disinherited because their parents married in manhood, and died before their mother. Both, however, would have saved the inheritance, if they had married in infancy, and had begotten children before the age of 21 years. It was not the object of testator to put a premium on boyish procreation. The eventual disposition of the property in case of the death of the devisees, or either of them, during minority, was all he sought to provide for; and, the contingencies

not having happened, the sweeping devise of a fee subject to a life estate, in the first part of the clause, remained in full force as to both grandsons. The many authorities cited by counsel for appellant in which the word "or" has been read "and," and by counsel for appellee where the court has refused to treat it other than disjunctive, are not without weight, and we have considered them; but in not a single one of the cases cited has the will under consideration borne such resemblance to the one before us as to cause us to adopt it as a pointed and binding precedent. The case of *Holmes v. Holmes*, 5 Bin. 252, approaches nearest our case, and the whole question is there so fully and ably discussed by each of the three judges who heard the cause that we need only call attention to it. The majority of the court, in interpreting that will, read the word "or," "and." It is there admitted that it is useless to cite cases on wills as authority for interpretation unless the instruments and surroundings of the testator are similar. That and the long line of cases following it have established the principle that no inapt words, nor any misuse of proper words, will be destructive of the plain intent, as ascertained from the whole will.

As to the point raised for the first time on argument in this court, that the widow was not a proper party plaintiff, that should have been taken advantage of in the court below. After a hearing and judgment on the merits, such misjoinder will not be held fatal here. Also, the point is made that plaintiffs were bound to prove affirmatively actual ouster from possession. We do not think so. The plaintiffs' writ served on defendant averred a wrongful detention of possession from plaintiffs. The sheriff's return and defendant's plea of the general issue was *prima facie* evidence of adverse possession by defendant. No evidence was offered by defendant to rebut this presumption of hostile possession, and therefore plaintiffs, without further evidence, could stand on the presumption which the act of assembly raises in their favor by the sheriff's return. It is directed that the judgment of the court below be reversed, and judgment is now entered in favor of plaintiffs and against defendant for the undivided one-half of the land described in the writ.

VAN BAMAN et al. v. GALLAGHER et al.
(Supreme Court of Pennsylvania. July 15,
1897.)

COUNTIES—PUBLIC BUILDINGS—LIMITATION OF
INDEBTEDNESS.

1. A soldiers' monument is not a public building, within Act April 19, 1895 (P. L. 38), requiring the county commissioners, in the erection of county buildings, to let the work to the lowest bidder.

2. Where the annual revenue of a county from assessments for county purposes, together with the cash on hand and amount due, was largely in excess of the county liability, including the amount due under the contract in controversy.

such contract is not in conflict with Const. art. 9, §§ 8, 10, relating to the increase of municipal indebtedness.

Appeal from court of common pleas, York county; John W. Bittenger, Judge.

Bill by M. L. Van Baman and others against Edward Gallagher and others. Decree for plaintiffs, and defendants appeal. Reversed.

The following is the opinion of the court below:

"This hearing was fixed and had for the purpose of determining whether the injunction issued on the 26th day of December, 1896, should be continued, or whether it should be dissolved. The evidence shows that Alowese Gruver, one of the defendant commissioners, refused to sign either of the contracts mentioned in this bill, for the reason that there were no funds in the treasury for the erection of the monument. His course in this matter was prudent and legal, and the injunction is dissolved against him. The course of the other two commissioners cannot be approved. They signed the contract of December 4, 1896, without any advice from their legal adviser, H. C. Brenneman, the county solicitor. The act was done without his knowledge, and was concealed from him. He was not consulted concerning the contract of the 21st of December, except that the contract itself was shown to him, and he added a clause protecting the county against a payment of twenty-five per cent. of the amount of the cost of the monument on the 24th of December, 1896, before the commencement of the work, and before the execution of a proper bond. This addition to the terms of the contract provided that no money should be paid before the approval and acceptance of a proper bond. Both contracts were furnished by the contractor, Edward Gallagher, the drafts for the same having been prepared in Philadelphia, and brought here by him, and typewritten in York. The last-mentioned contract provided for the payment of \$23,550 for the monument completed according to the specifications. Neither the county solicitor nor any member of the advisory committee appointed to aid in selecting or adopting a design of the monument was consulted before the execution of the contracts, except, as above stated, as regards the county solicitor, and as regards J. A. Dempwolf, who it is in evidence was employed as architect by the county commissioners. No competitive bids were invited or received, and no inquiry is shown to have been made by the commissioners, except from J. A. Dempwolf, already mentioned, who was the architect for the drawing of the plans and specifications, and in the construction of said monument, as to the probable amount for which the monument could be erected,—that is, there were no inquiries made as to the probable amount the monument could be erected for, with the exception named, from experts or from others,—but the contract, involving the expenditure of \$23,550 of the moneys of the taxpayers of the county, was executed under the circumstances

stated, without a public letting, or any proper inquiry or investigation. The amount demanded by Edward Gallagher, the contractor, was promptly accorded, without an objection or a quibble by either of the two commissioners defendants, as appears by the testimony of Edward Gallagher. He was not even asked if that was the lowest price that would be accepted by him; and the large sum of 25 per cent. of the amount of the cost of the monument was to be paid him before the commencement of the work, and before the materials were furnished. Common prudence would have required full inquiry in regard to the value of a matter of this important character, the value of which the commissioners are not shown to have been familiar with, and which they could not know without proper inquiry. Even if not required by express enactment, the contract should have been publicly given out to the lowest and best bidder. It is apparent that no man of ordinary prudence and intelligence would contract for a one hundred dollar headstone or monument in the manner it appears that William Cunningham and Jacob Leithelser contracted for the magnificent monument to be erected by the county, whose business the commissioners are to faithfully transact, and whose interests they are to guard, and whose rights they must protect.

"While no actual fraud on the part of the two commissioners who executed these contracts has been shown, excepting by circumstances which point in that direction, gross negligence akin to fraud has been fully established by the facts proven. The price to be paid is excessive. What boots it that several witnesses, including the defendant Gallagher, granite workers and dealers, whose interest is to sell the least monument for the most money, testify that \$24,000 is a fair price for the monument, when A. B. Ebaugh, a responsible granite worker and dealer, resident in York, with the same interests, stands ready to complete the same contract at \$19,000, and to give a bond in \$25,000 for the faithful execution of the contract, and stood ready and willing to do so at the time the contract was executed? The act of April 19, 1895 (P. L. 88), provides as follows: 'That whenever the commissioners of any county are authorized and required to erect a court house, jail, or other county building, they shall submit the plans and specifications adopted by them to the judges of the court of common pleas of the proper county for their approval, and when it is obtained they shall let the work by contract to the lowest and best bidder, after three weeks' public notice in two newspapers published in the county, which contract or contracts shall be made subject to the approval of the said judges.' We regard this structure as covered by this act of assembly. The monument is an additional building to those enumerated in previous or other acts of assembly. Before it can be built the project must receive the approval of two grand juries and the court, as is required in the case of other coun-

ty buildings. These preliminary steps were regularly taken. The monument must be erected by the commissioners of the county out of the county funds, at the county seat, to the memory of the soldiers and sailors of the late war of the Rebellion from said county. It is to be in the custody of the county authorities, and maintained and kept in repair by them. True, it is not to be occupied by the living for any business or other purpose, such as are the county court house and the jail, but it is to perpetuate the memory of those from this county who risked their lives that the nation might live, and who patriotically sacrificed their comfort and health, and many of them their lives, on the altar of their country. Too much honor cannot be done them, and no one will question the wisdom of the act of assembly. But let it be faithfully executed, as required by the constitution and the laws. Anderson, in his Dictionary of Law, on page 139, defines a 'building' as follows: 'A structure of considerable size, intended to be permanent, or at least to endure for a considerable time.' Reference is also made to the definition of the words 'building' and 'monument' in Bouvier's Law Dictionary and the Century Dictionary, in which the definitions are more fully set forth than in the authority which I have just cited (Anderson's Law Dictionary). This structure proposed to be built is to be a permanent building to perpetuate the memory of the soldiers and sailors, in whose honor it is erected, for all time. It is a costly building, of the most sacred and cherished character. The commissioners are therefore required, under the act of assembly, 'to let the work to the lowest and best bidder, after three weeks' public notice in two newspapers published in the county, which contract or contracts shall be made subject to the approval of the judges.' This contract is also made in violation of the tenth section of article 9 of the constitution of Pennsylvania, which is as follows: 'Any county, township, school district, or other municipality, incurring any indebtedness shall, at the or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof within thirty years.' It is also in violation of the act of assembly of 1874, made in pursuance of the constitution, in reference to the increasing of debts of municipalities under that clause of the constitution cited. The evidence clearly shows that there is an outstanding contract for a bridge over the Codorus creek, on College avenue, for \$46,000 or \$47,000, in round figures, \$40,000 of which is yet unpaid; also a contract for iron cases in the register's office, with a present existing county debt, of over \$6,000, together with other indebtedness not necessary to enumerate. This contract cannot be executed without largely increasing the county debt, which is unconstitutional in the absence of a compliance with the constitution and the act of assembly approved the 20th day of April, 1874 (P. L. p. 65). No provision

has been made for the payment of this increase of the debt, or the interest on the same. And now, January 1, 1897, for the reasons stated, the special preliminary injunction issued on December 28, 1896, is dissolved as regards Allowese Gruver, one of the defendants, and continued as to William Cunningham, Jacob Leithelser, and Edward Gallagher, the other defendants, until the final hearing of this case."

J. W. Heller, J. S. Black, and B. F. Fisher, for appellant. James W. Latimer and Henry C. Niles, for appellees.

STERRETT, C. J. This taxpayer's bill was brought to restrain the execution of a contract between appellant and the county commissioners for the erection of a monument, under the act of May 22, 1895, which provides "that upon the petition of at least fifty citizens to the court of quarter sessions of any county * * * for the erection or completion of a monument in memory of the soldiers and sailors of the late war, it shall be the duty of said court to lay the petition before the grand jury, and, if approved by two successive grand juries and said court, the county commissioners shall be authorized to erect or complete any monument now partly erected but not completed, and maintain at the county seat a suitable monument in memory of the soldiers and sailors of the late war of the Rebellion from said county." Act May 22, 1895 (P. L. 96). All the conditions precedent to official action of the county commissioners, such as presentation of the petition, approval thereof by two successive grand juries and the court, etc., were fully complied with before the contract was made. For reasons which sufficiently appear in the opinion of the learned president of the court below, a preliminary injunction was granted, and by subsequent decree continued until final hearing. From that decree this appeal was taken by one of the defendants, Edward Gallagher, whose contention is that no sufficient ground for such injunction was shown. One of the reasons assigned by the court below, in support of its decree, is that the contract in question is invalid for want of compliance with the act of April 19, 1895 (P. L. 38), requiring county commissioners, in the erection of "a court house, jail or other county building," to let the work to the lowest and best bidder. This conclusion was made possible only by the learned judge's assumption that the proposed monument is or will be a "county building" within the act. In that he was clearly mistaken. The provisions of the act have no application to structures such as that under consideration. In *Society of Cincinnati's Appeal*, 154 Pa. St. 621, 26 Atl. 647, the meaning of the word "building," in the clause of the act of March 11, 1816, prohibiting the erection "of any sort of buildings" on part of Independence Square, was con-

sidered by this court, and in an opinion by our Brother Mitchell it was held that the Washington Monument, finally located in Fairmount Park, and recently dedicated with imposing ceremonies, was not a "building," within the meaning of said prohibitory clause. It was there said: "The proposed monument is not a 'building' within the prohibited condition. A monument may take the shape of a memorial hall or other building, but that is not the general use of the word, and will not be presumed. A statue on a pedestal, even though the latter be large, is not a 'building,' in the proper meaning of the term." This construction of the word "building" is not only reasonable, but in full accord with the general understanding; and, in the absence of a clearly-defined intention to the contrary, it should be given controlling effect in the interpretation of the legislative will. No such contrary intent is apparent here, and we therefore think the court below erred in holding that the act of April 19, 1895, has any application to the facts of this case.

Another reason given by the learned judge of the common pleas is that the contract was made in violation of sections 8 and 10 of article 9 of the constitution, and of the law regulating the mode of increasing municipal indebtedness. We find nothing in the record that warrants any such conclusion as this. The undisputed evidence shows that the total aggregate valuation of property taxable for county purposes for the years 1896 and 1897 was \$42,865,430. On December 21, 1896, when the contract was signed, there was in the county treasury, approximately, \$12,000 cash, \$30,000 due from the state treasurer, and \$13,000 overdue taxes. As against this there were outstanding, —bonds, \$76,000; a bridge-contract balance, about \$40,000; and for office furnishings, \$3,000. The contract price of the monument was \$23,550. These items in the aggregate are very much less than the per centum authorized by the constitution. Two per centum on the assessed valuation would be \$857,308.62. The evidence further shows that the annual revenues of the county from assessments made for county purposes, together with the sum received annually from the state treasurer as the county's proportion of taxes collected, etc., would aggregate at least \$200,000 for the year 1897. The taxes levied by the commissioners for that year, together with the cash on hand and amounts due, were very largely in excess of the county's liabilities, including the contract price of the monument. The only conclusion that can be fairly drawn from the evidence before us is that the contract in question does not in any manner come in conflict with the constitutional provisions above referred to or those of the act of 1874. *Reving v. City of Titusville*, 175 Pa. St. 512, 34 Atl. 916; *Wade v. Oakmont Borough*, 165 Pa. St. 479, 30 Atl. 959; *City of Erie's Appeal*, 91 Pa. St. 398.

Further elaboration of the questions suggested by the court below is neither necessary nor desirable. It is sufficient to say that the case, as presented to us, discloses no sufficient ground either for granting or continuing the injunction. It is virtually admitted by the court below that the allegations of fraud were not proved. It is scarcely necessary to say that proof of suspicious circumstances, if any there be, is not enough. The decree continuing the injunction is reversed and set aside, and the preliminary injunction is dissolved; and it is ordered, adjudged, and decreed that the costs, including the costs of this appeal, be paid by the plaintiffs.

SCHUYLKILL COUNTY v. PEPPER.

(Supreme Court of Pennsylvania. July 15, 1897.)

COUNTY TREASURER—COMPENSATION.

A treasurer of a county having more than 150,000 inhabitants, being a salaried officer, cannot appropriate to his own use fees for the performance of any duty cast upon him by law, under Const. art. 14, § 5, providing that county officers who are salaried shall pay all fees which they may receive into the treasury of the county or state, and that in counties of over 150,000 all county officers shall be paid by salary, and Act March 31, 1876, prohibiting officers in such counties from receiving for their own use any fees for any official services whatsoever, except for the use of the proper county.

Appeal from court of common pleas, Schuylkill county.

Action by Schuylkill county against Thomas Pepper. Judgment for plaintiff. Defendant appeals. Affirmed.

Wm. A. Marr, for appellant. C. E. Berger, County Sol., and J. O. Ulrich, for appellee.

DEAN, J. Thomas Pepper, defendant, was the duly qualified county treasurer of Schuylkill county for the year 1891. The county auditors who settled his accounts for that year found a balance due from him to the county of \$1,868.73. This balance was made up of the following items:

Boroughs' and townships' share of liquor licenses.....	\$1,293 40
Commissions on county's share of liquor licenses.....	132 58
25 cents on each of 700 liquor licenses	175 00
25 cents on 1,071 mercantile, billiard, etc., licenses.....	267 75
Total	\$1,868 73

The defendant appealed from this settlement to the court of common pleas. On hearing, the court struck off the last two charges against him, reducing the balance to \$1,425.98, for which amount, with interest from December 31, 1892, judgment was entered. From that judgment the treasurer appeals to this court.

It will be noticed the judgment now stands for commissions on that part of the liquor licenses paid to the boroughs and townships,

and on that part retained by the county under the act of June 9, 1896, which directs that "in cities, the sum of one hundred dollars, in boroughs and townships, one-fifth of the amount of the license shall be paid to the treasurers of the respective counties, for the use of the counties, and the balance shall be paid to the respective boroughs and townships for their respective use." The treasurer claims that the commissions retained by him were for services rendered the different boroughs and townships, which were in no way connected with his official duty to the county, and therefore the court erred in finding these commissions should be paid to Schuylkill county. The treasurer is a county officer of a county having more than 150,000 inhabitants. Under the act of 1876 his salary was fixed at \$4,000, and this, by act of 1895, was increased to \$5,000; so that he comes within the plain provisions of section 5 of article 14 of the constitution of 1874, which declares: "The compensation of county officers shall be regulated by law, and all county officers who are or may be salaried shall pay all fees which they may be authorized to receive into the treasury of the county or state, as may be directed by law. In counties containing over 150,000 inhabitants, all county officers shall be paid by salary." As we have several times decided, the intent of this provision is so manifest that there is no room for mistake or doubt. The old fee system had become intolerable. It held out a constant temptation to extortion upon the public by the officers. Therefore, as far as it was practicable to do so, the constitution enjoined its abolition. In those large counties where the wrong was most grievous, the evil, under this command, must be remedied immediately; and, with the growth of population, it was supposed that, in a comparatively few years, many more of the counties of the commonwealth would come under its wholesome provisions. The act of 1876 was, as itself declares, passed to carry this constitutional provision into effect. It enacts that, in all counties containing over 150,000 inhabitants, all legal fees received by the county officers shall belong to the county, except taxes and fees levied for the state, and prohibits every county officer from receiving for his own use, or for any use or purpose whatever, except for the use of the proper county or for the state, any fees for any official services whatsoever.

The constitutional mandate and the legislative enactment are so plain that there is no room for construction. Salaried county officers can appropriate to their own use no fees for the performance of any duty cast upon them by law. We so decided in *Pierle v. Philadelphia*, 139 Pa. St. 573, 21 Atl. 90; *McCleary v. Allegheny Co.*, 163 Pa. St. 578, 30 Atl. 120; *Com. v. Mann*, 168 Pa. St. 298, 31 Atl. 1003; and in other cases. As we have more than once noticed, the case of *Philadelphia v. Martin*, 125 Pa. St. 583, 17 Atl. 507,

has no bearing on the question before us. That case is authority for the point decided, which was that, under the facts, the services were rendered the state, and in that particular he was the agent and officer of the state. That case was heard before the late Judge Allison, who filed an exhaustive opinion, and the judgment was affirmed per curiam by this court. Some of his remarks, in discussing the issue, would tend to sustain the position of appellant here; but these were not necessary to a decision of the point before him, and were not intended to be adopted by this court. The judgment in that case rests solely on these reasons: That the officer acted by authority of an act of assembly as the agent or officer of the state, although not designated by law as a state official. The case was cited and relied on by the officers in all the cases which have come before us since. It has never been recognized as an authority for any other issue than that raised by the particular facts of it. Now, again, this appeal is founded upon it; and we again decide that it has no bearing on the issue. The state may, by law, appoint any county officer its agent for the transaction of its business, and, as such state officer or agent, he may be entitled to fees for such services; but, for the performance of any and every duty as a county officer, the fees must be paid into the county treasury. The plain letter of the law and public policy demand that the commissions retained by the treasurer out of the boroughs', townships', and county's portion of liquor licenses should be turned into the county treasury, because he received them as a county officer. As to the nature of his duties and his relation to the county by virtue of his office, that question was directly ruled in *Potter Co. v. Oswayo Tp.*, 47 Pa. St. 162. There the county treasurer, as is authorized by law, received the township's taxes on unseated lands in the township, and went out of office without paying over the money. The township, on the assumption that he was a county officer in receiving its money, sued the county directly for the amount claimed. The county defended on the ground that, in receiving these particular taxes, he acted for the township, and was not, as to this money, a county officer, for whose default the county was answerable. It was held that he had received the money in his official capacity as county treasurer, and the county must make good his default. That decision has never been questioned. Under it, if, in the case before us, the county treasurer has made default in payment of these liquor licenses to the townships or boroughs, the county would have been held liable for his default, on the ground that, in receiving them, he was a county officer. As to the 25 cents fee received on each license, and stricken off by the court below, the county has taken no appeal, and we express no opinion on that question. The judgment is affirmed.

CITY OF CHESTER, to Use of ROSS, v.
EYRE et al.
(Supreme Court of Pennsylvania. July 15,
1897.)

**MUNICIPAL CORPORATIONS—PAYMENTS—AUTHORITY
TO CONSTRUCT—RATIFICATION—LIEN—CLAIM—
DESCRIPTION—COUNCIL COMMITTEES—AUTHORITY
OF MEMBERS.**

1. The effect of an ordinance directing abutting owners to pave a street cannot be abrogated by declarations of individual members of a committee of the council to the effect that the paving would not be then required of the owners.

2. It is no defense to a municipal lien for the cost of paving a street that the work was not authorized before it was done, where the council, on its completion, fully accepted it.

3. It was proper to file against an entire square a claim of lien for paving a street bounding but one side of the square, where the property belonged to one person, and was used as a whole, and there were no division lines across it.

Appeal from court of common pleas, Delaware county.

Scire facias by the city of Chester, to the use of Michael Ross, against Martha S. Eyre and others, on a municipal lien for the grading, curbing, and paving of both sides of Eighth street in said city from Barclay street to Concord avenue. From a judgment for plaintiff, defendants appeal. Affirmed.

Following are the specifications of error, viz.:

"(1) The court erred in dismissing the following exceptions to the report of the referee, and in not sustaining the same:

"The referee erred in his rulings upon the admission and rejection of evidence, viz.: In overruling defendants' offer of evidence. The evidence rejected being as follows:

"Defendants' Offer. It is admitted the sidewalk committee is the proper committee referred to in the ordinance of January 6, 1890, and defendants offer to prove that the paving, grading, and curbing for which the lien was filed in the above case was not done under the instructions or directions of the sidewalk committee, but, on the contrary, that committee had decided that the paving for which the lien is filed need not be done by the defendants. Plaintiff objects. The objection is sustained for the reason that the only question in this case is whether or not the work for which this lien was filed was done as was required by the subsequent ordinance of September 22, 1891. Exception noted.

"Jacob Craig, Jr., called and affirmed. Examined by Mr. Dickinson. "Q. You are now city treasurer of the city of Chester? A. Yes, sir. Q. In the fall of 1891, and spring of 1892, what connection had you with the city government? A. Member of select council. Q. And a member of what committees? A. Member of finance committee, sidewalk committee, and public property. Q. Do you recall an application having been made to the committee on sidewalks, acting in conjunction with the committee on streets, made you, by me, on behalf of the Eyre estate, relative to the question of paving the south side of

Eighth street, between Barclay and Fulton?" Mr. Booth objects. Objection overruled. Exception noted. Witness not to go into any statement. "A. Yes. Q. Did the sidewalk committee at that time keep any minutes or records of what it did?" Mr. Booth objects. Objection overruled. Exception noted. "A. I don't remember that it did. Q. I wish you would state what was decided by the committee with respect to whether the Eyre estate would be required or not required to pave the south side of Eighth street between Barclay and Fulton, under the provisions of the ordinance of September, 1891." Mr. Booth objects. Objection sustained. Exception noted. Defendants offer to prove by this witness that he was a member of the sidewalk committee in 1891 and 1892, that the sidewalk committee, under the custom and practice of councils, is made up by the committee on sidewalks from both the select and common council, and is presided over by a joint chairman; that the committee considered the question of the requirement of the paving on the south side of Eighth street, between Barclay and Fulton, along the Eyre estate property, and decided in committee that the defendants should not be required to do the paving until the sidewalk committee should so direct them, when, in their judgment, they deemed it proper; that the witness, as one of the members of the sidewalk committee, was called in at a conference between O. B. Dickinson, acting for the defendants, and Thomson, the commissioner of highways, and informed the highway commissioner of the action of the committee, and that it had been decided that the paving would not be required to be done; that the understanding between the sidewalk committee and the defendants was that they were not to do the paving unless they should subsequently receive notice from the committee, when the committee decided to have the paving done; that the committee never did so decide, and never gave the notice. This is to be followed up with evidence from the records and minutes of council that a communication on the subject was received in each branch of council on March 7, 1892, from the defendants, and was referred by each branch of council to the sidewalk committee, and was acted upon by the committee, and the decision reached as above stated, and that a report of the action of the committee was made to and accepted by councils; and to be further followed up by the testimony of Alfred Brown, the joint chairman of the sidewalk committee, that he never directed, nor did the committee direct, the paving to be done on the south side of Eighth street, but, on the contrary, the committee had decided, and he had so directed, that it should not be done unless the committee subsequently so ordered, and that they never did so order. Mr. Booth objects to the offer. Objection sustained, and exception noted for defendants.

"Mrs. M. S. Knowles, called and affirmed.

Examined by Mr. Dickinson. "Q. You are one of the defendants in this case? A. I am. Q. Did you have any conversation with any of the members of the sidewalk or street committee of councils with reference to the paving on the south side of Eighth street, between September 22, 1891, after the ordinance was passed, until June of 1892, when you left Chester?" Mr. Booth objects. Objection sustained. Exception noted. Defendants propose to prove by this witness the action of the sidewalk committee and the joint meeting of the sidewalk and street committee, by which it was decided that the paving on the south side of Eighth street would not be required, and that the witness was so notified by different members of the committee. Mr. Booth objects. Objection sustained. Exception noted.

"Albert D. Brown, called and affirmed. Examined by Mr. Dickinson. "Q. Where do you reside? A. No. 131 East Third street, Chester, Pa. Q. Were you a member of city councils of Chester in 1891 and 1892? A. I was. Q. On what committees were you during 1892? A. Corporation, chairman of sidewalk committee, and street committee, and joint chairman of the three combined. Q. As I understand that each branch of council has its own committee and a chairman of the committee, then there is a joint chairman elected for the two committees?" Mr. Booth objects. Objection overruled. Exception noted. "A. Yes, sir. Q. Who was joint chairman of the sidewalk committee? A. I was. Q. Do you know William P. Thomson? A. I do. Q. And what was his official connection with the city government in 1892? A. Commissioner of highways. Q. Were you chairman of the sidewalk committee in 1891? A. I was. Q. Mr. Thomson has testified here that some time, the date of which he does not remember, or did not give, he received notice from you orally that he should have the sidewalk on the south side of Eighth street, being at the rear of what is known as the 'Eyre property,' paved. State whether that is correct. A. What do you mean by 'orally'? Q. By word of mouth. A. I would say not. I generally wrote my orders to him of whatever I had to do. Q. It appears by the minutes of council that on March 7, 1892, a communication was presented in each branch of council from O. B. Dickinson, representing the Eyre estate, which, by the minutes, was referred to the sidewalk committee. Do you remember receiving such a communication? A. I had of that nature; yes. Q. Have you made any investigation to learn whether or not you still have that, and whether you can produce it? A. That I cannot say. I had a great many of those, and I have been cleaning up for the past two weeks, but I have not been able to find it. Q. Have you made a search for that paper? A. I have. Q. Were you able to find it? A. I was not. Q. Do you remember what it contained?" Mr. Booth objects. Objection sustained. Exception noted. Defend-

ants propose to prove by this witness, and to contradict Wm. P. Thomson wherein he testified that Mr. Brown, as chairman of the sidewalk committee, gave him orders to have the paving, grading, and curbing on the south side of Eighth street, referred to in his testimony, done, and that Mr. Brown told him that he was to take his orders from him (Mr. Brown), and was not to mind what Mr. Craig or any of the other members of the committee told him to do. I propose further to show by this witness that the communication which was received by city councils on March 7th, and which was referred to the sidewalk committee in each branch of councils, was considered by the committee in joint session, and that it was there decided by the committee that the paving on the south side of Eighth street was not to be done, and that Mr. Brown, by direction of committee, so reported to councils, and notified the representative of the Eyre estate. I propose further to show by this witness that the committee gave directions that the work on Eighth street should be stopped, and to show also that the street commissioner and the city paver were both so notified. I propose also to show that it was the practice, use, and custom for all paving questions to be submitted to and be under the control of the sidewalk committee. I propose also to show that the same question was considered in connection with a mistake in grade which had been made in the grade on the north side of Eighth street by the street committee and the sidewalk committee of councils in joint session, and the same decision was arrived at. To be followed up with the minutes of councils, showing the receipt of the communication from O. B. Dickinson, the reference to the sidewalk committee, the report of the sidewalk committee therein, and its acceptance by council. Also that no written notice referred to by William P. Thomson in his testimony was given to him by the sidewalk committee, or the chairman thereof, relative to the south side of Eighth street, that there was no such notices in the office of the highway commissioner, or among the city records and papers. Followed up also by the records of council showing who constituted the committee during the times referred to, and the rules of council showing the jurisdiction and authority of the various committees. Mr. Booth objects to the offer. By the Referee: "So far as the offer relates to the written communication, and the action of the sidewalk committee, and the instructions given by them to William P. Thomson, the objection is sustained, and exception noted, the testimony of Mr. Thomson upon these points being wholly irrelevant, and apart from the present issue." Mr. Dickinson: "Q. Did the sidewalk committee keep any records or minutes of its proceedings?" Mr. Booth objects. Objection overruled. Exception noted. "A. No further than from one meeting to another. Q. I mean, are there any minutes now in existence, or any record

of these minutes in existence? A. Not of the meeting itself, unless it comes before councils committee themselves. They never kept any record. Q. Is there any minute or record of the actions of the committee relative to the question as to whether the Eyre estate should be required to pave Eighth street other than a minute which appears on the records of city councils of your report on that question? A. No other report except what is kept by the clerk of council. Q. What action, if any, did the sidewalk committee take upon the question as to whether the Eyre estate should be required to pave the south side of Eighth street, between Barclay and Fulton? Mr. Booth objects. Objection sustained. Exception noted. Mr. Dickinson: "I propose upon this point to prove by this witness that the committee decided that the defendants should not be required to pave the south side of Eighth street until ordered by the committee, and that the committee never ordered them; to be followed up with proofs that the action of the committee was reported to councils, and the report accepted by councils, and that under the ordinances and rules of council the sidewalk committee had authority and jurisdiction over such matters." Mr. Booth objects. By the Referee: "So far as the offer relates to what is proposed to be proven by this witness, the objection is sustained. So far as the objection relates to the ordinance and rules of council, the objection is overruled. Exception noted." "Q. Were any instructions given by the sidewalk committee, or any member thereof, by authority of the sidewalk committee, to William P. Thomson, the street commissioner, and to Michael Ross, the city paver, as to the work on Eighth street, referred to in the previous question?" Mr. Booth objects. Objection sustained. Exception noted. Mr. Dickinson: "I propose to show by this witness that specific notice was given to the street commissioner and Michael Ross to stop work on the south side of Eighth street, and they were expressly directed that it was not to be done." Mr. Booth objects. Objection sustained. Exception noted. "Q. William P. Thomson was asked, when he was on the stand, if he did not remember a conversation between Mr. Craig, of the sidewalk committee, myself, and Thomson, at which he was told by Mr. Craig that the committee had decided that the sidewalk on the south side of Eighth street, adjoining the Eyre property, need not be done, to which he answered as follows: 'I remember something of that sort at the time, but the chairman of the sidewalk committee was at me to push it, and not to take orders from any one else; that he was chairman, and that I was to obey his orders. The chairman told me to go on, and said that he was the one that I was to obey, just the same as if I got my orders from the city council.' I ask you whether you ever said anything of that kind to William P. Thomson? A. Well, I will state in that matter, that if I had previously given him writ-

ten orders I might have said those words. I was not in the habit of giving any verbal orders. I always wrote them out, so that the commissioner would be on the safe side. Q. Did you ever give Thomson orders to go ahead and pave the south side of Eighth street, adjoining the Eyre property? A. I cannot say that I did. If he has a written order to that effect, I must have given it to him. I cannot say that I did or did not. If he got an order, it was a written order. Q. Do you know whether any instructions were given him as to not doing the work there?" Mr. Booth objects. Objection sustained. Exception noted. Mr. Dickinson: "I propose to show, in explanation of the witness' testimony, that what he refers to as to whether or not he did give notice, refers to a condition of things existing long prior to the doing of the work, and that after March 21, 1892, and several months before the paving on Eighth street was done, that he gave notice to the commissioner of highways and to the paver that the paving on Eighth street was not to be done." Mr. Booth objects. By the Referee: "Exception sustained, testimony being irrelevant. Exception noted."

"Frank W. Harrison, called and sworn. Examined by Mr. Dickinson. "Q. Mr. Harrison, what is your position in connection with the city government? A. Clerk of common council and city clerk. Q. As such official do you have charge of the records of the city? A. Yes, sir. Q. Have you here their records covering the year 1892? A. I have. Q. I wish you would turn to the organization of council, at the commencement of the year 1892." Witness refers to minute book of common council, at page 526, under date of April 18, 1892. Mr. Booth objects. Defendants offer to prove by the minutes of council for the years 1891 and 1892, showing who constituted the committees on streets and sidewalks, as part of the previous offer to prove that the sidewalk and street committee had decided that the paving on the south side of Eighth, between Barclay and Fulton streets, need not be done by the owners until they received notice from the sidewalk committee, and that no such notice was ever given. Mr. Booth objects. Objection sustained, and exception noted.

"Mr. Edmund Oliver, called and sworn. Examined by Mr. Dickinson. "Q. You are the present commissioner of highways of the city of Chester? A. Yes, sir. Q. Have you among the papers relating to your office, any communication in writing directed to William P. Thomson, commissioner of highways, or to the commissioner of highways in 1891 or 1892, relating to sidewalk paving on the south side of Eighth street, between Barclay and Fulton streets?" Mr. Booth objects. Objection sustained, and exception noted. Defendants offer to prove by this witness that he has made a search among the papers of his office, and there is no paper there such as testified to by William P. Thomson; "that if it was in exist-

ence, it was on file in the office of the commissioner of highways," for the purpose of contradicting the evidence of the existence of any such paper. By the Referee: "Offer overruled as irrelevant, immaterial testimony, and exception noted."

"Oliver B. Dickinson, called and affirmed on the part of the defendants. Defendants offer to prove by this witness the facts as stated in the supplementary affidavit of defense as follows: "That he was the attorney of the defendant, and also represented the estate of Joshua P. Eyre, deceased, of which the premises described in above referred to lien are part. These premises occupied the square of ground between Barclay, Fulton, Seventh, and Eighth streets. The estate of Joshua P. Eyre, deceased, was also the owner of other lands bounding on these streets. In the fall of the year 1891 the city councils were proposing a number of improvements in the locality where the lands above referred to are situated. These improvements involved the paving of Seventh street with asphalt blocks, and the sewerage, curbing, and paving of the sidewalks of at least six different streets upon which the lands of said estate abutted, and the repaving of the sidewalk of Seventh street. The amount required in the aggregate for these improvements to be paid by the Eyre estate amounted to several thousand dollars, and the properties were all unproductive. There were introduced in city councils ordinances to grade, curb, and pave both sides of Eighth street, and both sides of Barclay street, both sides of Fulton street, and, in addition, notice was given to repave Seventh street. This deponent, acting for the Eyre estate, met the committee of councils having the ordinance in charge, and represented to them that all the improvements which were proposed would cost the Eyre estate a sum approaching ten thousand dollars, and urged some modification of the plan, claiming that some of the streets to be paved and curbed there was no public necessity nor benefit in having paved, and that this applied particularly to Eighth street. It was finally proposed, with the consent of all present, that Seventh street should be repaved, and Barclay and Fulton streets paved and curbed on both sides, but that the ordinance relating to Eighth street should be amended so as to exclude the south side of the street. The witness acting on this arrangement employed Michael Ross, the use plaintiff, and had him repave Seventh street and curb and pave Fulton and Barclay streets on both sides where the Eyre estate owned lands. This was done at the expense of defendant, and was paid by defendant or witness for her. Shortly afterwards the attention of witness was called to the fact that the Eighth street ordinance had been passed without amendment. He immediately saw A. D. Brown, who was chairman of the sidewalk committee, and asked him about it. Together he and Mr. Brown went to the office of the city clerk, and learned that an ordi-

nance had been passed and approved September 22, 1891. Mr. Brown, as chairman of the sidewalk committee, then stated to witness that under the ordinance and practice of the city, notices to curb and pave were given by the street commissioner, acting upon resolutions of the sidewalk committee, and that defendant would not be required to curb and pave the south side of Eighth street until the sidewalk committee so ordered. On March 7, 1892, witness addressed a communication to city councils which was referred to the sidewalk committee. Witness afterwards met the sidewalk committee and the street committee acting together, and it was decided by both committees, and so explained and stated to him, that the paving would not be required until ordered by the sidewalk committee, and was assured that the sidewalk committee would not order the paving of the south side of Eighth street. Witness then, as above stated, did the work required on Seventh, Barclay, Fulton, and Ninth streets, at a very heavy expense to the estate. After this work had been done, the street commissioner spoke to the witness about the Eighth street paving, stating that the ordinance required this to be paved also. Witness told him of the arrangement made as to this street. The commissioner said that, while he did not doubt this, it ought to be confirmed by a member of the committee. Witness at once sent for Mr. Craig. Mr. Craig came, and confirmed the arrangement as stated by witness, and, after conferring with the street commissioner, and in his presence, stated to witness that the paving need not be done. No notice was served to pave. Some two or three days after this, witness was stopped on the street, at Third and Market streets, by Michael Ross, and asked if Ross wasn't to have the job of curbing and paving Eighth street. Witness explained to him that neither the curbing nor paving would be required by councils. Ross stated that he was the city paver, and that, if witness did not give him the job, he would go ahead under the city ordinances, and collect from the owner. Witness again called his attention to the agreement made with the committees of council, and that the work on Eighth street would not be required to be done. Ross again stated that he would do the work, and witness finally told him that if he did it, it would be at his own risk, as the owner would not pay the bill unless compelled to. Witness did not again hear of the matter until he learned that work had been done. Also that the bill produced on call was rendered by the paver on October 21 or 22, 1892, and that the other items on the bill referred to the work done by Ross, to the other streets referred to in his offer, and were done under a contract between witness and Ross, and have been paid for." Mr. Booth objects. Objection sustained. Exception noted. Defendants also offer to prove by this witness that the notice to curb and pave, testified to by William P. Thomson, as having been offered

to witness by him, was not a notice to curb and pave on Eighth street, and did not relate to the paving charged for in the lien filed, but to other paving. Mr. Booth objects. Objection sustained. Exception noted.'

"(3) The court erred in dismissing the following exception to the report of the referee, and in not sustaining the same: 'The referee erred in his conclusion of law as follows: In holding the lien filed to be a valid lien against property other than that fronting on the street paved.'

"(4) The court erred in dismissing the following exception to the report of the referee, and in not sustaining the same: 'The referee erred in finding that the defendants had failed to prove that the work had been done "without any authority from the committee of councils" after he had expressly overruled the defendants' offer to prove this very fact.'

"(5) The court erred in dismissing the following exception to the report of the referee, and in not sustaining the same: 'The referee erred in finding that under the ordinances there is any authority in the city paver to do work on behalf of the city except "under the instructions or directions of the proper committee of said councils."'

"(6) The court erred in dismissing the following exception to the report of the referee, and in not sustaining the same: 'The referee erred in not finding that there are under the laws and ordinances of the city of Chester two well-defined and entirely distinct methods of doing work for the city, one of which is done by the city paver, and the other by the employes of the city acting under the city commissioner of highways, and that the work in suit was done by the city paver on his own account, and that he had no authority to do the same except as provided in the ordinance, when he did the same "under the instructions or directions of the proper committee of said councils."'

"(7) The court erred in dismissing the following exceptions to the report of the referee, and in not sustaining the same: 'The referee erred in his answers to plaintiff's points, the said points and answers being as follows: "Point 1. If the referee finds that the work was done in pursuance of the ordinance passed September 22, 1891, at any time after thirty days from the first publication of the ordinance, and the lien therefor filed within six months after the completion of the work, the judgment should be for the plaintiff and against the defendants for the full amount of the lien, with interest from December 15, 1892. Answer 1. Sustained, except that the referee allows interest only from the date of filing the lien. Point 2. The defendants, at the time of the work being the owners of a square of ground bounded on the north by Eighth street and extending in depth southwardly about two hundred and fifty-six feet to Seventh street, bounded otherwise by Barclay and Fulton streets, with no subdivisions visible upon the ground, and a substantial stone resi-

dence erected practically in the middle of the square, with sales made by the defendants subsequent to the time of the work being done, but before the filing of the lien of two different portions of the square of ground both extending from Seventh to Eighth street, one sale covering all of Barclay street and the other covering all of the Fulton street front with deeds to the purchasers rendered before the filing of the lien, thus precluding all intentions upon the part of the defendants to divide the lot by an alley extending from Barclay to Fulton street, midway between Seventh and Eighth streets, and the lien being for paving done on the Eighth street side of the square, the same was correctly filed to cover the whole square of ground, and the judgment should be for the plaintiff. Answer 2. Sustained."'

"(8) The court erred in dismissing the following exception to the report of the referee, and in not sustaining the same: 'The referee erred in his answers to plaintiff's points except the seventh, the points and answers being as follows: "Point 4. The property against which the claim is filed is not subject to a lien therefor, and the judgment should be for the defendants. Answer 4. Refused. Point 5. The referee is asked to find as a fact that the work for which the claim is filed was done by one Michael Ross and workmen in his employ, and that the committee referred to in the ordinance approved January 6, 1890, was the sidewalk committee, and, there being no evidence offered by the plaintiff that the work for which the claim was filed was done under the direction or by the authority of this committee, the said Michael Ross had no authority to do said work as city paver, and the judgment should be for the defendants. Answer 5. Refused. Point 6. William P. Thomson had no power to authorize Michael Ross to do the work claimed for as city paver, but such power is by law and the city ordinances vested in the sidewalk committee. Answer 6. Refused. Point 8. There can be no recovery in this case on the lien filed as the same purports to have been filed for an assessment of a special tax for paving sidewalk, etc. No date of assessment is set forth in the lien nor proven by the evidence, nor has the fact of any such assessment been proven as required by the act of assembly of May 23, 1869. Answer 8. Refused. Point 9. Under all the evidence, the judgment should be for the defendants. Answer 9. Refused."'

"(9) The court erred in entering judgment in favor of the plaintiff and against the defendants.

"(10) The court erred in not entering judgment in favor of the defendants and against the plaintiff."

O. B. Dickinson, for appellants. A. A. Cochran and George M. Booth, for appellee.

GREEN, J. When this case was here before (167 Pa. St. 308, 31 Atl. 634), it was only upon the sufficiency of an affidavit of de-

fense in which it was alleged that the work was not done by the city, nor in pursuance of its authority, but by the plaintiff Ross "on his own motion, and without the authority of the city to do so." The sufficiency of that defense alone was considered, and on that one point only the judgment was reversed, and the case sent back to be heard on its merits. On the hearing before the referee a large amount of testimony was taken on this very subject, and it was simply overwhelming in proof of the fact that the work was done by the authority of the city, and that Michael Ross, the plaintiff, was not only authorized, but positively ordered, to do the work in question by the proper officer, the commissioner of highways. Moreover, an ordinance for the curbing and paving in question had been passed by the city councils on September 22, 1891, and on November 16, 1891, notice partly printed and partly written was given to Mrs. J. P. Eyre, one of the defendants, requiring her to do the work in pursuance of the ordinance within 10 days from receipt of the notice, or otherwise the work would be done by the highway department. The referee has found all these facts, and the defendants entirely failed to establish the facts set out in their affidavit of defense, and the former decision has no application in the present consideration of the cause. All of that branch of the argument for the appellants will therefore be dismissed without further notice.

The offers of testimony which were rejected by the referee are in no better condition. The official action of the city, by its proper officers, certainly could not be abrogated by the declarations of individual members of the sidewalk committee, and this kind of testimony was the basis upon which the offers in question were made. The ordinance of councils is the proper legal expression of the city's authority in reference to all matters of grading, paving, and curbing on the streets, and the proposition is not to be tolerated for a moment that the declarations of the members of any of the committees can suffice to defeat and overthrow such ordinances. The matter is too plain for argument, and we are clearly of opinion that the rulings of the referee on this subject in disposing of the rejected offers of testimony were absolutely correct. Moreover, all the work done by the plaintiff in this regard was fully accepted and ratified by the city councils after it was completed, and, even had there been any real question as to want of prior authority to do the work, the decision of this court in *Re Shiloh St.*, 165 Pa. St. 393, 30 Atl. 986, would amply sustain the subsequent ratification, and thereby validate the action of the plaintiff in the performance of the work. The record shows that the defendants had ample notice of the passage of the ordinance requiring the work to be done, and also notice in writing that the work must be done. Although the "ordinance"

was passed in September, 1891, and the written notice to do the work was dated November 16, 1891, and duly served thereafter, nothing was done by the following spring, and thereupon the highway commissioner, on April 16, 1892, notified the plaintiff, who was city contractor, to proceed, and do the work. A further delay of several months took place, and still the work was undone, and it was not until October, 1892, that the plaintiff did the work, acting under the authority of the ordinance of September, 1891, and the written order of the highway commissioner. It seems hardly necessary to refer to the legislation which clothes the highway commissioner with authority to act in the premises, but, as some question is made upon this subject in the argument for the appellants, reference is made to the ordinance of February 10, 1891, printed in the Ordinance Book at page 456. The second section directs that whenever the city councils shall by resolution or ordinance direct the sidewalks or footways of any street or alley to be curbed or paved, it shall be the duty of the owner, after notice by publication, to do this work, and, if not done by the owner within 30 days after the publication of the notice, "it shall be the duty of the commissioner of highways to cause the same to be done, and the cost and expense therefor shall be collected from said owner or owners by lien or suit according to law." The third section contains a similar provision in case any of the sidewalks or footways become out of repair, and if, after notice by the highway commissioner by authority of the sidewalk committee, the work is not done by the owner, then the highway commissioner is directed to cause the work to be done, and the cost and expense to be collected. As this section relates to cases of repairs, and as this case is one of new work, it is the second, and not the third, section that is applicable. But the ordinance of September 22, 1891, is specific, and is directed to this very work to be done on both sides of Eighth street from Barclay street to Concord avenue, which embraces these premises, and by that ordinance it is provided that in case of the failure of the owner to do the work within the time specified "the commissioner of highways is authorized and instructed to have the same done, and collect the costs thereof by lien or suit as provided by law and ordinance." It will be seen at once that the sidewalk committee has nothing to do with the matter under either of the ordinances applicable to the present case, and hence the acts or declarations of the members of that committee are not relevant.

As to the contention that the lien was improperly filed against the whole of the property of the defendants on Eighth street, it is only necessary to say that the property was a unit embracing all within the boundary lines, and with no division lines across it in either direction. The referee found that the

entire square of ground was used as the curtilage of the mansion, which stood very nearly in the center of the lot, and that there were no marks or division lines of any kind upon the ground by which the city solicitor could have made a division for the purpose of the lien. In these circumstances there is no force in the appellants' contention. In a well-considered case in the common pleas of Philadelphia county (*City of Philadelphia v. Cadwallader*, 22 Wkly. Notes Cas. 8), this question arose, and it was decided that the claim was well filed against one lot as a whole, although there were really four lots separately laid out on the registered plans in the survey office of the city. In a careful opinion, written by our Brother Mitchell, who was then a member of that court, the lien was sustained. The reasoning of the opinion is entirely satisfactory to us, and we hold, as was there held, that, there being no division lines marking the different lots, the claim of lien filed was not defective because it was filed against the whole. In the present case there could be no means of distinguishing parts of the property which are liable for the cost of the work from other parts which are not so liable, and, as the whole property was used as one, we think the lien was not defective in not defining interior lines.

There are some other matters of minor consequences appearing in appellants' argument, but we do not regard them as of any materiality, and, without considering them in detail, we are of opinion the judgment should be affirmed. The assignments of error are all dismissed. Judgment affirmed.

O'NEIL v. BEHANNA et al.

(Supreme Court of Pennsylvania. July 15, 1897.)

INTIMIDATION OF EMPLOYEES—WHAT CONSTITUTES—DAMAGES.

1. It is an unlawful intimidation of employees for a large number of persons to surround them, and follow them for a considerable distance, urging them in a hostile manner not to go to work, and calling them opprobrious names, though no physical violence is used; and persons so doing are liable in damages to the employer.

2. Where persons are going to a place of employment either under contract to work or in search of work, others have no right to stop them and occupy their time without their consent, or that of their employer if actually employed, in order to peacefully urge them not to go to work; and persons so doing are liable to the employer in damages.

Appeal from court of common pleas, Fayette county.

Bill by Margaret O'Neill, doing business as the Fayette City Coal Works, against Noah Behanna and others, for an injunction and damages. There was a decree for defendants on a master's report, and plaintiff appeals. Reversed.

R. P. Kennedy and Edward Campbell, for appellant. Howell & Reppert and Boyd & Umbel, for appellees.

MITCHELL, J. We are obliged to differ wholly from the view of the facts reported by the learned master. It is totally irreconcilable with the testimony, read in the light of experience and a knowledge of human nature. Nor can we agree entirely with the view of the court below, though it is more in accordance with the evidence and the law. The learned judge, in his opinion, says: "The testimony establishes the fact that certain of the defendants overstepped these bounds, and used annoyance, intimidation, ridicule, and coercion to prevent new men from engaging in work for the plaintiff. When the new men were followed, and importuned not to work, from their point of embarkation to their destination, and there met by the strikers in considerable numbers, and followed to their lodging places, all the time being pressed and entreated to return, and called 'scabs' and 'blacklegs,' and sometimes surrounded, and the effort made to pull them away, and unfriendly (at least) atmosphere about everywhere, it must be admitted that there was something more than mere argument and persuasion and the orderly and legitimate conduct of a strike. This was certainly serious annoyance, and well calculated to intimidate and coerce; and that effect was apparently produced on more than one occasion. Nor did such acts entirely end when the men imported actually began work, but such men were on occasions, and in a less public manner, approached in a like manner in their intervals of labor, and advised that there would be trouble there, and they had better leave. No actual violence, however, was employed." This is a mild and judicially restrained statement of what the evidence clearly showed. The strikers and their counsel seem to think that the former could do anything to attain their ends, short of actual physical violence. This is a most serious misconception. The "arguments" and "persuasion" and "appeals" of a hostile and demonstrative mob have a potency over men of ordinary nerve which far exceeds the limits of lawfulness. The display of force, though none is actually used, is intimidation, and as much unlawful as violence itself.

An attempt is made to argue that the strikers only congregated at the place of arrival of the new men, in accordance with the custom at boat and train arrivals in small towns. But this disguise is too flimsy to hide the real purpose. If they desired in good faith to meet peaceably and lawfully for their own business, they should have selected another place, sufficiently remote to be free from the excitement and crowds which, their own testimony admits, attended the arrival of the new men, and also far enough away to avoid the intimidating effect of a hostile crowd on the new-

comers. But, in truth, they did not desire to avoid that effect. On the contrary, that was what they were there for, and their presence indicates their real intentions too plainly for any verbal denials on their part to offset.

It is further urged that the strikers, through their committees, only exercised ("insisted on" is the phrase their counsel use in this court) their right to talk to the new men to persuade them not to go to work. There was no such right. These men were there presumably under contract with the plaintiff, and certainly in search of work, if not yet actually under pay. They were not at leisure, and their time, whether their own or their employer's, could not lawfully be taken up, and their progress interfered with, by these or any other outsiders, on any pretense or under any claim of right to argue or persuade them to break their contracts. Even, therefore, if the arguments and persuasion had been confined to lawful means, they were exerted at an improper time, and were an interference with the plaintiff's rights, which made the perpetrators liable for any damages the plaintiff suffered in consequence. But, in fact, their efforts were not confined to lawful means. The result of the evidence, as stated by the learned judge, is that the new men were "followed and importuned not to work, from their point of embarkation to their destination, and there met by the strikers in considerable numbers, * * * called 'scabs' and 'blacklegs,' and sometimes surrounded, and the effort made to pull them away." This view is quite sufficiently favorable to the defendants, and, as already said, a hostile and threatening crowd does not need to resort to actual violence to be guilty of unlawful intimidation. The acts of these defendants were an unlawful interference with the rights of the new men, and with those of the plaintiff. In *Cote v. Murphy*, 159 Pa. St. 420, 28 Atl. 190, it is said by our Brother Dean that "It is one of the indefeasible rights of a mechanic or laborer in this commonwealth to fix such value on his services as he sees proper, and, under the constitution, there is no power lodged anywhere to compel him to work for less than he chooses to accept," nor, as the same right may be stated with reference to this case, to prevent his working for such pay as he can get and is willing to accept. We regard the testimony as demonstrating that the defendants were guilty of an unlawful combination, which, while professing the intention and trying to maintain an outward appearance of lawfulness, was carried out by violent and threatening conduct, which was equally a violation of the rights of the new men who came to work for plaintiff, and of the plaintiff herself, and that they are liable in this suit for all the damages which plaintiff suffered thereby.

We have nothing at present to do with the acts of assembly from 1869 to 1891, which have modified the common law as to conspir-

acy. The question of their constitutionality was left open in *Cote v. Murphy*, supra, and does not need to be considered here, as the evidence takes the case entirely out of their provisions.

The learned judge below found no damages against any of the defendants, but made a distinction between them as to liability for costs. We do not think the evidence sustains this distinction. The master reports that "all of the defendants are included in the term 'strikers,' as used by him in his report"; and the testimony is ample to show that all participated personally in the unlawful conduct, or in such combination as made them liable for the acts of the others done in pursuance of the common purpose.

The view taken by the master prevented him from considering the subject of damages, nor did the learned judge make any specific findings on them. In the absence of such findings, we do not enter on the discussion of the subject, further than to say that the plaintiff has established her claim to some substantial damages, though her claim may be larger, and may start at an earlier date, than the proof will sustain. So far as yet appears, the defendants did nothing to make them liable prior to the attempt of plaintiff to resume operations, in February, 1893. But after that date the violation of her rights is clear. The case must go back for examination and ascertainment of the facts on this branch of it.

Not the least notable feature is the expression of surprise by the counsel, and even by the court, that the case was pushed after the strike was over. It appears to be a fact that the strike was less violent and disorderly than others which had preceded it, and a sentiment seems to have pervaded the community—even the court not being entirely exempt—that, the strike being over, the subject had better be dropped. This is not law nor justice. A plaintiff who might have been hurt worse than he was may be inclined not to push his claim for compensation for the injury actually received; but it is for him, and not for others, and especially not for courts, to make the choice, and there should be no judicial surprise if he insists on his rights, though other men may think discretion the better part of valor. Decree reversed, bill reinstated, and damages directed to be ascertained in accordance with this opinion; costs to be paid by the appellees.

FARMERS' BANK OF SPRINGVILLE, N. Y., v. SHIPPEY et al.

(Supreme Court of Pennsylvania. July 15, 1897.)

PROMISSORY NOTES—NEGOTIABILITY.

The indorsement of credits on the back of a note before its delivery does not render it nonnegotiable.

Appeal from court of common pleas, Wyoming county.

Assumpsit by the Farmers' Bank of Springville, N. Y., against J. B. Shippey and others, on a note. From a judgment for defendants, plaintiff appeals. Reversed.

W. E. & C. A. Little, Joseph Moore, and Ross & Dersheimer, for appellant. Chas. E. Terry, Edwin J. Jorden, and James W. Platt, for appellees.

DEAN, J. The action was assumpsit upon a note, of which the following is a copy: "\$833 ²²/₁₀₀. Tunkhannock, July 8th, 1891. One year after date, for value received, we or either of us promise to pay J. Thompson & Co., or order, eight hundred and thirty-three ²²/₁₀₀ dollars, at the Wyoming National Bank of Tunkhannock, Pa., with interest at 6 per cent. per annum, interest payable annually." This was signed by all of defendants, 15 in number. On the back of the note were these indorsements: "July 11th, 1891. Rec'd of J. C. Reed thirty-three and ²²/₁₀₀ dollars, to apply to within note." There was a like indorsement of payment of a like amount as to seven others of the drawers, and indorsement of payment by one other in sum of \$68.66, and one other in sum of \$16.66. Then followed the indorsement of the payees, "J. Thompson & Co." On notice by defendants, before trial, the plaintiff proved it was bona fide holder, for value, before maturity, without notice of any defense by the drawers. The defendants offered evidence tending to prove that the note represented a part of the purchase price of a horse sold to 25 persons by Thompson & Co., through an agent, Shaw; that the whole price was \$2,500, for which three notes of a like amount, \$833.33 payable in one, two, and three years, were given, and that these notes were not to become obligatory on any one of the purchasers until the whole 25 had signed; that this note was not so signed; further, that gross misrepresentations had been made to them by Shaw as to the age and soundness of the horse. The court below, being of opinion that the indorsements destroyed the negotiability of the note, submitted the evidence to the jury on both particulars set up by the defendants. There was a verdict for defendants, and, judgment having been entered thereon, plaintiff now appeals, assigning for error the refusal of the court to affirm its first point, as follows: "The note in suit is a negotiable instrument, and its negotiability is not destroyed by reason of the indorsements of payments thereon."

The reasons for denying the point fairly appear in the language of the court below, as follows: "Here was a note dated 8th July, 1891, due one year from date, and called for the payment of \$833.33. Now, nothing can be paid on that note until the year is up, unless by the agreement of the parties

and a modification of the contract which the parties then enter into. It seems from the face of the note, by the indorsements that were upon it at the time the plaintiff purchased it, that on the 11th July, 1891, the sum of \$33 was paid by various parties, and indorsed upon the back of the note. That was before the note was due, and could only have been placed there by the consent of those who held the note at the time, through a modification of the contract as originally written. Now, the parties have agreed to modify this contract, and that they would agree to treat certain portions of this note as due before the year was up, and permit payments to be made. That reduced the amount of the note from \$833.33 to a different amount, which is not stated on the face of the paper or anywhere else upon it. A note or instrument cannot be negotiable unless the amount due upon it is stated in writing or figures. The amount due upon the note in suit is nowhere stated in figures or writing upon it. When this note left the hands of these parties, it was negotiable paper, and remained such until it was modified by a different contract by the parties who held it. When they received any amount before the note was due, it modified the contract; so it is no longer a negotiable instrument, for the reason that the amount due is no longer stated on the face of the paper." The ruling of the court is based on the assumption that the note was executed on the 8th, and the contract modified by accepting payment on the 11th, three days after; that is, the payees of the note, to whom it was delivered on the 8th, subsequently, on the 11th, agreed to a change of the contract with part only of the drawers, thereby rendering the amount due uncertain, a certain amount no longer appearing, either in words or figures, on the face of the note. Taking the date as of the 8th, and the indorsements as of the 11th, the presumption that the indorsements were made after delivery would be warranted; but the court below seems to have overlooked the undisputed fact that the final execution of the note by delivery did not take place until the 13th. Three of the drawers signed after the indorsement of the payments. So, there was no modification of the contract, as between the drawers and the payee, after delivery. The indorsements were made as between the drawers themselves. Therefore, what would be the effect as to other drawers if part of them, after delivery to the payee, with his consent, modified the original contract, does not arise. When executed by delivery, the contract was precisely what it now appears.

The note, on its face, being negotiable, and indorsed by the payee to plaintiff, who took it for value, without notice of any fraud, as between the original parties to it, did the indorsements on the back destroy its negotiability, so that plaintiff took it subject to any de-

fense the drawers had as between them and the payees? "It is a necessary quality of commercial paper that it should be simple, certain, unconditional, not subject to any contingency." *Woods v. North*, 84 Pa. St. 407. The note in question in that case had a clause "and five per cent. collection fee if not paid when due." This court held that these words imported into the paper an undoubted element of uncertainty, because the amount of the collection fees could not be arbitrarily determined by the parties. A reasonable compensation was all that could be recovered, notwithstanding the stipulation. Unquestionably, if the 5 per cent. was not unalterably fixed, if only a reasonable compensation, which might be 2, 3, or 4 per cent., could be added, then the face of the note signified no certain amount. It might just as well have been written "with reasonable charges for collection." But how does the indorsement of a payment before execution render the amount called for on the face of the note uncertain? It is a mere matter of computation, which, by reason of numerous payments, may be burdensome, but nevertheless the mathematical result is absolutely certain. In *Ege v. Kyle*, 2 Watts, 222, there was indorsed on the note, "Received on the within note six tons, nine hundred one-quarter and nineteen pounds, of bar iron, the net proceeds arising from the sale of which are to be credited on the within, which is \$397.50." The court below ruled that this indorsement did not affect the negotiability of the paper. And while, as argued by appellee, the principal contention in this court was whether the suit had been properly brought in the name of Kyle, nevertheless that was not the only one, for this point must have been passed on when this court decided: "The other errors are not supported." Although the case is meagerly reported, it is quite obvious that counsel had but little confidence in his point, and it was probably not pressed in either court. *Ege v. Kyle* was approved as a precedent on this point, in *Dunning v. Heller*, 103 Pa. St. 269, *Paxson, J.*, delivering the opinion, saying: "It was held in *Ege v. Kyle* that an indorsement on a negotiable note of a receipt on account of a quantity of iron, the net proceeds of which are to be credited on the within, 'did not destroy its negotiable character.' Such indorsement could not render the amount less certain than a promise to pay with interest; yet such a stipulation does not destroy the negotiability of the paper. 'A negotiable note may be made payable with interest from its date, and, if more than lawful interest be stipulated for, it does not, in Pennsylvania, make the contract void, but only the usury.'" *Woods v. North*, supra. In the case of *Bank v. Morgan*, 165 Pa. St. 199, 30 Atl. 957, the suit was on a note of the precise amount of this one, and given for a like consideration. The question was as to the sufficiency of an affidavit of defense averring precisely the same misrepresentations and fraudulent conduct on part of payee, and that plain-

tiff had notice of the same, as were set up by the drawers in this case. It was held by this court that the note was negotiable, and the affidavit was insufficient. But, although a credit was indorsed by the payees on the back of the note of \$116.66, neither the affidavit, the counsel for defendants, the court below, nor this court, intimate that that fact affected its negotiability. All assume it did not. The rarity of cases on a question which must be of such frequent occurrence as indorsements of payments on negotiable paper only indicated that since *Ege v. Kyle*, decided more than 60 years ago, the profession generally has assumed that such indorsements do not affect the negotiability of such paper. We are of the opinion that these indorsements did not take from the note its character as commercial paper, and that the learned judge of the court below erred in deciding otherwise. It is wholly immaterial who made the payments. When made, they were to that extent in relief of the drawers' liability, and, being made while the paper was still in their possession, the presumption, as between them and a bona fide holder, is absolute that they were made with their authority. The note being negotiable, the suit in favor of this plaintiff can be sustained jointly against all the drawers. The judgment is reversed, and a v. f. d. n. awarded.

STERRETT, C. J., dissents.

KRALL v. FORNEY et al.

(Supreme Court of Pennsylvania. July 15, 1897.)

PARTNERSHIP—WHAT CONSTITUTES—ACCOUNTING.

1. In order to establish a friend in business, several persons executed an agreement appointing him their agent to carry on a certain business, and providing that they should advance him money up to a certain sum, and should own the stock in trade; that such agent was to repay from time to time the money advanced, was to be paid solely from the profits, and be responsible for all losses. The principals in such business did not intend to thereby become partners. *Held*, that as between themselves they were not partners.

2. Where a partner sells goods to the firm in the ordinary course of his individual business, his remedy for the price is at law, not by suit for an accounting.

Appeal from court of common pleas, Lebanon county.

Bill by John Krall against Jacob Forney and others. Decree for plaintiff, and defendants appeal. Reversed.

Thomas H. Capp and George B. Schock, for appellants. J. M. Funck and Howard C. Shirk, for appellee.

DEAN, J. On 13th November, 1889, Jacob Forney, Samuel E. Fox, Atkins & Bro., and John Krall, this plaintiff, as parties of the first part, the other three of them being these defendants, and Aaron Brubacher, as party of

the second part, entered into an agreement, as follows: "The said parties of the first part agree to employ the said Brubacher to carry on the butchering business at his shop in Cornwall township, Lebanon county, Pa., hereby constituting and appointing him as their agent, and agree to advance him money for said purpose as may be required, not exceeding two thousand dollars (\$2,000). That the parties of the first part shall and are to be the exclusive owners of the property purchased, or its transformation into belognas, or in whatever shape it may be made, including the cattle or steers purchased by said Brubacher. That the said Brubacher shall pay the money so advanced from time to time, shall render us a statement, and take an inventory of what stock he has whenever required. That said Brubacher is to be paid out of the profits solely, and shall be responsible for any and all losses on the sales he makes, hereby giving our agent power and authority to do what may be necessary to carry on said business as our agent, and hereby ratifying what he must necessarily do in the premises to carry on said business, and continue until this agreement is revoked and annulled." The parties of the first part raised the \$2,000 by indorsing for Brubacher a note to that amount, which was discounted by a bank, the money paid to him, and he commenced the business of butchering, which he continued for a period of nearly three years. In this time he had done, in the aggregate, a very considerable business, but it proved unsuccessful, he becoming embarrassed financially. He then delivered his stock on hand to defendants, who made sale of it, and applied the proceeds to payment of the \$2,000 note, on which Brubacher had paid part, and the balance had been renewed from time to time, defendants continuing as indorsers. When his business was closed, Brubacher was largely in debt, not only on the balance yet due on the \$2,000 note, but to other parties, among them this plaintiff, Krall, to whom he owed \$1,574.81, a balance on the purchase of a lot of cattle; also \$145.55, amount of a note, with interest. Krall's sale of cattle to Brubacher during the three years aggregated over \$7,000, all of which had been paid except the two sums mentioned. Krall, alleging the agreement to which he was a party constituted a partnership, brought this bill for an account against his alleged co-partners. The court below determined the agreement created a partnership; that the partnership, consisting of the four partners, owed Krall, with interest, \$1,717.36; and that each should pay to Krall \$429.34, or one-fourth of the whole amount, and each pay one-fourth the costs. From that decree defendants, the three other alleged partners, appeal.

Several errors are assigned, the material ones being: (1) The court erred in deciding the agreement was a partnership agreement. (2) In not deciding that equity had no jurisdiction, because the transactions of Krall, even if

there was a partnership, were between him as an individual and the partnership, constituting the mere relation of debtor and creditor, and involving no rights as partners.

It is somewhat difficult to determine, from what the parties have expressed in the agreement, their legal relations. They, and the attorney who drew it, acknowledged that, although they knew what they intended to say, they did not know at the time the agreement was executed what, by its terms, they had agreed to do. Krall, the plaintiff, testifies: "I signed without much meaning, and didn't know what it meant." Brubacher, the party of the second part, testifies, when asked if the agreement had been read to him before signing: "I can't say whether he read the whole paper, but I did not understand the half he did read." Lantz, a member of the bar, who drew the agreement, testifies, in substance, that he made a mistake in expressing the intention of the parties; that his idea was to make them secure to the extent of the \$2,000 advanced, by giving them a title to the property and business of Brubacher. He declined to say, when on the stand, just what construction should be given what he did write. Fox, one of the defendants, testifies: "When this paper was ready, I went up to the squire's to sign the paper, got the paper up, and could not read it very well. Looked over it a little bit; in fact, I hadn't time to read it. I asked the squire, 'What is this paper?' He said, 'For \$2,000,—four of you men.' I signed that paper." Atkins, another of defendants, says he read the first part of the agreement, and if he had taken time he might have got the meaning, but the squire told him "it was the paper to be signed to secure the \$2,000," and then he signed it. Forney testifies he signed it supposing it was a collateral security for the loan of \$2,000. These are all the parties who affixed their signatures and the attorney who drew it. Not one of them positively knew or understood the expressed purport of the paper. Not one of them intended, either in fact or by construction, to form a partnership, and appoint Brubacher their agent. Every one, Krall, the plaintiff, as well, testifies the intention was to aid Brubacher to start business by raising for him \$2,000. As security for this loan, they tried to retain a right of possession in the business property. The word "agent" was inserted at the suggestion of Lantz, the attorney, who thought that would protect the property from other creditors of Brubacher. If anything is clear, from the testimony of the parties to the writing, and those having any connection with or knowledge of it, it was not intended to be a contract of partnership in fact. Nor can we agree with the learned judge of the court below that it was one in law. Parties may so act, or hold themselves out to the public, that the law will hold them answerable as partners, although as between themselves they are not partners. But this is where the rights of third parties are involved. As between the parties to the agreement, does the

contract constitute a partnership? They agree to employ Brubacher to carry on the butchering business, and appoint him agent; further, agree to furnish him \$2,000. They are to be the owners of the property purchased by him, and the prepared meats manufactured by him. He is to be paid out of the profits solely, and to be responsible for all losses, his employers to have power to annul the agreement at any time. The plain implication is, Brubacher was to enjoy all the profits, and it is expressly stipulated he is to pay all losses. There have been many definitions of a partnership. This court, in *Hallstead's Appeal*, 157 Pa. St. 59, 27 Atl. 383, opinion by our Brother Williams, adopts Story's definition: "A contract relation between persons who have combined their labor or skill in a joint enterprise or business for the purpose of joint profit." Every element of a partnership embraced in this definition is negated by the agreement before us. In *Walker v. Tupper*, 152 Pa. St. 1, 25 Atl. 172, opinion by our Brother Mitchell, it is said: "No general definition of partnership has yet been given which applies without qualification to all the infinite variety of business arrangements in this commercial age, but an essential element, universally conceded, is participation in profits as such. But even this does not necessarily create a partnership." Here, in no event, were the parties to share in profits, and they expressly stipulated against a liability for losses. They contemplated the possible loss of their \$2,000, and attempted to make some provision for this by the assertion of title to the property purchased by Brubacher. But the writing, as between themselves, did not create a partnership, whatever may be its construction as to creditors of Brubacher, who were strangers to it. Taking the ambiguous writing, the surroundings of the parties, and their vague testimony, we can glean from all pretty certainly this truth: Brubacher had failed shortly before. He was anxious to carry on business, but was wholly without means. They were friends of his, and, at his solicitation, generously agreed to advance him \$2,000. As some sort of security, it was agreed they should have title to the business property, and have the right to take possession when they thought proper. They were joint lenders of the \$2,000. Brubacher was their bailee of the property. In no contingency did either one of the four intend to put in peril more than \$500, the one-fourth of the \$2,000. This is shown by the manifest preponderance of the testimony. No one thought otherwise until after the business was a failure. Brubacher probably expresses the truth exactly, as notice his testimony: "Q. Was it your idea they would have to pay for everything you bought in this business? A. No; not in the beginning, until after some people told me so." This plaintiff, one of the joint lenders or sureties, now, on the assumption that they were partners, seeks to recoup his individual loss from his alleged co-partners. There was no partnership in law or in fact, and therefore the bill cannot be maintained by

him as a partner for an accounting. But, even assuming a partnership existed, his debt was not contracted as a partner. He does not allege he advanced to the partnership more than his share of the capital, or has paid more than his share of the debts, or that his partners have retained more than their share of the profits. His averment, in substance, is that he, John Krall, an individual cattle dealer, sold to the partnership a lot of cattle, at a certain price, and it, the partnership, refuses to pay him. Wherein is his right as a partner affected by such a contention? It is a simple contract debt for a round sum. No equities of the partners, as such, are to be worked out which require the intervention of a court of equity. His bill does not, even expressly, aver a partnership; is almost in form a declaration of assumpsit. Equity has for that reason no jurisdiction. Both of appellants' assignments of error are sustained, and the decree of the court below is reversed, costs to be paid by appellee.

GUMAER v. BARBER.

(Supreme Court of Pennsylvania. July 15, 1897.)

PURCHASE BY EXECUTOR FOR HEIRS—TRUSTS—WILLS—ELECTION.

Deceased had obtained judgments that were a lien against land which after his death was offered for sale on an independent lien subsequent to the judgments. All the heirs had an interest in the judgments, and certain of them authorized the executor to bid in the land for all of them, on the agreement that their interests in the judgments should thereafter be represented by the land. The executor was to use the judgments in paying his bid, and said heirs were to raise the money which it might be necessary to pay in excess of the amount of the judgments. The agreement was consummated, the sheriff's deed, however, running to the executor in his representative capacity. *Held*, that the executor took title merely as trustee for the consenting heirs, and not as executor, the trust as to the consenting heirs not being affected by the fact that some of the heirs did not join in such arrangement.

Appeal from court of common pleas, Lackawanna county.

Ejectment by Edmund Gumaer against Parndon T. Barber. From a judgment for plaintiff, defendant appeals. Reversed.

The following are the assignments of error: "(1) The learned court erred in charging the jury as follows, to wit: 'Considerable has been said here in regard to the executor holding this property, and not disposing of it until 1885; that is, from the time of the sheriff's sale, in 1877, to April, 1885. While he had the power, and while it may possibly have been his duty, to dispose of it sooner, still the fact that the will of Williams Barber contained the clause which I have already referred to, mentioned to you, and the fact that the widow lived until 1884, would, if you believe it, be a reasonable explanation why the executor did not exercise the power that he had until April, 1885.' (2) The learned court erred in charging the jury as follows, to wit: 'Now, gentlemen, consider

the testimony of all these witnesses, and ascertain, if you can, by the weight and fair preponderance of the testimony, whether or not the heirs of Williams Barber elected to take this property, this fifty-acre lot, as real estate. That is one of the main questions in this case, and the most important question in this case which you have to decide. In order to make an election of that kind valid, and of binding effect upon this title, it is necessary for you to find that all the heirs acquiesced. An election by one or two or three or four or five is not enough; it must be an election by them both all.' (3) The learned court erred in charging the jury as follows, to wit: 'Now, then, take this case. Take the testimony of all the witnesses. Start in the beginning previous to the time of 1877, and get down until April, 1885, and after that date the sale. Take it all into consideration, and say whether you can, by the fair weight and preponderance of the evidence in this case, find that all the heirs of Williams Barber made an election to take this property as real estate. If you can find that, then your verdict will be for the defendant. But if you do not find that, if you find that any one or more of the heirs of Williams Barber did not join in this election, or that they all of them did not make an election, then you would have a right to find a verdict for the plaintiff.' (4) The learned court erred in refusing to charge the jury as requested in defendant's third point for charge, and the answer thereto, as follows, to wit: 'That the proof offered by the defendant of the arrangement made by the heirs in 1877 before the sheriff's sale, if believed, was an election on the part of the heirs to take the land, and hold it as real estate; and the retention of the land by and before for the heirs for a period of eight years after the sheriff's sale was sufficient evidence of their election to take the land as real estate, and not that it should be held as personal property.' Answer of the court: 'I refuse this point, because I have submitted the question of the election and the facts to sustain the election to you to be found by you.' (5) The learned court erred in refusing unqualifiedly to charge the jury as requested by the defendant's fifth point for charge, as follows, to wit: 'That the notice given by and for the heirs not to sell the property, at and before the sale in 1885, was a sufficient notice of election to hold the property as real estate, and this notice having been given in the presence of Edmund Gumaer, the plaintiff, at and before they made the purchase, a sale to him after such notice would convey no title.' Answer of the court: 'This point I refuse.' (6) The learned court erred in refusing to charge the jury as requested for charge in defendant's fifth point, and the answer thereto, as follows, to wit: 'That the dispute which existed at the time of the sale in 1885 as to the right of the executor to sell, and his sale of the land at a grossly inadequate price while such dispute existed, was a breach of trust; and, both the dispute and the inadequacy of

price being known to the plaintiff at and before the purchase, no title to the land was vested in him by the sale.' Answer of the court: 'This law is applicable in certain cases, but I do not consider it applicable in this case, and for that reason I refuse the point.' (7) The learned court erred in refusing to charge the jury as requested in defendant's sixth point for charge, as follows, to wit: 'Under all the evidence of the case, no title passed to the plaintiff by the sale of 1885, and therefore the plaintiff is not entitled to recover.' Answer of the court: 'I refuse this point, because I have already submitted it to you as a matter of fact.' (8) The learned court erred in refusing the defendant's offer of evidence, as follows, to wit: 'Q. Are you acquainted with the value of the property in that locality? A. Yes, sir. (The counsel for the plaintiff object to the question, as incompetent and immaterial. The counsel for the defendant propose to prove by the witness on the stand that the price for which the property was sold to the plaintiff was grossly inadequate; that at the time of the sale the land was worth from sixteen to eighteen hundred dollars. This for the purpose of proving the knowledge of the witness that the executor had not power to sell, and that the sale at this inadequate price was owing to the disputed claim of the executor's right to make a sale of the property, and the plaintiff knew at the time of the purchase that the price was grossly inadequate.) By the Court: I don't think there is anything in the evidence so far disclosed to show fraud in this transaction. I will sustain the objection. (Exception noted for defendant, at whose request a bill is sealed.)' (9) The learned court erred in admitting the following evidence, to wit: 'The counsel for the plaintiff now offer in evidence a deed of Coleman Wells, executor and trustee of the estate of Williams Barber, deceased, late of Benton township, to Edmund Gumaer, the plaintiff in this writ, for the land described in the writ, dated the 14th day of April, 1885, acknowledged the 14th day of April, 1885, recorded the 23d day of September, 1885, in Lackawanna county, in Deed Book 31, p. 295. (The counsel for the defendant object to the offer as incompetent; no evidence in the case that Coleman Wells, executor, had any right to make a sale of the property, or any authority of law to make such a sale.) By the Court: I will admit the deed in evidence. The objection is overruled. (Exception noted for defendant, at whose request a bill is sealed.)''

Charles H. Soper, for appellant. Watson & Zimmerman, for appellee.

DEAN, J. Williams Barber, of Benton township, Lackawanna county, died in 1875, leaving, to survive him, a widow and eight children, among them a son, this defendant. The decedent left a will, of which he appointed Coleman Wells the executor. He devised a life estate to his widow in all his lands, and at her death provided for an equal division of

his estate among his children. Early in life he had purchased a farm consisting of two separate tracts, one containing 39 acres, the other 50 acres. On this farm he resided for many years, and reared his family; but in 1832 (12 years before his death) he conveyed the 50-acre tract to his son George, who conveyed to his brother Ira T. Barber, the father holding judgments from the son Ira, in his favor, for a larger part, if not the whole, of the purchase money, which at his death were subsisting liens on the land. Ira remained in possession of the land purchased until 1877, two years after the death of his father; but in 1876 one Sidney Finn obtained a judgment against him for \$204, which was a lien junior to those of the father. Finn seized the land by execution on this judgment, and it was offered at sheriff's sale. All the children were desirous that the land should not be sold, and pass into the hands of strangers. All had an interest in the prior judgments in favor of the father's estate. They, it was alleged by defendant, through him, consulted with Wells, the executor; and it was agreed the land should be bid in for them, and their interests thereafter should be represented by the land, instead of by judgments. Pardon Barber and his brothers raised the money necessary to pay in excess of the judgments, and the liens it was agreed should be discharged by the purchase. It was arranged Wells should do the bidding, and the property was knocked down to him at a bid of \$200, and deed acknowledged accordingly. On the same day, Wells delivered to Pardon Barber a receipt, as follows: "Real-estate sale on the 8th September, 1877, by William P. Kirkendall, sheriff, of defendant's property, in Benton township, Luzerne county, Pa., to Coleman Wells, executor of Williams Barber, deceased, for two hundred dollars; deed to be made to Coleman Wells, executor, etc.; money receipted on said writ by the sheriff as paid by me. Now, this is to certify that the purchase money mentioned and receipted on writ, together with one dollar and fifty-six cents additional for costs,—in all \$201.56,—was furnished me by Pardon T. Barber solely, and was and is not the property of myself, or of the estate of Williams Barber. Coleman Wells." Finn being unable to pay the purchase money on a bid sufficient to reach his judgment, it was agreed by all parties that he should receive all the money on a bid of \$200, and it was accordingly paid over for his benefit. Pardon Barber immediately went into possession of the land, and so remained up until the spring of 1885; Wells neither demanding nor receiving rents, Pardon Barber treating the land as the property of himself and brothers and sisters. He even purchased, at private sale, the interests of two of his brothers. In the spring of 1885, eight years after Pardon Barber went into possession, Wells, as executor of the father, by printed handbills, gave notice that the property would be offered at

public sale on the 5th of April. On that day he and his attorney appeared on the premises, and offered the property at auction, as the land of Williams Barber, the ancestor. Immediately the attorney for the heirs read a written notice, in the hearing of all bidders, that the property belonged to Pardon Barber and the other heirs of Williams Barber, and that a purchaser could take no title from the executor. Gumaer then asked if Wells, the executor, would give a warranty deed. His attorney replied "No;" that the purchaser would take such title as Wells has. The property was finally knocked down to Edmund Gumaer, this plaintiff, a grandson of testator, for \$450, about one-fourth of its value. Deed was executed to him by the executor. Pardon Barber continued in undisturbed possession until October 6, 1892, more than five years after the executor's sale, when Gumaer brought this ejectment. Wells, the executor, died in 1887, insolvent.

At the trial in the court below, there was evidence on part of plaintiff that two of the eight heirs, Mrs. Wallace and Mrs. Gumaer, had not joined in the arrangement to purchase the land at sheriff's sale, and had not consented to appropriate their interests in the judgments as part of the purchase money. On part of the defendants there was testimony that Pardon Barber, at the request of all, raised the money to bid upon the property, and that it was purchased for all. In the opinion of the court, the question at issue was determined by the fact of whether all of the eight heirs were parties to the agreement. The following paragraph from the charge presents, we think, a fair statement of the court's view. "Now, then, take this case. Take the testimony of all the witnesses. Start in the beginning, previous to the time of 1877, and get down until April, 1885, and after that date the sale. Take it all into consideration, and say whether you can, by the fair weight and preponderance of the evidence in this case, find that all the heirs of Williams Barber made an election to take this property as real estate. If you can find that, then your verdict will be for the defendant. But if you do not find that, if you find that any one or more of the heirs of Williams Barber did not join in this election, or that they all of them did not make an election, then you would have a right to find a verdict for the plaintiff." Under this instruction, there was a verdict for plaintiff, and defendant appeals, assigning several errors, among them the charge of the court in substance as quoted.

The real question in the case, and the one on which it must turn, is, what was the nature of the title which Wells took by his sheriff's deed, as against Pardon Barber, the representative of the heirs? for the purchaser at the executor's sale took the executor's title.—no better one. If the executor, before sale, had brought ejectment against Pardon Barber, could he have recovered the land? If, at the sheriff's sale, he took an absolute title in the

land, as executor, he was entitled to possession. If he took the title in trust for Pardon Barber and the heirs, he could not recover the land, even if one or more of the heirs successfully denied their consent to the trust. They, in such case, were entitled to an accounting from the executor, as to their share of the judgments; but, as they had not agreed that land should be substituted for their interests in the judgments, they could not, in the face of such an assertion, claim land. But if the executor bought the land at the sheriff's sale, in his representative capacity for the estate, the land still continued personalty for purposes of distribution under the will, and the purchaser, Gumaer, took a good title at the executor's sale. In other words, if he bought for himself as executor, he was a trustee under the will, and he had the right to dispose of the farm. If he bought for the heirs, in pursuance of an agreement with them, with their money and judgments, then he was a trustee for them, wholly independent of the will; and, they having the whole beneficial interest, he had no authority to sell without their consent.

What does the evidence show as to the purchase at sheriff's sale? It is undisputed that, before the sale, Pardon Barber and five others (six out of the eight) desired to purchase the land, and substitute it for their interests in the judgments; that Pardon was authorized to go to Wilkesbarre, attend the sale, and, if possible, have it bid in for the heirs. Two of the eight deny they were parties to the agreement. We think the decided preponderance of the evidence shows they also desired and authorized the arrangement. But assume these two did not consent. Pardon, assuming to act for and to represent the eight, raised money to bid, and arranged with Wells that he should do the bidding. For whom and with whose money did Wells buy? He explicitly states in the receipt that the money was furnished by Pardon Barber, and was not the property either of himself or the estate, although the deed was taken in his name. O. F. Nicholson, the attorney who drew the receipt, after stating the circumstances under which it was given, sums up his testimony in this language: "The intention was, as I understood it, that Coleman Wells was to hold the legal title for the heirs or family of Williams Barber, and to show that Pardon Barber furnished the money to make the purchase. That was the intention of the parties, as expressed at or about the time that paper was prepared." Notice, next, Wells' conduct afterwards. Pardon Barber goes into possession of the property, and so remains for eight years, without a single attempt of Wells to exercise an act of ownership. Barber farms it, makes improvements, pays all the taxes, purchases the interests of two of his co-owners. While in possession, he paid, at the request of Wells, between two and three hundred dollars of debts owing by the estate. Is it credible that an executor, bound to collect the income of land

for which he must account to all the heirs, was thus totally indifferent to his duty and interests? His first attempt to assert control was to offer the property for sale in 1885. When called upon, and his authority for such a step demanded, he said to counsel for the heirs: "He knew of no debts against the property at that time, and that if it was not for the fact that Ira Barber, who was connected with it, had acted the hog, he would not have undertaken to sell the property." It seems to us there was ample evidence, if the jury believed it, taken in connection with the paper, to show that Wells took the legal title to the land in trust for the heirs. He took the land for them, and paid for it with the money or judgments of all of them. It was not in his power, out of resentment, or for any other reason of his own, without their consent, to arbitrarily turn it back into money. The moment it was purchased, and the deed taken in pursuance of the agreement to purchase, the legal title was in him, not as executor, but as trustee for them, they having the right in equity to demand a conveyance. It was a dry trust,—one in which the trustee had no duty to perform. The reason for making the deed to him, instead of directly to Pardon Barber, one of the heirs, is stated by the two attorneys, Nicholson and Chase. Wells did not trust Barber, and was afraid he would not hold the land for the heirs. If the former chose to put himself in that position, without the consent of one or more, he was answerable to the nonconsenting parties for their share of the judgments, which he, without authority, had turned into land; and, if he had so accounted to them, equity would have substituted him to the ownership of the land to the extent of such interests. The case of *Miller v. Meetch*, 8 Pa. St. 417, cited by counsel for appellees, is not an authority to the contrary. There the testator devised to his executors certain lands, and directed that they be converted into money for distribution among his children. It was held that the right of election to take land, instead of money, could not be exercised, except by all the beneficiaries. That is not this case. The testator did not own this land. He only had liens against it. When the land was about to be sold on an independent lien, as alleged by defendant, the heirs agreed to buy, and substitute the land for the judgments. For this purpose they agreed to put the legal title in the name of a trustee for their benefit. The trustee consented to take and so hold it. This was not for purpose of fulfilling any provision of the will directing distribution, but was an agreement among themselves for the purchase of land they desired to own, consenting that the judgments should be used in payment of the purchase money. The arrangement is consummated, the land purchased, and the conveyance taken. The executor, who had the legal ownership of the judgments, appropriates them in payment of the purchase money. In doing so, he was performing no duty enjoined

by the will. He was a mere volunteer. If two out of eight did not consent to such use of the judgments, then they must look to the executor, who so used the judgments without authority, just the same as if he had collected the money, and refused to pay it over. The trust, as to the others, is unaffected. Or suppose, instead of judgments, the executor had had, at the date of the sheriff's sale, \$800 in cash belonging to these heirs. The property which had once belonged to their ancestor was in danger of passing to strangers. Six out of the eight heirs request the executor to purchase it for their common benefit, and he bids it to \$800, pays the purchase money with the whole fund in his hands, and takes the deed in his name for them. Eight years after, two of them deny giving authority to so use their money. That could not destroy the trust created by the original conveyance, whatever equitable right the trustee might assert as to the two-eighths interests of those objecting. If he had acted, under such circumstances, for but one of the heirs, he constituted himself, to that extent, a voluntary trustee,—assumed a relation to the one which he could not destroy by the mere arbitrary exercise of his will. Legal and equitable titles to land are not thus changed from one beneficiary or owner to another.

We think the learned judge of the court below fell into error by assuming the land should be treated as the subject of a devise to the executor, to be converted into money for distribution. If that had been the case, the instruction would have been necessary, before the legal title of the executor under the will would have been divested. But, when we consider this was not the land of testator, but, as alleged, a purchase at the instance of the heirs by a trustee for them, the rule has no application. We are of opinion the third assignment of error is sustained. It should be submitted to the jury to find, from the evidence, whether Coleman Wells purchased the land as trustee for the heirs. If so, the verdict should be for defendant, even though it now appears, that two or more of the heirs did not join in the agreement for such purpose. On the other hand, if he purchased in his official capacity as executor, to hold for purpose of future distribution under the will, he could thereafter make sale of the same under the will, and plaintiff took a good title. This is the real contention in the case, and the one on which the case should turn. The other assignments of error, in this view, are immaterial.

It is but fair to the learned judge of the court below to notice that this view of the case was not prominently presented to him by counsel for defendant; yet the exception to the charge and the third assignment of error compel us to pass upon it here. The same view, however, is distinctly intimated in the opinion of Rhone, P. J., of the orphans' court, in the matter of the petition of the heirs for a citation to the executor to show cause why the

sale to Gumaer should not be set aside; that learned judge deciding that the orphans' court had no jurisdiction, as Wells did not hold the land by virtue of his office as executor, but extra the will, on an agreement between him and the heirs. See *Barber's Appeal*, 125 Pa. St. 564. 18 Atl. 394. The judgment is reversed, and a v. f. d. n. awarded.

IN RE NOBLE'S ESTATE.

Appeal of SMITH.

(Supreme Court of Pennsylvania. July 15, 1897.)

WILLS—INTERPRETATION—ESTATE GIVEN.

A will bequeathed a certain sum to each of testator's daughters, and provided that the bequest to one daughter should be vested in loans or stock, and the income paid to her separate use, with remainder to her children. Immediately following was a provision that, as to the bequest to the second daughter, the executors should "vest it in the same way," and pay the income to her separate use. A subsequent clause provided that, if the second daughter died without issue, the bequest to her should go to certain other legatees. *Held*, that the second daughter took only a life estate.

Appeal from orphans' court, Cumberland county.

Proceedings for the distribution of the estate of James Noble, deceased. From a decree confirming the report of an auditor, Elizabeth Smith, a legatee, appeals. Reversed.

J. Webster Henderson, H. S. Stuart, and J. W. Wetzel, for appellant. John Hays and W. F. Sadler, for appellees.

MITCHELL, J. The learned auditor was of opinion that the separate use trust created by the testator for the legacy to his daughter Mary Patton was intended only for her protection during coverture, and he held, therefore, that the legacy became hers absolutely upon the death of her husband. But this does not give effect to the full intention of the testator. After charging the residue of his estate in the hands of three of his sons with legacies of \$8,000 each to his four daughters and his son James, the will provides that, "as to the bequest to my daughter Margaret, I direct my executors to vest the same on loan or stock, as they may deem best, and pay the proceeds thereof to my daughter for her sole and separate maintenance and that of her children during her life, and after her death I bequeath the same to her children absolutely, her receipt for the proceeds to be taken by my executors. As to the bequest to my daughter Mary Patton, I direct that my executors shall vest it in the same way, and pay the proceeds to her separate maintenance, and take her separate receipt therefor." Had the will left the subject without further expression, there would have been strong ground for the view that the testator's sole object was a separate use to protect Mary's share from her husband and his creditors, though even then it would not have been entirely free of doubt whether the words "vest it in the same way"

might not have been meant to cover the estate that was to pass, as well as the mode in which it was to be invested, the intent being apparently to assimilate Mary's share generally to Margaret's, which was for life only, and the trust as to her being to preserve remainders, as well as for separate use. But the testator did not leave the subject here, though he interjected at this point certain provisions as to his son James and his brother William, with which we are not concerned. But he then returns to Mary's legacy, and provides that, "if my daughter Mary Patton should die without issue, then the bequest to her to go to my other daughters, share and share alike, subject to the limitations and directions as are made herein as to their bequests." This must be read continuously with the previous clause on the same subject, directing the investment of Mary's share in the same way as Margaret's, and, so read, it makes plain the testator's intention that the provision for both daughters shall be the same, to wit, a separate use for each to herself during her life, with remainder expressed to Margaret's children, a like remainder implied to Mary's children if she should have any, and a plainly expressed devise over to her sisters upon her death without issue. With the long line of cases which hold that, after an absolute gift, restrictions sought to be imposed upon the incidents of ownership are ineffective, or the other cases where a devise over upon the death of the first legatee is held to mean such death in the lifetime of the testator, we have nothing to do. The whole will, taken together, as to the parts which relate to this legacy, shows that the gift was not absolute; and, the testator's intent to that effect being clear, we do not need to resort to rules of construction, nor do we get much light from what other testators may have meant by more or less similar language used under different circumstances, or in different connection. It is therefore unnecessary to discuss the numerous cases cited by both parties in their arguments. Decree reversed, with costs, and distribution directed to be made in accordance with this opinion.

BENDER v. STREABICH et al.

(Supreme Court of Pennsylvania. July 15, 1897.)

SCHOOL HOUSES—USES.

School directors may not permit the use of school buildings for sectarian religious meetings, nor for the holding of public lyceums, nor for any purposes other than school purposes.

Appeal from court of common pleas, Lancaster county.

Bill by H. H. Bender against Martin K. Streabich, president; Daniel D. Herr, secretary; John B. Le Fever, treasurer; Robert S. Knox, Henry B. Shuman, and Joseph S. Seits, the board of school directors,—of the district of Manor township, Lancaster county. From a decree for complainant, defendants appeal. Affirmed.

The following are the assignments of error, viz.: "First Assignment. The court erred in not sustaining defendants' fourth point as to conclusions of law, which reads as follows: '(4) The holding of lyceums in the public-school houses is within the meaning and intent of the common-school law, and such use of the school houses, being in aid of education and for the general improvement of the neighborhood, cannot be restrained by injunction.' Second Assignment. The court erred in not sustaining defendants' sixth point as to conclusions of law, which reads as follows: '(6) The facts in the case showing that no school house mentioned in the bill is now being used, or likely to be used, for other than common-school purposes, except the Little Pittsburgh school house, and that this house is not used for sectarian purposes, and is never used during week days, but only on Sunday, for purposes wholly innocent, and promotive of the good of the neighborhood, no injunction to restrain the same should issue.' Third Assignment. The court erred in entering the following decree, viz.: 'And now, April 28, 1896, this cause came on to be heard upon bill and answer, and upon testimony taken, and after considering the testimony and hearing the arguments of counsel and upon full and due consideration thereof, the court have decided to let the injunction granted in this cause remain and be perpetual, to restrain the respondents or defendants therein named, and their successors in office, from permitting or allowing the school houses named in the bill of complaint, and all other common-school houses in Manor township school district, to be used for any other than common-school purposes, stand, and do now order and decree that said injunction shall remain and be perpetual, and that the costs of this proceeding shall be paid by the respondents.'"

Chas. I. Landis, for appellants. J. Hay Brown, W. U. Hensel, and J. W. Denlinger, for appellee.

FELL, J. The bill in this case was filed to restrain the defendants, who are the members of a board of school directors, from permitting the use of the school houses under their charge for sectarian religious meetings, and for the holding of public lyceums. The only question presented is whether school directors may permit or authorize the use of school buildings for other than school purposes. This question, in so far as it relates to their use for religious meetings, is fully answered by the decision in *Hysong v. School Dist.*, 164 Pa. St. 629, 30 Atl. 482. The use of school buildings by the community at large for public meetings for the discussion of subjects of general interest may be said to be in the line of their use for educational purposes, but it is not the use intended by law. The public-school system is for the instruction of pupils who may attend the schools, and

not for the instruction or entertainment of other persons. The school directors are trustees of the school property for that use, and they may not, against objection, authorize or permit its use for other purposes. If the school buildings may be used for meetings for the convenience, pleasure, or instruction of the general public, all other school property may with equal propriety be so used, and it would be but a step further to apply a part of the school funds to the same use. This view of the law does not forbid the use of the buildings for any purpose directly related to the instruction of the pupils of the schools, and it does not exclude their use for lectures or debates which are made a part of the course of instruction. The decree is affirmed.

In re HANDY'S ESTATE.

Appeal of LARNED et al.

(Supreme Court of Pennsylvania. July 15, 1897.)

JUDGMENT LIEN—INTEREST OF BENEFICIARY.

Where testator leaves his estate in trust, giving a beneficial interest in one-fourth of it to his son on the death of testator's wife, but the specific property of which it shall consist is left within the control of the trustees, and can only be determined when they make the division between the beneficiaries on the death of testator's widow, such sum has no vested interest in any part of the land, but only a mere possibility, not the subject of lien.

Appeal from court of common pleas, Philadelphia county.

In the matter of the assignment of E. S. Handy, Jr., Larned and Haas appeal from an order for the sale of the estate of the insolvent. Affirmed.

The report of the master was substantially as follows:

"The only questions before the master are those referred to him by the decision of the supreme court, and this depends upon the construction of the will of the testator. By the eighth item of his will, the testator devised and bequeathed his estate to the Philadelphia Trust, Safe-Deposit & Insurance Company, in trust for his wife for life, and after her death directed that the trustees should pay to his sons, on their respectively attaining the age of twenty-five and twenty-eight years, three-fourths of their share in the testator's estate, their respective shares 'being one-fourth part of my estate,' the remaining fourth to be held by the trustees under a spendthrift son's trust. Full powers of sale were given to the said trustees. By the second codicil to his will, the testator provided as follows: 'I hereby revoke the authority given to my said trustees in the ninth item of my will to sell my real estate in the city of Philadelphia, and I further direct that upon the death of my wife my said trustees shall divide my estate, both real and personal, into four equal shares, and one equal share shall be held by my said trustees

for each one of my said children upon the trusts and for the same purposes as are set forth in my will, and for no other trust or purpose whatsoever. And of this division and allotment they shall cause a record to be made in the office of the recorder of deeds for the county of Philadelphia. I authorize my trustees, however, to sell any vacant lots on Kensington or Lehigh avenues of which I may die seised whenever they can do so advantageously.' By the third codicil, the testator empowered his trustees to sell any of his real estate, except that situated in the Nineteenth and Twentieth wards of the city of Philadelphia, and his Digby residence, the latter restriction being under certain conditions. In alluding to the nature of the interests thus created, the first report of the master stated: 'Under the will of the testator, while the said E. S. Handy, Jr., has a vested remainder in three-sixteenths of the entire estate of the testator, yet it is doubtful whether any title vests in the said E. S. Handy, Jr., in any specific piece of property constituting that three-sixteenths interest. The testator, by his second codicil, directs that, after the death of the widow, the said trustees shall divide his estate, both real and personal, into four equal shares, which are to be held and disposed of as provided in the will, and that the said trustees shall make a record of this division and allotment in the office of the recorder of deeds. It is the trustees who are to make this division, and, although the allotments may be equal in gross, they are not necessarily specific interests in each specific piece of property. Authority to partition implies authority to make equality. One house may be assigned to one distributee, and another house to another. It was to prevent the necessity of the distributees holding together undivided interests in common, and being compelled to resort to partition by bill in equity and consequent sales of interests, that the testator provided for division and allotment by the trustees. To vest the title in specific pieces of property in the distributees, the allotment and division was ordered to be recorded in the recorder of deeds office. The sole restriction upon the trustees' powers is that such division and allotment shall be equal in gross to similar divisions and allotments to other distributees.' Upon appeal, the supreme court, per Mr. Justice Mitchell, said: 'As will be noticed more fully hereafter, no specific gift is made to him [E. S. Handy, Jr.] of any part of the estate, real or personal, but only a share in the sum total of the value of both; and it is open to argument that his interest in realty, as such, will begin only in the event of any realty being set apart to him in the division which the trustees shall make hereafter. That his interest in the estate as a whole is vested and liable for the payment of his debts, as the master held, does not settle the question of its present liability as land to the lien of a judgment.' 167 Pa. St. 563, 31 Atl. 984. And the learned

judge further said: 'Moreover, of what the debtor's share shall finally consist as to realty or personalty is and must remain entirely uncertain and contingent until after the death of the life tenant, when the trustees are to make partition and distribution in their unfettered discretion, so that they make "four equal shares," and until that time there is a power of conversion in the trustees as to a considerable portion of the realty by a sale, which would, under the will, be paramount to any interest of Handy, Jr., or a purchaser of his title in any part of the realty. Nothing could be more utterly vain and speculative than an attempt to fix the value of the debtor's interest in the real estate under such circumstances. He may not have any real estate at all, for, as the personalty is more than two-thirds of the whole, the trustees may allot his entire share in personalty; or, on the other hand, they may put it all in realty, with or without owelty. The one thing in all this maze which is capable of even an approximate estimation is the general value of his interest in his father's estate, as a whole, real and personal combined.' 167 Pa. St. 564, 31 Atl. 985. And, in deciding that a creditor would not have a right to use his lien as equivalent to money in bidding at the sale, the learned judge further said that this resulted 'by the testator's act, in giving his son an undivided remainder in the blended real and personal estate, so that the latter's interest in the realty alone, if any he has, is impossible of present ascertainment.' 167 Pa. St. 565, 31 Atl. 985. The question, however, although so directly alluded to, was not decided. Hence, in accordance with the directions of the supreme court, the master proceeds to ascertain:

"1. What liens exist against the interest of E. S. Handy, Jr.? Messrs. Larned & Haas claim a lien against the interest of E. S. Handy, Jr., in the real estate of his father, by virtue of their judgment of July 11, 1893. As a judgment is not a lien upon personalty, and as execution was not here issued until after the assignment for the benefit of creditors, the question is whether E. S. Handy, Jr., has such an interest in the land as is bound by the lien of a judgment. In Pennsylvania a judgment binds equitable, reversionary, and even inchoate interests, but those interests must be estates in the land; and, unless the debtor has an interest in specific real estate which he could himself convey, a judgment against such debtor is not a lien against said real estate. In *Morrow v. Brenizer*, 2 Rawle, 188, Chief Justice Gibson said: 'It is supposed that a judgment is a lien on every possible interest in land, whether immediate or remote, actual or contingent. This takes for granted that the legatee had in fact an interest in the land.' * * * But it is proper to remark that both the major and minor are untrue. The interest of a mortgagee, judgment creditor, owner of a legacy charged on land, creditor of an in-

testate estate, mechanic, or material man, or of a preferred creditor under an assignment to trustees (to each of whom the land is debtor), is not the subject of judgment and execution. Nothing is such but an immediate interest, as, for instance, the estate of a tenant by the curtesy initiate, or of a widow, whose interest is put, by the intestate acts, on the footing of a rent charge. The only thing peculiar to a judgment with us is that it binds an equitable, or even an inchoate, interest, but that interest must be an estate in the land.' So, in *Thomas v. Simpson*, 3 Pa. St. 60, the court said: 'In Pennsylvania a judgment is a lien on every kind of equitable as well as legal interest in land vested in the debtor at the time of the judgment, and such interest may be seized and sold in execution in payment of debts. A rent charge on estates of a tenant by curtesy initiate, or widow's dower, her interest being put by the intestate acts on the footing of a rent charge, or right or title in land, although unaccompanied by possession,—in short, every interest, of every description, provided it be an interest in the land,—may, in this state, be sold on execution.' To the same effect are *Allison v. Wilson*, 13 Serg. & R. 330, and *Hess v. Shorb*, 7 Pa. St. 231. Hence it has been held that a judgment is not a lien upon the right to live upon land belonging to another (*Calhoun v. Jester*, 11 Pa. St. 474), nor upon an easement consisting of a right of way or occupation of certain land (*Railroad Co. v. Johnston*, 59 Pa. St. 294). This principle was applied in a different form in *Calhoun v. Snider*, 6 Bin. 135, *Ross' Appeal*, 106 Pa. St. 82, and *Waters' Appeal*, 35 Pa. St. 523.

"Applying these principles, it will be observed that under the will, while the interest of a son is vested, yet that such interest is a general interest in the testator's entire estate, and not in any separate or distinct item thereof. The sole right of the distributees is, after the death of the widow, to receive something which will amount to one-fourth of the entire estate of the testator, and this is to be worked out by the trustees alone; and it is their decision and allotment which the testator directs shall be recorded in the office of the recorder of deeds, which alone vests the title in specific pieces of property. Prior to allotment, of what real estate is E. S. Handy, Jr., seised? What specific land could he convey? Upon what real estate could the sheriff post his notices of execution? The interest of E. S. Handy, Jr., is not a three-sixteenths interest in each piece of land of which the testator died seised, for that would imply a jurisdiction to compel the trustees to allot a three-sixteenths interest in each tract or house to the said E. S. Handy, Jr. The only control which E. S. Handy, Jr., has over the trustees, and his only present specific interest in the estate, is an interest to compel a proper execution of the trust, viz. to compel an allotment of one equal fourth part to the said E. S. Handy, Jr. He

has no interest to compel the allotment of specific items of the estate. That discretion the testator has vested in his trustees by the second codicil, and this clause has been decided by the supreme court, and held to empower the trustees to make allotment 'in their unfettered discretion,' the only limitation being that it shall be divided into 'four equal shares.' In *re Handy's Estate*, 167 Pa. St. 564, 31 Atl. 983, 986. The trustees could allot one share in personality, provided that it was equal in value to every other share. Under the evidence, there is ample personality to make such allotment. The scheme of the testator is apparently not to invest any child with any specific interest in any specific property prior to allotment and division by the trustees. The powers of sale vested in the trustees as to many properties would lead to the same conclusion as to the testator's intention, for a sale of any piece of real estate by the trustees under their power would defeat the title of a judgment creditor, and searches would not be taken out against the *cestuis que trustent*, who are distributees. Under the statute, executors who are given powers of sale are invested with the estate. The interest of E. S. Handy, Jr., under the present will, would seem to be somewhat analogous to the interest of the distributees in *Chew's Ex'rs v. Chew*, 28 Pa. St. 17, where a testator authorized his executors, after they had obtained knowledge of the condition of his estate, to convey at their discretion lands to his children as the executors might select; and it was held that the children had no estate in the land until it was conveyed to them by said executors.

"The fact that the will does not operate as a conversion, as has been argued, does not affect the determination of this question. If there was a conversion, of course no lien by judgment would attach. But, because there is no conversion, it does not follow that the interest of E. S. Handy, Jr., is a specific interest in each place of real estate of which his father died seised. The rights and interests of E. S. Handy, Jr., are solely conferred by the will of his father, and he takes them in such manner as the testator chooses to direct; and there is nothing illegal in the testator giving a vested interest in the execution of the trust, and deferring that vesting as to any specific item of his estate within any time regulated by the rule against perpetuities. No illegal injustice to creditors is effected by such provision, for the testator, had he so chosen, could have exempted the entire interest from liability of every kind to creditors by making a spendthrift son trust of the entire interest, instead of as to only one-fourth thereof, as he has done. The question is whether E. S. Handy, Jr., has such a tangible interest in the land of which his father died seised *qua* land as entitles a judgment to become a lien thereon, or whether, on the contrary, the interest of E. S. Handy, Jr., is simply an interest in a blended fund, the specific proportions of which are impossible to

ascertain until division. In the opinion of the master, the latter is the correct construction of the testator's will. To hold that, prior to allotment, each son is invested with a specific interest in each specific piece of real estate of which the testator died seised, whereby executions may be issued, and a specific interest sold in certain described real estate, would seem necessarily to conflict with the plan of distribution provided by the testator, as it divests the trustees of any discretion whatever in making their allotment and division. By such construction it would necessarily follow that the trustees had no discretion other than to make their allotments, so that each share should contain an equal fourth interest in realty, and an equal fourth interest in personality; whereas the supreme court, in this case, have held that the trustees are to make such 'partition and distribution in their unfettered discretion, * * * and the trustee may allot his share in personality, or, on the other hand, they may put it all in realty, with or without owelty.' It was, however, argued that all parties in interest had a right to elect to dispense with the execution of the trust, and to take the land as land, and that the judgment given by E. S. Handy, Jr., was evidence of his election to take sufficient land as land as would be necessary to satisfy the judgment. But E. S. Handy, Jr., could not disturb the will by his sole election, and there was no evidence of any election on the part of the other distributees; and, moreover, giving a judgment would seem to be no evidence of such an election on the part of E. S. Handy, Jr. The judgment was establishing, by matter of record, the validity and amount of an existing indebtedness. Such judgment could be enforced against personality as well as realty, therein differing from a mortgage, which was held to be a provisional election in *Bailey v. Bank*, 104 Pa. St. 425. In the last-named case it also appears that all the other distributees under the will had united in an express election. If giving a judgment is to be treated as an election under a will to appropriate land to satisfy the judgment, it might in this case, with equal force, be conversely argued that the prior assignment by E. S. Handy, Jr., of April 29, 1893, to the Philadelphia Trust Company, was equally declaratory of his intention to elect to appropriate so much personality as would be necessary to fully satisfy that assignment. Hence the master reports that the judgment of Larned & Haas is not a lien upon the interest of E. S. Handy, Jr., in his father's estate. The result does not lessen the liability of the interest of E. S. Handy, Jr., to pay his debts, and it does not deprive Larned & Haas of their rights as creditors. It simply puts them upon an equality with all creditors other than the executors of the estate.

"The only other claimants who assert a lien are the executors of the estate. On April 29, 1893, E. S. Handy, Jr., conveyed all his right, title, and interest in his father's estate to the

executors, to secure the payment of the sum of \$42,031.13, the amount stated in the said assignment to be the indebtedness of E. S. Handy, Jr., to the said estate. At this date the trustees, who (except the widow) are also executors, were and are in possession of the estate. It was, in the language of the supreme court, 'a valid and effective assignment.' The executors, therefore, have a lien upon the interest of the said E. S. Handy, Jr., under his said assignment of April 29, 1893. Under the evidence, the amount for which the executors have a lien is, as of January 1, 1896, the sum of \$44,188.73. As appears in the second original finding of fact, this is composed of three promissory notes, given by E. S. Handy, Jr., to his father, amounting to \$24,746, and of the sum of \$17,285.13, being the amount due by the said E. S. Handy, Jr., upon the pledge of certain shares of stock loaned him by his father, and redeemed by the executors' payment of this sum of \$17,285.13. This last-named indebtedness arose in the lifetime of the testator, the said testator having loaned his son fifty shares of the Philadelphia Trust Company stock, for the purpose of borrowing for the use of his said son such sum as the Philadelphia Trust Company might loan thereon to him. The Philadelphia Trust Company thereupon loaned the said E. S. Handy, Jr., \$18,000, which was subsequently reduced by payments to \$16,500. On April 29, 1893, this sum amounted, with interest, to the aforesaid sum of \$17,285.13; and, as the stock was more valuable than the amount of the loan, the executors reduced the liability to a cash basis, by paying the debt for which it was pledged. As this indebtedness arose from the express act of the testator in his lifetime, being in reality a loan of cash by the testator in the form of stock, which was liquidated in cash by the executors, it would seem that, although not recited in the will, its validity is the same as the other loans made by the testator, which were so set forth in his said will.

"The indebtedness of E. S. Handy, Jr., to his father's estate was stated, by the agreement of April 29, 1893, to be at that date \$42,031.13. Apart from this liquidation, the master has investigated the amount of the indebtedness, and finds that the sum stated in said agreement is correct, and that all interest thereon had been previously paid or adjusted. The executors presented a claim for interest on the notes held by the testator from 1881 down to the testator's death, in 1889; but this claim was negatived by the evidence, and by subsequent admissions. Since the testator's death, the interest on these notes has been paid in full to October, 1896, by deductions from E. S. Handy, Jr.'s, share of the income of the estate. The result is that the total indebtedness of E. S. Handy, Jr., for which the executors have a lien, is, as of January 1, 1896, the amount of the notes held by testator, viz. \$24,746, with interest at five per cent. from October 2, 1895, to January 1, 1896,

\$305.89; and the additional sum of \$17,285.13, with interest at six per cent. to January 1, 1896, less partial payments, \$1,851.71,—making altogether, as of January 1, 1896, \$44,188.73. The assignment of April 29, 1893, was not recorded prior to the judgment of Larned & Haas; but, if the master is correct in finding the judgment of Larned & Haas is not a lien, it would be unnecessary to discuss the effect of such nonrecording. If, however, the master should err in his decision as to the nature of the interest of E. S. Handy, Jr., in the estate, it would still seem that, as against Larned & Haas, the unrecorded assignment is, under the decision in *Davey v. Ruffell*, 162 Pa. St. 443, 29 Atl. 804, as valid as if it had been duly lodged for record; for Larned & Haas, being neither purchasers nor mortgagees, but merely judgment creditors, were not within the purview of the recording acts.

"2. Whether the sale will be subject to or discharged from the executors' lien. The executors joined in the prayer of the assignee's petition, and by their answer, filed of record, prayed and consented that the sale might be free and discharged from the lien which they held by virtue of their assignment of April 29, 1893, and that their rights should be asserted upon the fund to be produced thereby. The former decree of the master, decreeing a sale discharged from their lien, was made upon their consent. This, of course, binds them. Apart from this, the same conclusion would seem to result under general doctrine. Thus, the interest created by the assignment of April 29, 1893, is such an interest, by way of lien, as would seriously embarrass any private sale attempted to be made by the assignee. In the language of the act of 1876, it is to the 'manifest interest of all parties' that the purchasers' title shall be a clear and unincumbered title. Otherwise, the property would be more or less sacrificed in value, as the purchasers would be compelled to speculate on the duration of the life of the widow in determining how long they could hold the property before being called upon to pay the principal of the lien subject to which they bought it; and the existence of this prior lien and its uncertain duration would also prevent the purchasers from borrowing money thereon by way of mortgage or other charge, and in other ways add to the unmarketability of the title. These contingencies would defeat the obtaining a fair price for the property, and it is obviously the interest of Messrs. Larned & Haas, as well as the assignee, that the sale shall be made in such manner that the largest price can be obtained. The executors are also interested in such result, and hence themselves pray that the sale may be free and discharged from any claim upon their part, and that their rights shall be asserted upon the fund to be produced thereby. There does not seem to be any rule of law which prevents this. The decisions are the other way, for the indebtedness to secure the payment of which the assignment of April 29, 1893, was executed, in

so far as said indebtedness consists of the amounts advanced by the testator, has been decided by the supreme court to consist merely of loans, and not technical advances; and in so far as said indebtedness is composed of the amount due by E. S. Handy, Jr., upon the stock loaned him by his father, such indebtedness is also clearly a loan. Hence the entire sum for which the interest of E. S. Handy, Jr., in his father's estate, is held by the executors of the estate, is a debt due by the said E. S. Handy, Jr., to the estate charged upon his share thereof; and it has always been so treated by the executors, the trustees, and the said E. S. Handy, Jr. Such charges will be discharged by judicial sale. *Reed v. Reed*, 1 Watts & S. 239; *Hlester v. Green*, 48 Pa. St. 102; *Strauss' Appeal*, 49 Pa. St. 353; *Woods v. White*, 97 Pa. St. 222; *Pryer v. Mark*, 129 Pa. St. 529, 19 Atl. 895.

"It is therefore submitted that the interest of E. S. Handy, Jr., will be sold free and clear from any charge or lien against E. S. Handy, Jr., whether imposed by the act of the testator or the act of the said E. S. Handy, Jr., and that the purchaser will take title clear and discharged therefrom. The master therefore reports that the only lien upon the interest of the said E. S. Handy, Jr., in his father's estate, is that of the executors of the estate of E. S. Handy, Sr., in the sum of \$44,188.73, as of January 1, 1896; that the sale shall be made discharged from said lien; that the amount of purchase money to be realized at said sale shall be paid to the said executors to the extent of their said lien thus discharged, and the balance, if any, shall be paid to the assignee for the benefit of creditors of E. S. Handy, Jr., as general assets."

William Drayton and Joseph L. Tull, for appellants. Rowland Evans and R. L. Ashurst, for appellees Philadelphia Trust, Safe-Deposit & Insurance Co. and others. C. Berkeley Taylor and John G. Johnson, for appellees assignee and creditors.

MITCHELL, J. The matters involved in this controversy were before this court in *Re Handy's Estate*, 167 Pa. St. 552, 31 Atl. 983, 986, and most of them decided. The principal question now raised is whether the estate of E. S. Handy, Jr., under his father's will, included any interest in land which would be subject to the lien of a judgment against him. This question was incidentally considered in the former case, but, in the state of the record then, was not decided, though some intimation was given of the leaning of the court. The learned master, however, to whom the matter was referred back for the ascertainment of the liens and the effect of the sale upon them, took up the question anew with great learning and ability, and has stated his conclusions with such clearness and accuracy that little more is necessary for us than to express our approval of them. The testator left his estate in trust, but gave a beneficial interest in one-fourth of

it to his son E. S. Handy, Jr. The proportionate part was fixed, but the specific property of which it should consist was left wholly within the control of the trustees, and could only be determined when they made the division directed by the testator on the death of his widow. Such division is within their absolute discretion, subject only to the requirement that it shall be into equal fourths in value. They may set apart as this son's share all personalty, or all realty, or a portion of each. Until such allotment, he has no vested interest in any part of the land, but only a mere possibility or expectation, not the subject of lien. Decree affirmed, with costs.

OWENS et al. v. CITY OF LANCASTER.
(Supreme Court of Pennsylvania. July 15, 1897.)

MUNICIPAL CORPORATIONS — SEWAGE — WATER
COURSES—OBSTRUCTION AND POLLUTION
—DAMAGES—PRESCRIPTION.

1. As the result of the use of a stream as a sewer by a municipal corporation, the volume of water was increased so that in times of ordinary rains the banks of the stream were overflowed, and the lands of lower owners were washed with sewage, and banks were broken down and washed away; considerable quantities of offensive refuse accumulated on the banks and in the stream, and not only obstructed the flow, but emitted disgusting and unhealthy smells, which extended to such a degree over lower lands as to render them untenable; and the bottom of the stream was considerably elevated by the accumulation of sand and solid refuse, which the city allowed to increase from year to year, and thus to cause frequent overflows. *Held*, that the city was liable in damages to the lower owners as for a continuing nuisance, though it had the right to use the stream as a sewer.

2. Where a city uses a stream as an open sewer, it cannot acquire by prescription a right to neglect its duty to keep open the channel, and to remove accumulations of refuse therein.

Appeal from court of common pleas, Lancaster county.

Trespass by Stephen J. Owens and another against the city of Lancaster to recover damages for negligence in the use of a stream known as "Hoffman's Run," as an open sewer. The court granted a compulsory nonsuit, and plaintiffs appeal, all their specifications of error going to error in the nonsuit. Reversed.

Martin, Holahan & Alexander, for appellants. A. F. Shenck, J. W. Brown, and A. B. Hassler, for appellee.

GREEN, J. The evidence for the plaintiffs in this case tended strongly to establish several conditions as the result of the defendant's user of the stream as an open sewer: First. That it created an increase in the natural flowage of the stream, so that in times of ordinary rains the banks of the stream were overflowed, and the plaintiffs' land was washed with sewage and offal, and the banks of the stream were broken down and washed away. Second. That considerable quantities of filthy and offensive refuse were allowed to accumulate on

the banks and in the stream, and not only to obstruct the flow, but to emit disgusting, unhealthy, and injurious smells and odors, which extended to such a degree over plaintiffs' land and buildings as to render the same uninhabitable, and prevent the owners from renting the same for any sum whatever. The testimony was quite positive that the premises commanded a rental of \$300 per annum in 1887, and afterwards a rental rapidly diminishing to 1890, when it ceased to have any rental value whatever, and from the latter date the property could not be rented at any price, and stood idle. It was abundantly proved that this state of things resulted exclusively from the presence of decaying offal and offensive refuse along the banks and in the stream, and the extremely noisome and unwholesome odors, vapors, and smells which pervaded the premises of the plaintiffs from the matter brought down the stream. Third. There was also evidence showing that the stream was obstructed, so that the bottom was considerably elevated by the accumulation of sand, solid refuse, and other substances, which the defendant did not clean out, but allowed to increase from year to year, and thus caused frequent overflows upon the land of the plaintiffs. It was alleged for the plaintiffs that these grievances were of so serious and injurious a character as to amount to a continuing nuisance on their lands, and they therefore claimed damages from the defendant. Now, the question whether these consequences resulted from acts and omissions of the defendant, and whether they were of the very serious character complained of by the plaintiffs, were questions which the jury alone could decide. They were pure questions of fact, and it is not possible to say that they were not supported by testimony. It is not necessary to review the testimony in detail, because the case abounds with it. The learned court below seemed to take the view that because the city had used the stream as an open sewer for a long time, and had a right to use a stream for a sewer, it was not responsible for any consequences of such user. But that this view is not sanctioned by the authorities is very clear. Thus, in *Butcher's Ice & Coal Co. v. City of Philadelphia*, 156 Pa. St. 54, 27 Atl. 376, we held that the city was liable to the owners of a wharf for injury to their property caused by deposits from their sewer. In *Harris v. City of Philadelphia*, 153 Pa. St. 76, 26 Atl. 874, it was decided that the city was liable to a lot owner for maintaining a sewer mouth upon his lot. In *Good v. Altoona City*, 162 Pa. St. 493, 29 Atl. 741, a city constructed a system of sewers, the contents of which emptied into a stream, polluting it. The bed of the stream was of limestone rock, through the fissures of which the water found a well-defined passage, and fed two springs near plaintiff's farm buildings. The springs were rendered unfit for use. Plaintiff was also unable to obtain pure water by digging wells, as the whole underground supply was polluted. Held, that the plaintiff was entitled to recover dam-

ages from the city. In the very recent case of *Blizzard v. Borough of Danville*, 175 Pa. St. 479, 34 Atl. 846, the leading facts were quite similar to those of the present case. A borough adopted a small stream as an open sewer in 1860. An action was brought in 1891 to recover damages from the borough for obstructing the flow of the stream by the accumulation of sewage, so that the banks were overflowed, and injuries caused to the plaintiff's land abutting on the stream. We held that, where a municipality adopts a stream as an open sewer, it is bound to keep open the channel of the stream, and to remove accumulations of filth, ashes, or other material that obstructs the flow of the water, and throws it out of its banks upon the land of adjoining owners. There can be no prescriptive right to neglect so plain a municipal duty. Our Brother Williams, delivering the opinion, said: "If the borough has simply drained into this stream, and then given no attention to the effect of its action on the stream, or on lot holders along its banks, and the stream has been choked or its channel obstructed in consequence of the character or quantity of the material drained into it, and injury has resulted to the plaintiff, the negligence of the borough authorities in not removing such obstructions, and keeping the channel open, is the true ground on which the plaintiff's right to recover must rest." We apprehend the same principle would apply to the injury inflicted by allowing offensive and injurious odors and smells to issue from the polluting substances discharged into the stream from the city sewers. We think that the plaintiffs' testimony was quite sufficient to raise questions of fact on these several subjects to carry them to the jury, and that it was therefore error to grant a compulsory nonsuit. The assignments of error are all sustained. Judgment reversed, and new venire awarded.

WALLS v. WALLS.

(Supreme Court of Pennsylvania. July 15, 1897.)

WITNESS—COMPETENCY—EFFECT OF CODICIL.

1. Incompetency of a legatee, and therefore of her husband, to testify in suit of executor against a third person, is removed by a release absolutely discharging and surrendering all interest in the estate.

2. A witness is not incompetent to testify, in a suit by an executor against a third person, as to indebtedness of such person to the estate, because witness is also indebted to the estate, and such third person would have an interest in the money which witness might pay the estate.

3. A codicil to a will revoking all provisions in favor of testator's son W. does not discharge an obligation of W. to testator, incurred between the making of the will and codicil, where the will merely discharged all obligations "that I may hold against any of my children * * * at this time."

Appeal from court of common pleas, Union county.

Action by W. C. Walls, administrator d. h. n. c. t. a. of John Walls, deceased, against

Margaret A. Walls, executrix of Augusta G. Walls, deceased. Judgment for plaintiff. Defendant appeals. Affirmed.

J. M. & P. B. Linn, Samuel H. Orwig, and Alfred Hayes, for appellant. Andrew A. Leiser, for appellee.

GREEN, J. The jury having found that the two notes in suit were never paid in point of fact, and the evidence being entirely sufficient to warrant such a verdict, there are but two serious questions on the record arising for our consideration. They are: First, the competency of Judge Bucher as a witness; and, second, the time at which the will of John Walls speaks, and the effect of the codicil.

As to the competency of the witness, it is to be observed it is not a question arising under the statutes relating to the competency of witnesses, but as to the effect of the release executed and delivered by Judge Bucher and his wife. Judge Bucher himself has no interest in either estate. It was his wife who was interested as one of the children of John Walls. It is correct to say that if she was incompetent, by reason of interest, her husband was also incompetent. The release is in writing, under seal, signed by Mrs. Bucher and her husband, and separately acknowledged before a notary public by her. It is absolute in its terms, and without doubt releases all and every interest of both of the releasors in the estate of John Walls, deceased. There can be no question as to its complete efficacy to that end. It was delivered to the plaintiff as administrator of John Walls, deceased, and was offered and admitted in evidence on the trial. If a proper release of all interest in the estate of the decedent could operate to establish the competency of Judge Bucher as a witness in this case, that result is clearly accomplished by this release. The suit is an action by the administrator of John Walls, deceased, against the executor of A. G. Walls, deceased, to recover money loaned by John Walls, in his lifetime, to A. G. Walls, in his lifetime, and for which loans the notes in suit were given. Mrs. Bucher is a daughter of John Walls, and, if there is a recovery in this action, she would be interested as a legatee under the will of her father, and that is the interest which would disqualify her, and therefore her husband. But it is too plain for argument that the release was an absolute discharge and surrender of all interest in that estate, and therefore established her competency as a witness, and, by consequence, that of her husband. It is not contended now for the appellant that the release has not accomplished that result, but an objection is suggested in these words: "It is not Mrs. Bucher's right to receive from the estates of her father and mother, represented by the plaintiff in this case, that makes her or her husband an incompetent witness. It is her liability to pay money over in which the estate of Dr. Walls has an interest, and the fact that Dr. Walls is dead, that makes both

Mrs. Bucher and her husband, J. C. Bucher, incompetent to testify against Dr. Walls." This statement of objection, standing by itself, is unintelligible, and it can only be considered by the help of extrinsic testimony to prove, as a matter of fact, that Mrs. Bucher is liable to pay money over in which the estate of Dr. Walls has an interest. That feature is not at all discussed by the learned counsel for the appellant, nor is any authority cited in support of their contention. What seems to be in the mind of counsel is that in the will of her father there is a recital that his former wife, Margaret Walls, had devised all her estate to him upon certain trusts, which trusts he had fulfilled, and in pursuance thereof he had made distribution of her personal estate to their children, and, in further discharge of that duty, he devised, inter alia, a certain lot of ground to Mrs. Bucher, upon condition that she should pay \$1,000 into his estate, to be used with other sums to make an equal distribution of his estate among all his children. Thereupon the contention seems to be that, as Dr. Walls would be interested in the estate of his mother thus given by his father, therefore he had an interest in the sum of \$1,000 to be paid by Mrs. Bucher, and therefore she is an incompetent witness in this suit. We cannot possibly discover any connection between this premise and its conclusion. The only argument in its support that we observe is that "an adverse verdict would take from Dr. Walls his equal share in that \$1,000." What that proposition has to do with the question of Mrs. Bucher's competency as a witness in this case we cannot understand. If Dr. Walls has an interest in that \$1,000, he can certainly enforce it, without any reference to the payment of the money he borrowed from his father, for which the notes in suit were given. His right to get the benefit of the provision in his father's will cannot possibly be affected one way or the other by Judge Bucher's testimony as to whether he owed the money due on these notes. There is no relevancy or connection between the two subjects. The only interest that could disqualify Mrs. Bucher would be a right to have a part of the money recovered in this action, and any right of that kind is swept entirely away by the release. We therefore dismiss the first and second assignments of error.

The third and fifth assignments present the other principal question. The will of John Walls contained the following provision: "I hereby order and declare that all obligations that I may hold against any of my children for the payment of money at this time shall be canceled and discharged, except the two obligations above cited, of my son G. W. Walls." The will was dated and executed the 5th day of May, 1879. The notes in suit were dated, the one for \$1,000 on March 6, 1883, payable at one day after date, and under seal, and the one for \$100 on April 7, 1880, payable three months after date, and without seal. As the will only discharged

obligations which were in existence at the date of the will, viz. May 5, 1879, it had no such effect as to these two notes. But the testator made a codicil on October 15, 1890, by which he revoked all the provisions of his will in favor of his son A. G. Walls, and positively ordered and directed that he should have no interest in his (John Walls') estate, and gave all the interests bequeathed to him to his other children. He added in the codicil that he had already paid to this son his full share of his mother's estate, and more, and again repeated the revocation in these words: "I hereby order and declare that all the bequests made to him by the former will hereto attached, either from me or in right of his deceased mother, shall be revoked." It is now argued for the appellant that because a codicil is a republication of the original will, and the will therefore speaks from the date of the codicil, and not from its original date, the will of John Walls must be considered as if it had been dated and executed on the 15th of October, 1890, instead of the 5th day of May, 1879. And it is further argued that, because the will discharged all his obligations then existing against his children, it must now be construed as having discharged the two obligations in suit. While it might be true that, if the will contained a general discharge of all obligations against the children, an obligation subsequently incurred might be included by force of a codicil which did not affect the subject-matter of the former bequest, it is impossible that such a construction can be given to this will, for two distinct and obvious reasons, the mere statement of which is sufficient to dispose of the whole question: First, the provision of the will was expressly limited to obligations existing at the time the will was made, and hence could not extend to and embrace obligations which were not in existence until long after that time. To hold otherwise would be to set aside the express intent of the testator by the mere force of a constructive intent. Upon this subject the authorities are most numerous and without conflict. But the second answer to the appellant's contention is still more fatal. The codicil expressly revokes all the provisions of the will in favor of Dr. Walls, and hence, even if the will had positively discharged future, as well as past, obligations, it would have deprived him of any benefit under the will. If we were now to hold that, under the codicil, the notes in suit were to be discharged, we would stultify the codicil, and make it declare the very opposite of what it explicitly and most emphatically directed. In other words, the codicil expressly takes away from A. G. Walls all interest in the estate of his father under the will; yet we are asked to say that it gave him an interest under the will which even the will itself never gave him. It is a waste of time to discuss such a question, and we decline to do so. The third and fifth assignments are dismissed.

As to the remaining assignments of error, they are entirely without merit, and are therefore dismissed. Judgment affirmed.

In re THOURON'S ESTATE.

(Supreme Court of Pennsylvania. July 15, 1897.)

TRUSTEES—COMMISSIONS ON PRINCIPAL.

Commissions on principal of estate are properly allowed before termination of the trust, where the services of the trustee have extended through a period of 16 years, and in the accounts made in that time practically no claims for commissions on income have been made, and his management has been so judicious that the principal has been increased by over \$100,000 by the sale of unproductive land originally valued at a small sum.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of Nicholas E. Thouron, deceased. From a decree of the orphans' court sustaining exceptions to the allowance by the auditing judge of commissions to Nicholas Thouron, trustee of the estate, said trustee appeals. Reversed.

Dallas Sanders and John G. Johnson, for appellant. Henry C. Brown, for appellee.

GREEN, J. The account under consideration is the fourth account filed by the present trustee, and its items occupy 46 pages of solid printed matter, and vary in innumerable details from 25 cents to \$179,796. It represents an account of capital and an account of income, including the distribution of the latter in monthly payments to those entitled. The capital account starts with the balance of assets in hand from the third account, amounting to \$179,796, and cash, \$17,865.60. The aggregate debits of this capital account at its close amount to \$315,158.88, and, after deducting the payments charged against them, the resulting balance to the credit of the account is \$302,406.87. Then follows an investment account, showing the various changes of investments and new investments of the capital, resulting in an exhibition of securities amounting to \$293,543.61 and cash \$8,863.26. In addition to the foregoing, an income account is annexed, with an immense number of items, most of them small, but aggregating \$78,288.61, against which are charges leaving a balance of \$51,367.55, which was distributed to the parties entitled in very numerous items, leaving a balance of cash on hand of \$1,620.73. In the income account credit is taken for commissions to the amount of \$3,903.44, to which no objection is made. In the capital account no credit is taken for commissions, but a claim for compensation was made before the auditing judge, who allowed the sum of \$7,500 in view of the extraordinary character of the circumstances and the length of time through which the services of the accountant were rendered. A statement of facts

sworn to by the accountant and annexed to his account explained the reasons for his action in regard to compensation, and this was in no way contradicted or impeached as to its correctness. It is upon the record without objection as a part of the account, and was considered by the auditing judge in passing upon the question raised. From the statements there made it appears that the accountant became sole trustee by appointment of the orphans' court in October, 1880. His first account was filed in January, 1882, and in it he made no claim for compensation. His second account was filed in May, 1891, and again no charge was made for compensation. The third account was filed in April, 1892, on the death of one of the legatees. A credit was taken and allowed for a small commission of \$467.31 on the income. The present account was filed in June, 1896, and covered the time from April, 1892, to the date of filing, and in this account large additions were made to the bulk of the fund. A body of coal land in Schuylkill county was sold for upwards of \$100,000. A tract of land in the state of Texas was sold for \$6,180. Both of these properties were theretofore unproductive, and their value constituted no part of the capital of the estate in any of the preceding accounts. The capital, as shown by the third account, was \$196,661.60, and by the fourth account it was \$302,158.88, exhibiting an increase of \$105,497.28. It further appears that the accountant had never received any compensation whatever for his management of the capital of the estate. His total sales of real estate amounted to \$164,485. His collections of gross income amounted to \$270,679, and his total transactions on account of the principal or capital of the estate, including reinvestments, amounted to \$749,691; making a total of all items of \$1,020,370, which passed through his hands. His payments to the legatees were made with unusual promptness, and were very large in amount. To three annuitants he paid \$41,334, and to each one of the cestuis que trustent he paid \$29,015.24. His management of the estate extended over a period of 15½ years. It was a most successful management in every respect. His very numerous investments, most of them in moderate sums, have not resulted in any loss to the estate. No objection whatever is made to any of his acts and transactions in conducting the affairs of the estate, and nothing but praise is awarded to him even by the only one of the parties in interest who excepts, or rather who objects, to the allowance of compensation for the management of the principal of the estate. No other objection to any part of the account is made by any one. The amount of compensation in that connection which was allowed by the auditing judge—\$7,500—is not objected to as unreasonable, and it certainly is not unreasonable in any point of view. In addition to all this, the cestuis que trustent, who are five in number, acquiesced in the allowance, except one, a

brother, and they make no objection now to the allowance.

In view of all the facts of the case we coincide entirely with the auditing judge in regarding this as an exceptional case, and presenting an instance of extraordinary circumstances, such as are held sufficient to constitute an exception to the ordinary rule that commissions cannot be allowed on the principal of a trust until the termination of the trust, or of the trustee's relation to it. The auditing judge was overruled by two of the judges of the orphans' court solely upon the strict application of the general rule, and not upon any other ground whatever. In considering the propriety of this ruling it must be borne in mind that this is not the case of a fixed, definite amount of a trust fund, which would be diminished by the allowance of commissions upon it. On the contrary, it is a case in which the capital of the estate has been very largely increased by the excellent and judicious management of the trustee, and, instead of its being reduced by the allowance of commissions, it will still be very much larger after the allowance than it was at the beginning of the account. The reason for the general rule therefore does not exist, and hence that rule is not of controlling force in determining the question. The record does not show what the capital account was when the accountant was appointed in 1880, but it does show that even at the end of the third account in 1892 it was \$197,661.60, whereas at the close of the fourth account it was \$302,406.87, showing an increase of about \$105,000 in the four years and three months over which it extended. It cannot be contended, therefore, that the capital of the trust will be reduced by the allowance of the very moderate compensation granted by the auditing judge. Nor is it any answer to this to say that the capital was always there, though in a different form. It was unproductive real estate, which was originally valued at only \$7,000, and it was a kind of real estate which has no fixed value in the market, and whose ultimate money value depends almost entirely upon the skill, and prudence, and good judgment of the person who has it in charge. When it is considered that this piece of real estate was so wisely and skillfully managed; that instead of the original valuation of \$7,000 the sum of \$103,385 was obtained for it, and added to the real capital of the estate, it seems incredible that such a thing could be. It seems to us that the circumstances of this estate are of the most unusual and extraordinary character, and most amply justify, and indeed require, a departure from the usual rule regulating this subject. Again, it must be considered that the accountant can never again receive this or any other compensation for this particular service. It is conceded that, if this were the final account, the trustee would be entitled to full compensation as well upon the principal as upon the income; but, so far as this accountant is concerned, he would not.

upon the settlement of his final account, be permitted to charge any part of the sum now allowed, and hence the estate could not suffer by its present allowance. The authorities, particularly Bosler's Estate, 161 Pa. St. 457, 29 Atl. 57, and Mintzer's Estate, 18 Phila. 98, recognize the exception of extraordinary circumstances to the operation of the general rule, and when to this is added the fact that the real capital of the fund will not be diminished by the allowance, and that the amount allowed can never be allowed again, all reason for enforcing the general rule disappears. We are clearly of opinion, upon a consideration of all the facts of the case, that the ruling of the auditing judge was correct, and that the sum of \$7,500 allowed by him was a fair and reasonable allowance of the compensation claimed, and we therefore sustain it. The assignments of error are sustained. The decree of the court below is reversed at the cost of the appellee, and the record is remitted, with direction to the court below to correct it in accordance with this opinion.

NAUMAN et al. v. WEIDMAN.

(Supreme Court of Pennsylvania. July 15, 1897.)

CHARITABLE USES — PERPETUITIES — POWER OF TRUSTEES—CONVEYANCES—COMPROMISE.

1. A valid trust for charitable uses, and not a perpetuity, was created by a devise of land to a religious association in trust, to devote the income to keeping testator's family lot in the meeting house graveyard, and to distribute the balance, within specified limits as to amount, to home or foreign missions, and the residue among the needy poor of the vicinity, as the trustees and their successors might think best.

2. A will created a valid trust for charitable uses, and testator's heirs brought ejectment for the trust property, on the ground that the will created a perpetuity for an unascertainable purpose. The action was compromised, and the trustees and all parties claiming an interest in the property joined, without order of court, in a conveyance of same. *Held*, that the conveyance, being in violation of the trust, passed no title.

Appeal from court of common pleas, Lancaster county.

Assumpsit by George Nauman, William B. Given, and Eugene G. Smith, trustees, against John S. Weidman, to recover the sum of \$15,125, with interest from April 1, 1897, which Lizzie N. Weidman, by articles of agreement dated September 4, 1896, covenanted and agreed to pay to the plaintiffs on the delivery of a deed in fee simple for a farm located in Penn township, Lancaster county, Pa., on the 1st day of April, 1897, he being the surety of the said Lizzie N. Weidman for the due performance of the said articles of agreement on her part. On the 1st day of April, 1897, the plaintiffs tendered a deed for the premises to Lizzie N. Weidman, who declined to accept the same, and pay the purchase money, on the ground that the title of the plaintiffs to the farm was defective, and that they had no right to convey it to her, at the same time ex-

pressing her willingness to pay the plaintiffs the sum agreed upon if a title in fee simple in accordance with the articles of agreement could be made by plaintiffs to her. From a judgment for plaintiffs, defendant appeals. Reversed.

The following are the assignments of error. viz.: "(1) The court erred in confirming the report of the referee. (2) The court erred in not sustaining the first exception to the report of the referee, which reads as follows: 'First. The referee erred in his conclusions of law that the plaintiffs are seised of an indefeasible interest in fee simple in the Abraham Kauffman farm, containing ninety-eight acres, more or less, situate in Penn township, Lancaster county, Pa., which they covenanted to convey to Lizzie N. Weidman by articles of agreement on April 1, 1897, for the sum of \$15,125.' (3) The court erred in directing judgment to be entered in favor of the plaintiffs, and against the defendant, in the sum of \$15,196. (4) The court erred in not sustaining the third exception to the report of the referee, which reads as follows, viz.: 'Third. The referee erred in not finding as a matter of law that, even if the trustees of the Mennonite Meeting House and grounds could alienate the lands in controversy, they could only do so in pursuance of an order of the orphans' court, in accordance with the provisions of the act of April 18, 1853 (P. L. 1853, p. 503).' (5) The court erred in not directing judgment to be entered for the defendant, with costs."

Owen P. Bricker and Chas. I. Landis, for appellant. George Nauman, Wm. B. Given, and Eugene G. Smith, for appellees.

MITCHELL, J. This is an action for the enforcement of a contract of sale, and the defense is that the title offered by plaintiffs is not good. The facts found by the referee, and undisputed, show that the title is not merely unmarketable, but utterly worthless for any purpose. Abraham Kauffman, dying in 1886, devised the land in question to the Mennonite Meeting, and directed his executors to make a deed to the trustees upon certain trusts, the principal of which were that, after the death of his sister, they should devote the income to keeping testator's family lot in the meeting house graveyard in order, and to distribute the balance, within specified limits as to amounts, to home or foreign missions for the spread of Christianity, and the residue among the needy poor of the vicinity, as the trustees and their successors may think best. The executors made the deed as directed, and the Mennonite Meeting accepted the trust. Thereupon the title became vested in them in fee simple for the uses named by the testator. The will created a valid trust for charitable uses. Many analogous uses are shown in the cases cited by the appellant, but the validity of this trust is too clear to need any discussion.

In 1892 some collateral heirs of Abraham

Kauffman brought ejectment for this land, on the claim that the will created a perpetuity for an unascertainable purpose, and to that extent it was inoperative and void. This ejectment was compromised, and the Mennonite Meeting House Association (which has been incorporated since testator's death), the trustees of the meeting house property, the surviving executor of Kauffman, and Kauffman's heirs at law made conveyances to the present plaintiffs, for the purpose of selling the land, and distributing the proceeds among the parties, or some of them, in a manner agreed upon, but discreetly not disclosed. It is this title which plaintiffs offer to appellant in the case now before us. The plaintiffs in the ejectment had no claim at all. The suit was simply a discreditable scheme of greedy relatives to set aside the will of the testator, by taking advantage of the well-known unwillingness of the Mennonites to litigate. Courts, however, do not enter into consideration of the merits of claims which have been settled by compromise of actually existing litigation, and this case would be no exception on that ground. But the compromise passed no title to the present plaintiffs, because none of the parties had any title except the Kauffman Mennonite Association, and it had no power to convey. As already said, the testator created a valid trust for specific charitable uses, and, as a general rule, lands so held cannot be conveyed away by the trustee. In *Yard's Appeal*, 64 Pa. St. 95, *Sharswood, J.*, quotes approvingly from *Lewis on Perpetuities*, that "land dedicated to the service of charity and religion is practically inalienable." There are classes of cases where the object of the trust has come to an end, or conditions have so changed as to require change of location, etc., in which courts of equity will decree sale, and supervise the application of the proceeds to the same uses; but in this state that power is now exercised under the act of 1853. See case of *In re Mercer Home for Disabled Clergymen*, 162 Pa. St. 232, 29 Atl. 731. There is no pretense that the authority of the court was secured in this case. The conveyance by the Kauffman Association was not only a conversion of the estate left by the testator, but a diversion of part of the proceeds from the trust. This the association was without power to make. Even the court could not do it, unless possibly to preserve the rest of the estate from the risks involved in a bona fide and substantial claim against it, by a compromise fully explained to the court, and of the necessity for which it was judicially convinced. The cases which hold that a devise in trust for charity is not a conditional estate, and therefore the grantor or his heirs cannot re-enter for condition broken by alienation, such as *Griffiths v. Cope*, 17 Pa. St. 96, or *Barr v. Weld*, 24 Pa. St. 84, or the other line of cases not of a charitable use, like *Brendle v. German Congregation*, 33 Pa. St. 415, we do not need to discuss, as the facts take this case entirely out of those classes. On the

undisputed facts, the title to the land is still in the Kauffman Mennonite Association. The plaintiffs took nothing by the conveyance to them, and therefore have no claim against appellant on which they could recover. Judgment reversed.

90 Me. 102
BENNETT v. DAVIS.

(Supreme Judicial Court of Maine. March 8, 1897.)

TAX SALE—CONTESTING VALIDITY—CONSTITUTIONAL LAW—DECLARATION OF RIGHTS.

1. Rev. St. c. 6, § 205, as amended by St. 1896, c. 70, § 11, requiring the owner of land sold for nonpayment of taxes to deposit with the clerk of court the amount of all taxes, interest, and costs accrued up to that time, before he can be admitted to contest the validity of the tax or sale, is unconstitutional.

2. It infringes upon the constitutional right of the citizen (1) not to be deprived of his property but by the judgment of his peers, or by the law of the land; (2) to have remedy by due course of law for any injury done his property; and (3) to have right and justice administered to him freely and without sale.

(Official.)

Appeal from supreme judicial court, Cumberland county.

Action by Elbridge G. Bennett against Charles O. Davis.

This was a petition for partition of real estate situated in Cape Elizabeth, brought under Rev. St. c. 88; the petitioner claiming one-half interest therein, and admitting that the respondent was the owner of the remaining one-half interest.

The respondent pleaded that he was the owner and seld of the whole of the real estate described in the petition, and that the petitioner had no interest therein.

Under these pleadings the presiding justice ordered, under section 9 of said chapter, that there first be a separate trial of the claim of title of the respondent to the whole property as pleaded by him.

In support of his claim of title to the whole of said real estate, the respondent introduced in evidence certain tax deeds of said real estate from the treasurer of the town of Cape Elizabeth for taxes assessed in 1883, 1884, and 1891; also, certain quitclaim deeds,—claiming by said tax deeds and quitclaims to him to make a prima facie case of title to said real estate sufficient to require the petitioner to make the deposit required by section 205, c. 6, Rev. St.

The petitioner claimed that the tax deeds were defective and void, making specific objections thereto, and that the same, together with the quitclaims, did not make a prima facie case of title requiring him to make said deposit.

The presiding judge overruled, pro forma, the objections of the petitioner, and ruled, pro forma, that the tax deeds and quitclaims made a prima facie case of title.

To all these rulings the petitioner excepted. Exceptions sustained.

M. P. Frank and P. J. Larrabee, for plaintiff. Carroll W. Morrill and Geo. Libby, for defendant.

EMERY, J. The petitioner at one time owned in fee one undivided half of the land sought to be divided. The respondent undertakes to show that the petitioner's estate has been transferred to him. To show this transfer, he introduces deeds of the petitioner's interest in the land from the treasurer of the town of Cape Elizabeth, in which the land is situated, to the town, and then traces title by mesne conveyances from the town to himself. These deeds from the treasurer of the town purport to be official deeds of the land as sold for non-payment of taxes thereon, and are regularly executed and recorded. The respondent offered no other evidence of any transfer of the petitioner's title.

The court has repeatedly held, however, and consonant with reason as well as authority, that such deeds alone are not even *prima facie* evidence of a lawful assessment of a tax upon the land, nor of legal proceedings for a sale of the land for nonpayment of such tax, and hence are no evidence that a landowner has been deprived of his property according to "the law of the land." *Phillips v. Sherman*, 61 Me. 548; *Rackliff v. Look*, 69 Me. 516; *Libby v. Mayberry*, 80 Me. 187, 13 Atl. 577; *Ladd v. Dickey*, 84 Me. 190, 24 Atl. 813; *Bank v. Parsons*, 86 Me. 514, 30 Atl. 110; *Maddocks v. Stevens*, 89 Me. 336, 36 Atl. 398.

The respondent cites against these decisions the statute (Rev. St. c. 6, § 205), as amended by section 11 of chapter 70 of the Laws of 1895, which declares, in effect, that such a deed shall be sufficient and conclusive evidence of the lawful alienation of the original owner's property, though against his will, unless he shall have deposited with the clerk of the court the amount of all taxes, interest, and costs accrued up to the time. The petitioner did not make this required deposit, and the respondent contends that, by force of the statute cited, the deeds are now to be taken as conclusive evidence of his own title.

The form of the *pro forma* ruling was that the treasurer's deeds were sufficient in form and execution to make them *prima facie* evidence under the statute. In effect, however, the ruling was that the petitioner must make the deposit named before he could be heard to question the *prima facie* evidence; or, in other words, that the deeds were conclusive evidence of title if the petitioner did not make the deposit. The question, therefore, is whether the petitioner can be lawfully required to make the deposit named in the statute, before contesting the validity of the assessment and sale of his land for taxes.

In *Dunn v. Snell*, 74 Me. 22, the court strongly suggested, though without expressly deciding, that the owner of property is protected by the constitution against the statute cited. Finding the statute again invoked, and this time in such a way that it cannot fairly be

avoided, we have again carefully considered the question of its constitutionality. In our consideration we have given, as we should, great weight to the legislative opinion, and have kept in view the rule that no statute is to be declared unconstitutional unless it appears to be unmistakably so. In this case, however, we are constrained to declare it our unhesitating opinion that this statute is against the plain letter and spirit of the constitution of this state and that of the United States.

Among the rights constitutionally guaranteed to the citizen against governmental action are (1) to have remedy by due course of law for any injury done his property; (2) to have right and justice administered to him freely and without sale (Maine Declaration of Rights, § 19); (3) not to be deprived of his property but by the judgment of his peers, or by the law of the land (Id. § 6). This last-named guaranty is enforced by section 1 of article 14 of the constitution of the United States, which declares that no state shall deprive any person of life, liberty, or property without due process of law.

While the legislature may regulate the use of legal remedies, may require the payment of various fees, and may require security to be given for fees and costs, the requirement of this statute is not within either category. This requirement, practically, is that, before he "begins" his action or his defense, he shall pay into court the whole sum claimed against him, including interest and costs. With such an obstacle placed in his way by the legislature, the citizen cannot be truly said to have remedy by due course of law, or to have right and justice administered to him freely and without sale. As well might the legislature undertake to enact that no defendant shall begin his defense until he pays into court the whole sum demanded of him. It is not what has been done, or ordinarily would be done, under a statute, but what might be done under it, that determines whether it infringes upon the constitutional right of the citizen. The constitution guards against the chances of infringement. It is evident that under this statute the citizen might in some cases be practically deprived of all remedy.

Again, the statute, in effect, undertakes to deprive the citizen of his property without his consent, and without procedure according to the "law of the land," or "without due process of law." The phrases "law of the land" and "due process of law," as used in constitutions, are similar in meaning. They both imply a judgment by an authorized tribunal after an opportunity for a hearing. There must be some sort of a tribunal, some opportunity for a hearing, and some sort of an adjudication. These requirements, at least, are ingrained in the fundamental law. The legislature cannot make that "due process of law," or the "law of the land," which is not that in the constitutional sense. *Saco v. Wentworth*, 37 Me. 165; *Dunn v. Burleigh*, 62 Me. 24; *Portland v. Bangor*, 65 Me. 120. While the

legislature may impose a specific tax on specific kinds of property,—a tax which shall be self-assessing, without providing any tribunal to hear and assess,—yet, when the amount of the tax is to depend on the value of the property, the property owner is constitutionally entitled to some kind of a tribunal to judicially determine that value, and is also entitled to an opportunity to be heard before that tribunal. *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663.

In violation of this constitutional guaranty, this statute undertakes to make the ex parte act of a mere ministerial officer deprive the owner of his property. A town collector of taxes, or a town treasurer, is a mere ministerial officer. He has no power to hear and determine, but only to act. His executing and delivering a tax deed of the land of one citizen to another citizen is a pure ministerial act. The statute assumes to say that the property owner in the first instance shall not question the authority of the ministerial officer, nor the conclusiveness of the ministerial act, to transfer his property. This is clearly undertaking to deprive him of his property "without due process of law," and otherwise than "by the law of the land."

It is true, and should not be forgotten, that under this statute the property owner may question the authority of the officer and the conclusiveness of his deed by paying into court the amount of the taxes, interest, and costs claimed. It is not stated how this amount to be deposited shall be ascertained,—whether from the recitals in the deed, or from evidence adduced by the parties; but, since the deed is made evidence of title, its recitals are evidently intended to be taken as true in the first instance. No mode is pointed out for the owner to question the amount to be deposited. He cannot "begin" to question anything until he has made the deposit. He must deposit enough, at his peril. His only safety is to deposit the amount claimed by the grantee to have been paid, or at least the amount recited in the deed as having accrued. This enables the adverse party, by his claims, or the officer, by his recitals, to sequester any amount of the citizen's property and deprive him of its use, or to completely shut him out from asserting his title. As said above, not what probably would happen, but what might or could happen, under a statute, is the true test of its character; and this statute might put the citizen at the mercy of his adversary, or at least of a ministerial officer,—a result abhorrent to the very nature of constitutional government. As well might the legislature undertake to enact that a sheriff's deed alone should be conclusive evidence, as against the owner of the land, that his land had been transferred to the sheriff's grantee, unless the owner should first pay into court whatever sum was claimed or recited to be due from the owner to the grantee.

In addition to the authorities cited in *Dunn*

v. Snell, supra, others may be adduced. In New York the legislature undertook to enact that, if a judgment debtor or his assigns desired to effectually enforce his own title against that of the purchaser of his land at execution sale, he must pay to such purchaser or his assigns the amount paid by him upon the sale, with interest, and the costs of defending the execution title. The court held the statute to be in contravention of the constitutional guaranty to the citizen of his legal remedy. *Gilman v. Tucker*, 128 N. Y. 190. 28 N. E. 1040. In *Cromwell v. MacLean*, 123 N. Y. 475, 25 N. E. 932, it was held that the legislature could not validate a void tax or a void tax sale. In *Marx v. Hanthorn*, 148 U. S. 172, 13 Sup. Ct. 508, it was declared that the legislature of a state could not make a tax deed conclusive evidence of the validity of the tax assessment and tax sale. See, also, *Craig v. Flanagan*, 21 Ark. 319; *Pope v. Macon*, 23 Ark. 644.

It is to be noted that we do not decide that the legislature cannot make a tax deed prima facie evidence of title, leaving the original owner free to contest it; nor do we decide whether that is the effect of this statute. We express no opinion on that point. We only decide that the legislature cannot impose the condition named in this statute upon the owner's right to assert or defend his title or claim. The pro forma ruling practically enforced that condition, and hence must be overruled. Exceptions sustained.

MUNROE v. WHITEHOUSE.

(Supreme Judicial Court of Maine. April 3, 1897.)

EXCEPTIONS—RECORD—SET-OFF.

1. It is incumbent on an excepting party to show affirmatively from the facts reported that the ruling complained of is erroneous.

2. An excepting party must present enough of the case to enable the court to determine not only that the ruling may be erroneous, but that it is so.

3. When a person intrusted with goods as agent sells them to one who has no knowledge that he is agent, but is led to believe from the manner in which he has been allowed to deal with the goods that they are his, the other party may offset against the principal a debt of the agent. But it is otherwise when the defendant appears to have hired the property of one who was not the plaintiff's general agent, who, for aught that appears, not only had neither possession nor ownership of the property, nor any authority whatever to deal with it, but one who had never in any manner been held out by the plaintiff as having any interest in or control over the property, or any right to make contracts in relation to it.

(Official.)

Exceptions from supreme judicial court. Androscoggin county.

Action by Charles A. Munroe against George I. Whitehouse. Judgment for plaintiff, and defendant excepts. Exceptions overruled.

Geo. C. Wing, for plaintiff. Tascus Atwood, for defendant.

WHITEHOUSE, J. The plaintiff recovered a verdict for \$90 for the use of a boiler and engine owned by him.

At the trial the defendant offered testimony tending to prove that in hiring the boiler and engine in question he dealt with one E. Y. Turner, supposing him to be the principal, and that he had no dealings whatever with the plaintiff. He also proposed to introduce evidence to show that Turner was indebted to him in a sum larger than the amount due for the use of the boiler and engine, and claimed the right to offset this indebtedness from Turner against the plaintiff's claim in suit.

The presiding justice excluded the evidence, the reason for the ruling being stated as follows: "He cannot avail himself of the right of a set-off here when there is no set-off to defeat the rights of the owner of the article. My ruling goes no further than this: that it is no defense to this suit to show that there is an unsettled account between Mr. Whitehouse and Mr. Turner."

To this ruling the plaintiff excepted.

It is incumbent on the excepting party to show affirmatively from the facts reported that the ruling complained of was erroneous.

He must present enough of the case to enable the court to determine not only that the ruling may have been erroneous, but that it was so. *Harvey v. Dodge*, 73 Me. 316; *Bradstreet v. Rich*, 74 Me. 303.

In the case at bar there is no evidence whatever that E. Y. Turner, with whom the defendant claims to have dealt in hiring the boiler and engine, had either the possession or any other indicia of ownership of the property at the time of the hiring. There is no suggestion that the defendant's misapprehension in regard to the ownership was induced in the slightest degree by any act or declaration of the plaintiff; nor is there any pretense that Turner assumed to make any agreement that the use of the boiler and engine should be appropriated in satisfaction of the defendant's account against him. It is expressly stated, however, that "there was no evidence offered to show that Turner was acting as the agent of the plaintiff."

Here, then, is a case where the defendant in some way obtained possession of the plaintiff's property, and used it as charged in the writ, under an alleged contract with one who was not the plaintiff's general agent, who, for aught that appears, not only had neither possession nor ownership of the property, nor any authority whatever in fact to deal with it, but one who had never in any manner been held out by the plaintiff as having any interest in or control over the property, or any right to make contracts in relation to it.

The authorities are undoubtedly agreed that "when a person intrusted with goods as agent sells them to one who has no knowledge that he is agent, but is led to believe from the manner in which he has been allowed to deal with the goods, that they are his, the other party may set off against the principal a debt of the

agent." *Locke v. Lewis*, 124 Mass. 1; *Dean v. Plunkett*, 136 Mass. 195; *Traub v. Milliken*, 57 Me. 63, and cases cited.

But it is manifest that the case at bar discloses no facts to which this principle can be safely or equitably applied. It is not affirmatively made to appear that the ruling was erroneous, but upon the facts stated it satisfactorily appears that the ruling was correct.

Exceptions overruled.

INHABITANTS OF CUMBERLAND COUNTY v. CENTRAL WHARF STEAM TOWBOAT CO.

(Supreme Judicial Court of Maine. *Sagadahoc*.
March 8, 1897.)

NEGLIGENCE—TOWBOAT—PROXIMATE CAUSE—ABATEMENT.

1. The owner of a towboat towing a vessel, whether astern by a hawser or lashed alongside, is, as to third parties, the active, directing, and responsible agent controlling the movements of the vessel it is undertaking to tow.

2. A third party, injured through the fault of the master of such towboat, may recover of the owner therefor, even though those upon the vessel being towed were also in fault.

3. The pendency of an action against the owner of the vessel for such fault does not bar nor abate an action against the owner of the towboat for the fault of the latter.

4. The fact that the owner of a bridge across tide water has not in all respects complied with the requirements of the license granted him to build and maintain such bridge will not prevent his recovering damages for an injury thereto, if it appears that such omission was not one of the real and proximate causes of the injury.

5. A verdict will not be set aside when it does not appear to the court that upon the issues of fact raised it is unmistakably wrong.

(Official.)

Exceptions from supreme judicial court, *Sagadahoc* county.

Action by the inhabitants of Cumberland county against the Central Wharf Steam Towboat Company for injuries to the Portland bridge, caused by a schooner striking the western corner of the bridge while in tow of defendant's steam tug. Verdict for plaintiff. Defendant moved to have the verdict set aside, and also filed exceptions. Motion and exceptions overruled.

Chas. A. True and Richard Webb, for plaintiff. Benj. Thompson, for defendant.

EMERY, J. The undisputed facts are these: The schooner *Viator* was lying at the Eastern Railroad dock in Portland harbor, up Fore river above the second bridge. She was in charge of the mate, but had a full crew on board. The defendant company, a corporation engaged in the business of towing vessels for hire, sent one of its servants (Capt. Howe) in the steam tug *Warren*, accompanied by the steam tug *Salem*, to tow the *Viator* from its dock down through the bridges to the outer harbor, preparatory to her going to sea. Arriving at the dock, the *Warren* made fast to the schooner's starboard quarter, while the *Salem* took a line from her starboard bow. The two

tugs thus towed the schooner off from the pier, and took her down to the upper or railroad bridge. The draw of this upper bridge being too narrow for the tug and schooner to pass through abreast, the Warren cast off and fell behind while the Salem went on ahead towing the schooner behind with a 20-fathom hawser. After passing through the upper draw in this manner, the draw of the lower bridge, the Portland bridge, was in plain sight, about 1,700 feet distant. The Salem, after a momentary stop, kept on towing the schooner by the hawser, while the Warren followed behind the schooner, but disconnected. The wind was blowing rather across the river from the Portland or left-hand side.

As they thus approached the Portland bridge draw, Capt. Griffin of the Salem called back to the schooner that he would go through the Portland side of the center pier of the draw, and for the schooner to follow him. Capt. Howe of the Warren, then astern, called out for the schooner to keep up to the windward; i. e. towards the Portland shore. To do this required a somewhat starboard helm. The Salem passed midway through the draw all right, but when very near the draw the helm of the schooner was put further to starboard, and she suddenly sheered to port in towards the abutment on the Portland side.

When this sheer was seen, orders were at once shouted from the tugs for the schooner to put her helm to port, but before these orders could take effect she struck the abutment of the bridge on that side with her port bow, inflicting damage to the bridge.

There was some contention as to whether the manner of towing through the draw (i. e. by the Salem going ahead and towing with a 20-fathom hawser, while the Warren cast off and merely followed behind) was decided upon by the master of the schooner or the master of the tugs. This question, we think, is practically immaterial, as will appear further on.

The real cause of the starboard helm of the schooner and her consequent sudden sheer to port at the critical moment of entering the draw was also much in dispute. This question is essentially material, for, unless this cause was in some fault of the defendant's servant, the master of the tugs, the defendant cannot be held liable, since no other sufficient ground appears in the evidence. The plaintiff contended, and there was evidence tending to show, that this movement of the helm and consequent sheer of the schooner was in obedience to orders from Capt. Howe of the Warren, who was in charge of the operation. The defendant contended, and there was evidence tending to show, that no such orders were given from the tugs, and that, if the helmsman had any such order, it came solely from those on the schooner. Whatever be our own belief, the jury have found for the plaintiff on this issue, and we are constrained to say that their finding is not so unmistakably wrong as to justify us in disregarding it. Capt. Howe admittedly gave a general direction to the schooner

to keep to windward, and hence it is not very improbable that he may have enforced this general direction by a special one of the same tenor. It must be assumed, therefore, that Capt. Howe of the Warren did give the order which brought about the disaster. The jury further found that the giving such an order at that time under those circumstances was a negligent act, and hence an actual fault on the part of the defendant. This finding also must be assumed to be correct.

The legal propositions applicable to the above state of facts can be briefly stated.

1. The defendant company was engaged in a regular, well-known, distinctive business,—in a recognized separate branch of the business of navigation,—the towing of sailing vessels from sea to dock and from dock to sea, and from place to place, and in rivers and harbors. In such towing it was, as to third parties, the active, directing agent controlling the movements of the vessel it was undertaking to tow. As such active agent, it was liable to third parties for any injury caused them by its negligence in managing a tow. *Sproul v. Hemmingway*, 14 Pick. 1; *New York & B. T. Co. v. Philadelphia & S. S. Co.*, 22 How. 461. That it adopted suggestions from the vessel in tow would not relieve it from liability to third parties.

The fact that those upon the sailing vessel were also in fault in managing the vessel, and by their fault contributed to such injury to third parties, does not exempt the defendant, the owner of the tugs. The third party thus injured can recover compensation from either the vessel or the tug, if each has been guilty of a fault causing the injury. The fact that the plaintiff has a separate suit pending against the owners of the schooner *Viator* for the same injury, in which suit the fault of the vessel is alleged as the cause of the injury, does not bar this suit against the owner of the tug. *The Mabey and The Cooper*, 14 Wall. 204; *The Atlas*, 93 U. S. 303; *The Civilta v. Perry*, 103 U. S. 599; *Lake v. Milliken*, 62 Me. 240.

Applying these principles to this case, if the plaintiff was not also guilty of a contributing fault, it is clearly entitled to recover of the towboat company by reason of the proven fault of the latter in misdirecting the helm of the schooner.

2. The defendant, however, insists that the plaintiff was guilty of a contributing fault in that it did not provide in its bridge a draw of the full width of 70 feet from pier to abutment. There was evidence tending to show that the plaintiff's authority to build, or at least maintain, this bridge across tide water was accompanied by the requirement that the width of the draw between pier and abutment should be full 70 feet. There was also evidence tending to show that at the time of the accident, at least, the actual width was from 15 to 20 inches less than 70 feet. As the contention of the defendant and the rulings of the presiding justice were based on this evidence, we must, for the present, assume its truth.

The defendant contended that this failure to comply with the requirements and conditions of the authority given the plaintiff to maintain this bridge left the bridge an illegal structure as to the defendant, so that no action could be maintained for the defendant's injury to it. The defendant further contended that if the main part of the bridge was not an illegal structure, such part of it as was within the 70-foot limit was illegal, and without legal protection, and, if such part contributed to the collision, the plaintiff could not recover. Upon these points the presiding justice instructed the jury that upon the evidence as to the width of the draw there was "an unlawful obstruction, but that would not necessarily deprive the plaintiff of his right to recover as against a stranger who had inflicted this damage, if it appeared that this mere variation from the seventy feet was not one of the real and proximate causes of the injury." Under this instruction the jury must have found that the variation in the width of the draw from the required 70 feet down to 68 feet and some inches was not one of the real and proximate causes of the injury.

The instruction was in accordance with the principle stated by the United States circuit court in *Missouri River Packet Co. v. Hannibal & St. J. R. Co.*, 2 Fed. 285. In that case the defendant was authorized to maintain a railroad bridge across the Missouri river, but with a clear distance of 160 feet between piers. The actual distance between the piers was a few feet less than 160 feet. The plaintiff's boat, while passing under the bridge, was driven by the current against one of the piers, and was damaged. The plaintiff contended that the mere fact of the distance between the piers being less than the required 160 feet rendered the bridge an unlawful structure, and deprived its owner of any defense against the consequences of such a collision. The jury, however, were instructed as follows: "Though you may find from the testimony that the width between the piers as constructed is less than the act of congress requires, yet this violation of the law by the defendant in this construction of its bridge is not available to the plaintiff in recovering damages, unless it caused or contributed to the injury by the plaintiff complained of."

A motion for a new trial was heard before the full circuit bench, which declared through McCrary, circuit judge, that the above instruction stated the true rule upon the subject. In *Dimes v. Petley*, 15 Q. B. 276, the owner of a wharf claimed damages, as here, from the owner of a vessel for his negligence in running his vessel against the wharf. The defendant claimed, as here, that the wharf, as against him, was an illegal structure. It was held by the court that the offered defense was not sufficient; that he would still be liable if by the exercise of reasonable care and with reasonable convenience he could have avoided the collision.

The principle is also exemplified in *Damon v. Scituate*, 119 Mass. 67, where it was held that the mere fact that the plaintiff was traveling on the wrong side of the road in violation of the statute did not defeat his action for injuries from a collision with the defendant's team, if that fault did not contribute to the injury. So in *Steele v. Burkhardt*, 104 Mass. 59, it appeared that plaintiff, a drayman, had backed his team against the curb, and across the street, in violation of the city ordinance, and was thus illegally partially obstructing the street. The defendant, in driving past on the other side, ran his wagon over the fore feet of the plaintiff's horse. It was held that the mere fact that the plaintiff's team at the time was an unlawful obstruction did not bar the plaintiff's action, if that circumstance did not contribute to the injury.

When carefully studied, the cases cited by the defendant (except, perhaps, the case [*Missouri River Packet Co. v. Hannibal & St. J. R. Co.*] cited from 79 Mo. 478) will be found not to conflict with the principle as applied here by the presiding justice. They mainly go to the conceded proposition that a plaintiff cannot recover damages for a disaster that his own illegal or wrongful conduct helped bring about.

The exception to this instruction must be overruled. The other exceptions upon the same subject-matter naturally fall with this one, including that in relation to damages. That part of the bridge within the required space of 70 feet was the plaintiff's property. The jury have found that it did the defendant no harm, and was not a factor in the legal cause of the disaster. Hence it is not without the pale of the law.

3. The request for a ruling that the "dolphins" at the ends of the draw pier tended to justify the mode of towing by hawser is not urged in argument. The question seems to have become immaterial.

Motion and exceptions overruled.

LOWELL et al. v. WASHINGTON COUNTY R. CO. et al.

(Supreme Judicial Court of Maine. March 8, 1897.)

RAILROADS—LOCATION—CHANGE—RELEASE OF SUBSCRIBERS—STATUTES—CONSTRUCTION—COUNTY COMMISSIONERS—APPROVAL OF BOND—FINALITY.

1. The statute of 1893, c. 193, confers the same authority upon chartered roads to make changes in their location that was previously conferred upon roads organized under the general railroad law. *Held*, that the change of location in this case was authorized by law.

2. When a later act, extending the time for the location and construction of a railroad, identifies the corporation, eo nomine, but through error recites a wrong chapter as being the act of incorporation, *held*, that the later act applies to the railroad therein named, notwithstanding the mistaken number of the chapter.

3. By special act of 1895, c. 91, the county commissioners were authorized to pass upon the

sufficiency of the guaranty given by contractors for the faithful performance of their contract to build a railroad. *Held*, that the commissioners acted judiciously in approving the bond, and that their decision is final; also, that the court has no authority, in the absence of fraud, to revise their judgment.

4. By an act of the legislature the county of Washington was authorized to subscribe for and take preferred stock in the Washington County Railroad. The charter of the railroad gave its termini as "some point on the Saint Croix river in the city of Calais or vicinity," and "some point on the Maine Central Railroad in Hancock county." There was no other direction or limitation upon its location, other than it must "pass through the counties of Washington and Hancock by such route as the directors may select." When the vote to take the preferred stock was had, no location of the railroad had been made. *Held*, that the location might be anywhere between the two termini, through the two counties, and that the directors had full and absolute control as to the line of location.

5. *Held*, that the change in the location in this case, as approved by the railroad commissioners, did not release the county from its liability under its original subscription for stock, and that a second subscription for stock was unnecessary.

6. Also, while a radical, fundamental change in the character of an original enterprise releases the subscriber for stock who does not consent to it, it does not have that effect if consented to. In this case it appears that the county consented to the changed location, as shown by their resubscription for stock, and, there being nothing in the vote of the county to the contrary, the county commissioners had authority to give consent.

7. Upon an objection that work done in grading before January 1, 1893, was done before location of the line which might be located elsewhere, and therefore cannot be treated as work done upon the road, within the terms of the special act of 1895, c. 91, *held*, that it was known from preliminary surveys where the line would be at that point, and the actual location subsequently made coincides identically with the grading done. These facts must be regarded as a substantial compliance with the statute limitation of time within which the work of construction should be commenced.

(Official.)

Report from supreme judicial court, Washington county.

Bill in equity by George A. Lowell and others against the Washington County Railroad Company and others. Submitted on report, and heard on bill, answer, and testimony. Bill dismissed.

C. P. Stetson, G. M. Hanson, and F. B. Livingston, for plaintiffs. C. E. & A. S. Littlefield and B. D. & H. M. Verrill, for defendants.

STROUT, J. Fifteen taxpayers in the county of Washington seek by this bill to restrain the county commissioners and county treasurer of Washington county from any further payment to the Washington County Railroad Company upon the county's subscription for \$500,000 of the preferred stock of the railroad company. The complainants claim, upon several grounds, that the county has been released from all liability.

The Washington County Railroad Company was incorporated by the legislature in 1893. Sp. Laws 1893, c. 454. The second section of the charter provided that "said corporation shall have the right to locate, construct, equip,

maintain and operate, or lease a railroad from some point on the Saint Croix river, in the city of Calais, or vicinity, through the counties of Washington and Hancock, by such route as the directors of said corporation may select, subject however to all provisions of the Revised Statutes, chapter fifty-one, section six, to some point on the Maine Central Railroad in Hancock county, including a branch to Eastport, and to consolidate with any railroad company in the state of Maine, or in the province of New Brunswick, with which it may connect." Section 7 of the charter provided that the charter should become void "unless the railroad between Calais and some point on the Maine Central Railroad as aforesaid, shall have been located and the construction thereof commenced by the first day of February," 1896, "and the railroad completed for travel between said termini by the first day of February," 1899, "except as to such part thereof as may then have been completed." By chapter 90 of the Special Laws of 1895, "the time for the location and construction of the Washington County Railroad Company, incorporated under chapter fifty-four of the Private Acts of Eighteen Hundred and Ninety-Three, is hereby extended to four years from the date of the approval of this act, and all the provisions of said chapter shall be and remain in force during said four years." This act was approved February 28, 1895.

It will be noticed that the act of 1895 refers to the original charter as chapter 54, when it should have been 454. Chapter 54 was an act in regard to larceny. But the act extends the time for the construction of the "Washington County Railroad Company," incorporated in 1893. The only act of incorporation of the Washington County Railroad Company in that year was by chapter 454. The latter act identifies the railroad, eo nomine; and it would be puerile to hold that, because of the mistaken number of the chapter, the later act did not apply to the original charter of 1893. *Woodworth v. Grenier*, 70 Me. 242. By chapter 91 of the Special Laws of 1895, the county of Washington was authorized to aid in the construction of the railroad "by subscribing for and purchasing preferred stock of the Washington County Railroad Company to an amount not to exceed five hundred thousand dollars in all." Full provision was made in the act for submitting to the voters of the county the question whether the county should so subscribe. It is admitted that all the provisions of this act were complied with to validate a favorable vote, and that by an overwhelming vote, on the 29th of July, 1895, the voters of Washington county authorized a subscription of \$500,000 to the preferred stock of the railroad. Section 6 of the act provided that, if the county authorized the subscription, then "when the entire line shall be under contract and a satisfactory guarantee is given to the county commissioners, that the line shall be completed under said contract, then said commissioners shall cause subscription to be

made in behalf of said county for preferred stock" to the amount authorized. The act also provided (section 7) that unless the location of the railroad "through Washington county from the west line thereof to the Saint Croix river" should be filed with the county commissioners on or before October 1, 1899, "accompanied by the affidavit of the majority of the directors of said company, that they intend in good faith to proceed" with construction, "and shall have begun the work of actual construction of said line within said county on or before the first day of January, eighteen hundred and ninety-six, then if either of said conditions fail," all the provisions of the act relating to the railroad "shall become null and void, and said company shall thereby forfeit all rights herein conferred or granted" by the county of Washington.

It will be noticed that the charter of the railroad gives its termini as "some point on the Saint Croix river in the city of Calais or vicinity," and "some point on the Maine Central Railroad in Hancock county." There is no other direction or limitation upon its location, other than it must "pass through the counties of Washington and Hancock by such route as the directors may select."

When the vote to take preferred stock was had, no location of the railroad had been made. It might be anywhere between the termini, through the two counties. The directors had full and absolute control as to the line of location. The length of the road exceeds 100 miles. It is evident, from the latitude given in the charter, that the legislature contemplated a road which should afford to Washington county an outlet to the Maine Central, and by it to the sea, shorter and more convenient than any existing land communication, and thus largely develop the resources of Washington county in particular and the state generally. It designedly left to the practical judgment of the directors the selection of the most feasible route; reference being had to the expense of construction, the possibility of obtaining the necessary funds, and all other considerations that would affect or control the choice of route. When the question was submitted to the voters of the county, they knew that no location had been made, and that the directors of the road alone were authorized to make such selection of route as they might deem wise,—limited only to the two termini,—and between them to pass through Washington and Hancock counties. It is claimed by complainants that, when the matter was submitted to the people, it was understood or represented that the location would be from Calais, down the margin of the St. Croix to Red Beach, and thence on to Dennysville. It is sufficient to say that the case fails to disclose any evidence of such representation or understanding. And, if it had, it would have made no difference, as the place of location was intrusted to the discretion of the directors as necessity might require, and they might judge expedient.

The vote of the county having been canvassed and declared by the county commissioners and properly recorded on August 15, 1895, the railroad company on September 5, 1895, made a contract with George P. Wescott and James Mitchell by which the entire line was to be constructed by the contractors for a price stipulated therein. Although the line had not then been located, the contract bound the contractors to build between the termini, through Washington and Hancock counties, wherever it might be located by the directors. They also bound themselves to conform to the charter and the act authorizing the county of Washington to aid the road. The contractors on the 13th day of September, 1895, gave a bond with sureties to the county commissioners of Washington county, in the sum of \$100,000 for the faithful performance of their contract to build the railroad. This bond was approved by the county commissioners, in accordance with section 6, c. 91, Sp. Laws 1895. The statute conferred upon the county commissioners authority to pass upon the sufficiency of the guaranty. In doing this they acted judicially, and their decision was final. We have no authority, in the absence of fraud, to revise their judgment. *Walton v. Greenwood*, 60 Me. 356-368; *Rev. St. c. 78, § 10*; *Brewer v. Railroad*, 113 Mass. 56; *English v. Smock*, 34 Ind. 36; *State v. Dunnington*, 12 Md. 340. These acts constituted a full compliance with the conditions precedent required by section 6, c. 91, Sp. Laws 1895; and the county commissioners were then authorized to subscribe for \$500,000 of the preferred stock of the railroad company, which they did on September 21, 1895.

To hold their rights under this subscription, as provided in section 7, c. 91, Sp. Laws 1895, it was necessary that the work of actual construction of the road within the county of Washington should have been begun on or before January 1, 1896. The bill alleges "that work was begun on said railroad about October 1, 1895, and continued by said contractors (Wescott and Mitchell) in the towns of Machias and Jonesboro," upon which the county commissioners paid to the railroad company over \$22,000, in accordance with section 6 of chapter 91, which required a pro rata payment by the county upon its stock when the company "shall have graded any section of five miles of its line." At this time the line had not been actually and finally located, but it was known where the line would be at the place of this work, and the subsequent location in fact is identical with it. The evidence shows that about seven miles of the road had been graded by Wescott and Mitchell under their contract prior to January 1, 1896, and that prior to that time the contractors had expended in the grading and right of way over \$45,000, and incurred liabilities in addition of over \$3,000. These sums included \$25,000 paid J. N. Greene in accordance with section 4, c. 90, Sp. Laws 1895. It is in evidence that about 15 miles of road in all within the

county of Washington had been graded at the time of filing this bill.

The rights of the parties had now become fixed, and, if the contractors had proceeded with the construction of the road, the corporation would have been entitled to receive, and the county bound to pay, under its subscription, for every section of five miles graded, the pro rata amount provided for in section 6 of chapter 91. The contract of Wescott and Mitchell described the line as running through Robbinston, Perry, and Pembroke, to Dennysville, although no actual location had then been made by the directors. They undoubtedly contemplated locating it through those towns, and in March, 1896, the directors did regularly locate the line through those towns to Dennysville, and from thence to the Maine Central, which location was duly approved by the railroad commissioners.

Meantime Wescott, one of the contractors to construct the road, becoming sick, utterly refused to proceed under the contract. The railroad company then had the right, by suit, to recover damages for breach of the contract, and the county commissioners could have resorted to a suit upon their bond. But all parties desired the road to be built. These suits would not have accomplished that result. In this dilemma, the railroad company made a new contract for the construction with James Mitchell for the same cost, and practically upon the same terms and conditions, who gave a bond to the county commissioners, with sureties satisfactory to and approved by them, for the performance of his contract; and this substituted contract and guaranty was accepted by the county commissioners in lieu of the first contract and guaranty. Under the new contract and guaranty the county commissioners and the railroad company had reason to believe that the actual building of the road was assured. It could make no difference to the county by whom the work of construction was done, if the cost was not increased. The important and greatly-desired object was to have the road built.

It was not necessary, nor could it be expected, in a great enterprise like this, involving a cost of over \$2,000,000, that the railroad company, when commencing work, should be in possession, or have in control, the entire amount of funds necessary to complete the work, as claimed by complainants. If such had been the rule, few railroads would have been built. With the \$500,000 from the county, and such subscriptions as could be obtained along the line of the road, it might well be assumed that sufficient bonds of the road could be floated as the funds were needed to complete it.

Complainants earnestly contend that this change of contract and guaranty was unauthorized, and released the county from its subscription. The objection does not impress us as valid. On the contrary, under the circumstances of the case, the directors acted wisely in making a new contract to insure the

construction of the road, instead of resorting to a suit for damages under the contract. The commissioners would have encountered the same practical difficulty in a suit upon the original bond.

Before any work was done upon that portion of the line between Calais and Dennysville, the directors found that the great cost of grading this road through Robbinston and Perry endangered the success of the enterprise, and that a route from the St. Croix, in Calais, through Baring and Charlotte to Dennysville, could be graded, at a saving of at least \$100,000, without increasing the distance, or lessening the usefulness of the road as a through line to the Maine Central. They therefore deemed it wise, for the interest of the railroad, the county, and the state, to change the location through Robbinston to one through Baring, and thence to Dennysville, a distance of about 20 miles. No change of location from Dennysville to the Maine Central, a distance of about 80 miles, was contemplated or made. Accordingly the directors abandoned the former location from Calais to Dennysville, and located a new line to Dennysville, through Baring and Charlotte. This location commenced at the St. Croix & Penobscot Railroad, in Calais, on the bank of the St. Croix river, at a point about five miles westerly of the eastern terminus of the St. Croix & Penobscot Railroad; thence through Baring and Charlotte to Dennysville. From the point begun at, it was proposed to pass over the St. Croix & Penobscot Railroad to a station in the populous part of Calais almost identical with that established by the original location. The first location began at or near the southern terminus of the St. Croix road. Mitchell, the contractor, controls the St. Croix & Penobscot, and the charter of the Washington County Railroad authorized consolidation with other railroads. The utilizing of the St. Croix road saved the building of about three miles of new road. This location was duly approved by the railroad commissioners on July 11, 1896, and by the county commissioners on July 23, 1896. This was a substantial compliance with the charter (*People v. Holden*, 82 Ill. 98), since which time about eight miles had been graded upon this new location before the filing of the bill.

It is strenuously urged by the complainants that the change was unauthorized; that, when the first location had been made and approved, the delegation to the railroad company of the right of eminent domain, under the charter, had been exhausted; and that, if the railroad should be constructed upon this line under purchase of the right of way, it is such a deviation as absolves the county from liability under its subscription to stock.

It is true that in many cases the exercise of a granted power is once for all. But, aside from statute, the better opinion now is, as to railroads, that the exercise of the right of eminent domain is not exhausted by the first location. Railroads are of great utility to the

business of a community. They generally attract population and new industries along their line, and to meet the necessities thus produced, and to afford greater service to the people, it becomes necessary, from time to time, to have enlarged terminal facilities, new stations, sidings, etc. These needs cannot always be foreseen, and, if they could, it might be difficult or impossible to raise sufficient funds to provide for these future demands at the inception of the enterprise; and accordingly it is now held that the right of eminent domain continues in the corporation, unless limited in its charter, to meet these necessities. *Elliot, R. R. § 962; Rand. Em. Dom. § 116; Railroad v. Williams, 54 Pa. St. 107; Hagner v. Railroad, 154 Pa. St. 478, 25 Atl. 1082; Railroad v. Daniels, 16 Ohio St. 396; Prather v. Railroad, 52 Ind. 42; Railroad v. Wilson, 17 Ill. 123; Peck v. Railroad, 101 Ind. 368.*

This court has held that a railroad company cannot condemn land for an extension of its road after the time limited in its charter for completing the road. *Peavey v. Railroad, 30 Me. 501.* But this doctrine is not inconsistent with the right of a railroad company to condemn land for necessary stations and sidings as the necessity therefor may arise. But the matter is regulated in this state by statute. *Rev. St. c. 51, § 8,* relating to railroad corporations created under the general law, provides that the location of the route shall be presented to the railroad commissioners, and also filed with the county commissioners, and if the railroad commissioners approve the location, and determine that public convenience requires it, the corporation may proceed with the construction, "but the location so filed shall not vary, except to avoid expense of construction, from the route first presented to said board of commissioners unless said variation is approved by them." This section is made a part of the charter of the Washington County Railroad. Under it, it is obvious that there is a variation from the original location, to avoid expense of construction, which in this case could be made, subject to the approval of the railroad commissioners. As this section applied only to corporations created under the general law, unless specially referred to in the charter, and as many, if not most, of the large roads existed under special charter, the legislature in 1893, by chapter 193, authorized any railroad corporation, under the direction of the railroad commissioners, to make any changes in the location deemed necessary or expedient, and for this purpose they were authorized to purchase or condemn lands under the right of eminent domain. While this statute is not in terms an amendment of section 6 of chapter 51, it relates to the same subject-matter, and, being in *pari materia*, should be construed with it. *Collins v. Chase, 71 Me. 434.* It confers the same authority upon chartered roads that was previously conferred upon roads organized under the general law. It was intended to cure a defect in the statute.

It enlarges the rights of railroads existing by charter. No reason is perceived why its benefits should not be shared by the Washington County Railroad. The reference to section 6 in the charter should not be construed to exclude this general law. *State v. Chadbourne, 74 Me. 508.* The case of *State v. Cleland, 68 Me. 258,* was of a specific grant, acting upon a particular thing, inuring to the benefit of a single individual. A subsequent general act upon the same subject-matter, and affecting the right of persons generally, was properly held not to repeal or modify the first act. But this principle does not apply in this case. The same may be said of *County of Cass v. Gillett, 100 U. S. 585.*

It follows that the change in the location, as approved by the railroad commissioners, was authorized by law. All the provisions of law were compiled with which were necessary to render it valid.

Such change did not release the county from its liability under its original subscription for stock. The second subscription was unnecessary. It was made from abundant caution, but it did not change or invalidate the first and original subscription. At most, it was a substitution of a subscription for one already in force, upon which the county commissioners took a guaranty to secure the building of the road under the new contract, and was within the power of the county commissioners, and binding upon the county. It neither enlarged nor changed the liability which the county by its votes authorized its commissioners to assume for it. It was not a new execution of a power once completely executed, but a reaffirmance of a former act, done by consent of parties, with full authority from the county.

It must be remembered that the charter was for a road from the St. Croix, at or near Calais, through Washington and Hancock counties, to a junction with the Maine Central, upon such line as the directors should determine. The vote of the county was to take stock in a road to be built under this general charter. No conditions were affixed to the vote, and none can be implied, except as stated in the charter. The subscription by the county commissioners was without condition. No route had then been determined upon. The fact that the directors afterwards located one route did not have the effect of a condition subsequent that the road should be built on that route, so far as the subscriber for stock was concerned; and the change to another location within the chartered limits was one the directors had a right to make, subject to approval by the railroad commissioners.

This was known to the voters when they cast their ballots, and to the county commissioners when they subscribed for stock. If the vote or subscription had been upon a condition, the subscriber would not be held if the condition had not been performed. *Railroad v. Brewer, 67 Me. 295.* But here there was no condition. In such case a change in

the charter does not relieve the subscriber (Dam Co. v. Gray, 30 Me. 547); nor does a change or extension in the route (Railroad Co. v. Winchester, 13 Allen, 32; Nugent v. Supervisors, 19 Wall. 242; Cantillon v. Railroad, 78 Iowa, 56, 42 N. W. 618; Bank v. Concord, 50 Vt. 279; Martin v. Railroad, 8 Fla. 370).

A radical, fundamental change in the character of the original enterprise releases the subscriber for stock who does not consent to it. It does not have that effect if consented to. In this case the county, through its county commissioners, has consented to the changed location, as shown by their resubscription for stock. There being nothing in the vote of the county to the contrary, the county commissioners had authority to give consent. But we hold the change was not of that radical and fundamental character which would relieve a nonconsenting stock subscriber. *Moesen v. Port Washington*, 37 Wis. 174.

It is claimed that the work done in grading before January 1, 1896, was done before location of the line, which might be located elsewhere, and therefore it cannot be treated as work upon the road, within chapter 91 of the Special Laws of 1896. But it was evidently known from preliminary surveys where the line would be at that point, and the actual location subsequently made coincides identically with the grading done. These facts must be regarded as a substantial compliance with the statute limitation of time within which the work of construction should be commenced. A great public enterprise like this, of manifest importance to Washington county specially, and the state generally, should not be thwarted or overthrown by the court upon technical and unimportant grounds. A substantial compliance with the requirements of the charter and the laws applicable is sufficient. Such is the doctrine of the courts.

Bill dismissed, with costs.

DONNELLY v. BOOTH BROTHERS & HURRICANE ISLE GRANITE CO.

(Supreme Judicial Court of Maine. March 23, 1897.)

MASTER AND SERVANT — NEGLIGENCE — FELLOW SERVANT — VICE PRINCIPAL — DEFECTIVE MACHINERY — EXCEPTIONS — VERDICT.

1. An employer whose duty it is to provide reasonably safe appliances cannot escape liability for his negligence by employing incompetent or unsuitable persons to discharge it.

2. The servant is not required to take the risks of carelessness of those who undertake to discharge, under the master's directions, the master's duty towards him, even if they are also servants of the same master.

3. *Held*, in this case, that the plaintiff's injury resulted from the breaking of a defective rope that sustained a platform on which he was at work, which should have been discovered before it was used, and would have been if reasonable care had been exercised in the selection of the tackle; and that the neglect in this respect was not that of a fellow servant, but was a failure on the part of the defendants to use the necessary precautions which the law requires of the master towards his servant.

4. Whether a particular case falls within the duty of the master or that of the servants as such is a mixed question of law and fact, to be submitted to the jury, as to the fact, under legal rules, and its determination depends upon the circumstances of the case.

5. *Held*, in this case, that it was the duty of the defendants to use reasonable diligence to furnish a safe platform with safe appliances for its support. They, through their vice principal, selected the men to do this work; men not shown to be suitable, and from their own testimony as to the faulty appearance of the rope which broke, observed by them when they applied it, evidently unsuitable men to be intrusted with it. There was, therefore, both negligence in the selection of agents and also in the failure to inspect the gear to be used.

6. Where a large number of exceptions to a charge consists of extracts detached from their context, *held*, that to judge of the instructions excepted to the whole charge must be examined.

7. The court will not disturb a verdict upon the ground of excessive damages unless it very clearly appears to be excessive upon any view of the facts which the jury are authorized to adopt.

(Official.)

Exceptions from supreme judicial court, Knox county.

Action by Michael Donnelly against the Booth Brothers & Hurricane Isle Granite Company to recover damages for personal injuries. There was a verdict for plaintiff, and defendants move for new trial, and bring exceptions. Motions and exceptions overruled.

W. H. Fogler and A. A. Beaton, for plaintiff. C. E. & A. S. Littlefield, for defendants.

STROUT, J. Defendants operated a granite quarry at Long Cove. They were shipping granite paving blocks by a schooner lying at a wharf. The mode of loading the blocks on board was over a run or platform 16 to 18 feet long, one end resting upon the wharf, and the other supported by rigging attached to the vessel's throat halyards. This end extended to the forward hatch, and was elevated about seven feet above the deck. The paving blocks were placed in a car, and pushed over rails upon this run or platform, and dumped into the hold of the vessel. The plaintiff was in the employ of the defendants as a common laborer, doing such various kinds of work as he was directed to do. On September 29, 1894, he was injured, while engaged in loading paving blocks upon the schooner, by the falling of the run or platform upon which he then was with a car of blocks, near to the end of the platform, at the forward hatch. The fall was caused by the breaking of the fore throat halyard, which supported the right end of the platform at the hatch. The platform and loaded car weighed about two tons. The platform had been put in position in the afternoon of the preceding day, and fell at about 2 o'clock on the day of the accident. While in position, some thousands of paving blocks had been loaded into the vessel, having passed over this platform. It fell with the last load on the car. James M. Smith was superintendent of defendants' works at Long Cove, had the general supervision for defendants of loading

vessels, and hired and discharged the men. The platform belonged to defendants, and in suspending it the vessel's halyards were used. It was put up on this occasion by direction of Smith. The work was done by some laborers of defendants, called from their work of stowing stone posts in the schooner, aided by some of the crew of the vessel. These men selected the ropes used from a quantity of ropes on board. Plaintiff had nothing to do with this, but after the platform was rigged in place he was directed by Smith to help load the blocks on board, and was so engaged when the accident occurred. He had no knowledge of the condition of the ropes which suspended the platform. That Mr. Smith, in all matters connected with the loading of the vessel, stood in the place of defendants, and represented them as a vice principal, is abundantly proved. Any negligence of his, therefore, in regard to duties resting upon defendants, is in law their negligence. There is no claim that any want of care on the part of plaintiff contributed to the accident. *Dube v. City of Lewiston*, 83 Me. 217, 22 Atl. 112; *Mayhew v. Mining Co.*, 76 Me. 108, 109. The only issue presented was whether the defendants were guilty of negligence in securing the platform and the selection of gear; or whether, if there was any negligence, it was that of a fellow servant of the plaintiff, for which defendants were not responsible.

The defendants made six requests of the presiding judge for instructions, which were not given in terms, and have taken twenty-two exceptions to the charge, consisting of detached extracts therefrom. The whole charge is reported as part of the exceptions.

The duty of a master to his servant in furnishing machinery or appliances for the work has been repeatedly stated by this court. In *Buzzell v. Laconia Co.*, 48 Me. 116, it is said: "It is the duty of every employer to use all reasonable precautions for the safety of those in his service. He should provide them with suitable machinery, and see that it is kept in a condition which shall not endanger the safety of the employed. If the employer knowingly make use of defective and unsafe machinery, when an injury is done to a servant ignorant of its conditions and in the exercise of ordinary care, he should compensate the person thus injured. * * * The superior intelligence and determining will of the master demand vigilance on his part that his servants shall neither wantonly nor negligently be exposed to needless and unnecessary peril. * * * The same reasoning which shows that the machinery and other instruments of labor should be safe would demand that the bridges used in passing from one part of the premises to another, or the ladders used in ascending to or descending from labor, and that the passageways in the premises of the employer and within the precincts of the place where the labor is to be done, should be safe and convenient." In *Dixon v. Rankin*, 14 Ct. Sess. Cas. 420, cited with approval by this

court in same case, *supra*, it is said: "The master of men in dangerous occupations is bound to provide for their safety. This obligation extends to furnishing good and sufficient apparatus, and keeping the same in good condition." And in *Hull v. Hall*, 78 Me. 118, 3 Atl. 39, the court said: "To render the master liable, it must appear that he knew, or from the nature of the case ought to have known, of the unfitness of the means of labor furnished to the servant, and that the servant did not know or could not reasonably be held to have known of the defect."

And in *Shanny v. Androscoggin Mills*, 66 Me. 425, it is said that: "The employer provides the means of carrying on the business, and as a matter of course he assumes the responsibility that his work shall be done with due care; and, as the responsibility continues so long as the means are used, so must the same care be exercised in keeping the required means in the same safe condition as at first."

In a late case in New Jersey (*Comben v. Stone Co.*; 1897), reported in 36 Atl. 473, after stating the general principle, the court says: "The master is responsible for the negligence of any agent whom he may select to perform this duty for him if the agent fails to exercise reasonable care and skill in its performance." See, also, *Railroad Co. v. Ross*, 112 U. S. 390, 5 Sup. Ct. 184.

And in cases like *Kelley v. Norcross*, 121 Mass. 508, where it was held that if "the master does not undertake the duty of furnishing or adapting the appliances by which the work is to be performed, but this duty is intrusted to or assumed by the workmen themselves, within the scope of their employment, he is exempt from responsibility, if suitable materials are furnished and suitable workmen are employed by him, even if they negligently do that which they then undertake," the exemption falls if "suitable workmen" are not employed. Here, common laborers, engaged in stowing stone posts in the schooner, were charged with the duty of securing the platform, and allowed to select the gear, without instruction, and there is no evidence that they possessed the requisite skill, intelligence, or care,—a fact to be shown by the defendants, if they would escape responsibility. The law will not allow an employer, whose duty it is to provide reasonably safe appliances, to escape liability by employing incompetent or unsuitable persons to discharge it. But in the case last cited the court say: "The servant is not required to take the risks of the carelessness of those who undertake to discharge, under the master's direction, the master's duty towards him, even if they are also servants of the same master." *Ford v. Railroad*, 110 Mass. 260. See, also, *McKinnon v. Norcross*, 148 Mass. 536, 20 N. E. 183. When the selection of materials or construction of the appliances to the business is such that it may properly be left to the workmen in their capacity as workmen, and within the scope of their

employment, and it is so left by the master, he is relieved from responsibility for their negligence, as in the case of a mason or carpenter building a house, where in the progress of the work a staging is being frequently changed or enlarged. Whether a particular case falls within the duty of the master or that of the servants as such is a mixed question of law and fact, to be submitted to the jury, as to the fact, under legal rules, and its determination depends upon the circumstances of the case. *Arkerson v. Dennison*, 117 Mass. 412; *McGinty v. Reservoir Co.*, 155 Mass. 187, 29 N. E. 510.

This question was submitted to the jury under suitable instructions, and they found that the rigging of the platform and selection of gear was within the duty of the master, and not within that of the servants in their capacity as servants.

Upon this finding of fact it was the duty of defendants to use reasonable diligence to furnish a safe platform with safe appliances for its support. They, through their vice principal, Smith, selected the men to do this work; men not shown to be suitable, and from their own testimony as to the faulty appearance of the rope which broke, observed by them when they applied it, evidently unsuitable men to be intrusted with it. There was, therefore, both negligence in the selection of agents and also in the failure to inspect the gear to be used.

It is claimed that the rigging of the platform was ordinarily done by the fellow servants of the plaintiff. If that be true, the duty to furnish safe appliances resting upon defendants, it will not relieve them from liability. They must discharge their duty in the premises. Negligence, however often repeated, will not ripen into an excuse for a neglect from which injury results.

An application of these principles shows that all the requested instructions were properly refused.

It will serve no useful purpose to consider specifically the exceptions to the charge. They consist of extracts detached from their context, and nearly all of them relate to the question whether it was the duty of defendants to furnish the run and gear in a reasonably safe condition, or whether the workmen, as such, had rightful authority to select from materials furnished by defendants, and thus exempt the defendants from responsibility for their negligence.

To judge of the instructions excepted to, the whole charge must be examined.

James M. Smith stated fully his duties and authority at Long Cove under his employment by the defendants. It was a question of law whether he occupied, as to the plaintiff, the position of vice principal, or was a fellow servant with plaintiff. The court instructed the jury that he was a vice principal, and stood in place of the defendants, and his acts or omissions were those of the principal. There can be no doubt that upon the evidence

in the case this instruction was correct. The argument of defendants that the question was submitted to the jury is not well taken; but, if it was submitted to them, the defendants cannot complain, as the jury decided it correctly. The important question—whether the erecting and support of the run, including the selection of the gear, was within the duty of the principal, or that of the workmen, as a part of their work as servants or workmen—was suitably presented to the jury, coupled with the correct rule of law that in the former case any negligence would be that of defendants, and in the latter it would be that of a fellow servant, for which the principal would not be responsible. This instruction was as favorable to defendants as could be required. *Arkerson v. Dennison*, 117 Mass. 412.

We have carefully examined the charge, and find that it presented the legal questions involved clearly and appropriately, and fully preserved all the rights of the defendants. The exceptions must be overruled.

Upon the motion. The jury found that the duty of placing and securing the run, including the selection of suitable gear, rested upon the defendants, and was not within the ordinary duty of the workmen, as workmen, and that when the plaintiff was directed by James M. Smith, the defendants' alter ego, to work upon that stage, it was held out to him by the defendants as a reasonably safe structure for him to labor upon, and that he had the right to so regard it; that it was in fact unsafe, and that the defendants were negligent in the selection of gear which they ought to have known, and with the exercise of reasonable diligence would have known, was insufficient, and that in consequence the plaintiff was injured. We think the evidence justified these findings. *Atkins v. Field*, 89 Me. 283, 36 Atl. 375.

That the rope which broke was insufficient, is undoubted. "*Res ipsa loquitur.*" That it appeared to be old, weather-beaten, and of doubtful strength, was seen by Peter Smith, one of the men who helped rig the run. He says: "I see the rope was kind of poor, and so I took a piece of warp, and went up and made it so safe that it was safe for anybody to go up. They appeared to be old, old rope, or part of it." After it broke, he examined it, and he says: "I should think, by the looks of it, the rope had been poor. I didn't open the rope to see, but I should judge it was poor." Jones, a witness for defendants, says he untwisted the rope, and "it was weather-beaten some"; did not look new. Dwyer, another of defendants' witnesses, says he examined the rope after the accident, and "found the rope looking very weather-beaten on the outside. I unlaid it, and found it was all bright inside." "Probably two-thirds of the rope was good rope." He says he should judge "it would hold up a ton easy enough." He says the run and car and load of paving "didn't weigh over two tons," in his opinion. He also says: "When a car has got a hun-

dred paving in it, it is pretty heavy, and running it out on the end of the stage brings a heavy strain on the tackle, of course, and when it is dumped it rises about, well, six or eight inches. That, of course, would cause a chafing in the upper block." He also says that the rope would not chafe if the block was in good running order. It is apparent that to sustain such a strain as was put upon this tackle required the use of thoroughly sound rope of sufficient size, and it cannot be doubted that a reasonably careful examination of this rope before it was attached to the run would have shown its insufficiency. The fact that it sustained the strain till the last load is immaterial. No unusual strain is shown at this time. It was evidently a weak rope at the beginning, gradually growing weaker with each load upon it, until its tensile strength for the load upon it utterly failed.

We are satisfied with the finding that the defendants' duty required them to use reasonable care in the erection and maintenance of the run and the selection of suitable gear for that purpose, and that this duty was not properly discharged by them; and for the consequences of this neglect they are legally responsible to the plaintiff.

While the damages are large, we cannot say that they are so excessive as to require us to disturb the verdict. At the plaintiff's age, entire recovery cannot be as certainly predicated as it might be in a younger person. His pain and suffering, which was an element of damage, it is difficult to compensate for in money by any definite rule of computation. Much is left to the good judgment of the jury. There is a conflict in the testimony as to the extent of plaintiff's recovery and his ability to labor. The jury saw and heard the witnesses, and were in a better position to determine the exact facts than the court can be, and we are reluctant to disturb a verdict upon this question unless it very clearly appears to be excessive upon any view of the facts which the jury were authorized to adopt. Such is not the case here, and the entry must be:

Motions and exceptions overruled.

STATE v. WEBBER.

(Supreme Judicial Court of Maine. March 17, 1897.)

CRIMINAL LAW—VERDICT—JURY—PRACTICE.

1. In the case of a misdemeanor the jury agreed during the recess of the court, and were allowed to separate after sealing up their verdict. At the next session of the court their verdict was presented, indorsed on the indictment in a sealed wrapper as follows: "Guilty as charged in the indictment. Samuel Strout, Foreman." In response to the usual inquiry and request from the clerk, the jury rendered their verdict of guilty orally in open court, and the sealed verdict was also affirmed in the usual manner. *Held*, that the written verdict, though abbreviated in form, being indorsed on the indictment, could only refer to the respondent therein named.

2. It is unnecessary to determine, however, whether this form should be deemed "substantial-

ly equivalent" to the form prescribed in the Anonymous Case, 63 Me. 590. It was sufficient to prove beyond a doubt that before separating the jury arrived at the same result which they afterwards announced in open court, and, aided by the oral delivery, it was properly accepted by the court.

(Official.)

Exceptions from supreme judicial court, Sagadahoc county.

Gilman H. Webber was convicted of maintaining a liquor nuisance, and excepta. Exceptions overruled.

Grant Rogers, Co. Atty., for the State. C. D. Newell, for defendant.

WHITEHOUSE, J. This was an indictment for maintaining a liquor nuisance. At the usual hour of adjournment in the afternoon the jury were deliberating upon their verdict, and were directed by the court to seal it up when they had agreed, suitable blanks being furnished to the officer in attendance for that purpose. The jury agreed, and separated in the evening. The next morning they came into court, and in response to the usual inquiry and request from the clerk stated "that they had no sealed verdict other than what appeared on the indictment, which was in a sealed wrapper, with the following written at the bottom of the indictment, to wit: "Guilty as charged in the indictment. Samuel Strout, Foreman."

Thereupon the jury rendered their verdict of guilty orally in open court, and the verdict of "guilty as charged in the indictment," sealed up by the jury before separating, was affirmed in the usual manner by direction of the court. To this direction that the verdict be affirmed the respondent took exception.

In the view of this question which has uniformly prevailed in the courts of Massachusetts, the only purpose or effect of the written verdict, signed and sealed up by the jury, is to afford conclusive evidence that the oral verdict delivered in open court is substantially the same as the result recorded in the written form, and that the jury were not influenced in arriving at their oral verdict by anything that occurred after their separation. It is accordingly settled in that state that the delivery of the verdict by the foreman of the jury by word of mouth in the presence of the court is an indispensable safeguard in all criminal cases. *Com. v. Tobin*, 125 Mass. 203.

But a different view has been adopted by our court. In the Anonymous Case, reported in 63 Me. 590, the conclusion is reached, after careful advisement, that in any criminal case, where the offense is not punishable by imprisonment for life, the presiding judge may authorize the jury to seal up their verdict, and separate during an adjournment of the court, and have it opened, read, and affirmed at the coming in of the court, with the same effect as if pronounced orally; and for this purpose a verdict signed by the foreman in the form there prescribed, or in any other substantially

equivalent form, is declared to be sufficient. In *State v. McCormick*, 84 Me. 566, 24 Atl. 938, this conclusion is reaffirmed, and the practice of requiring an oral verdict in addition to the sealed one declared to be a matter of form, rather than of substance. Either course is there said to be legal.

In the case at bar both methods appear to have been observed.

The written verdict was not the simple word "guilty" on a separate paper bearing no signature, as in *State v. McCormick*, supra. It was indorsed on the indictment itself, and duly authenticated by the signature of the foreman of the jury. It was returned in a sealed wrapper, and evidently brought to the attention of the court before the oral verdict was delivered. By direction of the court the written verdict was then affirmed. A double safeguard against mistake was thus secured. The written verdict, though abbreviated in form, being indorsed on the indictment, could only refer to the respondent therein named. No other party to that proceeding could be found "guilty as charged in the indictment." It is unnecessary to determine, however, whether this form should be deemed "substantially equivalent" to the form prescribed by our court in 63 Me. 590, and be held sufficient as a written verdict without the aid of the oral delivery. It was sufficient to prove beyond a doubt that before separating the jury arrived at the same result which they afterwards orally announced in open court, and it is more regular and satisfactory than the form sustained under like circumstances in the case of a misdemeanor in *Com. v. Carrington*, 116 Mass. 37.

Exceptions overruled.

STATE v. CARKIN.

(Supreme Judicial Court of Maine. April 3, 1897.)

EMBEZZLEMENT—INDICTMENT—SUFFICIENCY.

An indictment for embezzlement is insufficient which simply charges that the defendant did, by virtue of his office and employment, have, receive, and take into his possession certain money to a large amount, and does not charge that the defendant embezzled or fraudulently converted such money, or any money, to his own use. Such a material omission in an indictment that fails to express the gravamen of the crime of embezzlement cannot be supplied by intendment.

(Official.)

Exceptions from supreme judicial court, Knox county.

Frank E. Carkin was convicted of embezzlement, and excepts. Exceptions sustained,

Indictment.

"State of Maine.

"Knox—ss.:

"At the supreme judicial court, begun and holden at Rockland, within and for the county of Knox, on the second Tuesday of March, in the year of our Lord one thousand eight hundred and ninety-two.

"The grand jurors for said state upon their oath present that Frank E. Carkin, of Appleton, in the said county of Knox, on the 1st day of December, in the year of our Lord one thousand eight hundred and eighty-seven, at Appleton, in said county of Knox, being then and there an officer, to wit, the treasurer and collector of the town of Appleton, aforesaid, the said town of Appleton being then and there a municipal corporation duly and legally organized and established under and by virtue of the laws of the state of Maine, the said Frank E. Carkin not being then and there an apprentice to the said town of Appleton, a municipal corporation organized and established as aforesaid, nor a person under the age of sixteen years, did then and there, by virtue of his said office and employment, have, receive, and take into his possession certain money, to a large amount, to wit, to the amount of thirteen hundred and sixty-five dollars, and of the value of thirteen hundred and sixty-five dollars, of the property and money of the said town of Appleton, a municipal corporation organized and established as aforesaid, the said Frank E. Carkin's said employer, whereby, and by force of the statute in such case made and provided, the said Frank E. Carkin is deemed to have committed the crime of larceny.

"And so the jurors aforesaid, upon their oath aforesaid, do present and say that the said Frank E. Carkin then and there in manner and form aforesaid, the said money of the property of the said town of Appleton, a municipal corporation organized as aforesaid, the said Frank E. Carkin's said employer, from the said town of Appleton, a municipal corporation organized as aforesaid, feloniously did steal, take, and carry away, against the peace of said state, and contrary to the form of the statute in such case made and provided.

"The jurors for said state upon their oath do further present that Frank E. Carkin, of Appleton, in said county of Knox, on the 1st day of December in the year of our Lord one thousand eight hundred and eighty-seven, at Appleton, in said county of Knox, was then and there an officer, to wit, the treasurer and collector of the town of Appleton, said town of Appleton then and there being a municipal corporation incorporated and duly and legally established and organized and existing as a municipal corporation under and by virtue of the laws of the state of Maine; he, the said Frank E. Carkin, not being then and there an apprentice to the said town of Appleton, nor a person under the age of sixteen years, did then and there, by virtue of his said office as treasurer as aforesaid, and while he continued and was employed in his said office as treasurer as aforesaid, have, receive, and take into his possession certain money to a large amount, to wit, to the amount of thirteen hundred and seventy-five dollars, and of the value of thirteen hundred and seventy-five dollars, of the goods, property, and money of the said town of Appleton, then and there unlawfully, fraudulently, and feloniously did embezzle.

and convert to his own use, without the consent of the said town of Appleton.

"Whereby, and by force of the statute in such case made and provided, the said Frank E. Carlin is deemed to have committed the crime of larceny.

"And so the jurors aforesaid, upon their oath aforesaid, do present and say that the said Frank E. Carlin, on said 1st day of December, in the year of our Lord one thousand eight hundred and eighty-seven, at Appleton aforesaid, in the county of Knox aforesaid, in manner and form aforesaid, the said money, the property of the said town of Appleton, from the said town of Appleton, feloniously did steal, take, and carry away, against the peace of said state, and contrary to the form of the statute in such case made and provided."

W. R. Prescott, Co. Atty., for the State. W. H. Fogler, for defendant.

WHITEHOUSE, J. This is an indictment against the respondent, as "treasurer and collector" of the town of Appleton, in which there is an apparent attempt to charge him with the crime of embezzlement. The defendant filed a general demurrer, which was overruled by the presiding justice, and the case comes to this court on exceptions to this ruling.

This indictment is based on section 7 of chapter 120 of the Revised Statutes, and contains two counts.

In the first count it is alleged that the defendant was "an officer, to wit, the treasurer and collector, of the town of Appleton," and that by "virtue of his said office and employment he did then and there have, receive, and take into his possession certain money to a large amount, to wit, to the amount of \$1,365, of the property and money of said town." It will be observed, however, that here there is not only an omission to specify whether he received this money in his capacity as treasurer, or by virtue of his office as collector, but there is an entire absence of any averment whatever that he embezzled or fraudulently converted to his own use either this money or any other.

This count, therefore, wholly fails to charge him with a crime by embezzling money, but only credits him with the performance of an official duty in receiving it.

The second count, like the first, avers that he "was then and there an officer, to wit, the treasurer and collector of the town of Appleton," but avers that he "did then and there, by virtue of his said office as treasurer, * * * have, receive and take into his possession certain money to a large amount, to wit, to the amount of \$1,375, * * * of the goods and money of the said town of Appleton, then and there unlawfully, fraudulently, and feloniously did embezzle and convert to his own use, without the consent of the said town of Appleton." Here was an evident attempt on the

part of the pleader to introduce the indispensable averment of a fraudulent conversion, but by an inadvertent change in the order of the several clauses of the sentence above quoted, and the omission to state the object of the verb "embezzle and convert," he again failed to charge that the respondent fraudulently converted the money which he had taken into his possession by virtue of his office as treasurer, or any other money or thing whatsoever.

While it is undoubtedly true, as observed by Mr. Bishop (1 Cr. Proc. § 356), that "sound sense" should be consulted, to the "disregard of captious objections, in looking for the meaning of the allegations in the indictment," it is the opinion of the court that such a material omission as is found in this case in the language employed to express the gravamen of the crime of embezzlement, ought not to be supplied by intendment.

Exceptions sustained. Indictment adjudged bad.

JONES et al. v. VINAL HAVEN STEAMBOAT CO.

(Supreme Judicial Court of Maine. March 30, 1897.)

SET-OFF—RECOUPMENT—CLAIM IN DIFFERENT RIGHT.

1. It is well-settled law that, in an action by a firm for a partnership claim, a demand against one of the partners individually is not a legal or proper set-off; and, conversely, in an action by one of a firm for his individual claim, a demand against the firm cannot be offset.

2. A member of the plaintiff firm was treasurer of the defendant corporation, and had in his hands, as treasurer, money of the corporation; and it did not appear that he ever held this money in any other capacity than that of treasurer, or received it or held it as a partner in the plaintiff firm, or appropriated it or attempted to appropriate it to the payment of a partnership debt, nor was there any agreement that it should be so appropriated. In an action to recover a debt from the defendant, *held*, that the defendant's claim cannot be allowed either by way of set-off or recoupment, or on the ground of payment.

(Official.)

Report from supreme judicial court, Knox county.

Action by Hiram P. Jones and George T. Rogers, as co-partners, against the Vinal Haven Steamboat Company. Judgment for plaintiffs.

C. E. & A. S. Littlefield, for plaintiffs. W. H. Fogler, for defendant.

WHITEHOUSE, J. This action is brought by H. P. Jones and George T. Rogers, co-partners, to recover the sum of \$1,972.16 for coal sold and delivered by the plaintiff firm to the defendant corporation between June, 1893, and February, 1895. During all that time, and until April, 1895, the plaintiff Jones was treasurer of the defendant company; and it was claimed in behalf of the defense that, as treasurer, Jones had money in his hands belonging to the defendant company, and that this money should be applied in reduction of the amount due from the defendant company to the part-

nership of which he was a member. The plea was the general issue, no account in set-off being filed. The case was reported for the law court to determine whether any money thus held by Jones as treasurer can be legally applied in this action in reduction of the plaintiff's co-partnership claim.

It is clear that the defendant's claim cannot be allowed upon the facts and pleadings stated, either by way of set-off or recoupment, or on the ground of payment.

It is not contended that in the exercise of his right, or the discharge of his duty, as treasurer of the defendant company, Jones had in fact appropriated the money in his hands as treasurer to the payment of the debt. It is not claimed that there had ever been any agreement between all the parties that it should be so appropriated. It is not suggested that Jones was the only ostensible and active member of the firm, and that Rogers was only a dormant partner, or that there was any uniform practice or usage on the part of the plaintiff firm in receiving accounts against the individual partners in payment of partnership demands which would have justified the defendant company in assuming that this claim would be so received. Under these circumstances, the law is well settled that, in an action by a firm for a partnership claim, a demand against one of the partners individually is not a legal or proper offset, and, conversely, that in an action by one of a firm for his individual claim a demand against the firm cannot be set off. *Stevens v. Lunt*, 19 Me. 70; *Williams v. Brimhall*, 13 Gray, 462; *Wat. Set-Off*, 226-238. "The demand must be due from all the plaintiffs to all the defendants jointly." Rev. St. c. 82, § 57.

It cannot be sustained by way of recoupment, because the defendant's claim is not against both plaintiffs, and had no connection whatever with the purchase of the coal from the plaintiff firm. The two claims do not arise from the same transaction or the same subject-matter. *Wat. Set-Off*, 464.

Indeed, the learned counsel for the defendant expressly states in his argument that the company does not rely upon set-off or recoupment; but he insists that the money in the hands of Jones should be regarded as payment, for the reason that it was his duty as treasurer to pay for the coal, and, if the amount now in his hands as treasurer had been charged by him on the defendant's books as having been paid to his firm in liquidation of this account, it would undoubtedly have been deemed payment pro tanto. And it is argued that it is none the less so because he failed to charge the amount on the books of the company.

But, unfortunately for the defendant, the case only shows that "said Jones, as treasurer of said company, had in April, 1895, and still has, money of the defendant company in his hands as treasurer." It fails to appear that he ever had this money in his hands in any other capacity than that of treasurer. He never received the money as a partner in the

plaintiff firm, and never held it as a partner. There is no evidence whatever of any attempt to appropriate it to the payment of this partnership debt, or of any pretense on his part that he had so appropriated it. He still holds it as the money of the defendant company. The plaintiff Rogers cannot be affected by it. It cannot be offset against the claim in suit.

Judgment for the plaintiff.

NILES v. PHINNEY.

(Supreme Judicial Court of Maine. March 30, 1897.)

RESCISSION OF CONTRACT—PURCHASE OF LAND—ACTION FOR PRICE—WAIVER.

1. The defendant took a bond of the plaintiff, in which it was agreed that the plaintiff should convey to the defendant certain land described in the bond, upon condition that he pay his notes mentioned in the bond. The defendant took and retained possession of the land, with the plaintiff's consent, four years, the notes having become due and remaining unpaid. The defendant voluntarily abandoned the premises, and the plaintiff, resuming the possession and the ownership, brought an action to recover upon the notes. *Held*, that neither the defendant's neglect or refusal to pay his notes, nor his voluntary abandonment of the premises, could terminate or rescind the contract without the plaintiff's consent.

2. Also, that the plaintiff may waive a forfeiture for the defendant's breach of the conditions of the bond, and enforce payment of the notes.

3. Also, that, the plaintiff having the right of possession until the notes were paid, his act of resuming possession after the defendant's voluntary abandonment had no tendency to show an intention to waive a forfeiture of the bond.

(Official.)

Exceptions from supreme judicial court, Franklin county.

Action by Silas W. Niles against Alfred L. Phinney. Verdict for plaintiff, and defendant excepts. Overruled.

Frank W. Butler, for plaintiff. J. W. Warren, for defendant.

WHITEHOUSE, J. This is an action of assumpsit on four promissory notes.

It appears from the statement of facts accompanying the exceptions that three of the notes declared upon were received by the plaintiff as part consideration for a bond of certain real estate given by him to the defendant September 13, 1890; that after the bond was given the defendant entered into occupation of the property, with the consent of the plaintiff, and remained in possession until September, 1894, when he voluntarily abandoned the premises, and the plaintiff resumed possession, the notes being then due and unpaid.

Thereupon it was contended that this act of the plaintiff in taking possession of the real estate described in the bond after the maturity of the notes, but before the commencement of this action, should be deemed an election on his part to insist upon a forfeiture of the bond, rather than a compliance with its conditions, and that, as to the notes in question, the ac-

tion could not be maintained. But the presiding justice ruled otherwise, and ordered a verdict for the plaintiff. To this ruling the defendant excepted.

It is the opinion of the court that this ruling was correct. No other conclusion would be justified by the facts stated. The plaintiff's obligation to convey the real estate to the defendant upon payment of the price agreed was a valuable consideration for the notes given therefor. *Todd v. Whitney*, 27 Me. 480. There is no evidence to warrant the inference that this consideration was ever impaired or modified by any act of the plaintiff.

The bond for the conveyance of the real estate was the plaintiff's personal contract, which conveyed to the defendant no estate in the land. It apparently contained no stipulation respecting the occupancy of the premises, and hence was ineffectual to give the defendant the right of possession, either before or after the maturity of the notes. Neither the defendant's neglect or refusal to pay his notes at maturity, nor his voluntary abandonment of the premises, could have the effect to terminate or rescind the contract without the plaintiff's consent. The plaintiff had the right, indeed, to request a strict compliance with the conditions of the bond, and to enforce a forfeiture for breach of such conditions. He also had the right to waive a forfeiture of the bond and enforce payment of the notes. He manifestly elected to pursue the latter course. He performed no act from which a contrary intention can be inferred. He had a legal right to the possession of the property until the notes were paid, but only exercised that right by resuming possession after the defendant's voluntary abandonment of the premises. The act of taking possession of his property under such circumstances has no tendency whatever to show an intention to waive the forfeiture. He still retained the title, and was presumably ready and willing to perform the obligations of the bond on his part, by conveying the land to the defendant upon payment of the notes. He has clearly not intended to avail himself of the forfeiture of the bond, but, by seeking to enforce payment of the notes, has waived it. *Manning v. Brown*, 10 Me. 49; *Shaw v. Wise*, Id. 113; *Little v. Thurston*, 58 Me. 86; *Cook v. Walker*, 70 Me. 235; *Newhall v. Insurance Co.*, 52 Me. 180.

Exceptions overruled.

HUSTON v. GOUDY.

(Supreme Judicial Court of Maine. April 1, 1897.)

INSOLVENCY—DISCHARGE—ILLEGAL PREFERENCE—TRADER.

1. By the statutes of this state, an insolvent debtor will be denied a discharge from his debts when guilty of a fraudulent preference.

2. An insolvent debtor who is a trader will not be discharged when he has failed to keep proper books of account.

3. *Held*, in this case, that the insolvent was a

trader, within the meaning of the insolvent law. He bought and sold lumber; bought clay, and made and sold bricks; and received and sold mowing machines on commission.

See *Wyman v. Gay*, 37 Atl. 325, 90 Me. 36.

(Official.)

Report from supreme judicial court, Lincoln county.

This was an appeal by Alfred W. Huston, an insolvent debtor, from a decree of the insolvent court denying his petition for a discharge. Affirmed.

The case was tried to a jury in the court below, who returned special verdicts on issues submitted to them as follows:

"(1) Did Alfred W. Huston, the appellant, on the 26th day of January, A. D. 1894, having reasonable cause to believe himself insolvent, pay or secure in whole or in part a pre-existing debt due from him to one Gilbert E. Gay by assigning to said Gay the two life insurance policies, and by conveying and delivering to said Gay, by bill of sale or otherwise, the other personal property named in the first objection to said Huston's discharge, with intent to defraud his creditors, or to give a preference contrary to chapter 70 of the Revised Statutes of Maine?

"Answer: Yes.

"(2) Whether, about December, 1893, said Huston, having reasonable cause to believe himself insolvent, sold and delivered to said Gilbert E. Gay, in part payment of a pre-existing debt due from him to said Gay, the sleigh named in the first objection, with intent to defraud his creditors, or to give a preference contrary to chapter 70 of the Revised Statutes of Maine?

"Answer: No."

The appellant seasonably moved to set aside the first special finding, because it was against the law and evidence and the manifest weight of evidence.

The case, with the motion, was thereupon reported by the presiding justice to the law court to decide whether the petitioner was entitled to a discharge or not, and to order judgment accordingly.

The material portions of the report are as follows:

It is admitted that the petitioner went into voluntary insolvency on the 24th day of March, 1894, and that the proceedings are still pending. He moved for his discharge at a term of the insolvency court of Lincoln county on the 4th of September, 1894, and his petition was denied by the judge of that court, he taking an appeal to this court on that question.

No question is made about the regularity of the papers leading up to the hearing of that question in this court. The creditor who opposes his discharge does so upon two grounds: First, that the petitioner, being alleged to have been a trader, kept no proper books of account since March 23, 1878; and, secondly, for fraudulent preferences.

"Under the first objection, the examination

of the insolvent debtor, made in the insolvent court on the 2d day of October, 1894, and also the deposition of Gilbert E. Gay, is made a part of the case. One full copy of each is to be made, and the original books of account,—all of them,—such as the insolvent debtor kept, should be furnished for the examination of the full court; and in addition to which the parties may submit copies of any portions of them as they see fit.

"Upon the objection of fraudulent preferences, two questions were submitted to the jury, which are to be copied as a part of the case, on the first of which an affirmative answer was given, and upon the second of which a negative answer was given, and the answers were affirmed as special verdicts. The petitioner seasonably filed a motion to set aside the first of said special findings as being against law and the evidence, which motion the court may consider as a part of the case. And the said deposition and examination may be used on this issue as well as the other."

Geo. B. Sawyer, for appellant. W. H. Hilton, for objecting creditor.

WALTON, J. The question is whether the insolvent debtor is entitled to a discharge. We are forced to the conclusion that he is not. A jury has found that he was guilty of a fraudulent preference, and a careful examination of the evidence fails to satisfy us that the verdict was wrong. This alone is sufficient to defeat his right to a discharge.

But there is another ground equally fatal to his right to a discharge. There is no doubt that he was a trader within the meaning of the law. He bought and sold lumber; he bought clay, and made and sold bricks; and he received and sold mowing machines for a commission. And yet he kept no proper books of account.

We cannot doubt that the decree in the court below refusing his discharge was correct, and must be affirmed. *Groves v. Kilgore*, 72 Me. 489; *In re Tolman*, 83 Me. 553, 22 Atl. 244; *In re Patten*, 85 Me. 154, 27 Atl. 89.

Decree in court below affirmed.

HOLWAY et al. v. PROPRIETORS OF MACHIAS BOOM (two cases).

(Supreme Judicial Court of Maine. March 30, 1897.)

NEGLIGENCE—DEFECTIVE BOOM.

1. In an action to recover damages by loss of the plaintiffs' logs by reason of a defective boom belonging to the defendant, it is incumbent on the plaintiffs to prove that the defendant corporation did not exercise reasonable precaution or due care and diligence either in the construction and repair or in the management of the boom.

2. Where the evidence satisfactorily shows that the defendant company failed to perform this reasonable obligation by reason of a radical defect in the method of constructing the boom, and

for want of proper inspection and repair of its chain, *held*, that it is the opinion of the court that the verdict should stand.

(Official.)

Action by William C. Holway and others against the proprietors of Machias Boom. The actions were consolidated, and a verdict rendered for plaintiffs. Motion by defendant to set it aside. Overruled.

H. M. Heath and C. L. Andrews, for plaintiffs. Charles Sargent, for defendant.

WHITEHOUSE, J. A large number of logs owned by the plaintiffs in these two cases were swept away and lost by reason of the breaking of the boom maintained by the defendant corporation across Machias river. The jury found that the aggregate damage thus sustained, including the expense of recovering a portion of the logs that escaped, was \$2,197.50; and, by agreement between the plaintiffs in the two cases, this sum was equally divided between them, and a verdict rendered for \$1,098.75 in each case. The defendant moves to have these verdicts set aside as against law and evidence.

After a careful and patient examination of all the evidence reported, it is the opinion of the court that this motion must be overruled. It not only fails to appear that the verdicts were unmistakably wrong, but it affirmatively appears that they were clearly right.

The boom in question extended from shore to shore of Machias river, a distance of 325 feet, and was hung by chains below the pier, instead of being buttressed against them. On the 10th of April, 1895, the chain stretched across the southern, or Dublin, gap, was broken by the pressure of the logs and ice, and the boom carried away.

As originally built, this gap appears to have been constructed according to an approved design, and upon correct mechanical principles. On the northerly side of the gap the boom stick was fastened to the pier, and both the boom stick and the gap piece held in position by means of three chains running diagonally from the corner of the pier to the boom stick. On the southerly side of this gap the shore end of the boom stick was buttressed against a substantial pier, and, by the aid of a second pier further up the river and three chains extending diagonally therefrom to the boom stick, the gap piece and boom stick on the southerly side were securely held in a fixed position. A chain was also drawn over the platform of the gap itself, and attached to the gap pieces on either side. Thus the boom was held in a rigid condition its entire length, with the pressure distributed among eight or more bearings, and the gap chain subjected to comparatively little strain.

But at the time of the breaking in question the conditions on the southerly side were entirely different. The lower pier to which the shore end of the boom stick had formerly been fastened had rotted down and been abandoned.

and in readjusting the boom on this side of the gap, a fatal change was made in the method of construction. The boom stick was used as a guy extending diagonally from the only remaining pier on the shore, up river, to the southerly gap piece, and three chains ran from the upper corner of that pier to the gap piece. Thus, the southerly gap piece and the outer end of the boom stick attached to it were only held in position by means of the chain drawn over the platform of the gap, and this gap chain was obviously the only power at that time to resist the constant pressure shoreward of the logs and ice against the southerly gap piece and boom stick. With such a structure, several chains of extraordinary size and strength would have been required to withstand the pressure which might reasonably have been expected to result from the action of logs and ice at ordinary spring freshets. Instead of such means, however, only one gap chain was stretched over the platform, and this chain, composed in part of an old ship's cable, had been in use so long that its strength was nearly gone. A section of it was exhibited for the inspection of the court, and it was manifestly unsuitable and insufficient for the purpose.

Under these circumstances, that happened on the 10th of April, 1895, which might reasonably have been expected to happen under the existing conditions, which do not appear to have been extraordinary in a spring freshet. The old gap chain, of greatly impaired strength, broke and parted under the pressure of logs and ice. The other chains then gave way in rapid succession, the boom sticks swung around, and the logs escaped.

The learned counsel for the defendant insists, however, that there is no evidence that the gap chain parted first.

In answer to the question by the court, "Where did the boom part?" Daniel McLaughlin testified unequivocally, "Parted in the middle of the gap;" and in cross-examination the fact is repeated and emphasized that the gap covered by the chain broke and separated, and that this was the first part to break. He was an eyewitness to the disaster, having a plain view of the boom and of Dublin gap. His testimony is corroborated by Hannah Reynolds, who also witnessed the occurrence, and there is no evidence to contradict the direct testimony of these two witnesses. On the contrary, all of the circumstances and results tend to confirm their evidence.

It was incumbent on the plaintiffs to prove that the defendant corporation did not exercise reasonable precaution or due care and diligence either in the construction and repair or in the management of the boom. The evidence satisfactorily shows that the defendant failed to perform this reasonable obligation, by reason of a radical defect in the method of constructing the boom, and for want of proper inspection and repair of the gap chain, as already shown.

No question is made respecting the amount of damages awarded, and there seems to be sufficient evidence on that branch of the case also to justify the verdict of the jury.

Motion overruled.

HUTCHINGS v. INHABITANTS OF SULLIVAN.

(Supreme Judicial Court of Maine. April 2, 1897.)

HIGHWAYS—BOUNDARIES—SIDEWALKS—DEFECTS—LIABILITY OF TOWN—NOTICE TO SELECTMEN—DAMAGES.

1. The Revised Statutes (chapter 18, § 95) declare that, when buildings or fences have existed more than 20 years fronting upon any way, street, lane, or land appropriated to public use, the bounds of which cannot be made certain by records or monuments, such buildings or fences shall be deemed the true bounds thereof. In an action to recover damages caused by a defect in the highway, *held*, that the plaintiff can establish the limits of the way in the manner referred to in this statute.

2. When private parties construct a sidewalk within the limits of a highway, which has the character and general appearance of a public walk, so that thereby the public is justified in believing that they are invited to walk upon it as a part of the public way, and it is thus used for a series of years by the public, the town will be liable for defects in it the same as if the town had constructed it in the first place.

3. *Held*, that the following location of the defect in a highway, in the statutory notice to the selectmen of the town, is stated with reasonable certainty: "A hole in the sidewalk situated between Hotel Cleaves and Dunbar Brothers' store, upon townway in said town of Sullivan."

4. A verdict against a town for personal injuries caused by a defective highway will not be set aside, as against evidence and for excessive damages, when it appears that the evidence was sufficient to justify the jury in finding that the municipal officers of the town had the statutory notice of the defect; that the sidewalk was clearly defective; and that the verdict for a broken arm and other serious injuries is only \$300.

(Official.)

Exceptions from supreme judicial court, Hancock county.

Action by Nancy C. Hutchings against the inhabitants of Sullivan. There was a verdict for plaintiff, and defendant excepts, and moves for a new trial. Motions and exceptions overruled.

L. B. Deasy and B. E. Tracy, for plaintiff.
Henry Boynton and A. W. King, for defendants.

WALTON, J. This is an action to recover damages for injuries claimed to have been received through a defect in a concrete sidewalk in the town of Sullivan. There was a depression in the sidewalk about 3 feet long, 2 feet wide, and $5\frac{1}{4}$ inches deep in the lowest place. The plaintiff says that, as she was walking along on this sidewalk on a dark, foggy evening, she stepped into this depression, and was thereby thrown down, breaking her arm, and otherwise injuring herself. She has obtained a verdict for \$300, and the case is before the

law court on motions and exceptions by the defendants. We will first consider the exceptions.

1. The Revised Statutes (chapter 18, § 95) declare that, when buildings or fences have existed more than 20 years fronting upon any way, street, lane, or land appropriated to public use, the bounds of which cannot be made certain by records or monuments, such buildings or fences shall be deemed the true bounds thereof. The defendants claimed at the trial in the court below that this statute does not apply to this class of cases, and that the plaintiff could not establish the limits of the way in question in the manner referred to, even by proof sufficient to satisfy all the requirements of the statute. The court ruled otherwise. We think the ruling was correct.

2. The defendants claimed that the sidewalk in question was built by private persons, and that the town had never made any repairs on it, or assumed any responsibility for repairs on it; and the defendants requested the court to rule that, under these circumstances, the town would not be liable for defects in it. The court declined to so rule, and instructed the jury that when private parties construct a sidewalk within the limits of a highway, which has the character and general appearance of a public walk, so that thereby the public is justified in believing that they are invited to walk upon it as a part of the public way, and it is thus used for a series of years by the public, the town will be liable for defects in it, the same as if the town had constructed it in the first place.

We think this ruling was correct. We are not aware that this precise question has before been presented to this court; but it has been presented to other courts, and they have held that when a sidewalk has been built, no matter by whom or by what authority, and the municipal authorities have notice that it has become defective and dangerous to public travel, the municipality will be liable as though the sidewalk had been built by its express authority. *Village of Ponca v. Crawford*, 23 Neb. 662, 37 N. W. 609; *Hill v. City of Sedalia*, 2 Mo. App. Rep'r, 1019, Am. Dig. 1896, p. 3829. And in the fourth edition of *Shearman and Redfield on Negligence* (section 368) the law is said to be that, where towns or other municipal corporations are declared by statute to be liable for defects in their highways, it is of no consequence that such defects were caused by third persons, so long as the highway is thereby rendered defective, within the meaning of the statute; that the mere fact that they were created by third persons without its consent is no defense to the corporation. We think the ruling upon this point was correct, and well supported by authority.

3. The defendants excepted to the admission of the plaintiff's notice to the selectmen of the town, on the ground that it did not sufficiently

describe the location of the defect. The notice described the location of the defect as "a hole in the sidewalk situated between Hotel Cleaves and Dunbar Brothers' store, upon townway in said town of Sullivan." The evidence shows that the distance between the hotel and the store was 315 feet (a fraction over 19 rods); and it is urged in defense that, while this might be sufficient if the defect were described in such a way that it might be readily identified, it is not sufficient where the defect is described as a "hole," with no other description; and *Chapman v. Nobleboro*, 76 Me. 427, is cited in support of this position. The notice in the case cited was substantially like the notice in this case, and the objection to it was substantially the same; and, if the notice in that case had been held to be insufficient, we think the same result must have followed in this case. But the notice was not held insufficient in that case. It was held to be sufficient. And on the authority of that case, and the reasoning by which the decision in that case was sustained, we think the same result must follow in this case. The fact must not be overlooked that the objection to the notice made at the trial in the court below was not to a want of accuracy in describing the defect or its location, but to a want of definiteness in stating its location. We think the location of the defect was stated with reasonable certainty, and that the objection to the admission of the paper to prove the statutory notice to the selectmen of the town of Sullivan was properly overruled.

4. Motion. The defendants ask for a new trial, on the ground that the verdict is against evidence, and the damages excessive. We do not think the request can be granted. The sidewalk was clearly defective. It was made of concrete; and there was a sunken place in it, the bottom of which was $5\frac{1}{4}$ inches lower than the surrounding surface. The plaintiff calls it a "hole." The defendants call it a "depression." It is immaterial whether we call it a "hole," a "hollow," a "sag," or a "depression." It was a place dangerous to travelers using the walk during a dark and foggy evening; and we think the evidence was sufficient to justify the jury in finding that the municipal officers of the town had the statutory notice of the defect. The plaintiff was a comparative stranger. She had not passed over the walk for more than two years. The evening was dark and foggy, and there were no lights; and, as she passed along on the walk, she stepped into this sunken place, and was thrown down. Her arm was broken, and she claims to have been otherwise seriously injured. The jury assessed her damages at \$300.

Surely, such a verdict cannot be regarded as excessive in amount; and we do not think it is so clearly against the weight of evidence as other particulars as to require the court to set it aside, and grant a new trial.

Motions and exceptions overruled.

MERRITT v. BUCKNAM et al.

(Supreme Judicial Court of Maine. April 9, 1897.)

ASSIGNMENTS FOR CREDITORS—RELEASE—JOINT DEBTORS—FRAUD.

1. Two of several joint makers of a promissory note, by an instrument under seal, conveyed, transferred, and assigned to trustees all of their property, of every description, except such as was by law exempt from attachment, in trust to sell, dispose of, and convert into money, and to make a proportional distribution of the net proceeds thereof among such creditors of the assignors as became parties to the assignment within the time limited.

The indenture of assignment contained this clause: "And the creditors whose names are hereto subscribed agree to said assignment, and to receive their proportional shares of said property in full of all their claims against said parties of the first part; and, upon payment thereof, they hereby release and forever discharge said parties of the first part from their respective claims."

In a suit against the executors of another joint maker of this note, *held*, that whether the language of the indenture, applicable to creditors who became parties thereto, should be regarded merely as an executory agreement to release the assignor upon the subsequent proportional distribution of the property conveyed in trust for this purpose, or as a then present release of the assignors from all further liability, depends upon the intention of the parties, to be obtained, if possible, by construing the instrument as a whole, and by taking into consideration the circumstances and relations of the parties.

2. In this case the payee of the note, by becoming a party to this indenture, intended a then present release of the assignors from all further liability.

3. As this was a technical release under seal of some of the joint promisors, it must be regarded as a discharge of all.

4. A release may be given to one of several joint debtors, and all rights be reserved against the others, but this was not done in the indenture under consideration; nor does the instrument show any intention upon the part of creditors to reserve rights against other joint debtors or promisors.

5. A secret agreement between assignors and a creditor, made to induce the creditor to assent to the assignment, without the knowledge of the other creditors, and repugnant to the terms of the indenture of assignment, is a fraud upon the other creditors, and is void.

(Official.)

Exceptions from supreme judicial court, Washington county.

Assumpsit by Hannah O. Merritt, executrix of Abraham Merritt, deceased, against Gilbert L. Bucknam and another, executors of Isaac Carleton, deceased, on a note. There was verdict for plaintiff, and defendants bring exceptions. Sustained.

H. H. Gray, for plaintiff. John F. Lynch and W. R. Pattangall, for defendants.

WISWELL, J. This is an action against the executors of one of the joint makers of a promissory note. The note was signed by L. Leighton & Son, and indorsed, at the inception of the note and before its negotiation, by L. Leighton, H. M. Leighton, and Isaac Carleton, the defendants' testator. They were therefore co-promisors.

The defense was that the payee of the note,

by an instrument under seal, had released and discharged from all liability two of the co-promisors, Levi Leighton and Horace M. Leighton, and that thereby the defendants' testator had been released.

The note in suit was dated October 29, 1892. On September 15, 1893, by an instrument under seal, Levi Leighton and Horace M. Leighton, both individually and as members of the firm of L. Leighton & Son, conveyed, transferred, and assigned to the persons therein named all of their property of every description, except such as was by law exempt from attachment, in trust to sell, dispose of, and convert into money, and to make a proportional distribution of the net proceeds thereof among such creditors of the assignors as became parties to the assignment within the time limited.

The indenture of assignment contained this clause: "And the creditors whose names are hereunto subscribed agree to said assignment, and to receive their proportional shares of said property in full of all their claims against said parties of the first part; and, upon payment thereof, they hereby relieve and forever discharge said parties of the first part from their respective claims."

The main question presented is as to the proper construction of this language in the indenture applicable to creditors who became parties thereto,—whether it should be regarded merely as an executory agreement to release the assignors upon the subsequent proportional distribution of the property conveyed in trust for this purpose, a covenant not to sue, or as a then present release of the assignors from all further liability.

It is undoubtedly true that the tendency of authority is towards a more liberal construction of such instruments than formerly prevailed, and that the intention of the parties is to be obtained, if possible, by construing the instrument as a whole, and by taking into consideration the circumstances and relations of the parties. It is not always an easy question to decide, but it is the opinion of the court that, by the indenture under consideration, the parties intended a present release.

The assignors conveyed all of their property without limitation or restriction, except as to that exempt by law from attachment, for the benefit of such creditors as became parties. This creditor, together with others who assented to the assignment, immediately acquired thereby something of value, and an advantage over other creditors who did not become parties. The consideration of the conveyance was the release of liability, and the consideration of the release the immediate and unconditional acquirement by the creditors who became parties of all the property of the debtors.

The language adopted by the creditors shows, we think, an intention to then and there discharge and release the assignors from further liability. They assent to the assignment; they agree to receive their proportion-

al shares of the property in full of their claims; and, upon payment thereof, they "hereby relieve and forever discharge said parties of the first part from their respective claims."

In *Tuckerman v. Newhall*, 17 Mass. 581, it was held that this language in an assignment for the benefit of creditors, "that the said creditors do severally agree and covenant * * * that they will receive their respective proportions of the moneys arising, etc., in full satisfaction of their several and respective demands, and will further release and discharge the said J. & I. Newhall from all further claims and demands upon them by reason thereof," should be construed as a present release.

In *Dickinson v. Bank*, 130 Mass. 132, in which there was an assignment for the benefit of creditors, it was held that the language used by the creditors, "We do hereby accept," and "We do hereby absolutely release," should not operate as a present release, because other portions of the instrument clearly showed that the use of the present tense in the words quoted was incorrect and inaccurate, and that this was not the intention of the parties. But in the case under consideration no other portion of the instrument shows a contrary intent from that to be obtained from the language adopted by the creditors.

This, then, being a technical release, under seal, of some of the joint promisors, must be regarded as a discharge of all. *Hale v. Spaulding*, 145 Mass. 482, 14 N. E. 534, and cases cited; *Bradford v. Prescott*, 85 Me. 482, 27 Atl. 461, and cases cited.

A release may be given to one of several joint debtors, and all rights be reserved against the others, but that was not done in this indenture; nor does the instrument show any intention upon the part of creditors to reserve rights against other joint debtors or promisors.

The plaintiff offered in rebuttal the following agreement upon a separate paper:

"Columbia Falls, October 14, 1893. It is agreed by the undersigned that by A. Merritt signing the assignment of L. Leighton & Son this day, that it shall not debar or prevent Merritt from collecting on his notes full amount due. H. M. Leighton. John L. Dalot, Assignee."

Merritt was the payee and holder of the note at the time of the assignment, and at the date of this agreement. This case does not show how or under what circumstances this agreement was signed and given to Merritt, but we think that it may be fairly inferred that it was a secret agreement, made to induce him to assent to the assignment, and without the knowledge of the other creditors. It was repugnant to the terms of the indenture of assignment, and was a fraud upon the other creditors. It is therefore void. *Ramsdell v. Edgarton*, 8 Metc. (Mass.) 227.

The direction of the court to return a verdict for the plaintiff for the amount due upon the note was therefore erroneous.

Exceptions sustained.

LEAVITT v. CANADIAN PAC. RY. CO.

(Supreme Judicial Court of Maine. April 9, 1897.)

RAILROADS—FIRES—INSURANCE—SUBROGATION—STATUTES—OPERATION—CONSTITUTIONAL LAW—EQUAL PROTECTION—OBLIGATION OF CONTRACTS.

1. The act of the legislature of 1895 (chapter 79, St. 1895) whereby Rev. St. c. 51, § 64, was so amended that the liability of railroad corporations in case of injury to property by fire communicated from a locomotive engine in the use of the corporation was limited to the excess of the injury suffered by the property owner over the net amount of insurance recovered, if received before the damages are assessed, and which provides that if the insurance is not recovered before the damages are assessed the policy shall be assigned to the railroad corporation, which may maintain an action thereon, or prosecute an action already commenced by the insured, with all the rights which the insured originally had, is not in violation of the clause of the fourteenth amendment of the federal constitution, which declares: "Nor shall any state deny any person within its jurisdiction the equal protection of the laws." This clause merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.

2. Held, that the amended statute operates alike upon all persons and property similarly situated. It is general in its terms, and applies to all cases falling within its provisions. All persons and property subject to it are treated alike. There is no unjust discrimination in the protection given by the statute between different persons or classes of persons.

3. The right which an insurer has, who has paid a loss, to prosecute for his own benefit any person primarily liable to the insured for the injury, is not based upon a vested interest or any ownership in the property insured, but rather upon the doctrine of subrogation, which is founded, not upon contract, but upon the relationship of the parties, and upon equitable principles, for the purpose of accomplishing the substantial ends of justice.

4. Subrogation is the substitution of one person in place of another, whether as a creditor, or as the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies, or securities. But one cannot thereby succeed to or acquire any claim or right which the party for whom he is substituted did not have.

5. In accordance with these equitable principles, a surety who has been compelled to pay a debt for which another is primarily liable succeeds to all rights which the creditor had of enforcing the liability of the original debtor, or an insurer, who has paid a loss for which another is responsible, either by statute or at common law, is subrogated to any claim that the insured had against the person whose tortious act caused the injury, or who, for any reason, is liable to the owner therefor.

6. Where the plaintiff's property was injured by fire communicated by a locomotive engine in the use of the defendant corporation, on July 26, 1895, some months after the act of 1895 became effective, and the property was insured by policies dated in March, some time before the act went into effect, held, that the amended statute was intended to apply, and does apply, to such a case.

7. This statute, although applicable to any case where the injury occurred after it went into effect, even if the contract of insurance was made before, in no way affects or impairs the obligation of a contract. It very materially affects the rights of the insurer, but not his contractual rights. This was entirely within the province and power of the legislature. The liability of the railroad corporation was created by the legis-

lature. It was not based upon negligence, but was placed rather as a condition upon its franchise. The same power that created this unconditional liability could either limit or entirely take it away.

8. Two persons cannot, by contract, continue the statutory liability of a third person, not a party to the contract, beyond such a time as the legislature may see fit, by a subsequent enactment to the contract, to limit or repeal the liability.

9. *Held*, that an insurance company, after as well as before the time that this statute went into effect, had the right to be subrogated to all the right of recovery that the insured had. What this right of recovery was for a fire communicated from one of the defendant's locomotives, without fault or negligence upon the part of the defendant, depended upon the law as it was at the time of the fire. This right did not depend upon any interest or ownership of the insurer in the property insured, but rested entirely upon the equitable rule that one who has been obliged to indemnify another against loss should succeed to all rights that other had, to the extent of the amount paid, to recover of the person who for any reason was primarily liable therefor, but to no other nor greater right than he had.

10. *Held*, in this case, that judgment should be entered for the plaintiff for the amount of damages assessed by the referee, after deducting the insurance received by the plaintiff, less the premium paid, and the expense, if any, of the recovery of the insurance, together with interest on such balance as provided by law.

(Official.)

Action by Elsie G. Leavitt against the Canadian Pacific Railway Company to recover damages for property injured by fire. Submitted on an agreed statement. Judgment for plaintiff.

Chas. P. Stetson, for plaintiff. Chas. F. Woodard, for defendant.

WISWELL, J. On July 26, 1895, the plaintiff's property, both real and personal, was injured by fire communicated by a locomotive engine in use by the defendant corporation, but, as is admitted, without fault or negligence on the part of the defendant. The plaintiff had insurance upon her property against fire under policies dated in March, 1895.

Rev. St. c. 51, § 64, prior to the amendment of 1895, was as follows: "When a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury, and it has an insurable interest in the property along the route, for which it is responsible, and may procure insurance thereon." Under this statute it was well settled that, in accordance with the doctrine of subrogation, an insurance company which had paid a loss upon property injured by fire communicated by a locomotive engine could maintain an action in the name of the assured against the railroad corporation using the locomotive, and recover the amount which it had been obliged to pay by reason of the contract of insurance.

But the legislature of 1895 amended this statute by adding thereto the following provision: "But such corporation shall be entitled to the benefit of any insurance upon such property effected by the owner thereof less

the premium and expense of recovery. The insurance shall be deducted from the damages, if recovered before the damages are assessed, or, if not, the policy shall be assigned to such corporation, which may maintain an action thereon, or prosecute, at its own expense, any action already commenced by the insured, in either case with all the rights which the insured originally had." Laws 1895, c. 79.

In this case the insurance had been recovered prior to the assessment of damages by a referee; the question as to whether the amount of insurance received by the plaintiff should be deducted from the damages being expressly reserved in the reference, and presented to this court upon an agreed statement of facts. The action is prosecuted for the benefit of the insurance companies, who had paid a portion of the loss, as well as for the plaintiff.

There can be no question as to the meaning of the amendment. It is expressly provided that the corporation liable for the injury by reason of fire communicated from its locomotive engine "shall be entitled to the benefit of any insurance upon such property effected by the owner thereof," and that the insurance "shall be deducted from the damages, if recovered before the damages are assessed." The effect of the statute as it now stands is to make railroad companies liable in such cases for the difference only between the net amount of insurance recovered and the amount of the injury suffered by the property owner. Before the amendment, by reason of the statute liability, the railroad company was responsible to the owner of the property thus injured, notwithstanding that the property was fully insured, and notwithstanding that the owner had received full indemnity from the insurance company. But in the latter case, upon the equitable principles of the doctrine of subrogation, this responsibility of the railroad company to the owner inured to the benefit of the insurer. Since the amendment, the liability is limited to the difference, as we have already seen.

But it is contended upon the part of the counsel for the plaintiff, representing the interests of the insurers, that this amendment of 1895 is invalid, because in violation of the last clause of the fourteenth amendment to the federal constitution: "Nor shall any state * * * deny to any person within its jurisdiction the equal protection of the laws."

This clause has very frequently been before the federal supreme court in attempts by unsuccessful litigants in the state courts to have legislative acts of almost every kind and unfavorable decisions of the state courts held to be within the inhibition of this clause, and it has received so frequent judicial construction by that court that its meaning has become pretty well settled.

In *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, Mr. Justice Field, in delivering the judgment of the court, said: "The fourteenth

amendment, in declaring that no state shall deprive any person of life, liberty, or property without a due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their person and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. * * * Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Legislation which is special in its character is not obnoxious to the last clause of the fourteenth amendment if all persons subject to it are treated alike, under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed. *Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161.

Whenever the law operates alike upon all persons and property similarly situated, equal protection cannot be said to be denied. *Walston v. Nevin*, 128 U. S. 578, 9 Sup. Ct. 192.

"It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Marchant v. Railroad Co.*, 153 U. S. 380, 14 Sup. Ct. 894.

"There is no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances." *Railway Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110.

In view of the construction which has so frequently been placed upon this clause by the United States supreme court, is the act of 1895 within the inhibition of the clause? We think not. The law operates alike upon all persons and property similarly situated. The act is general in its terms, and applies to all cases falling within its provisions. All persons and property subject to it are treated alike. The liability of the railroad corporation is the same, whatever the property injured, or by whomsoever it may be owned. There is no unjust discrimination in the protection given by the statute between different persons or classes of persons.

It is argued, however, by the counsel for

the plaintiff, that an insurer has a vested interest in the property insured; "to a certain extent an ownership"; and that, while the statute as amended furnishes full and absolute protection to the actual owner, it affords none whatever to the insurer; that, therefore, there is an unjust discrimination against a class of persons, viz. insurance companies,—corporations being undoubtedly persons, within the meaning of the constitutional amendment.

But we think that the right which an insurer who has paid the loss has to prosecute for his own benefit any person primarily liable to the assured for the injury is not based at all upon the idea that he has a vested interest, or any ownership whatever, in the property insured, but rather upon the doctrine of subrogation, which is founded, not upon contract, but upon the relationship of the parties, and upon equitable principles for the purpose of accomplishing the substantial ends of justice.

In accordance with these equitable principles, a surety who has been compelled to pay a debt for which another is primarily liable, succeeds to all the rights which the creditor had of enforcing the liability of the original debtor; or an insurer who has paid a loss for which another is responsible, either by statute or at common law, is subrogated to any claim that the insured had against the person whose tortious act caused the injury, or who, for any other reason, is liable to the owner therefor. If this were not so, the very inequitable result would follow that an insured owner of property, for an injury for which another is liable, would recover for one and the same loss full indemnity from the insurer, and compensation from the person liable therefor.

"Subrogation is the substitution of one person in place of another, whether as a creditor or as the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities." *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508, 2 N. E. 103.

It necessarily follows from the very principles of this doctrine of subrogation that one cannot thereby succeed to or acquire any claim or right which the party for whom he is substituted did not have. A mere statement of this proposition is such that the citation of authority in support of it is not necessary, but ample authority is not wanting.

"The party subrogated acquires no greater rights than those of the party for whom he is substituted." *Jackson Co. v. Insurance Co.*, supra.

"In any form of remedy, the insurer can take nothing by subrogation but the rights of the assured." *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 6 Sup. Ct. 754, 1176.

"The right of the insurance company is a mere equity to be put in the place of the insurer, * * * whatever his rights may be." *Kernochan v. Insurance Co.*, 17 N. Y. 423.

The following cases are excellent illustrations of the doctrine of subrogation and of the proposition that the insurer by subrogation succeeds to such claims and rights as the person indemnified had, and to none other.

In the case of *Simpson v. Thomson*, L. R. 3 App. Cas. 279, decided by the house of lords in 1877, an insured steamship was run down and destroyed by another steamship. Both vessels belonged to the same owner. The underwriters paid as for a total loss upon the steamship destroyed, and sought to share with the owners of the cargo in a fund which the vessel owner had paid into court under an act limiting the liability of the shipowners. The law peers who delivered opinions all agreed that the question must be considered just as if the underwriters had brought an action against the owner of both vessels; and the house of lords decided that, although the underwriters had paid for a total loss, and were entitled to all the rights in the injured ship which belonged to its owner, yet, if that owner could not assert a claim for damages against the wrongdoers, neither could the underwriters; that the underwriters' claim must be asserted in the name of the insured; and that any right of action that he had must be a right of action against himself, which is an absurdity, and thing unknown to law.

The lord chancellor, in delivering his opinion, said: "I know of no foundation for the right of underwriters except the well-known principle of law that where one person has agreed to indemnify another he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. It is on this principle that the underwriters of a ship that has been lost are entitled to the ship in specie if they can find and recover it; and it is on the same principle that they can assert any right which the owner of the ship might have asserted against a wrongdoer for damage for the act that has caused the loss. But this right of action for damages they must assert, not in their own name, but in the name of the person insured; and if the person insured be the person who has caused the damage, I am unable to see how the right can be asserted at all."

In *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508, 2 N. E. 103, the defendant insured the plaintiff on cotton in transit between different places in the United States and the plaintiff's mills in New Hampshire. The contract for transportation with a carrier contained a stipulation that "the company [carrier] incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton." It was held that it was no defense to an action on the policy for a loss insured against that the insured had, by contract with the carrier, given him the benefit of any insurance effected, if there was no fraud or concealment on the part of the insured in effecting the in-

surance, and if the policy of insurance contained no clause specifically subrogating the insurer to the rights of the insured in case of a loss through the fault of a carrier.

In *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 1176, goods in transit were insured by the plaintiff. A stipulation in the bill of lading allowed the carrier the benefit of any insurance procured by the owner. It was held that this stipulation was valid, although the loss was occasioned by the negligence of the carrier or his agents; and that, in the absence of fraudulent concealment or misrepresentation, the insurer could maintain no action against the carrier upon any terms inconsistent with the stipulation. Mr. Justice Gray, in delivering the judgment of the court, used language that has a special significance with reference to the plaintiff's contention in this case. "That the right of the assured to recover damages against a third person is not incident to the property in the thing insured, but only a personal right of the assured, is clearly shown by the fact that the insurer acquires a beneficial interest in that right of action, in proportion to the sum paid by him, not only in the case of a total loss, but likewise in the case of a partial loss, and when no interest in the property is abandoned or accrues to him."

These cases, and many others which might be cited, many of which are collected in the last two cases referred to, clearly illustrate the principles of the doctrine of subrogation, and show that the rights of an insurer in no sense depend upon any vested interest or ownership in the property insured, but entirely upon the equitable rule that one who has indemnified a property owner against loss should, in case of loss and payment, either in full or in part, be allowed to succeed to whatever rights the owner had to the extent of such payment against the person primarily liable therefor.

This clause in the insurance policies: "If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom,"—gives the insurers no greater right, in a case of this kind, than they would have had without it. Its only effect was to prevent the assured from releasing any claim that she had against any one responsible for the injury.

It is further urged that the act of 1895 cannot affect the plaintiff's right of recovery in this case, because otherwise it would impair the obligation of a contract; that it is not, and was not intended to be, retrospective. The plaintiff's property was injured by fire on July 26, 1895, some months after the act of 1895 became effective by the expiration of 30 days after the recess of the legislature passing it. The insurance policies were dated in March, some time before the act went into effect.

It is certainly true that the act was not intended to be and is not retrospective. The limitation of liability does not apply to any case where fire was communicated by a locomotive prior to the time that the law went into effect. But was it not intended, and does it not apply, to any injury thus caused afterwards? We think that such was the intention, and that the act does apply to this case. Nor can we see how it in any way affects or impairs the obligation of a contract. It undoubtedly very materially affects the rights of the insurer, but not his contractual rights. This was entirely within the province and power of the legislature. The liability of the railroad corporation was created by the legislature. It was not based upon negligence, but was placed rather as a condition upon its franchise. We have no doubt that the same power which created this unconditional liability could either limit or entirely take it away.

In *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. 408, in which it was decided that a statute which repealed usury laws and destroyed defenses to existing contracts on the ground of usury did not deprive parties of vested rights, nor impair the obligation of contracts, Mr. Justice Matthews, in the opinion, says "that the right of a defendant to avoid his contract is given to him by statute for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives under such circumstances, as long as it remains in fieri, and not realized, by having passed into a completed transaction, may, by a subsequent statute, be taken away."

It would hardly be claimed for a moment that a property owner along the route of a railroad has a vested right in this statutory liability, however much he might be injured by its repeal; nor do we think that an insurer has any more reason to complain of the unconstitutionality of the law. Certainly, the state cannot be said to have assumed any obligation, by the enactment of the original statute, to continue this liability of a railroad corporation without change beyond its pleasure.

It is said, however, that the clause in the policies already quoted gives to the insurer the right to be subrogated to this claim against a railroad corporation as it existed at the time that the contract of insurance was made. If this were the object of the clause, we are unable to see how two persons can, by contract, continue the statutory liability of a third person, not a party to the contract, beyond such a time as the legislature may see fit, by enactment subsequent to the contract, to limit or repeal the liability. While the legislature cannot impair the obligation of the contract between the insurer and the insured, the parties to the contract cannot prolong the statutory liability of a third and independent person, when the legislature has seen fit to limit or repeal it.

But the clause relied upon does not go to the extent claimed by the counsel. It simply provides that if the insurance company shall claim that the fire was caused by the act or neglect of any other person the company "shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom." This cannot refer to any right of recovery by the insured before the loss. It is a right of recovery "by the insured for the loss,"—necessarily such right as the insured had at the time of the loss and afterwards. This amendment in no way affected that provision in the policy. The insurance company after as well as before the time when this law went into effect had the right to be subrogated to all the right of recovery that the insured had, and this independently of the contract, as we have already seen.

What this right of recovery was that the insured had for a fire communicated from one of the defendant's locomotives, but without fault or negligence upon the part of the defendant, depended upon the law as it was at the time of the fire. We have already seen that this right did not depend upon any interest or ownership of the insurer in the property insured, but rested entirely upon the equitable rule that one who, by reason of a contract, has been obliged to indemnify another against loss, should succeed to all the rights that other had, to the extent of the amount paid, to recover of the person who, for any reason, was primarily liable therefor, but to no other nor greater rights than he had.

In this connection we again quote from the opinion of Mr. Justice Gray in *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, supra: "But the insurer stands in no relation of contract or of privity with such person. His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter." This right of subrogation remained in the insurer precisely the same after the act of 1895 went into effect as before. But in the meantime between the making of the contract of insurance and the time of the fire the plaintiff's right had been limited to a recovery of the difference between the amount of the injury and the amount of the insurance received, thus indirectly affecting the insurer's rights but not its contractual rights.

Our conclusion is that the act of 1895 is not in violation of any provision of the federal constitution, and that it does apply to this case. From the amount of damages assessed by the referee there will, therefore, be deducted the insurance received by the plaintiff, less the premium paid, and the expense, if any, of the recovery of insurance. The plaintiff will be entitled to judgment for this difference, together with interest thereon as provided by law.

Judgment accordingly.

TALCOTT v. ARNOLD et ux.

(Court of Errors and Appeals of New Jersey.
June 28, 1897.)

EMPLOYMENT OF HUSBAND BY WIFE—RIGHTS OF HUSBAND'S CREDITORS.

1. In equity, a contract between husband and wife, relating to the wife's separate estate, is as valid against the husband's creditors as if the wife were a feme sole.

2. If a married woman bona fide employ her husband to devise and perfect mechanical inventions for her, she agreeing to pay all the expenses to be incurred, and also to pay him a salary, out of her separate estate, and in pursuance thereof the patents for his inventions are issued to or assigned to the wife, the patents and their proceeds are the separate property of the wife, and cannot, in equity, be reached by the creditors of the husband. *Taylor v. Wanda*, 37 Atl. 315, reaffirmed.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill by James Talcott against Satterlee Arnold and Anna M. Arnold, his wife. The chancellor advised a decree for complainant (35 Atl. 532), and defendants appeal. Reversed.

E. O. Harris and C. L. Corbin, for appellants. J. B. Vreeland and T. Little, for respondent.

DIXON, J. A general statement of the circumstances of this case may be found in the opinion of the learned vice chancellor in 35 Atl. 532, and need not be here repeated. A fundamental difference exists between the view taken by the vice chancellor and that taken by this court regarding the central fact in controversy. We believe (although he did not) in the substantial truth of the testimony of Mr. and Mrs. Arnold concerning their agreement made in 1879. They both testify that then, shortly after Mr. Arnold's assignment for the benefit of his creditors, it was agreed that Mrs. Arnold, out of her own means (being a legacy of \$10,000 just before left to her), should furnish all the money required by Mr. Arnold in experimenting for the purpose of devising, developing, and perfecting mechanical inventions, and also should pay him a salary of \$1,200 per annum, which he was to devote, as far as necessary, to the support of his family; and that, in consideration thereof, Mr. Arnold should employ his skill and labor for the purpose mentioned, and should cause all his inventions, and whatever patents might be issued therefor, to become the separate property of Mrs. Arnold. To this testimony there is no contradiction. It is corroborated by their conduct since the time of the alleged making of the bargain, for no doubt exists that Mrs. Arnold employed almost the whole of her private fortune in the manner stipulated, and all the patents secured for Mr. Arnold's inventions were issued or at once assigned to his wife, and have always been treated as hers. It is true that in managing the business which this arrangement contemplated the husband has not been held to such a strict account, and the wife has not exer-

cised such careful scrutiny as would be looked for if they had been allied in business only. but, considering their close family relationship, this freedom on the one side and confidence on the other militate scarcely at all against the reality and bona fides of their business contract. The contract itself was one likely to be made under the circumstances, for Mr. Arnold's ability to support his family seems to have depended mainly on his inventive skill, and his insolvency rendered it improbable that he would find any other source than his wife's funds for supplying his pecuniary wants. Nor can any unfairness be charged, at least against Mrs. Arnold. In view of the extreme fallibility of all attempts at mechanical invention, and the actual failure of Mr. Arnold up to that time, it perhaps required the faith of a wife in her husband to subject all one's fortune to the hazard of such an enterprise. The result of the contract is that seventeen patents stand in Mrs. Arnold's name, of which only two or three seem to have any value; that out of these two or three large sums of money have been received, most of which has, however, been spent in further experimentation, leaving in her hands at present property worth about \$16,000, besides the patents, and the contracts made under them. This being the state of affairs, the question arises whether a court of equity should aid Mr. Arnold's creditor to collect his debt out of Mrs. Arnold's possessions. The complainant urges that such assistance should be given him for three reasons: First, because the contract was made with intent to delay, hinder, or defraud the husband's creditors; second, because the parties were incapable of contracting with each other; and, third, because a person's agreement to assign in gross all his future labors as an inventor, or the products of those labors, is invalid. On the grounds above stated, we believe the contract to have been made bona fide for valuable consideration on both sides, and without any improper design. The inability of husband and wife to contract with each other exists at law only. In equity, their contract relating to the wife's separate property is as valid as if the wife were a feme sole. *Perkins v. Elliott*, 23 N. J. Eq. 526. The present contract related to Mrs. Arnold's separate estate. As to the third reason, while the proposition there advanced may be sound (*Manufacturing Co. v. Gill*, 32 Fed. 697; *Manufacturing Co. v. Dice*, 105 Ill. 649), yet certainly, after the contract has been fully performed by the actual transfer of the patents obtained upon the inventions and the payment of the consideration to the inventor, a court of equity cannot be induced to undo the transaction, and take back the patents, merely because the contract had not been legally enforceable. At that stage the transaction has become simply a completed sale and delivery of personal property for a valuable consideration previously received, and is in all respects unobjectionable. The present case, as we regard it, falls

directly within the principle very recently applied by this court in *Taylor v. Wands*, 37 Atl. 315, that a married woman may invest her separate estate in any legitimate business, and employ her husband as her agent to carry it on for her, without rendering it, or the profits of it, liable for her husband's debts. The profits of the investment, produced through the purchased labor and skill of the husband, will, like the capital itself, be the separate property of the wife. The decree of the court below should be reversed, and the bill dismissed.

**INDUSTRIAL LAND DEVELOPMENT CO.
et al. v. POST et al.**

(Court of Errors and Appeals of New Jersey.
July 14, 1897.)

MORTGAGES—FAILURE TO PAY INSTALLMENT—OPTION TO DECLARE PRINCIPAL DUE.

A., being indebted to B., executed a bond and mortgage to secure the payment of the debt. One of the provisions contained therein was that the principal sum secured thereby should, at the option of the mortgagee, become immediately due and payable for failure to pay any installment of interest within 30 days after it had accrued. *Held*, that the fact that the mortgagee did not exercise his option the first time there was a failure to pay an installment of interest within the time limited did not deprive him of the right to elect that the principal should become immediately due and payable on account of a subsequent default in the payment of interest.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill by Abram Post and others against the Industrial Land Development Company and others. Decree for complainants (34 Atl. 137), and defendants appeal. Affirmed.

James Parker, for appellants. Edwin B. Goodell, for respondents.

GUMMERE, J. The respondents are the holders of a bond and mortgage given by the Industrial Land Development Company to one William Post, to secure the payment of \$150,000, loaned by him to the company. The bond and mortgage each contain a provision to the effect that the principal sum secured thereby shall, at the option of the holder thereof, become immediately due and payable for failure to pay any installment of interest within 30 days after it should fall due. On the 3d day of March, 1894, a semi-annual installment of interest fell due and remained unpaid until the 21st of May of that year,—a period of more than 30 days. On the 3d day of September, another installment of interest fell due. It also remained unpaid for more than 30 days, and, for this second default, the respondents elected that the whole of the principal debt should be immediately due and payable, and brought suit to foreclose the mortgage. A decree was entered for the whole amount of the principal, together with the arrears of interest.

The appellants contend that this decree is erroneous, insisting that the respondents, by failing to exercise their option to have the principal become immediately due and payable on account of the first default in the payment of interest, lost their right to exercise such option on account of any subsequent default. There is nothing in this contention. By the terms of the bond and mortgage, the right was reserved to the mortgagee to demand immediate payment of the principal debt for any default in the payment of interest thereon. This right recurred as each installment of interest fell due, and his failure to enforce it for one default did not operate to deprive the mortgagee of his option to call for the immediate payment of the principal for a subsequent default in the payment of interest, any more than it operated to relieve the mortgagor from the necessity of paying the subsequent installments as they fell due. *Dunpor's Case*, 1 Smith, Lead. Cas. 119, which is relied upon by counsel for the appellants as supporting their contention, seems to us to have no relevancy to the case in hand.

It is further urged on behalf of the appellants that the decree brought up by this appeal has, in fact, no existence, because it was never signed by the chancellor. It is difficult to see, even if this was so, how it could benefit the appellants; for, if there was no decree, then there was nothing for this appeal to operate on, and it would have to be dismissed as improvidently taken. The fact that the decree has been sent up with the other proceedings by the court of chancery, in pursuance of the appeal, justifies us in assuming that it is an existing judgment of that court. The decree below should be affirmed, with costs.

**CITY OF CAPE MAY v. CAPE MAY, D. R. &
S. F. R. CO.**

(Court of Errors and Appeals of New Jersey.
July 1, 1897.)

**STREET RAILROADS—TURNOUTS—OBSTRUCTION OF
STREET—SUMMARY REMOVAL—ORDI-
NANCE—VALIDITY.**

1. The city council of Cape May by an ordinance granted permission to a railway company to lay its tracks on certain streets (naming them), and also to construct all necessary switches and turnouts. *Held*, that turnouts built in pursuance of such authority, unless it clearly appears that the authority has been exceeded, are not such an obstruction of the streets as to warrant their summary and forcible removal by police intervention without notice or a hearing.

2. Notice, either actual or constructive, should be given to all who are interested, before the adoption of an ordinance which affects and practically adjudicates property rights. An unreasonable ordinance will not be sustained.

3. A resolution by a city council declaring the turnout of a street railway to be an unlawful obstruction, and directing the street committee to employ counsel and take legal measures to remove it, is not objectionable.

(Syllabus by the Court.)

Error to supreme court.

Certiorari, on the relation of the Cape May, Delaware Bay & Sewell's Point Railroad Company, against the city of Cape May and others, to review a resolution and ordinance of said city. From a judgment (34 Atl. 397) setting the proceedings aside, the city of Cape May brings error. Judgment setting aside the ordinance affirmed, but reversed as to resolution.

David J. Pancoast, for plaintiff in error.
Edward A. Armstrong, for defendant in error.

NIXON, J. This writ of error brings here for review the judgment of the supreme court setting aside both a resolution and an ordinance passed by the council of the city of Cape May. The resolution was adopted June 4, 1895, and is as follows: "Whereas, the Cape May, Delaware Bay and Sewell's Point Railroad Company, without the sanction or authority of the city council, on the twenty-eighth day of May last, made an extension of its road by laying an additional track on Beach avenue, from the Sea Breeze Hotel westward to the end of Beach Avenue drive, a distance of about fifteen hundred feet, the effect of which is injurious to the said Beach avenue and the right of the traveling public therein: Now, therefore, be it resolved, that the said railroad company be notified and requested to remove the said extension at once, and if they shall refuse to comply with such notice and request that said committee shall be empowered and directed to employ counsel and take legal measures in behalf of the city to enforce the same." The ordinance was introduced June 3, and adopted June 13, 1895, and is as follows:

"An ordinance relating to the railroad encroachments and obstructions in Beach avenue.

"Section 1. Be it ordained and enacted by the inhabitants of the city of Cape May, in city council assembled, and it is hereby enacted by the authority of the same, that the extension to their street railroad which the Cape May, Delaware Bay and Sewell's Point Railroad Company made on the twenty-eighth day of May, 1895, on Beach avenue, from the Sea Breeze Hotel westward to the end of Beach Avenue drive, without the sanction or authority of city council, is an unlawful obstruction and incumbrance in and upon the said avenue; and the street committee is hereby authorized and directed to remove the same, and the mayor of the city is hereby requested to aid and assist the said committee in the enforcement of this ordinance according to the duty imposed upon him by the city charter.

"Sec. 2. And be it ordained and enacted by the authority aforesaid, that this ordinance shall take effect immediately."

The principal question raised by the writ relates to the validity of this ordinance, and it is important to first note the relation of the

parties to the controversy. The defendant in error is a railway corporation formed by the merger and consolidation, under the laws of this state, of three companies, and has been for several years past operating a street railway in and through the city of Cape May to adjacent points; and a map of this consolidated road is on file in the office of the secretary of state, showing the true location of the same, as required by law. The validity of this consolidation, and the right of the new corporation to exercise all the privileges and franchises possessed by the constituent roads out of which it was formed by the merger, are not challenged in these proceedings. The city council of Cape May, the plaintiff in error, by an ordinance dated June 29, 1892, granted to the Cape May & Schellenger's Landing Railroad Company, one of the three companies merged into and now forming the Cape May, Delaware Bay & Sewell's Point Railroad Company, "permission to lay, construct, maintain, and operate a railroad, with the necessary switches and turnouts, upon and adjoining the board walk from Madison avenue, in the city of Cape May, to Wood street, in said city, and from Wood street, crossing the said board walk to the southerly side of Beach avenue, and thence extending inside and adjoining the board walk along the same to Broadway, and thence to the northwardly side of Beach avenue and extending to the boundary line of the city of Cape May." Other provisions follow, providing, among other things, that the propelling power for its cars shall be electric motors, and also that the company shall file its acceptance of the ordinance with the city recorder, which was done. It will be perceived that the ordinance gives permission to conduct and operate the railroad, with the necessary switches and turnouts, and also that the route includes Beach avenue, from which that part of the defendant's road described in the resolution and ordinance was to be removed. After the passage of this ordinance the company laid its tracks and two turnouts on Beach avenue, and the road had been operated with these sidings for over two years without objection, when, in May, 1895, the two were connected by the addition of about 470 feet, and thus converted into one turnout of about 1,500 feet in length. This act on the part of the company gave occasion for the passage of the ordinance in question, and also the resolution. The purport of the ordinance is to adjudge this turnout, or "extension," as it is termed in the ordinance, an unlawful obstruction, amounting to a nuisance, and to direct its removal as such. This is the status, as claimed by counsel for the plaintiff in error, who, in his brief, says, "On the 4th of June city council passed a resolution directing the street committee to take legal measures for the removal of said extension, and on the 13th of the same month passed an ordinance declaring the said extension to be a nuisance, and ordering its removal."

The general proposition that the municipal

authorities of a city may, in certain cases, remove in a summary manner obstructions from its streets, will not be controverted by any one. Power to do this is given to the council of Cape May. Laws 1875, p. 206, § 19. But such action without notice or hearing should be exercised only in cases of nuisances per se, and which are unquestioned and obvious, such as obstructions on a street which impede travel, or endanger the safety of persons using it. A street railway is not such an unlawful obstruction as can be summarily and forcibly removed by police intervention, when its construction has been authorized by the city council, and it does not clearly appear that the authority has been exceeded. In such a case some less summary remedy should be sought, if any grievance exists. The ordinance passed by the city council in 1892 empowered the company to construct all necessary turnouts. It is in evidence and contradicted that the business of the company made this lengthened turnout necessary in order that its cars might be properly operated at this point. Two turnouts had been in use at this place since 1893 without protest from any one, and the act complained of merely connected the two by an addition of 470 feet; making one siding of about 1,500 feet, instead of 1,000 feet in the two old ones. It does not appear how this turnout, only about one-third longer than the two previously used, could have so interfered with the public safety or convenience as to require its immediate and forcible removal without notice or a hearing given to the company. In Wood, Nuis. (3d Ed.) 977, it is said, "The fact that a particular thing is declared a nuisance by an ordinance does not make that use of property a nuisance unless it is in fact so, and comes within the common-law or statutory idea of a nuisance." Furthermore, the adoption of this ordinance by the city council was at once both an adjudication of the rights and a condemnation of the property of the defendant company without an opportunity to be heard; for it is not claimed that any previous notice, either actual or constructive, was given to the company of the action of the council. It being an ordinance which affected property rights, the defendant in error was entitled to notice before its passage.

This ordinance cannot be sustained, on still another ground. It is unreasonable. It will be perceived that it directs the removal of the extension to the street railroad made on the 28th of May, 1895, from the Sea Breeze Hotel westward to the end of Beach Avenue drive. This distance includes the whole of the turnout, both the old part and the new. That this was the purpose of the council is made clear by the resolution introduced concurrently with the ordinance, in which the extension is described in the same manner, and the words, "a distance of about fifteen hundred feet," are added. It thus contemplated the forcible removal, as an unlawful obstruction of the street, of the whole 1,500 feet, the entire

turnout of the defendant company on Beach avenue, two-thirds of which had been used for more than two years without protest from the city council, or any private citizen or property owner, and which was laid under authority from the city to construct "all necessary switches and turnouts." In 47 N. J. Law. 288, in *Pennsylvania R. Co. v. Jersey City*, the late Chief Justice Beasley said: "The third and last ground was that the ordinance in question is unreasonable, and the stress of the argument was properly laid on this point. If this by-law be subject to this imputation, there can be no doubt that it would be the duty of this court to pronounce it a nullity." We think this ordinance is subject to that imputation.

We do not, however, concur with the judgment of the supreme court in setting aside the resolution. It only provides that the street committee shall notify and request the railroad company to at once remove the extension of its track on Beach avenue from the Sea Breeze Hotel to the end of Beach Avenue drive,—a distance of about 1,500 feet, and instructs them, in case of refusal to comply with such notice, to employ counsel and take legal measures to enforce its removal. We think it was clearly within the power of council to pass such a resolution. It did not of itself affect any property right of the railroad company, and therefore no notice was required to be given before passing it. By its terms, it was only a notice and request. No summary or arbitrary action was advised or suggested, but rather the contrary; for the committee is directed to employ counsel, and to take legal measures to accomplish the object proposed. It is always lawful to employ counsel and take legal measures to remedy a real or supposed grievance, whether public or private, and we think the instructions to the committee were unobjectionable. Our conclusion is that the judgment of the supreme court setting aside the ordinance should be affirmed, but, with respect to the resolution, it should be reversed.

STATE (ILIFF, Prosecutor) v. BANGHART et al.

(Supreme Court of New Jersey. July 13, 1897.)

INSOLVENCY—FRAUDULENT MORTGAGE—DISCHARGE FROM ARREST.

By force of the fifteenth section of the insolvent debtors' act (2 Gen. St. p. 1731), the fact that the debtor has mortgaged his property with the intention of defrauding his creditors will operate as a bar to his discharge from imprisonment.

(Syllabus by the Court.)

Certiorari to court of common pleas, Warren county; Morrow, Judge.

Certiorari by the state on the prosecution of John Iliff against Henry A. Banghart and others. Affirmed.

Argued February term, 1897, before GARRISON and GUMMERE, JJ.

Joseph M. Roseberry, for prosecutor.
George M. Shipman, for defendants.

GUMMERE, J. The prosecutor seeks by this proceeding to have set aside an order of the court of common pleas of Warren county refusing him his discharge as an insolvent debtor. It appeared on the hearing of the prosecutor's application for his discharge that his body had been taken on a ca. sa. in satisfaction of a judgment recovered against him by the defendant Banghart, and that shortly after the institution of the suit in which the judgment was recovered the prosecutor executed a chattel mortgage to one of his brothers upon his personal estate. From the evidence before the court it found as a fact that this chattel mortgage was not given bona fide, but was a contrivance on the part of the prosecutor and his brother to defraud his creditors, particularly Banghart, and for this reason refused him the benefit of the insolvency laws. The prosecutor, at the time and place fixed for the hearing of his application, appeared before the court, and rendered an account of his estate, and an inventory thereof, in compliance with the requirement of the eighth section of the insolvent debtors' act (2 Gen. St. p. 1728), and he now insists that he was entitled to his discharge, unless the court of common pleas found that his conduct in making up his account and inventory and in delivering up his estate to his creditors was not fair, upright, and just; basing his contention upon the construction put upon the section referred to by this court in *Meliski v. Sloan*, 47 N. J. Law, 82. But this contention overlooks the fact that the fifteenth section of the insolvent debtors' act directs that, if it shall be made to appear to the satisfaction of the court before which the application for the benefit of the insolvency laws is made that the debtor has mortgaged his estate, real or personal, with intent to defraud his creditor or creditors, the said debtor shall be refused his discharge. 2 Gen. St. p. 1731. The decision of this court in *Meliski v. Sloan* was based entirely upon the construction to be given to the eighth section of the statute, the facts of that case not bringing it within the provision of the fifteenth section, and consequently not requiring a consideration of its effect. It is entirely clear, however, that in order to give due effect to each of these sections a debtor must be refused his discharge if it shall appear to the court to which his application is made that he has mortgaged his property with intent to defraud his creditors, even if his conduct in other respects was fair, upright, and just. *Reford v. Cramer*, 30 N. J. Law, 250. It was upon this construction of the statute that the court of common pleas, in the case before us, denied the prosecutor's application for his discharge. The order brought up by the writ, being in strict compliance with the statutory requirements, should be affirmed, with costs.

TALLON et al. v. MAYOR, ETC., OF CITY OF HOBOKEN et al.

(Court of Errors and Appeals of New Jersey.
July 14, 1897.)

CERTIORARI—WHEN LIES—MUNICIPAL CORPORATIONS—POWERS—HIGHWAYS—DEDICATION—RAILROADS—RIGHT OF WAY—EASEMENTS.

1. Certiorari will not lie in favor of private prosecutors to review a municipal ordinance, unless it appears that such prosecutors have a personal or property interest which will be specially affected, in an injurious manner, by the enforcement of such ordinance.

2. A corporation organized under the general railroad law has not, ordinarily, the right to occupy highways of this state longitudinally with its railway.

3. The power conferred upon the city of Hoboken by its charter, to regulate its streets, does not authorize it to permit the construction and operation of a railroad upon its streets by a corporation organized under the general railroad law.

4. The eleventh section of the charter of the city of Hoboken authorizes it to grant permission by ordinance to any person or corporation to lay railroad tracks and run rail cars thereon, in or over any of the streets within said city, subject to certain conditions therein specified. *Held*, that this provision is limited to the construction and operation of street railways, and does not authorize the city to permit the construction and operation in its streets of a railroad by a corporation organized under the general railroad law.

5. A person who dedicates land to public use as a highway may, in such dedication, reserve to himself and his assigns the right to construct and operate a railroad therein. When such reservation is made, the public takes the highway cum onere.

6. The owner of an easement in the land of another is not bound to use it in the particular manner prescribed by the instrument which creates it. He may use it in a different manner if he so desires, provided he does not, in doing so, increase the servitude, nor change it, to the injury of the owner of the servient tenement.

(Syllabus by the Court.)

Error to supreme court.

Certiorari by the state, on the prosecution of Richard Tallon and others, against the mayor and common council of the city of Hoboken and another, to test the validity of an ordinance. The court dismissed the writ (36 Atl. 693), and relators bring error. Ordinance set aside in part.

Abel I. Smith, Leon Abbett, and Wm. H. Corbin, for plaintiffs in error. James B. Vredenburg, Edwin A. S. Lewis, and James F. Minturn, for defendants in error.

GUMMERE, J. The city of Hoboken, by an ordinance approved October 30, 1896, gave consent and authority to the Hoboken Railroad, Warehouse & Steamship Connecting Company "to construct and operate a railway, propelled by electricity, on certain streets and avenues in the city of Hoboken, and also to erect poles on certain of said streets and avenues, for the purpose of stringing wires thereon, necessary to operate its railway with electric power." The plaintiffs in error sued out a certiorari from the supreme court for the purpose of contesting the validity of that ordinance; and, that court hav-

ing sustained the ordinance, and dismissed the certiorari, its decision is brought into this court for review. 36 Atl. 693.

So far as the plaintiffs in error other than John J. Devitt are concerned, we do not think that they are entitled to challenge the validity of this ordinance by certiorari. It has been frequently held, both in the supreme court and in this court, that certiorari will not lie in favor of private prosecutors, to review the action of public officials, unless such prosecutors have a personal or property interest, which will be specially and immediately affected by the action complained of; and, unless the person who applies for the writ shows that he will suffer a special injury beyond that which shall affect him in common with the remainder of the public, the writ will be denied him. *Kean v. Bronson*, 35 N. J. Law, 468; *Morgan v. Orange*, 50 N. J. Law, 389, 13 Atl. 340; *Jersey City v. Traphagen*, 53 N. J. Law, 434, 22 Atl. 190; *Montgomery v. Inhabitants of Trenton*, 36 N. J. Law, 79. There is nothing in the evidence taken to support the writ from which it can be concluded that any of the prosecutors, excepting Devitt, had any personal or property interest which the ordinance complained of would immediately affect, or that they would suffer a special injury by it beyond the remainder of the public. The writ was therefore properly dismissed as to them. Devitt, however, stands in a different position. By the provisions of the ordinance, one of the trolley poles which the Hoboken, etc., Connecting Company is authorized to erect in the streets of Hoboken is to be placed upon the property within the lines of one of those streets. He therefore has a property right which is, apparently, specially affected by this ordinance, and, consequently, is entitled to contest its validity by certiorari; and, if it shall be found that the ordinance was one beyond the power of the city of Hoboken to pass, he is entitled to have it declared invalid so far as it injuriously affects him. *Green v. Inhabitants of Trenton*, 54 N. J. Law, 92, 23 Atl. 281.

The Hoboken, etc., Connecting Company, is not a street-railway company. It was incorporated under the general railroad law, and the legislature has not conferred upon companies incorporated under that act the right to make use of the public highways of the state, longitudinally, for the purposes of their roads. *Thompson v. Railroad Co.*, 50 N. J. Law, —, 36 Atl. 1087. Nor, as I read the charter of the city of Hoboken, has the legislature conferred upon that municipality the power to authorize the diversion of its streets from the ordinary uses thereof to the uses of these railroad companies. It is insisted before us that the fortieth section of the city charter, which vests in the common council the regulation of its streets and public squares, authorizes it to permit such a diversion of the use of its streets. But this is not so. The grant of authority by the city to one of these companies to use its streets longitudinally is not a regulating of such streets, but is a conversion of them into a means

of transportation with which the existence of a street has no natural or necessary connection within the purview of the charter. *Montgomery v. Inhabitants of Trenton*, supra; *Davis v. Mayor, etc.*, 14 N. Y. 506.

It is further insisted on behalf of the defendants in error that the necessary power is conferred upon the city by the eleventh section of its charter, as amended by the supplement of 1861 (*Pamph. Laws 1861*, p. 526), which reads as follows: "It shall be lawful for the council, by general ordinance, to grant permission to any person or persons or corporation to lay railroad tracks, and run rail cars thereon, in or over any street or highway within said city, under such licenses, conditions, and restrictions as the said council may think proper, and to alter, change, or revoke the same at pleasure; provided that no such granting or permission shall be made or given until a majority of the property owners along the line of such street or highway shall have first given their consent in writing for the railway tracks to be laid." I do not think that this legislative provision has the effect claimed for it. In my opinion, it refers solely to the construction of such railroads as will not impose an additional servitude upon the land in the highway, inconsistent with the purposes for which it was originally appropriated to the public; in other words, to street railroads. This was the view taken by Chancellor Runyon in the case of *Chamberlain v. Cordage Co.*, 41 N. J. Eq. 43, 2 Atl. 775, of a similar provision in the charter of the city of Elizabeth. If we should hold otherwise, then the city of Hoboken, by virtue of this provision of its charter, has the power to divest the public of the use, not only of the streets mentioned in the ordinance under review, but also of the use of every other street within its boundaries, and to devote them exclusively to railroad uses; for the provision authorizes it to grant permission to lay railroad tracks, and run cars thereon, in or over "any street or highway within said city." To justify the conclusion that the legislature intended to grant to a municipality power to deprive the public either wholly or partially of its accustomed use of the city streets, and to appropriate them to the private uses of a railroad corporation, such intention should appear so plainly as to be beyond doubt. The fact that it does not so appear should be decisive that the power does not exist. The legislature not having granted to railroad companies, incorporated under the general railroad law, the right to construct and operate their railroads longitudinally on the public highways of the state, and not having conferred upon the city of Hoboken power to authorize the construction and operation of railroads within its streets by such corporations, it follows that the ordinance under review, so far as it attempts to authorize the Hoboken, etc., Connecting Company to do so, is ultra vires and void.

But it is urged on behalf of the defendants in error that, even if the ordinance in question should be deemed to be invalid, the certiorari

should be dismissed, for the reason that no personal or property interest of the prosecutor is injuriously affected by it. This contention rests upon the following facts: The property of the prosecutor, which he claims is affected by this ordinance, abuts on Hudson street, and extends to the middle line thereof. This street was laid out, opened, and dedicated to the public use by the Hoboken Land & Improvement Company, Martha B. Stevens, and Mary P. Lewis, who were at the time of its dedication the owners of the soil therein, and of the lots abutting thereon. The dedication was in the following words: Said street is "dedicated as a public highway for passage over the same by ordinary vehicles and foot passengers only, subject to the right of the said company, Martha B. Stevens, and Mary P. Lewis to lay tracks for horse cars and steam cars and elevated railways, to erect telegraph poles, electric light poles, and the right to operate and use the same, and also subject to the right to lay, maintain, and repair gas, sewer, and water pipes therein; all of which rights are expressly reserved unto the Hoboken Land and Improvement Company, its successors and assigns, Martha B. Stevens, and Mary P. Lewis, their heirs and assigns, forever, as fully and entirely as if no dedication of said lands to any public use whatever had ever been made." The prosecutor purchased his lot from Martha B. Stevens, one of the dedicators. Not only was the right to lay tracks for horse cars and steam cars, etc., and to operate and use the same, reserved to the dedicators and their assigns by the terms of the dedication, but, by the agreement for conveyance made by Martha B. Stevens to the prosecutor (the agreement has not yet been executed by the delivery of a deed, although the prosecutor has entered into possession), the same right was specifically reserved. Subsequent to the making of that agreement, the Hoboken Land & Improvement Company, Martha B. Stevens, and Mary P. Lewis granted and assigned to the Hoboken, etc., Connecting Company the right to lay and maintain railroad tracks, and to erect poles and string wires thereon, in Hudson street, and also the right to use and operate the same, which they had reserved to themselves and their assigns in the dedication of that street, and which Mrs. Stevens had reserved in the agreement for a conveyance made between herself and the prosecutor. That a person who dedicates land to public use as a highway may, in such dedication, reserve to himself and his assigns the right to construct and operate a railroad therein, cannot be denied. It has been so decided both in the supreme court and in this court. *Ayres v. Railroad Co.*, 48 N. J. Law, 44, 3 Atl. 885; *Id.*, 52 N. J. Law, 405, 20 Atl. 54. And, when such reservation is made, the public takes the highway cum onere. But even if the law was otherwise, and the reservation in the dedication

was nugatory so far as it affects the public interests in the street, still the reservation contained in the agreement for sale to Devitt was unquestionably valid, and, so far as the private rights of Devitt in the street are concerned, authorizes the construction and operation of a railroad therein either by Mrs. Stevens or her assigns.

It is clear, therefore, that the ordinance complained of, so far as it authorizes the laying of railroad tracks upon Hudson street, works no injury to the prosecutor, for that right exists in the Hoboken, etc., Connecting Company, independent of the ordinance. Nor do I think that the prosecutor is injuriously affected in his property rights by that portion of the ordinance which authorizes the connecting company to operate its railroad by electric power, notwithstanding the fact that the right reserved in the dedication and in the agreement for a conveyance to him is the operation of the road by horse or steam power. It is settled law that the owner of an easement in the land of another is not bound to use it in the particular manner prescribed by the instrument which creates it. He may use it in a different manner if he so desires, provided he does not, in doing so, increase the servitude, nor change it to the injury of the owner of the servient tenement. *Johnston v. Hyde*, 33 N. J. Eq. 641.

The ordinance also authorizes the erection of a trolley pole upon the property of the prosecutor, within the lines of the street, and the stringing of wires thereon for the purpose of supplying electric power to the connecting company's cars. In this respect, it seems to me, the ordinance injuriously affects the property rights of the prosecutor. It is true that one of the rights reserved in the dedication of the street, and in the agreement to convey, was the right "to erect telegraph poles and electric light poles, and to operate and use the same"; and it is suggested that this reserved right would justify the connecting company in erecting trolley poles, and stringing wires thereon, for the purpose of carrying power to its cars. But such a use is not only different from that which was reserved, but the character and intensity of the electric current carried, as well as its greater continuity, when used for the purpose of affording power to the company's cars, would increase the servitude upon the prosecutor's property, to a slight extent at least, and therefore is not warranted by the reservation. The conclusion which I have reached is that the prosecutor is entitled to have the ordinance set aside so far as it authorizes the erection of a trolley pole upon his lands in Hudson street, and the stringing of wires thereon, but that he is not entitled to contest the legality of the rest of the ordinance, or to have it set aside, as he has no personal or property interest which is specially affected by it.

RAUTH v. WARD, Register, et al.

(Court of Appeals of Maryland. June 23, 1897.)

VOTERS—QUALIFICATIONS—RESIDENCE.

Acts 1892, c. 36, amending Hagerstown City Charter, provides, in section 156, that a person, otherwise qualified, who has resided in the state and town for 12 months, and in the ward 6 months, preceding an election, shall be entitled to register, "provided always that where any person shall be legally registered in any of said wards, and shall remove therefrom to any other of said wards, and remain therein, he shall be entitled to have his name remain on the registry list of the ward from which he shall remove as aforesaid, and to vote therein, until he shall reside in the ward to which he shall have removed and remain therein a sufficient time to entitle him to register therein." Section 159, relating to qualifications of voters, contains a proviso that "the voter shall have resided for six months next preceding the election in the ward in which he offers to vote," and also provides that "in case of removal, or until such residence is acquired, the voter must vote in the ward from which he has removed, and in which he is a qualified elector." *Held*, that one who removed from one ward into another, where he resided for over six months, lost his residence in the former, and was not entitled to vote therein, though, from lack of opportunity, he had not been able to register in the latter.

Appeal from circuit court, Washington county.

Petition by William Penn Rauth against Charles O. Ward, register of voters, and George B. Oswald, clerk. From a ruling for defendants, petitioner appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Henry H. Keedy, Jr., Lewis D. Syester, and Wm. J. Witztenbacher, for appellant. A. C. Strite, for appellees.

McSHERRY, C. J. We think the court below was right in its ruling in this case. The sole question involved is whether one John P. Downin was entitled to vote at the municipal election held in Hagerstown on the fourth Monday of March, 1897, and its solution depends altogether upon whether he possessed the requisite legal residence in the ward in which it is insisted he had the right to vote. By the charter of the city as amended by the Act of 1892, c. 36, the qualifications of voters are prescribed. There are several provisions relative thereto which must be briefly stated. Section 156 declares that the male citizens of Hagerstown of the age of 21 years and upwards, who shall be duly registered, and who have resided in the state of Maryland and in the said town for 12 months, and in the ward 6 months, preceding an election, shall be entitled to register, "provided always that where any person shall be legally registered in any of said wards, and shall remove therefrom to any other of said wards, and remain therein, he shall be entitled to have his name remain on the registry list of the ward from which he shall remove as aforesaid, and to vote therein until he shall reside in the ward to which he shall have removed and remain therein a sufficient

time to entitle him to register therein." Section 159 enacts that the qualifications of the voters for councilmen shall be the same as for mayor, "provided the voters shall have resided for six months next preceding the election in the ward in which he offers to vote." The same section then proceeds, "and in case of removal or until such residence is acquired, the voter must vote in the ward from which he has removed, and in which he is a qualified elector." And section 159k requires that the voter shall be "a resident of Hagerstown one year and of the ward in which he may offer to vote for six months next preceding the election." It is quite clear that primarily there must be a residence of 12 months in the town, and of 6 months in the ward, to entitle a party to register and vote; and there are superadded provisos, designed to meet the contingency of a removal from one ward to another in the interim between registrations. These provisos do no more than preserve the right to vote in the ward where the voter has been legally registered if he should remove therefrom into another ward less than 6 months prior to a municipal election. It was designed that such a removal should not defeat the right to vote in the ward from which the voter had removed, until, by a sufficiently long residence in the ward to which he removed, he had gained the right to register and vote therein. But it does not seem to us that these provisions allow the voter's name to remain either indefinitely upon the registration books of a ward from which he has removed, or to remain there after he has been absent from the ward long enough to acquire the necessary residence in some other ward. While the predominant object of all registration laws is to secure, and not to defeat, the right of suffrage, a no less important purpose to be subserved by them is to guaranty fair and honest elections, by lessening the opportunities for fraudulent and illegal voting. The provision requiring a residence in a ward for a definite period was obviously devised to prevent impositions by persons having no fixed abode; and though the mere fact of a removal from one ward to another is not enough to disqualify, unless the absence consequent upon the removal has been of sufficient duration to enable the voter to acquire the requisite residence elsewhere before another election occurs, there is no provision which permits the name of a voter who has removed from a ward to continue upon the registration books of that ward until he has actually registered elsewhere. All the sections, taken together, obviously contemplate that the right to vote in a particular ward shall depend upon one of two conditions, provided, of course, the voter possesses the other necessary qualifications. These two conditions are—First, that the voter is, and has been for six months, a resident of the ward; and, secondly, that having been a resident of the

ward for six months, and having registered, he has subsequently removed therefrom to another ward, and has not resided there long enough to acquire a right to vote therein; or, stating the same thing another way, that he has not resided therein long enough to lose his residence in the ward from which he removed. If he has actually remained long enough in the ward to which he removed to gain a residence there, his right to vote in the ward whence he removed, and where he was registered, is gone, whether he registers in the other ward or not.

Now, the facts before us, as disclosed by the record, are these: Downin had been a resident of the Third ward for upwards of 17 years, and prior to November 1, 1895, he was duly registered therein. On the date just named he removed with his family to the Second ward. When the March election of 1896 came on, not having resided for six months between November 1, 1895, and the day of election, in the Second ward, he voted in the Third ward, as he was entitled to do. On the 1st of November, 1896, after having lived for one year in the Second ward, he went to Philadelphia, but his family moved back to the same house he had before occupied, in the Third ward. He remained in Philadelphia for about five months, or nearly up to the time of the election in March, 1897, though he had no intention of permanently leaving Hagerstown. Upon this state of facts, the officer of registration for the Third ward, after sending a notice to Downin, struck his name from the list of qualified voters on the first Monday of March last. Downin made no application to be reinstated, and an appeal to the circuit court from the registration officer was taken by Rauth, who has also brought the record into this court by an appeal from the circuit court for Washington county. Clearly, Downin lost his residence in the Third ward by living for a whole year in the Second ward. By living for a year in the Second ward, he gained a right to register there, and the moment he gained that right he ceased to retain the right to vote in the Third ward. The mere fact that no opportunity to register was afforded him after he became a legal resident of the Second ward, and before he went to Philadelphia, did not prolong his right to vote in the Third ward, or make him any the less a resident of the Second ward. The place—the ward—where he was entitled to vote was determined by his residence; and the fact that he was unable, by reason of their being no sitting of the registration officers, to register in the Second ward after acquiring a residence there, did not permit him to vote in the ward where he had ceased to have a legal residence. Having lost his residence in the Third ward by moving into and remaining in the Second ward a year, and not having regained a six-months residence in the Third ward after his return to his original home on November 1, 1896, he

was in the precise situation that a person who had never resided for six months in any ward would have been in. The question of his right to register and to vote in the Second ward is not now involved, but the naked and bald claim is that he had a right to vote in the Third ward, though his former legal residence therein had been abandoned, and had absolutely ceased to exist, and though he had confessedly not acquired by a new residence of six months a right to vote in that ward. It appears to us quite obvious that he had no legal claim to remain on the list of qualified voters of the Third ward, and that, consequently, the officer of registration was right in striking his name off. We accordingly affirm the ruling appealed from. Ruling affirmed, with costs above and below.

OHIO BRASS CO. v. CLARK et al.

(Court of Appeals of Maryland. June 23, 1897.)

GARNISHMENT — FOLLOWING FUNDS — TRUSTS — EQUITY JURISDICTION.

1. A judgment creditor who has garnished a company, and procured a judgment nisi for his claim in full, has no right to a fund due from the company to the debtor at the time of the garnishment, but which was subsequently paid for the benefit of the debtor to a trustee in whose hands it was attached by other creditors, as it is presumed the company retained funds sufficient to pay the claim.

2. Creditors may acquire an inchoate lien upon a fund attached in the hands of a trustee, and their respective rights may be adjudicated, and their claims paid in the order in which the attachments were laid, in a proceeding brought by such trustee to determine the proper distribution of the fund, though they could not obtain a final judgment against the trustee.

Appeal from circuit court of Baltimore city.

Bill by the Maryland Trust Company against John Jameson and others for orders of court respecting the distribution of a trust fund. From an order of distribution to claimants Lester Clark, Morton, Reed & Co., and B. F. Shaw & Co., claimant the Ohio Brass Company appeals. Affirmed.

In addition to the facts stated in the opinion, it appears that the money in controversy due to John Jameson was paid to the trustee by the railroad company after the company had been garnished by the Ohio Brass Company.

Argued before McSHERRY, C. J., and BRYAN, BOYD, ROBERTS, and FOWLER, JJ.

Thomas I. Elliott and Fred. T. Dorton, for appellant. Redmond C. Stewart and Joseph Packard, Jr., for appellees.

FOWLER, J. John Jameson, a resident of the state of Ohio, made an agreement with the Pikesville, Reisterstown & Emory Grove Railroad Company to construct an electric railroad in Baltimore county, and some complications and difficulties arising between the

parties in regard to the payment of claims against the former incurred in the building of a railroad, for which the railroad company might be answerable, the two parties, on the 30th of October, 1895, agreed in writing that all funds payable or to become payable to Jameson by the company should be, and were by said agreement, transferred to the Maryland Trust Company, for the purpose of discharging in certain order the claims aforesaid, and then the balance, if any, to be paid to said Jameson or his assigns. On the 26th December, 1895, the trust company, as trustee, filed a petition in the circuit court of Baltimore city, and with it the agreement we have just referred to, asking that court to take jurisdiction of the trust fund so held by it, to the end that the said agreement may be construed, and that said fund may be distributed to those entitled thereunder, for an order authorizing the trustee to publish notice to all claimants of such fund to file their claims in that court, and asking injunctions against the appellees Zouck & Clark to restrain them from further proceedings at law, they having both laid attachments in its hands as garnishee of Jameson. Whereupon jurisdiction was assumed, and on the 16th January, 1895, it was ordered that notice to creditors be given by the trustee. Under the petition thus filed and the order assuming jurisdiction, the trust company proceeded to administer the trust created by said agreement. Auditor's account A was filed, by which a large sum was distributed to creditors of Jameson in the order provided by said agreement. But with this account we are not concerned, as it was ratified and distribution made under it without any objection. Subsequently, however, a further sum came into the hands of the trustee for distribution, and by account B, filed on the 17th June, 1896, it was distributed as follows: To the payment in full of the attachment claims of Lester Clark and Morton, Reed & Co., and to the payment in part of the attachment claim of B. F. Shaw & Co.

The Ohio Brass Company, a creditor of Jameson, and the appellant in this case, alone objects to the distribution of the fund in question as proposed to be made by account B. And when it is stated that this appellant never had its attachment laid in the hands of the trust company to affect the fund it held, but did attach all the credits of Jameson in the hands of the railroad company, and duly recovered a judgment of condemnation nisi against said company for the full amount of its claim, the presumption being, therefore, that the railroad company has in its hands sufficient to pay the claim in full, it is difficult to understand why the appellant should be here in the position it now occupies. The fund which was distributed by account B to the attaching creditors of Jameson would otherwise, under the agreement, have gone to the latter or his assigns, and not to the appellant. But the appellees had prevented this other-

wise necessary result by attaching, and the inchoate lien created by the attachment followed the fund. While attaching creditors cannot generally proceed to final judgment against a garnishee who is a trustee, and in this case they were enjoined from so doing, yet the course adopted in respecting the inchoate liens of the attachments and the allowance of the attachment claims in the order in which they were laid in the trustee's hands is justified by the usual practice in courts of equity. *Early v. Dorsett*, 45 Md. 468. The appellant, like the appellees, could have laid its attachment both in the hands of the trustee and the railroad company; but, for reasons best known to itself, it selected the latter alone as garnishee; and it will not be permitted, therefore, to interfere with the distribution of a fund to which it has failed to show any legal claim whatever. Order affirmed, with costs.

BAMBERGER et al. v. JOHNSON.

(Court of Appeals of Maryland. June 22, 1897.)
SPECIFIC PERFORMANCE — FAILURE OF COMPLAINANT TO PERFORM.

A lessor will not be compelled to acknowledge the lease, so it may be recorded, and to specifically perform it, where the lessees have failed to pay the rent and to keep the property in good repair, as required by the lease, and have broken other covenants contained therein.

Appeal from circuit court, Dorchester county.

Bill by Joseph H. Bamberger and John W. Bamberger against Joseph H. Johnson for specific performance. From a decree for defendant, complainants appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Clem. Sullivan, for appellants. Joseph H. Johnson and Sewell T. Milbourne, for appellee.

ROBERTS, J. On the 2d of April, 1894, the appellants entered into an agreement in writing with the appellee to lease for the term of 10 years, beginning on the 1st of April in the year 1894, and ending on the 1st of April in the year 1904, a lot of ground belonging to the appellee, situate in the town of Cambridge, in Dorchester county, for an annual rent of \$30, to be paid in equal semiannual installments of \$15 on the 1st day of January and the 1st day of July of each and every year during the continuance of said lease; the appellants to have the privilege of purchasing said lot at any time during said term upon payment to the appellee of the sum of \$400 for the same, provided that all rent due the appellee under the terms of said lease at the time of such purchase shall be paid in full. Said lease also contains a covenant that the appellants will promptly pay said rent as hereinbefore stated, and that if, any time dur-

ing said term, any one payment shall remain in arrears and be unpaid for the period of six months after it is due, the said lease shall be void and of no effect, and the appellee may enter and resume full possession thereof, with the right to distrain or otherwise collect all rent due and unpaid. The appellants further covenant to keep the property in good repair, and not to haul or allow to be hauled sand, or anything else that may cause the shore to wash, unless they shall wall the shore with stone or logs. These are substantially the facts to be found in the contract of lease which constitute the ground of this controversy. On the 5th of August, 1896, the appellants filed their bill in the court below asking the passage of a decree to compel the appellee to complete said lease by acknowledging the same, or a similar paper, before a justice of the peace of said county, together with the appellants, in order that they might have the same recorded, and thus protect themselves against any fraudulent conveyance of said property to an innocent purchaser, as well as be protected against any attempt at law on the part of the appellee to dispossess them of the premises, and praying for general relief. The appellee on the 19th of September, 1896, answered said bill, admitting the execution of, and the covenants contained in, said lease, which is exhibited with their bill as part thereof, but denying generally the other facts set out in said bill, and especially and particularly the charge in said bill alleging fraud in the execution of said lease, or in the failure to acknowledge the same according to law, and charging the appellants with failure to pay the rent and taxes and to observe the several covenants as set out in said lease, and denying the waiver of forfeiture for the nonpayment of the rent which became due under said lease on the 18th day of January, 1896, and was not paid within the six months thereafter, when on the 16th of July, 1896, the appellee notified the appellants to quit the property and deliver possession of the same. The appellee further says that the appellants have entirely failed to observe their covenant that they would keep the property in good repair, and that, in direct violation of their said contract, they have constantly hauled sand from the shore without walling it with stone or logs to protect it from washing. The only testimony in the record is given by John W. Bamberger, one of the appellants, and Joseph H. Johnson, the appellee, each of whom testifies in his own behalf, and upon his own offer.

The bill in this case is in the nature of a bill for specific performance. Yet the effort here is primarily to compel the appellee to formally acknowledge the lease, that the same may be recorded, and then to compel its specific performance. There is, however, nothing in the lease itself, or in the proof offered, tending to support such a demand, or which would justify a court of equity in lending its aid to accomplish. The appellants filed with

their bill the original lease or contract, and it is offered as part of the testimony of the appellant who testifies in the cause, and is found to be such a paper as hereinbefore described, without formal acknowledgment, and simply signed and sealed by the parties to the controversy, and then delivered to the appellants. It is not necessary that we should enter into the consideration and determination of all of the questions which are sought to be made upon this appeal. There are certain propositions of law relating to specific performance which this court has had repeated occasion to pass upon, so that a mere reference to some of the decided cases will be sufficient.

Does this application for relief present a meritorious case? It is addressed to the sound discretion of the court, to be granted or refused according to its circumstances. It does not flow as a matter of right. "The meaning of this proposition is not that the court may arbitrarily or capriciously perform one contract and refuse to perform another, but that the court has regard to the conduct of the plaintiff, and to circumstances outside the contract itself, and that the mere fact of the existence of a valid contract is not conclusive in the plaintiff's favor." Fry, Spec. Perf. § 44; Pom. Spec. Perf. §§ 35-46. While the application is addressed, not to the arbitrary will of the court, but to its sound and reasonable discretion, yet, when a party seeks the execution of a contract, he must be able to show that he has fully, not partially, performed everything required to be done on his part. *O'Brien v. Pentz*, 48 Md. 577, 578; *Mills v. Matthews*, 7 Md. 324; *Small v. Owings*, 1 Md. Ch. Dec. 371; *Alexander v. Ghiselin*, 5 Gill, 183. In *Oliver v. Palmer*, 11 Gill & J. 446, it was held by the court to be "one of the oldest and soundest principles of equity that he who goes into a court of chancery, invoking its interposition in his behalf, must allege in his bill that he has done, or has offered to do, or is ready and willing to do, all that on his part is necessary to entitle him to the relief which he seeks, or he must set forth adequate reasons why he should be excused from doing so." By the express terms of the lease, the appellants have covenanted that they will pay to the appellee the sum of \$30 annually, in equal semiannual installments, on the days named in said lease. This they have not done. They further covenanted to keep the property in good repair. The proof shows that they have failed to keep this part of their contract. And again they have covenanted that they would not haul, or allow to be hauled, sand, or anything else that might cause the shore to wash, unless they walled the shore with stone or logs. This requirement they have failed to observe. It is true, the appellant whose testimony is found in the record seeks to place a different construction upon this provision of the lease by saying: "We declined to sign the lease without Mr. Johnson permitted sand to be

hauled. He then agreed that, if we would log or stone the shore, we would be permitted to use or haul the sand. We agreed to log the shore, but not all at one time." Neither the lease itself nor the oral proof in the record sustains this contention, for the lease expressly provides that sand shall not be hauled unless the shore be walled with stone or logs. The lease in this respect is so entirely clear and explicit as to leave no doubt as to its meaning. The state of case which this record presents is that of a party to a contract who has failed to observe not only part but all of its provisions, and yet considers himself justified in applying to a court of equity for the specific performance of such contract. To grant the relief asked would be to violate and ignore the plainest principles which lie at the very foundation of the jurisdiction of a court of equity. He who seeks equity should at least exhibit some disposition to do equity. As to the questions of forfeiture for nonpayment of the rent, and the waiver of the same, we have found nothing in the proof to justify the inference that the appellee has by his conduct waived the forfeiture of the lease. In the determination of this controversy it is not necessary that we should decide questions which are not properly before us, and for the reasons given we are of opinion that the appellants have no meritorious standing in a court of equity. We must therefore affirm the decree below. Decree affirmed, with costs.

BOTSFORD v. WALLACE.

(Supreme Court of Errors of Connecticut. June 15, 1897.)

DEED—RIGHT OF WAY—EVIDENCE—AMENDMENT.

1. Grantees in a deed providing that, while part of the granted premises shall be used in common by the grantor and grantees, the grantees shall be granted and allowed a pass way on the grantor's land, lose their right of way by excluding the grantor by erecting a structure of a permanent character on most of the granted premises, and fencing the rest; this being acquiesced in by the grantor.

2. Grantees in a deed providing that, while part of the granted premises shall be used in common by the grantor and grantees, the grantees shall be granted and allowed a pass way on the grantor's land, get no right to use the right of way, after excluding the grantor and his successors from use of the granted premises, by a deed from the grantor's widow quitclaiming the granted premises, and bounding them on one side by the pass way.

3. A grantee of a strip of land immediately in the rear of his lot abutting on the street cannot claim a way of necessity over the grantor's land, though he has covered most or all of his street front with a building.

4. Though one who granted to plaintiff land in the rear of the north half of plaintiff's lot, which abutted on the street, failed to include in her subsequent deed to defendant of land on the south and in the rear of plaintiff's lot a strip immediately in the rear of the south half of plaintiff's lot, no way of necessity is thereby acquired by plaintiff over defendant's land to the land granted plaintiff in the rear of the north half of his lot.

5. An exception in a covenant against incumbrances of "such rights of way, if any, as may exist of record," is not an admission that there are such rights.

6. Extrinsic evidence as to practical construction of deeds is not admissible, there being no ambiguity in them.

7. User of a pass way, though wrongful, does not oust the owner of the land of possession, so as to prevent her conveying the fee of the soil.

8. Proof of user is not competent to show a way of necessity.

9. Statement of landowner that she is willing to convey to plaintiff right to use a pass way over it, being a mere offer to do something, cannot affect the rights of defendant to whom the land is subsequently conveyed.

10. Evidence of what one paid for land, or what he told his grantor he intended to do with it, or of the extent of land which he occupied before he parted with title, is not admissible to show a right of way over adjoining land subsequently conveyed by the same grantor to defendant.

11. Amendment asked for during trial need not be allowed.

Appeal from superior court, New Haven county; Milton A. Shumway, Judge.

Action by Stanley Botsford against Frank A. Wallace—brought in 1895—for an injunction restraining defendant from obstructing an alleged right of way. From a judgment for defendant, plaintiff appeals. Affirmed.

The material facts, as stated in the finding, were as follows: Lorenzo Lewis, being owner of a lot of land bounded westerly on Main street in Wallingford, on which were two stores with a passage way between, conveyed to Lewis A. Young and another, the plaintiff's grantors, in 1871, by quitclaim deed, with the usual habendum clause as to the tenure of the premises with all the appurtenances in the releasees and their heirs and assigns forever, the northerly part of the lot on which was one of the stores, being a strip 25½ feet wide, front and rear, and 58 feet deep, bounded southerly and easterly on his own land, and north on land of F. A. Wallace. This deed contained, after the description of the premises, the following words: "The east line of said premises is hereby intended to be parallel with the building standing on the same, and twenty (20) feet distant therefrom. While the south half of the said twenty feet shall be used in common with myself and said releasees, a pass way ten (10) feet wide on the south side of said premises shall be granted and allowed to the said releasees." The south half of said 20 feet, in the rear of the store, on the land conveyed, was vacant space, and Lewis continued thereafter to use it in turning around his teams while delivering goods at the rear of his own store. On December 17, 1883, he being dead, and the rest of the land remaining after said deed, including the latter store, being owned by his widow, Mary E. Lewis, she released by quitclaim deed to Lewis A. Young, who was then the sole owner of the premises conveyed by the deed of 1871, all right, title, interest, claim, and demand to a parcel of land bounded west on Main street 25½ feet, north on land of F. A.

Wallace 58 feet, east on her own land 25½ feet, and "south on pass way fifty-eight feet." She had no interest in the premises released, unless a possible claim of a right to use said south half of said 20-foot back yard, under the deed of 1871. Immediately thereafter Young conveyed to the plaintiff, by warranty deed, a strip of land bounded and described as follows: West by Main street; north by land of F. A. Wallace, 58 feet more or less; southerly on land of Mary E. Lewis. "The east line of said premises is hereby intended to be parallel with the buildings standing on the same, and twenty feet distant therefrom, with a pass way ten feet wide in common with the heirs of Lorenzo Lewis on the south side of said building." The plaintiff in 1894 erected a brick building on his lot, covering substantially the whole width of the land, and extending to within three feet of the rear line. Shortly afterwards, in November, 1884, Mrs. Lewis conveyed to him, by warranty deed, a parcel of land "immediately in the rear of the brick building owned by said Botsford, and bounded and described as follows: Bounded north on land of Frank A. Wallace, east on land owned by the town of Wallingford, south on land of my own, and west on land of Stanley Botsford; being eleven (11) feet front and rear, and extending back to the land owned by the town of Wallingford, subject to a lease to the town of Wallingford to a portion of the rear land." This 11-foot strip adjoined the northerly part of the premises of the plaintiff previously described, and its south line was 14½ feet north of the north line of the pass way. The plaintiff immediately thereafter built a tight board fence all along the strip 3 feet wide, which was the remnant of the back yard, heretofore described, behind his store, and all along the south line of the 11-foot strip. In 1890 Mrs. Lewis conveyed to the defendant, by warranty deed, the rest of her land, bounding it northerly on land of the plaintiff, "from which said granted premises are separated by a line commencing on the easterly side of Main street; thence running easterly along the south side of Botsford's Block, so called, for sixty-six (66) feet; thence northerly, at right angles, for fourteen and one-half (14½) feet; thence easterly, at right angles, along said Botsford's line, sixty-nine (69) feet, more or less, to town land on the northeasterly boundary of said premises. A portion of said premises is subject to a lease to the borough of Wallingford"; excepting from the general covenants of warranty "the lease aforesaid, and such rights of pass way, if any, as may exist of record." The defendant claimed that there were rights of way over the rear of the granted premises in favor of one Beckley, which appeared of record, and introduced deeds tending to support such claim. It also appeared that the town claimed a pass way over the rear of said premises, but neither party introduced evidence of any record title to such a pass way. In 1894 the

plaintiff inserted a gate in the fence on the south line of his 11-foot strip, and ever since has used it for bringing out ashes and other material through the pass way on the defendant's land to Main street. He also offered evidence to show that ever since he obtained his title, in 1883, he had used said pass way continuously, openly, and daily. This evidence was offered to show the understanding of the parties in relation to the deed of December 17, 1883, from Mary E. Lewis to Lewis A. Young, the plaintiff's grantor; to show that it was a right of way of necessity; to show that Mary E. Lewis was ousted of possession, or disseised, as to the plaintiff's right to use said pass way, at the time she gave the deed to Frank A. Wallace, the defendant; to show that said pass way was appurtenant to the premises of the plaintiff at the time he took his deed from Lewis A. Young; and to show the practical construction put upon said deed from the said Mary E. Lewis to Lewis A. Young by the parties to said deed and by the plaintiff. The court ruled that said testimony was inadmissible, except so far as a user could be shown exclusively in connection with the 11-foot strip, as a way of necessity to or from said strip, and, the plaintiff not offering to show any user so limited, excluded it altogether. The plaintiff offered to show that he declined to buy the property from Lewis A. Young unless he could have the right to build over the whole of it, and still use the pass way in connection with it, and that, thereupon, the quitclaim deed from Mary E. Lewis to Lewis A. Young was procured and brought to him, and that, thereupon, Young made a warranty deed from him to the plaintiff, and, in connection therewith, that Lewis A. Young, the plaintiff's grantor, went with one O. I. Martin, of Wallingford, to Mary E. Lewis (who died a few years before the trial), and stated to her that Botsford desired the property, and would not buy unless he could have the right to build over the whole of it, and still have the right of the pass way, and that he then obtained from her the quitclaim deed hereinbefore mentioned; also, that the said Mary E. Lewis declared at the time of giving said deed that she was willing to convey the right to use the pass way, notwithstanding that the building was to be built over the whole premises. The plaintiff offered each part of the above, as well as the whole, for the purpose of affecting the construction of the quitclaim deed of December 17, 1883, from Mary E. Lewis to Lewis A. Young, and for the purpose of showing an oral agreement by Mary E. Lewis giving a right to use the pass way,¹ but the court excluded it. The plaintiff then asked leave to amend his complaint, so as to lay a further foundation for this testimony, by adding a claim for a

¹ The finding of the trial court in regard to this ruling was found to be incomplete, and was rectified, on the application of the plaintiff.

judgment that he was entitled to the right of way alleged, and that the defendant execute and deliver to him a proper conveyance thereof. This motion was denied. The plaintiff was called as a witness in his own behalf, and was asked the following questions: "State whether, at the time you built this building, you supposed you had a pass way that would be kept open on the south side." "When you bought this eleven-foot strip of Mrs. Lewis, did you tell her for what purpose you intended to use it?" "What did you pay for this eleven-foot strip of land?" And the plaintiff offered to show that he paid several times what it would be worth without a pass way to the street. The defendant objected to each of these questions, and the court excluded them, as also other evidence offered to show that when the plaintiff bought the land he intended to build a barn upon it. The plaintiff called Lewis A. Young, and asked: "State what land you in fact occupied." The court excluded the question. The plaintiff claimed that said deed from Mary E. Lewis to Lewis A. Young, in bounding on the south on the pass way, conveyed one-half the fee in said pass way on the southerly side of the plaintiff's land, together with the right to use the whole of said pass way in common with the heirs and assigns of said Mary E. Lewis, and, at any rate, that it gave him the right to build over the whole of his land, and still retain the right to use said pass way, as provided in the deed from Lorenzo Lewis, and to the same extent as if he had not occupied said southerly half of said 20 feet, and that such was the intention of the deed. And the plaintiff further claimed that he was entitled to a pass way on the southerly side of his brick building to the piece in the rear conveyed to him by the said Mary E. Lewis, as a way of necessity, and that he was entitled to such pass way as a way appurtenant to each of said pieces of land, and, in general, that the facts found gave him the right to have the pass way kept open on the southerly side of the piece of land sold to the plaintiff by Lewis A. Young. The court overruled all these claims.

Henry G. Newton and Clifford Gilbert, for appellant. John W. Ailing and O. H. D. Fowler, for appellee.

BALDWIN, J. (after stating the facts). No absolute and perpetual right of way was granted by Lorenzo Lewis in his deed of 1871. He stipulated only that, "while" (that is, so long as) the south half of the back yard in the rear of the store on the granted premises might be used by him in common with the grantees, they should be "granted and allowed" a pass way 10 feet wide on the south side of their lot. It is not clear whether this contemplated user by him was a reserved right, or a mere privilege terminable at the pleasure of his grantees; nor whether it was a right or privilege personal to himself, or could be claimed to be a constitu-

ent part of an appurtenance to the land, created by the deed in favor of the grantees, and so, by virtue of the habendum clause, inuring to the benefit of his successors and assigns. Whatever view may be taken with respect to these points, no right of way in favor of the successors of his grantees could inure after the extinction of the correlative right or privilege to the use of their land by him or his successors. The deed subjected the grantor's land to a servitude only while he (or perhaps his successors in title) continued to use the land of the grantees. A potential use may have been sufficient, but in fact it was actually used by him thereafter during his life, and the defendant admitted that his land remained subject to the right of way claimed by the plaintiff until the latter built his brick store, in 1884. That was a structure of a permanent character, and necessarily excluded the owners of the Lewis property from more than two-thirds of that part of the plaintiff's lot, the use of which was the expressed reason for any privilege on his part in respect to the pass way. From the rest of it they were also shut off, shortly afterwards, by a tight board fence. The superior court was fully justified in the conclusion that the acts of the plaintiff in thus preventing the use of his land by the successors in title of Mrs. Lewis, having been acquiesced in by them, put an end to the term to which his own enjoyment of the pass way had been limited; for that was to continue, at most, only while such use should be maintained or permitted.

The quitclaim deed to the plaintiff's grantor by Mrs. Lewis by bounding his lot south on the pass way did not enlarge the easement previously created by her husband's grant. Such a pass way then existed, and was a visible landmark, which might naturally be referred to as a boundary. Young claimed a right to use it under the deed of 1871, and there was nothing in her release to give him any additional rights in respect to it. It would rather tend to diminish them, by its necessary operation as a surrender of any privilege to which she might otherwise lay claim, as the successor of her husband, to the use of his back yard. His subsequent warranty deed to the plaintiff, therefore, conveyed nothing which he had not obtained by his original purchase in 1871.

The 11-foot strip bought by the plaintiff from Mrs. Lewis in 1884, being adjacent to the rear of his store lot, was accessible from Main street by going over his other property. The fact that he had covered most or all of his Main-street front by a brick building did not put him in a position to claim a way of necessity over her other land. He stood no better than if his front lot had been wholly vacant and unimproved.

It is contended that as the deed given by Mrs. Lewis to the defendant in 1890 bounded his land northerly on the plaintiff's land by a line running from Main street along the south side of Botsford's Block for 66 feet, and thence northerly at right angles 14½ feet to other land of the plaintiff, and as the plaintiff's land ad-

joining the pass way goes but 58 feet back from Main street, she did not convey a parcel of land in the rear of Botsford's Block, 8 feet wide, between the 11-foot strip and the pass way, and must have thus had in mind the existence of a way of necessity over it. Whether this be so or not is immaterial in the case at bar. The plaintiff's estate would not be enlarged by any such exception (if there be one) in her grant to the defendant. The land not conveyed would simply remain hers, and, if she thereby acquired a way of necessity to it, this would in no respect tend to show that the defendant ought to concede to the plaintiff a way of necessity over the land she did convey. Her exception in the covenant against incumbrances, also of "such rights of pass way, if any, as may exist of record," was not an admission that there are such rights.

The various rulings upon evidence, to which the plaintiff excepts, were obviously correct. There was no ambiguity in the deeds under which the parties claimed, to remove which extrinsic testimony as to their practical construction could be received. No mere user for less than 15 years, however open and continuous, could establish a right of way, and until 1884 it was not disputed that the right to use the pass way given by the deed of 1871 continued in full force. The user claimed would not tend to show that Mrs. Lewis was ousted of possession when she conveyed to the defendant in 1890. Whether rightful or wrongful, it constituted no objection to her conveying the fee of the soil. Nor was proof of user competent to show that the plaintiff had a way of necessity to his 11-foot strip. A way of necessity is derived from the law, and depends solely on the situation and boundaries of the land to which it is claimed to be appurtenant, as these existed at the time of the conveyance. The declarations of Mrs. Lewis did not come within the rule which permits proof of admissions of an owner of real estate to affect his successors in title. Her statement to Young, in 1883, that she was willing to convey the right to use the pass way notwithstanding a building might be put up covering the whole of the plaintiff's land, was a mere oral offer to do something which she in fact never did. That the plaintiff supposed that she had done it, or that he held a deed from Young containing covenants that she had, was nothing which could in any way affect the rights of those deriving title from her by subsequent conveyances. Nor could they be affected by evidence of what the plaintiff paid for the 11-foot strip, or of what he told Mrs. Lewis was his intention in making his purchases, or of the extent of land in fact occupied by Young before he parted with his title. The effect of a deed cannot thus be enlarged by parol.

The motion to amend the complaint came so late that the court was under no obligation to grant it. *Gulliver v. Fowler*, 64 Conn. 558, 30 Atl. 852.

The exceptions to the finding as to certain matters occurring at the trial go to points

which are entirely immaterial, and it is therefore unnecessary to consider whether they are supported by the evidence certified. There is no error. The other judges concurred.

✓

WEST CHESTER & W. PLANK-ROAD CO. v. CHESTER COUNTY.

(Supreme Court of Pennsylvania. July 15, 1897.)

TURNPIKES—CONDEMNATION—EVIDENCE OF VALUE —CONDITION OF ROAD—TAX RETURNS—FRANCHISE—LIABILITY TO FORFEITURE.

1. In proceedings against a county to assess damages for the making of a turnpike road free from tolls, evidence of the physical condition of the road at the time it was taken was admissible on the question of value, though in assessing damages the property must be valued as a whole, including the franchise.

2. Proof of tax returns made by the officers of the turnpike company as to the value of its capital stock was also admissible.

3. Though the inquiry as to value extended over a period of 10 years, it was not necessary to introduce the tax returns for all of such years in order to render one admissible; and, where proof of returns for different years not successive was offered, it was not necessary, in order to render them admissible, to show the returns for the intervening years.

4. The circumstance that, unless the then present length of the road was doubled within a period of about three years from the trial, the franchise would be subject to forfeiture, was also an element affecting the value.

Appeal from court of common pleas, Berks county.

Proceeding by the West Chester & Wilmington Plank-Road Company against Chester county to assess damages for the making of a turnpike road free from toll. From the judgment rendered, plaintiff appeals. Affirmed.

The following are the assignments of error:

"(1) The court below erred in permitting the defendant to introduce a valuation of the spalls or materials composing the surface of the plaintiff's road, and the toll houses and gates, without regard to the plaintiff's interest in the land or right of way by which the said materials were supported, and the plaintiff's franchise or right to take toll; the question, objection, ruling of the court, and testimony admitted being as follows: 'Q. That being, then, all the physical property of the company, what, in your judgment, was it worth immediately prior to the date of condemnation? Mr. Derr: Plaintiffs object to the defendant undertaking to submit any testimony showing the value of what the defendant calls the "physical turnpike," as separate and distinct from the franchise and right to take toll. The testimony is generally irrelevant and incompetent. The Court: We will admit the offer. Exception for plaintiffs. By Mr. Butler: Q. Will you give your judgment on the question that was propounded to you, the value of the physical property of the turnpike, as it was in April, 1894, immediately before the date of condemnation? A. Do you wish me to separate it in any way? Q. Give the total, and, if they want it separated, they can ask you to

do it. A. My estimate of the whole value, taking the stone and the road as there found — (Objected to. Stricken out.) Q. Just give, in dollars and cents, what the physical property was worth. A. About \$3,400. Cross-examined by Mr. Derr: Q. In the estimate that you put on what was called the "physical structure," did you take into account the land on which the turnpike was located? A. No, sir. Q. So you took into account only the material used in macadamizing the surface of the road? A. And the buildings and gates. Q. That is all? A. Yes, sir; all there is there.'

"(2) The court below erred in overruling the plaintiff's motion to strike out the estimate of Mr. McDonald, one of the defendant's witnesses, as to the value of the material composing the surface of the plaintiff's turnpike road, without regard to the plaintiff's franchise or right of way; the motion, ruling of the court, and testimony referred to in the motion being as follows: 'Mr. Derr: Mr. McDonald, one of the defendant's witnesses, having undertaken to value what has been designated the "physical structure" of the plaintiff's turnpike, and having admitted upon cross-examination that in making his estimate he omitted altogether the plaintiff's interest in the land on which the turnpike was located, and without which the surface of it would have been of no use whatever, the plaintiffs move to strike out the estimate of the witness, as not having been framed upon a proper basis, and not having taken into account an important element, without which such estimate could not be made. The Court: As to the motion made this morning, we will overrule it and allow the testimony to stand. Exception for plaintiffs. By Mr. Butler: Q. Will you give your judgment on the question that was propounded to you, the value of the physical property of the turnpike as it was in April, 1894, immediately before the date of condemnation? A. Do you wish me to separate it in any way? Q. Give the total, and, if they want it separated, they can ask you to do it. A. My estimate of the whole value, taking the stone and the road as there found— (Objected to. Stricken out.) Q. Just give, in dollars and cents, what the physical property was worth. A. About \$3,400. Cross-examined by Mr. Derr: Q. In the estimate that you put on what was called the "physical structure," did you take into account the land on which the turnpike was located? A. No, sir. Q. So you took into account only the material used in macadamizing the surface of the road? A. And the buildings and gates. Q. That is all? A. Yes, sir; all there is there.'

"(3) The court below erred in negating the plaintiff's fifth point, the said point and the answer of the court being as follows: 'As the estimate which Walter A. McDonald, one of the defendant's witnesses, undertook to place on the material structure of the plaintiff omitted altogether the plaintiff's interest in the land on which the turnpike was located, and

without which it could not exist, such estimate must be entirely disregarded by the jury. Answer. The fifth point I will negative without reading.'

"(4) The court below erred in declaring to the jury that the evidence did not show what the property of the plaintiff cost; such declaration being made by the affirmation of the defendant's third point, which, with the answer thereto, was as follows: 'The evidence in the case does not show what the property possessed by the plaintiff at the time of the condemnation cost it, and the jury have nothing to do with the question as to how much it cost. The question for the jury is the actual value of the plaintiff's holdings at the date of condemnation. The verdict must be limited to this actual value as of the date of condemnation in April, 1894. Answer. This point I affirm, and so instruct you.'

"(5) The court below erred in instructing the jury to disregard the matter of cost in ascertaining the value of the plaintiff's property; such instruction being made by the affirmation of the defendant's third point, which, with the answer thereto, is as follows: 'The evidence in the case does not show what the property possessed by the plaintiff at the time of the condemnation cost it, and the jury have nothing to do with the question as to how much it cost. The question for the jury is the actual value of the plaintiff's holdings at the date of condemnation. The verdict must be limited to this actual value as of the date of condemnation, in April, 1894. Answer. This point I affirm, and so instruct you.'

"(6) The court below erred in admitting in evidence the returns of the plaintiff to the auditor general for the years 1888, 1889, and 1893; the offer, objection, and ruling of the court, and the pertinent parts of the reports admitted, being as follows: 'Mr. Butler: Defendant offers in evidence returns of the turnpike company for 1888, 1889, and 1893, to the state, for the purpose of taxation, setting forth the value of their stock in those years, and their financial status at those times. We offer the certified copies. Mr. Derr: Plaintiff objects to the returns for the following reasons: First. The returns for 1888 and 1889, indicating an opinion of the officer making them as to the actual value of stock in those years, is too remote to the question here trying, as to what the value of the stock was in 1894. Therefore we object to those two. The entire three returns are objected to because it is an offer to show them without showing intervening returns between 1889 and 1893, and defendant should be obliged to put in evidence all the returns,—either all returns during a period of ten years, or at least all the returns from the date of the earliest one offered to the date of the last. If defendant will offer in evidence all the returns from 1888 to 1893 inclusive, plaintiffs will withdraw all objection. The Court: Admitted Exception for plaintiff.'

"The pertinent parts of the returns so admitted:

"Appraisement in return for 1888: 'I, the undersigned, being the treasurer and secretary of the West Chester and Wilmington Plank-Road Company, do certify that, in pursuance of my aforesaid oath or affirmation, I have estimated and appraised the capital stock of said company at its actual value in cash, as follows, viz.: 566 shares at fifteen dollars and — cents per share, amounting in the whole to eight thousand four hundred and ninety $\frac{0}{100}$ dollars. In witness whereof, I have hereunto set my hand the day and year aforesaid. S. G. Hickman, Treasurer. S. G. Hickman, Secretary.'

"Appraisement in return for 1889: 'We, the undersigned, Samuel G. Hickman and Evans Rogers, being the treasurer and president of the West Chester and Wilmington Plank-Road Company, do certify that, in pursuance of our aforesaid oaths and affirmations, we have estimated and appraised the capital stock of said company at its actual value in cash, as follows, viz.: 566 shares, at eighteen dollars per share, amounting in the whole to ten thousand one hundred and eighty-eight dollars. In witness whereof, we have hereunto set our hands the day and year aforesaid. S. G. Hickman, Treasurer. Evans Rogers, President.'

"Appraisement in return for 1893: 'We, the undersigned, Evans Rogers, president, and Sam'l G. Hickman, treasurer and secretary, of the West Chester and Wilmington Plank-Road Company, do hereby certify that, in pursuance of our aforesaid oaths or affirmations, we have estimated and appraised the capital stock of said company at its actual value in cash, as follows, viz.: 566 shares. Stock has very little value, for, unless the stockholders should decide to extend the road as required by their charter, the same will expire on March 12th, 1894. In witness whereof, we have hereunto set our hands the day and year aforesaid. Evans Rogers, President. Sam'l G. Hickman, Treasurer.'

"(7) The court below erred in negating the plaintiff's sixth point, which, with the answer thereto, is as follows: 'While the jury are to consider the reports of value of stock made by the plaintiff's officers to the auditor general for the years 1888, 1889, and 1893, they should also consider the fact that the defendant has omitted to put in evidence the reports for the remainder of the ten years over which the inquiry in this case has extended. The county of Chester might, if the remaining eight annual reports of the plaintiff were favorable to the county, have put them in evidence, as well as those for 1888, 1889, and 1893, while such reports could not have been put in evidence by the plaintiff. Answer. The sixth point I will negative without reading.'

"(8) The court below erred in instructing the jury to consider the obligation of the

plaintiff to extend its road two and one-half miles within five years; the part of the charge referred to being as follows: 'The property was a turnpike road, and the appurtenances and franchise two and one-half miles of pike, already constructed and toll-producing, with the obligation to prosecute to completion two and one-half miles more, and make it toll-producing. If not prosecuted to completion by March 16, 1899, its franchises were subject to forfeiture under the law.'

"(9) The court erred in instructing the jury to take into account the fact that, if the plaintiff did not extend its road within five years, its rights would be forfeited; the part of the charge referred to being as follows: 'The nature and character of the road; its two and one-half miles completed; its rights and franchises before completing another two and one-half miles, with its appurtenances, and its toll-producing character; the question that, if they did not complete it within five years, their rights would be forfeited,—all this will be taken into consideration, and then you will ascertain the market value of plaintiff's property and right as of the date of the taking.'

Robert S. Waddell, J. Frank E. Hause, and Cyrus G. Derr, for appellant. Ermentrout & Ruhl, William Butler, Jr., and John J. Gheen, for appellee.

GREEN, J. The learned court below very carefully and correctly charged the jury in the following words: "The measure of damages is the value of the property at the time of taking, to the owners,—not only by the mere value of the road itself, the mere structure, or physical turnpike, its toll houses and gates, but plaintiff's entire property rights, with the value of its franchise in connection with those property rights, under and by virtue of which they are used and enjoyed. The jury will readily understand that the mere possession of a roadbed, without the privileges of exacting toll, would be of but little account. Various elements enter into the determination of this question. The value of the company's franchises, its rights and privileges, depends largely upon its earning capacity. The value of its roads, its toll houses and gates, the amount of net tolls, the market value of its capital stock, are all elements to be considered in ascertaining the money value of the turnpike and its corporate franchise. * * * But you, as jurors, are required to consider this property just as it lay there, in the condition in which it was when it was taken, and its value then and there, with its accompanying franchises, under the conditions existing at, and immediately prior to, the time of its being taken." There was much more to the same effect in the general charge, and in the answers to points; and it is beyond all question that, in all that was said by the court on the measure of damages, there was absolute

correctness, and no error whatever. Thus in *Montgomery Co. v. Schuylkill Bridge Co.*, 110 Pa. St. 54, 20 Atl. 407, we said: "The bridge structure, the stone, iron, and wood, was but a portion of the property owned by the bridge company and taken by the county. There were the franchises of the company, including the right to take toll, and these were as effectually taken as was the bridge itself. Hence, to measure the damages by the mere cost of building the bridge would be to deprive the company of any compensation for the destruction of its franchises. The latter can no more be taken without compensation than can its tangible corporeal property. Their value necessarily depends upon their productiveness." In *Mifflin Bridge Co. v. Juniata Co.*, 144 Pa. St. 365, 22 Atl. 896, Paxson, C. J., said: "It was held in *Montgomery Co. v. Schuylkill Bridge Co.*, 110 Pa. St. 54, 20 Atl. 407, that where a bridge is taken by a county for public use under the act of May 8, 1876 (P. L. 131), the measure of damages is the value of the property to the owners, not to the county taking it, and that such value is to be ascertained, not only by the cost of the structure, but also by the value of its franchises. The value of its franchises depends largely upon its earning capacity." This was repeated in a turnpike case, viz. *Turnpike Co. v. Clarion Co.*, 172 Pa. St. 243, 33 Atl. 580, together with the following citation from the charge of the court below, viz.: "That the true measure of damages is just compensation for the loss suffered by plaintiff in consequence of the taking by defendant of plaintiff's property, being the substructure, superstructure, and approaches of the bridge, together with the franchise or right to take tolls, and the jury have no right to take less." To which our Brother Dean, delivering the opinion of this court, said, "There could have been no more correct statement of the law." The learned court below followed these cases in the charge and answers, and yet the principal complaint in a number of the assignments of error is that the franchise was ignored, and that only the materials that composed the road were considered, both in the testimony and charge. We do not so understand the rulings, either on offers of testimony, or in answers to points.

As to the evidence received under the first assignment, it was offered and received manifestly for the purpose of showing the condition of the road at the time the turnpike was taken. Most assuredly, this was entirely competent. Undoubtedly, it was proper for the defendant or the plaintiff to show precisely what was the condition, in a physical sense, of the property to be taken. If this turnpike was out of repair, having but a thin and irregular supply of hard material on its surface; if it had ruts and inequalities through the whole or a portion of its length,—would not the property be worthless as a whole, and in connection with the franchise, on that account? It would be a strange proposition, and one which we cannot possibly sanction, that such evidence can-

not be given because the property must be valued as a whole, including the franchise, and that no other testimony can be received, except such valuation in the aggregate. The value of such a property as a whole depends largely upon its physical condition for the purposes for which it is intended, and proof of the condition, therefore, is proof as to value. In no event can it be said that such testimony is irrelevant or incompetent. In *Mifflin Bridge Co. v. Juniata Co.*, supra, the court below said to the jury: "I therefore charge you that in estimating the damages you are to take into consideration the value of the physical structure at the time of the taking; and this value must be arrived at by taking into consideration the length and width of the structure, and number of piers, the value of the masonry, the value of the fill and abutments, as well as the superstructure, and to that you add the value of the franchises." We said upon this subject: "The witness L. G. Brown was asked as to the value of the bridge, by which I understand to be meant the superstructure only. This was objected to on the ground that Brown, having contracted for the erection of the bridge, should have been asked as to the contract price. We do not think this objection well taken. The true question was the value of the bridge, not what it cost. The contractor may have taken it at too low a figure, or the owner may have paid too much. The county is entitled to pay for it at its actual value at the time of the taking." These considerations dispose of the first three assignments of error.

The fourth and fifth assignments cannot be sustained. The court did not state to the jury that the evidence did not show what the property cost. The affirmance of the third point of the defendant was correct. There was no evidence of the actual cost of the property. Not one of the witnesses whose testimony is referred to in support of these assignments gave any testimony whatever as to the actual cost of the property. They were not examined upon that subject. They were called and testified as to the value of the shares of capital stock. They argued that, because the dividends were $5\frac{1}{2}$ per cent. on the capital stock of \$14,250, the shares were worth par, and that is the whole effect of their testimony. Not one of them testified that the property of the plaintiff had cost \$14,250. While, if there had been evidence of the actual cost of the property, that subject would have been one of the elements to be taken into consideration, with the other matters mentioned, in determining what was the value of the property, including the franchise, at the time of the taking, in the absence of such testimony there was no error in the answer to the point. What the court did say upon the subject of the cost was entirely correct, thus: "In passing upon the value of the turnpike road, toll houses, toll gates, the property of the plaintiff, you are not to be controlled by the cost of the original construction. It is not a question of original cost, but of value at the time of taking." The court then pro-

ceeded to illustrate the matter fully, and with absolute correctness, so there could be no question of misunderstanding on the part of the jury. Of course, the jury was not to be controlled by the element of cost, but were to consider all the elements affecting the question of value at the time of the taking.

The introduction of proof of the returns made by the officers of the company to the state authorities as to the value of the plaintiff's capital stock was certainly legitimate. Those returns were the acts of the plaintiff's officers. They were made under oath and constituted important official documents. They were evidence, therefore, on the subject of the value of the stock at the time of the taking, and hence were proper for the consideration of the jury. The very question was ruled in the case of *Mifflin Bridge Co. v. Juniata Co.*, supra. We there say: "It was clearly competent, therefore, for the defendant to show the value placed by the company upon its own stock,—a valuation made upon oath by its own officers. It is no answer to this to say that the return was made by the officers, and not by the stockholders. The officers were the duly-constituted agents or representatives of the latter, and their act was the act of the corporation itself. The return was made in pursuance of the act of assembly, and was the official act of the corporation. Hence we need not discuss the cases cited as to the power of an agent to bind his principal by his declarations. They are not relevant. While its return does not conclude the bridge company upon the question of value, it is nevertheless competent evidence for the consideration of the jury, and is, moreover, important." We do not think there is any force in the contention that all or none of the returns should have been offered and received. Each return is independent of the others, and speaks for itself. If it was an admission against interest, it was admissible for that reason, and its competency would not be destroyed or affected because there were other returns for other years. The sixth and seventh assignments are not sustained.

We do not consider that there was any error in the parts of the charge complained of in the eighth and ninth assignments. The circumstances that unless the road was completed by March 16, 1890, the franchise was subject to forfeiture under the law, certainly was an element affecting value. If the franchise might by any possibility be subject to termination and forfeiture in so short a time, it would certainly be much less valuable than if it continued for a long period. And if, in order to avoid that penalty, it was necessary to double the length of the road by additional construction to that extent, most certainly that obligation would be of very great consequence in determining the present value of the franchise, and consequently of the property. If the business of the road was profitable and prosperous, it would probably enhance the value of the property; but, if the contrary was true, it would simply increase the burdens of the company, and might se-

riously impair the marketable value of the property. The assignments are not sustained. Judgment affirmed.

FREEDMAN v. PROVIDENCE-WASHINGTON INS. CO.

(Supreme Court of Pennsylvania. July 15, 1897.)

INSURANCE—FALSE REPRESENTATIONS.

Where one procuring insurance for plaintiff, as her agent, falsely represents that she is a business man, it avoids the policy.

Appeal from court of common pleas, Bradford county.

Action by R. Freedman against the Providence-Washington Insurance Company. From an order directing judgment for defendant, plaintiff appeals. Affirmed.

For opinion on former appeal, see 34 Atl. 730.

The following is the charge of the court: "The action which you have sworn to try is an action of assumpsit brought by R. Freedman against the Providence-Washington Insurance Company of Providence, R. I. It is founded upon an insurance policy issued by the Providence-Washington Insurance Company to R. Freedman upon his stock of goods in his store situated at Laceyville. The evidence in this case as to the procuring of the insurance policy at the time it was procured, and the representation upon which it was procured from the company by its agent, is entirely uncontradicted, and therefore it is for the court to say to you that the evidence establishes the fact that when this insurance policy was procured from the Providence-Washington Insurance Company it was procured upon the representation that R. Freedman was a man living in the borough of Athens, and doing business there, when the fact is that R. Freedman was a married woman. We say to you that this is such a fraud as vitiates this policy, and that your verdict must therefore be for the defendant, and we therefore direct you to render a verdict in favor of the defendant."

Wm. Maxwell, I. N. Evans, and H. F. Maynard, for appellant. E. Overton, I. McPherson, and E. J. Angle, for appellee.

MITCHELL, J. The learned judge below directed a verdict for defendant on the ground that the misrepresentation upon which the policy was procured was a fraud which avoided the contract. In this he followed the law as settled in *Freedman v. Association*, 168 Pa. St. 249, 32 Atl. 39. The fact of such misrepresentation is undisputed, though as to whether Sturdivant knew it was untrue at the time he made it the evidence is conflicting. The correctness of the instruction, therefore, depends on the relation of Sturdivant to the parties. If he was the agent of defendant, then there was a question for the jury wheth-

er he had been informed, or had notice, that R. Freedman was a married woman. But if he was the agent of plaintiff, then his knowledge was immaterial. The plaintiff cannot avoid the responsibility of a misrepresentation by her own agent, whether made knowingly or not. An examination of the evidence shows that the learned judge was clearly right in holding Sturdivant to be the plaintiff's agent. His own testimony, which is uncontradicted on this point, shows that Sturdivant was an insurance broker, having no special relation to the defendant company, but occasionally taking out policies in it through its regular agent, for his customers, when he could not or did not wish to place their risks in the other companies which he personally represented. He was not at the time he procured this insurance, and had never been, an agent for the defendant, nor was he acting on this occasion in behalf or at the suggestion of the regular agent, Dart. On the contrary, in soliciting this insurance he was pursuing his own business as a broker, and, as he says, using his own judgment where to place the insurance his customers authorized him to procure for them. The case is clearly in line with *Pottsville Mut. Fire Ins. Co. v. Minnequa Springs Imp. Co.*, 100 Pa. St. 137. It is argued by appellant that the judge, in taking the case away from the jury, overlooked the decision of this court when the case was here before. 175 Pa. St. 350, 34 Atl. 730. But what was said there, in regard to the knowledge of defendant that the insured was a married woman being a question for the jury, was merely narrative, in distinguishing the case from one of the same name in 168 Pa. St. 249, 32 Atl. 39, and was based on the evidence as it then appeared to be. The opinion then proceeds to the subject of waiver, and states explicitly that that is the only question to be considered. Judgment affirmed.

RIDGE AVE. PASS. RY. CO. v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. July 15, 1897.)

STREET RAILROADS—CHANGE OF GRADE—DAMAGES—LIABILITY OF CITY.

1. Where a street-railway company is by statute granted a right of way, with a provision that, in the construction of its tracks, it shall conform to the grade of the street as established, or thereafter to be established, it cannot recover damages from the city for an impediment to travel caused by a change of grade made in the street by the city, and delay in the work, where the delay was not willful and not unnecessary, apart from a mere mistake of judgment by the city as to the best manner of doing the work.

2. Where a street railway acquires by statute a right of way over a certain street, with a provision that in its construction it shall conform to the grade of the street, and purchases from a turnpike company the right of way along the turnpike, and the city, by proper proceeding, changes the turnpike into a street of the city, the latter is not liable for delays caused by the change in the grade of the street, though the contract pro-

viding for the purchase of the right of way from the turnpike company stipulated that, if the city should at any time acquire the turnpike, the turnpike company should provide that there should be no interference with the grade of the railway, and no alteration should be made without the consent of the railway company.

Appeal from court of common pleas, Philadelphia county.

Action by the Ridge Avenue Passenger Railway Company against the city of Philadelphia. Judgment for defendant, and plaintiff appeals. Affirmed.

J. Howard Gendell and John G. Johnson, for appellant. John L. Kinsey, City Sol., and E. Spencer Miller and James Alcorn, Asst. City Sols., for appellee.

DEAN, J. This is a suit for damages against defendant for illegally permitting obstruction to travel on Ridge avenue, a street of the city, for several years prior to March 30, 1875. Under act of assembly of March 30, 1811, the Ridge Avenue Turnpike Company was incorporated, with right to construct a road from the intersection of Vine and Tenth streets to Perkiomen Bridge, in Montgomery county. This was done, and in and for a considerable distance out of, the city limits, was known as the "Ridge Road." By the terms of the charter, the road was to be macadamized and constructed not less than 40 nor more than 60 feet wide, with a good and sufficient summer road at the side thereof where practicable, and the company was thereafter forever to maintain it in perfect order and repair. By the consolidation act of 1854 the boundaries of the city were extended to include within its limits all of the road up to the Montgomery county line, and on the city plan the turnpike was adopted as a city street by the name of "Ridge Avenue." By act of April 15, 1858, the Girard College Passenger Railway Company was authorized to construct a railway down Ridge avenue from the college to Tenth and Ninth streets. By act of March 28, 1859, the Ridge Avenue & Manayunk Passenger Railway Company was authorized to construct a railway from the college, by the Ridge avenue and Manayunk turnpikes, to Manayunk and Roxborough, within the city limits, with the proviso that the passenger railway company, before commencing construction, should purchase the right of way from the turnpike companies. It was further provided in the act that the passenger railway company, in construction, should conform to the grades of the streets now established or hereafter to be established, and at their own expense perpetually keep the streets in good repair. Acting under the supposed authority of the act of March 8, 1872, the two passenger railways were consolidated under the name of the Ridge Avenue Passenger Railway Company. While this act was afterwards, in *City of Philadelphia v. Ridge Ave. Ry. Co.*, 142 Pa. St. 484, 21 Atl. 982, declared unconstitutional,

nevertheless, without it, the consolidation was lawful under previous legislation. When the Ridge Avenue & Manayunk Company constructed their railway, they located it, not upon the middle or macadamized part of the turnpike, but upon the summer road at the side; and, in obedience to the injunctions of the act under which the company was incorporated, it purchased from the turnpike company the right of way for the sum of fifteen thousand dollars; and by another agreement, of same date, it was stipulated that, if the city should at any time purchase the turnpike, the turnpike company would provide in some manner that there should be no interference with the grade of the railway company, and no alteration of the same, without the consent of the railway company, and, further, that the railway company should not have imposed upon it the obligation of keeping the street in repair. Subsequently to this agreement, the city, at different times, but before 1870, by proceedings in the quarter sessions, acquired the whole of the turnpike within the city limits. By resolution of councils, March 26, 1870, the city decided to grade Ridge avenue from Columbia avenue to Dauphin street, and contracts were entered into on July 13th and 18th following, with Patrick McEntee, to do the work according to the specifications of an ordinance theretofore passed, and to complete the work within six months after notice to begin from the chief commissioner of highways. If not so completed, the commissioner was authorized to annul the contract at three days' notice, but no work was to be done between the 1st days of December and April. The work was not completed by McEntee, and from May, 1872, to October, 1873, five other contracts were made with other contractors for parts of the work,—some of it between Columbia avenue and Dauphin street, covered by the McEntee contract, and other parts extending the entire length of the avenue, about four miles, to Wissahickon creek. Some of the contracts were for paving the sidewalks; others, for grading the bed of the street; and the work, from date of commencement to finish, covered a period of four years. During this time the plaintiff's business, as a carrier of passengers, was seriously interrupted, not only by the workmen of the city contractors in passing and repassing with carts across the roadbed, but also by the frequent temporary changes of rails to facilitate excavation, and the obstruction of public travel by vehicles on the roadway. It made complaint several times to the city authorities of undue delay by the contractors, and unnecessary impediments to travel on the railway. For the damages thus occasioned, this suit was brought against the city, which denied any liability to plaintiffs. In the suit as originally brought, the contractors were joined as defendants; but, after pending four years,

their names were stricken off, leaving the city the sole defendant. By agreement of the parties, on March 16, 1880, Samuel C. Perkins, Esq., was appointed referee, under the act of May 14, 1874, to hear the evidence, find the facts, and report his conclusions of law. He had many meetings, and on 25th May, 1895, 15 years after his appointment, filed his report, in which he determines that the city is not answerable for the damages sustained by plaintiff. Exceptions filed to the report were dismissed by the court below, and judgment entered for defendant. From that, plaintiff appeals, preferring 22 assignments of error, which may be grouped into two classes; those complaining of error in findings of fact, and those of error as to conclusions of law: (1) The referee does find that plaintiff was inconvenienced by the detention of its cars, was obliged to run fewer cars, its rolling stock and horses were injured, the passenger traffic and receipts fell off, and that plaintiff suffered serious damage. But (2) he finds, "there was not, in the course of the performance of the work under the contracts, any willful, malicious, and intentional delay in the construction of the work, or obstruction in the operation of the railway, or in the traffic and travel thereover." (3) He finds that the damage resulting to plaintiff was consequent upon the change of grade.

Putting aside the question as to the extent of the city's answerability for the conduct of independent contractors, and assuming for the present that it must respond in damages for them, nevertheless it seems to us, under the evidence, as well as under the referee's finding of fact, that the plaintiff cannot recover. There was some evidence tending to show unnecessary delay in the work, but, on the other side, the weight of it tended to show nothing more, in the most unfavorable view, than an error of judgment. It is indisputable that the grade adopted by the city could not, from its very nature, have been constructed on the ground, without more or less interruption to travel on the street, both by vehicle and railway. The length of street affected by the change was four miles. To have put at work a sufficient force of men, animals, and machinery to accomplish the change in the shortest possible time would for that time have stopped all travel for the whole length of the avenue. To avoid this total interruption for this distance, the city authorities contracted for the work by nine contracts, in sections. In 1870 the work between Columbia avenue and Dauphin street was contracted for; in 1872, the paving from Dauphin to Huntingdon street; in January, 1873, the grading of the avenue between the same points; in April, 1873, the paving between Allegheny avenue and Wissahickon creek; in June, 1873, the grading of the street between same points; and so down to 25th October, 1873, the date of the last contract. While by this method there was partial obstruction all these years at

one or more points, there was not a total stoppage of the travel the whole distance at any one time. As testified by Mr. Jones, president of the railway company, "the whole road, from end to end, was not impassable, but just such sections as were being worked upon." It is not demonstrated to a certainty, by the event, that the method adopted was not the best. When the improvement was determined on, the problem presented was, is it better to absolutely exclude the public from the avenue, including the passenger railway, for one year, and put sufficient force on to complete the work in that time? Or should it be done in sections, one piece at a time, leaving the avenue open its whole length, but the public more or less inconvenienced at some point for four years? That is, by way of illustration, two thousand men could have graded the four miles in one year, if public travel had been wholly stopped; five hundred men could do the work in four years, with travel only seriously inconvenienced. The city adopted the second method.* That may have been a mistake, but, if it were,—which is doubtful,—the city is not answerable for a mere mistake of judgment. In conducting the work, the city kept policemen on the ground, to direct the public and facilitate travel as much as possible; but necessarily the interruption and delays to both travelers and contractors, by traveling and working on the same street, were annoying, and sometimes exasperating to both, but that was a consequence of the method adopted, and not of negligence. In view of all the evidence, the referee was warranted in finding that there was no intentional delay or neglect in the prosecution of the work under the method adopted. And the finding of fact by the referee is as conclusive upon a court of error as the verdict of a jury. *City of Philadelphia v. Linnard*, 97 Pa. St. 242.

Taking the facts to be as found by the referee, are his conclusions of law sustained? The railway company was only an artificial person using the street in common with natural persons. Whatever rights it may possess in the use of the street, by reason of its construction and purpose, distinct from those of the general public, it has no peculiar or special exemption from the interruption and damage necessarily resulting from municipal improvements. It occupied the highway by grant from the commonwealth, with the written consent of the turnpike company. This very grant, instead of exempting, specially enjoined conformity to the grade of the street now established, or hereafter to be by law established. Afterwards, the turnpike, by proper proceedings, became a city street. The city did not take it subject to indefinite liens or contracts made by the turnpike company in favor of other corporations. It took the subject, the incorporeal hereditament. If thereby any injury resulted to the railway company, it must seek reimbursement from the damages paid for the taking, or must have

recourse to the contracting party on its covenant. The municipality, under its right, has taken all there was in the turnpike company to take. The very purpose of the taking, and the reason for granting the authority to take the turnpike, is that, for the good of the general public, it may be subjected to full municipal control under the municipal laws. What would be the right of plaintiff in its present location if the street were vacated by the city, it is not necessary to inquire, for the question is not before us; but the authority of the city to establish or change the grade of its street, which once had been the bed of a turnpike, without regard to the contracts of the company with third parties, antedating the lawful acquisition by the city of the street, is undoubted. The plaintiff, when it made its contract with the turnpike company, knew the city might by law take possession of the roadbed, and adopt it as one of its streets; and that then the city might change or alter the grade, and that the railway company, as one of the public, must submit, without compensation, to the inconvenience and damage from interruption of travel incident to the improvement, it also knew.

It is alleged further that the change of grade was unlawful because of failure to have confirmed a revised plan of the grade. While this point seems to have been made before the referee, he barely mentions it in his report, without a specific finding. Neither appellant nor appellee has pointed out to us the evidence on which the one avers and the other denies it. The referee does find, however, that the contracts for grading Ridge avenue from Columbia avenue to Dauphin street were, by authority of resolution of councils of March 26, 1870, to accord with the established grade, and that the work should be done as specified in accordance with ordinance approved March 27, 1868. And so in every contract for grading; each purports to be authorized by a resolution of councils, the grading to be done in accordance with an established city grade. We will not now assume, in absence of full proof, after a trial on the merits, that this irregularity, if it exists, is of such gravity as to render defendant a trespasser in improving its own streets.

We are clear, the city had authority to grade and improve this street. In doing this, it had the right to adopt such method of allotting and carrying on the work as to it seemed best. For the damage resulting to the public because of the necessary interruption to travel during the progress of the work, under the plans adopted, it is not answerable to one of the public, unless the complainant shows a damage different in kind, and peculiar to himself. The damage here shown by plaintiff, though probably greater in amount than that sustained by any other person, is of the same kind as suffered by the general public using the street. All assignments of error are overruled, and the judgment is affirmed.

KULP v. MARCH.

(Supreme Court of Pennsylvania. July 15, 1897.)

GIFT—DELIVERY.

Shortly before his death, the donor said to his wife's brother, in the presence of his wife, that he had transferred his life insurance to the wife; that the policies were in his safe; and that, as soon as possible after his death, the brother should get the insurance money for the wife. After the donor's death the brother found in the donor's office safe an absolute assignment of the policies to his wife, inclosed with the policies in an envelope bearing her name. *Held*, that the question of delivery was for the jury.

Appeal from court of common pleas, Montgomery county.

Action by T. Jefferson March, executor of Henry G. Kulp, deceased, against the Penn Mutual Life Insurance Company, to recover on a policy. Defendant was discharged on depositing the fund in court, and Aida E. B. Kulp, claimant, interpleaded as plaintiff against said March as defendant. Judgment on a verdict directed for defendant March, at the close of plaintiff's evidence, and plaintiff appeals. Reversed.

Henry M. Brownback, Montgomery Evans, and N. H. Larzelere, for appellant. Franklin March, J. H. Maxwell, and Miller D. Evans, for appellee.

GREEN, J. In considering the question at issue in this case it must be carefully borne in mind that the deceased, Henry G. Kulp, had formally executed a regular assignment in writing and under seal to his wife, the plaintiff, of all the policies of life insurance involved in the present contention. It was a perfect instrument, and carried all his interest in the policies, naming each one of them by a full description, and it was regularly signed and sealed, and subscribed by an attesting witness. In its terms it was an absolute assignment and transfer, without any qualification or condition whatever. It was expressed in the present tense, and was as efficacious to pass the whole title of the assignor as any deed in fee simple for real estate could possibly be. There is not a solitary question as to its legal efficacy except the question of delivery, and that question only arises in view of its character as a gift. But, in its aspect as a gift, it has certain attending circumstances and surroundings, which tend greatly to narrow the limits of the inquiry, and to give it a special character not usually incident in this class of cases. For instance, it is not the case of a parol gift of a chattel, or of a security, where there can be no pretense of the passage of the title unless the thing given is actually produced and handed over to the donee. In all that class of cases, and they are by far the most numerous, the corporal tradition of the gift is the very essence and foundation of the title. It is that alone which passes the title, and hence it must exist or no title passes.

But here there is no question as to the intent of the donor to transfer all the title he has to the donee, and no evidence is required on that subject. He has actually done so in the most efficient manner possible. In all such cases the question of delivery is of far less significance and importance than it is in all the cases where the physical delivery is the means of transmutation of the title. There the physical delivery must actually take place or there is no change of title. But where the title has been actually conveyed by a solemn instrument of writing, duly executed and sealed, the question is rather as to the delivery of the instrument than the delivery of the substance of the gift; and, as is well known to the profession, the delivery of the instrument presents a very different question from the delivery of the subject-matter of the instrument. It is largely a question of intent. It may be accomplished without the instrument being handed to the grantee at all. It may be left with other persons or at a certain place, and its proof may be established by the verbal declarations of the grantor. In the case of a deed for land, if it be placed on record by the grantor, that alone is sufficient evidence of delivery, though the deed itself was never handed to the grantee. Then, too, it is a question in this case of a delivery by a husband to a wife. It is well settled that the possession by the husband of his wife's deeds and securities is regarded by the law as consistent with a possession in her, and very slight evidence of such a possession is sufficient to vest her title. Some of the authorities illustrating the foregoing statements are as follows:

In *Jacques v. Fourthman*, 137 Pa. St. 428, 20 Atl. 802, we held that when the plaintiff claimed property in notes as a gift from her deceased brother, and proved her possession of them immediately after his death, with evidence of acts and declarations of the deceased in his lifetime, and other circumstances, appropriate to a gift of them, as alleged, it was error to refuse to submit the question of fact as to the delivery to the determination of the jury. In this case there was no assignment of the notes to the plaintiff, and there was no proof of their actual delivery. But there was some proof that they were at least in the custody of the plaintiff, and certain declarations of the deceased relating to them we held to be sufficient to carry the question of delivery to the jury. We said: "What did the decedent mean when he said, 'Julia, where are those notes I gave you?' Did he mean that he had given them to the plaintiff? Certainly the court cannot say, as a matter of law, that he did not. The word used was entirely appropriate to express the fact of the gift. The actual meaning of the declarant must be determined by the jury, and, if they decided that a gift was meant, could they not lawfully do so? Would such a meaning be an absolute illegitimate inference? We cannot say so."

In *Reese v. Reese*, 157 Pa. St. 200, 27 Atl. 703, we held that the transfer of a judgment by a husband to a wife at a time when the husband is out of debt is a valid gift. The consideration of natural love and affection will sustain it, although no money is paid for it. We held, also, that the subsequent declarations and misrepresentations made by the husband, in order to procure goods, would not affect the wife's title if she was not a party to them.

In *Re Livingood's Estate*, 167 Pa. St. 191, 31 Atl. 550, the decedent gave to his wife a mortgage and judgment bond which he held against his brother, directing her to deliver them to the brother. The securities were delivered to the brother, who returned them to decedent's wife, with a request that she should keep them for him. They were then placed in a box in which decedent kept his securities. Decedent repeatedly declared it to be his intention to forgive the debts for which they were given, and, in a paper requesting his brother to make oath to a tax return, stated that the judgment and mortgage against his brother were satisfied. Held, that the evidence was sufficient to sustain a finding that these debts had been forgiven by the decedent. There was no assignment or transfer of the securities, and after the death of the decedent they were found in his own box, and among his other securities. Yet we held the parol testimony sufficient to sustain the gift.

In *Gish v. Brown*, 171 Pa. St. 479, 33 Atl. 60, we decided that where a father delivered a deed to a third person with absolute direction to hold until his death, and then deliver it to his son, who was the grantee in the deed, a delivery to the son after the grantor's death, by the custodian of the deed, passed a good title to the son. By the verbal testimony it appeared that the grantor put the deed and a bond from the grantee to him for \$15,000, and another agreement between the father and son, into an envelope, which he sealed, and then delivered it to the third person, saying: "I will make a deed for the place to Henry." "I will give this to you [Rutt] to hold." He said, also, that the farm should be Henry's, and after he handed the papers to Rutt he said, "Now, the farm is gone;" and instructed Rutt to hold the papers until after his death, and then to give them to his son Henry. The court below left the question of delivery to the jury, and we sustained the court in so doing.

In *Wagoner's Estate*, 174 Pa. St. 558, 34 Atl. 114, the facts were that a niece kept house for her uncle during the last 15 years of his life. She did the household work, took care of cows, and worked in the garden. About 18 months before the uncle's death he called on a justice of the peace, and executed a bond in favor of his niece in the sum of \$2,000, payable to her absolutely in one year, with interest at the rate of 5 per cent., with a warrant of attorney appended. The bond was handed to the justice to be kept by him and delivered to the

niece after the uncle's death. Some time after the bond had been deposited with the justice the uncle told his niece that there was a bond of \$2,000 at the squire's, and that she was to leave it there as long as he lived, and at his death she was to go and get it. A few days after the uncle's death the niece called for the bond, and the justice gave it to her. We sustained the bond as a gift, and held there was a sufficient delivery to execute the gift to the niece, and that the contingency that the gift was not to take effect except in case of the survivorship of the niece did not render it void.

In *Malone's Estate*, 8 Wkly. Notes Cas. 179, the instrument in question was a life insurance policy which was made in the name of the husband before marriage, but was claimed by the wife after the husband's death. There was no assignment of the policy to the wife, but there was proof of declarations of the husband that he had given the policy to his wife. It was found after his death in the safe of the firm of which he was a member, and he had represented to his creditors that he owned the policy. The court below said: "The delivery may be proved by the declaration of the donor, just as the gift itself may be; and when the donor declares that he had given it at a previous time, and that the donee had then become the owner, it is implied that delivery, and, indeed, every other formality necessary to create a complete gift, had taken place. The law always presumes knowledge of its requirements." This case was affirmed by this court in 38 Leg. Int. 303, not reported in state Reports.

In *Osterhout's Estate*, 148 Pa. St. 223, 23 Atl. 1069, the court below charged as follows: "It is contended here on the part of the counsel for the plaintiff that a gift cannot be proven by the declarations of a donor made at a time different from that when it is claimed that the gift was made, but we say to you that a gift may be proven by the declarations of the donor; and if you believe that Mr. Osterhout said to R. T. Handrick that he had given these bonds to Eugene Handrick, and you credit that testimony, you may find from his declaration that he had at some time previously given these bonds to Eugene S. Handrick, the defendant." This court held, on appeal, that the evidence was for the jury.

In *Sourwine v. Claypool*, 138 Pa. St. 126, 20 Atl. 840, a daughter claimed that a certain sum of \$400, which had been contributed by her father to her husband in the purchase of some land by the latter, and which was subsequently sold by the sheriff and purchased by the father, had been advanced originally by him as a gift to her. The evidence in support of the claim consisted of declarations by the father, made to strangers, of his having given this money to his daughter. The verdict was in her favor, and the defendant claimed that the admissions of the donor were not sufficient evidence to prove the gift. Clark, J., delivering the opinion of this court, said: "This is

not a case where the plaintiff seeks to establish a parol gift or sale of land, and the deliberate admissions of the decedent, if they are sufficiently clear, full, and precise, and relate to existing facts, and not to a mere intention, are competent to establish the fact."

In view of the provisions of the act of April 15, 1868 (P. L. 103), in relation to life insurance policies assigned by husbands to their wives, it may well be contended that the policy of our law favors such transactions, even where the rights of creditors may be affected. The words of the act are as follows: "All policies of life insurance or annuities upon the life of any person which may hereafter mature, and which have been or shall be taken for the benefit of, or bona fide assigned to, the wife or children or any relative dependent upon such person, shall be vested in such wife or children or other relative full and clear from all claims of the creditors of such person." The assignment of the policy in such a case is alone sufficient to vest the title in the wife, even as against creditors, if it is bona fide. As there is not the least question as to the bona fides of the assignment in this case, that requirement of the act is fully complied with. In regard to the possession of the papers, we said in *Turner v. Warren*, 160 Pa. St. 343, 28 Atl. 782: "That a husband should place his wife's papers in his safe, and that they should remain there until his death, needs no explanation, for it is entirely free from suspicion or doubt. As between strangers, it would be improbable that the grantee in a deed would permit it, after delivery, to remain in the possession of the grantor. It is not so, however, where the grantee is the wife of the grantor, and he has a safe for the keeping of valuable papers. Care would in such case prompt the wife to deposit the deed in her husband's safe." In *Thornton on Gifts* (section 169) the author says: "The relation of husband to wife is so close, and their everyday life is so blended, that it is often difficult to tell when the husband has perfected a gift to his wife by delivery. The law takes cognizance of these relationships, of the daily contact of such donor and donee, of the blending, as it were, of their daily walks and acts, and will construe an act to amount to a delivery where it often would not if the donor and donee were not members of the same family. The law does not dispense with an actual or constructive delivery, but it accepts the acts of the donor, if a clear intent to give is shown, as amounting to a delivery, when it would not do so if the donor and donee occupied separate habitations, and were not members of the same family." It was said in *Malone's Estate*, supra: "If a valid gift was made, it is of no importance, as between husband and wife, that the former subsequently became custodian. In such case he holds as trustee, without the right to divest his wife's ownership."

Bearing in mind the principles and distinctions heretofore stated, and the fact that the assignment of the policies is absolute on its

face, and transfers all the interest of the husband to the wife, and considering, also, that relation as between these parties, let us review the testimony on the subject of delivery. The wife being incompetent to testify as to what took place between her husband and herself, allowance must be made for that circumstance in considering the effect of the whole of the testimony. Mr. Henry M. Brownbank, a brother of Mrs. Kulp, was examined on the trial, and testified that he was with Mr. Kulp on Sunday evening before he died on the Tuesday following, and had a conversation with him. He said there were two conversations, at the first of which Dr. Mays, Mrs. Kulp, his mother, Mrs. Brownbank, and himself were present. He said: "I was sent for, and came over to his bedroom. He was lying on the bed. I sat down on the other side of the bed, and he said to me: 'Harry, I transferred all my life insurance, amounting to over \$32,000, to Aida. The policies are in my safe, with my private papers. I want you to get the insurance as soon after my death as you can, as Aida will need money.' * * * After his death, in consequence of that direction, I went to secure these policies, and found the policies. * * * Mr. Kulp had in his possession other property of his wife's at the time of his death." Mrs. Ellen Brownbank, the mother of Mrs. Kulp, was also examined, and testified that she was present at the time spoken of by her son, and heard what was said. "He said he had transferred his life insurance all to Aida, and he said that Harry should get the insurance as soon as he could, because Aida would need money. * * * She was in the room all the time at that time. Mr. Kulp did not say anything to me. He said it to Harry. Harry was sitting on the bed with his hand in his, and he was talking to Harry. I heard it. * * * He said, 'My policies are in the safe among my private papers.' He said, 'I want you to get the insurance as soon as you can, because Aida will need money.' * * * Preceding that he said, 'I transferred all my life insurance to Aida, amounting to over \$30,000, and the policies are in my safe, among my private papers.' There was no contradiction of the foregoing testimony, and, as the court below took it all away from the jury, it must be assumed to be true. Upon that assumption several considerations arise, all of which would have been for the jury. The assignment was found in the safe after Mr. Kulp's death by Mr. Brownbank. It was inclosed in a sealed envelope. Mr. Brownbank said as to that: "Have in my hand the assignment that has been offered in evidence and an envelope. The assignment was inside of the envelope. The envelope was in Mr. Kulp's private safe, in his counting room, in Pottstown. With this assignment were the policies, so far as I recall it. * * * I took it [the envelope] and opened it. Found it had my sister's name indorsed upon it. Opened it, and found it was the assignment." From all the testimony it is obvious that Mr. Kulp intended to assign

and transfer the policies to his wife absolutely, because that is just what he did do when he executed the assignment. When he said he had transferred all his policies to his wife, he spoke of it as a past fact, and thereby implied that he had done all that was necessary to make a good legal transfer. And when he said to his wife's brother, in the presence of his wife, that the policies were in his safe among his private papers, and he wanted his wife's brother to get the insurance money as soon as possible, because his wife would need money, did he not then and there authorize her brother to take possession of the policies, and get the money due on them for her, and pay it over to her? When she tacitly acquiesced in this arrangement, in the presence of her husband, was there anything wanting to complete the delivery of a chose in action, the absolute title to which had already been formally assigned and transferred to her? We think not, and we think that the jury would have been justified in inferring such a delivery of the assignment and the policies as would sustain such a transfer. Nor do we think, in view of the fact that it was his own wife to whom the formal deed of assignment and transfer had been already made, that there was any inconsistency in the fact that the papers were kept in his private safe. It was a very proper place for them to be, and no necessary inference of a nondelivery flows from that fact. All the facts relating to that subject were in parol, and were proper for the consideration of the jury. They were entirely consistent with the theory of a previous delivery, and, indeed, they were very inconsistent with any theory that the title to the policies still remained in the husband. Great force is added to this by his positive direction to his wife's brother, in her presence, that he should get the insurance money as soon as possible, and pay it over to his wife. How could such a direction be reconciled with the idea that he still regarded himself as the owner of the policies, and therefore that the money should be paid to his executors, and a large part of it go to other persons than his wife. We are clearly of opinion that the question should have been submitted to the jury upon all the evidence, with instructions that they should find for the plaintiff if they found a delivery of the assignment or the policies. The assignments of error are sustained. Judgment reversed, and venire de novo awarded.

COMMONWEALTH ex rel. HENSEL, Attorney General, v. STURTEVANT et al.

(Supreme Court of Pennsylvania. July 15, 1897.)

CORPORATIONS—FORFEITURE OF FRANCHISE—QUO WARRANTO—WHEN LIES—PLEADING—MOTION IN ARREST.

1. A ferry franchise was made exclusive on condition "that the grantee and his successors should at all times keep the ferry in good order and repair, and furnish the needful facilities for

ferrying foot persons over said river." An information in quo warranto averred that the owners of the franchise had for several years neglected to furnish such facilities, and had not kept the ferry in repair, or complied with the condition of the grant, in that the ferryboats were and had been unfit and dangerous; that the employees in charge of them were and had been inexperienced, incapable, and negligent; that the owners refused and had refused on divers occasions to ferry travelers across the river; and that they had charged illegal tolls for ferrriage, and been guilty of other acts of misuser and nonuser. *Held*, that the information was not subject to the objection, first raised by motion in arrest, that its averments were too general, in that they did not set out the time within which the acts complained of were committed, or the name of any incompetent employee, or of any person who was refused ferrriage, or from whom excessive tolls had been demanded.

2. Nor would such motion be sustained because of the omission to aver that said acts were "willful."

3. Quo warranto lies to forfeit the exclusiveness of a franchise as well as to forfeit the entire franchise.

Appeal from court of common pleas, Perry county.

Quo warranto by the commonwealth, on the relation of William U. Hensel, attorney general, against Peleg Sturtevant and Henry F. Zaring, to forfeit the exclusiveness of a ferry franchise. From a judgment for defendants, plaintiff appeals. Reversed.

William H. Sponsler, for appellant. Chas. A. Barnett, for appellees.

DEAN, J. By special act of assembly of March 21, 1863, the commonwealth granted to one William Inch and his assigns a ferry franchise for foot travelers across the Susquehanna river, at the village of Liverpool, Pa. The right to conduct the ferry was exclusive in the grantee, and the legislature stipulated that no other grant would be made for a ferry to others within one-half mile above or below,—upon this condition, however: "That the grantee and his successors should at all times keep the ferry in good order and repair, and furnish the needful facilities for ferrying foot persons over said river." The grantee proceeded to construct and operate the ferry, and his successors, these defendants, were in the control and management of it on the 12th September, 1894, when the suggestion for a quo warranto was filed by the attorney general. Defendants had succeeded to Inch some years before. The information avers that the defendants have for several years neglected to furnish facilities for passing foot travelers across the river; have not kept it in repair, or complied with the condition of the grant. Then follow the specifications: (1) The ferry bonts are and have been unfit, inadequate, and dangerous; (2) the employees in charge of the ferry are and have been inexperienced, incapable, and negligent; (3) defendants do refuse and have refused on divers occasions to ferry travelers over the river when requested, so that they have been compelled to go to other ferries, a long distance above or below. (4) that defendants and their predecessors have charged excessive and illegal rates for fer-

riage; (5) have been guilty of other acts of misuser and nonuser. Whereby, it is averred, the condition of the grant has been broken, and the exclusiveness of the franchise has become forfeit to the commonwealth. On this suggestion the quo warranto issued, directed to defendants to appear and show cause why they claim the exclusive grant to establish and maintain a ferry at that point. To this, defendants appeared and filed a plea denying all the averments in the suggestion, and, on replication by plaintiff, issue was joined, and the cause proceeded with to trial before a jury. The trial occupied two days. Many witnesses testified. The evidence was conflicting, and was submitted by the court to the jury, who found a verdict for plaintiff. Although the evidence is not before us, the parties and the court below assumed that there was evidence sufficient, if the jury believed it, to sustain the averments and warrant the verdict. After verdict, however, the defendants filed a motion in arrest of judgment, for the reasons: (1) There was not that certainty in the information required by law; (2) the writ of quo warranto cannot be used to forfeit a part of a public franchise; (3) there is no averment that the acts complained of were willful; (4) that the acts complained of were acquiesced in for so long a time that this method of redress cannot be adopted; (5) no legal cause of forfeiture is set forth. After argument, the court, in opinion filed, sustained the motion and arrested judgment. From this order plaintiff appeals.

The learned judge of the court below sustains the motion, in substance, for two reasons: First, the averments in the information are too general, in that they do not set out the time within which the acts were committed, the name or names of any incompetent employés, the names of any persons who were refused ferriage, or from whom excessive tolls were demanded. In these particulars, he holds, the same certainty is required as in an indictment for a misdemeanor. Second, he is of opinion that the failure of the suggestion to aver that the acts complained of were "willful" is fatal, and no judgment for plaintiff could be entered, because of that omission. While the opinion is forcible, on the premises assumed, and sustained by the authorities cited, it seems to ignore the nature of the condition imposed by the special act, and the character of the proof necessary to show a breach of it. If a single act of omission or commission were sufficient to work a forfeiture, and the commonwealth sought to rest its case on proof of such act, the opinion of the court would be sound. As has been noticed, the defendants, when called on to plead, filed a general denial to the information. If at that time they had demurred for the same reason set up after verdict, it may be that the court, unless the charges were particularized by plaintiff within a reasonable time before trial, would have been justified in sustaining the demurrer. And this would have been done, not because the charges were not certain enough to warrant judgment, but because

the court might have assumed that they lacked that definiteness which would enable respondents to defend against them. Or, on application by defendants, the court might have, and doubtless would have, ordered plaintiff to file a bill of particulars, which would have reached the same end. It must be borne in mind, however, that in all applications for this writ, before it issues, the party charged had always one, and often two, hearings before the commonwealth's officers. The plaintiff's case must then, to a great extent, be disclosed. Not only the nature of the charges, but the particular evidence on which they are based, and the names of witnesses to sustain them, all come to the knowledge of the respondent. It may well be, then, that, when the issue is framed in court, he is in full possession of plaintiff's case, and requires nothing further, because he apprehends no surprise. Here defendants went through a prolonged and careful trial; took their chances of a verdict; they lose, then raise an objection which goes to a matter just as obvious before trial as afterwards. To succeed by such a method of practice, the party adopting it should have a very strong case to induce the court to sustain a motion in arrest of judgment based on purely formal and technical defects.

What conduct of defendants in operating their ferry under the grant will warrant a withdrawal of the franchise in part by the commonwealth? The second section of the special act says: "The said William Inch, his heirs and assigns, shall own, establish, and have the exclusive right to use the said public ferry, and keep the same in good order and repair, and furnish all needful facilities for ferrying foot persons across said river, and receive as tolls for each person a sum not exceeding twenty cents." This is the full extent of the exclusive grant. Now comes the condition plainly annexed, and upon which its exclusiveness depends: "That no person or persons, shall be permitted to keep a public ferry, within one half mile above or below said ferry, so long as the said incorporator or his assigns afford facilities for crossing said river." The act or omission to act which will constitute a violation of the condition must be a course of conduct. Not a single failure to carry a passenger, or several isolated acts of negligence, but a continued persistent neglect of duty, must be shown, before a failure to "afford facilities" would be proven. "Facilities," in the sense here used, means everything incident to the general, prompt, and safe carriage of passengers; boats in good repair, appliances answering the purpose, and readiness and willingness to perform throughout the year. Interruptions by ice, floods, accidents to machinery or employés, might often occasion temporary inconvenience to the public, but of these the public would have no right to complain. It is obvious that the charge which would cover a violation of the condition must go to a persistent and general course of conduct, covering more than special days and acts. It must be continuous through

months, and perhaps years. This, the plaintiff concisely and clearly averred. His proof, necessarily, must come from many witnesses, part of the traveling public, to whom ferrying facilities have not been afforded. They must testify to acts of defendants on many days, though each one would probably be able to testify to but one act on one day, but all of them together would testify to acts and days spread over a considerable period. Their testimony, taken as a whole, would show a continuous state of affairs at the ferry, and would prove that facilities had not been afforded. The averment would then be proven, and there is no reason why such averment would not, in view of such proof, warrant a judgment. We are not speaking now of what defendants might have demanded, from the discretion of the court, to enable them to prepare a defense. They demanded nothing. We are discussing only whether the averment is lacking in legal formality and definiteness under this statute. This is the exact point decided by this court in *Com. v. Commercial Bank*, 28 Pa. St. 391. There the quo warranto was issued against the bank to forfeit its charter because of exacting usurious rates of interest. One of the counts—the second—in the information charged: "For many months past the defendant has been in the constant practice of discounting promissory notes at exorbitant and usurious rates of interest, far exceeding the rate of one-half of one per centum for thirty days." The special demurrer to this count was that it did not allege any facts to sustain it, or any of the particulars of such alleged dealings. This court held the count good, saying: "It is not necessary that the acts constituting the offense be particularly described with all their circumstances, if it can be distinctly defined without this; and much of the particularity of pleading comes from an abundant caution, rather than from the requirements of the law. But many offenses are composed of a class of forbidden acts, punishable as a class, and such offenses are properly described by the general term under which the acts constituting them fall, and are individuated only by time and place." And again: "It is the diversion of its business out of the prescribed way that constitutes the offense, though the proof of it can be made out only by giving particulars. The particulars which it is thought ought to have been given are not the facts charged, but the evidence of them, and are properly left out." We think, under this special act imposing the condition, the charge of a violation of the condition is sufficiently certain to sustain a judgment on the verdict.

As to the omission of the word "willful," we do not think it essential, because a neglect or failure to "afford facilities for crossing said river" is the breach of the condition, on which the exclusiveness of the franchise is forfeited. The information avers an unlawful and negligent operation of the ferry. This is sufficient after verdict, because the objection is to

an omission purely formal. In an indictment, since the Criminal Code of 1860, it is sufficient to charge the crime substantially in the language of the act of assembly prohibiting it; and, further, any objection to any indictment for any formal defect must be taken by demurrer or motion to quash before the jury is sworn, and not afterwards. Under the strictness of criminal pleading that now prevails in this state, the defendants' motion was too late.

The forfeiture sought by the writ is only that which confers the exclusive right, for it is only that part of it which is dependent on a performance of the condition. There is no reason why it should be held that the writ extends to the entire franchise or to no part of it. There is nothing of merit in the remaining reasons. The judgment of the court below arresting judgment is reversed, and it is ordered that judgment be entered for plaintiff.

In re CLAGHORN'S ESTATE.

Appeal of KELLER.

(Supreme Court of Pennsylvania. July 15, 1897.)

CONFESSION OF JUDGMENT—LIMITATION OF ACTIONS—DEBTS OF DECEDENT—JUDGMENT—COLLATERAL ATTACK.

1. A bond by executors was conditioned that they "or their successors in the trust" should pay certain debts of testator. A warrant of attorney thereto attached provided that, if said executors (naming them) did not pay such debts, judgment might be confessed against them and their "heirs, executors, or administrators." *Held*, that the warrant authorized the confession of judgment only against the executors personally.

2. A creditor of the insolvent estate of a decedent, whose interest is affected by the claim of another creditor, may urge limitations against it, though the executor has expressly waived the bar.

3. The disallowance of a claim against the estate of a decedent, on the ground that an agreement by the executor in renewal thereof created only a personal liability, and did not arrest the running of limitations in favor of the estate, is not a collateral attack on a judgment against the executor personally for the claim on such agreement.

Appeal from orphans' court, Philadelphia county.

Proceedings for distribution of the estate of James L. Claghorn, deceased. From a decree allowing the claim of the Commercial National Bank of Philadelphia, Emma C. F. Keller, a creditor, appeals. Reversed, and decree directed.

John Weaver, John Sparhawk, Jr., and John G. Johnson, for appellant. Isaac D. Yocum and Thomas H. Talbot, for appellee.

DEAN, J. Julia Claghorn and J. Raymond Claghorn, widow and son of James L. Claghorn, deceased, and executors of his will, filed their first account in the orphans' court May 27, 1895. Their testator died August 25, 1884, and the wife and son were the sole beneficiaries under his will, and from the date of testator's death had been in possession of his

estate. The will expressly enjoined that they were not to give bond for the faithful performance of their duty as executors. It is not clear from the evidence and the confused and tangled account filed whether the estate of testator was solvent at his death. It is very clear that when the first account was filed, more than 10 years afterwards, it was largely insolvent. There was for distribution, after adding a surcharge of \$2,905, and deducting counsel fees and expenses, a balance of \$24,867. But two creditors claimed payment out of this fund,—Mrs. Emma C. F. Keller, who demanded \$36,344.34, with interest from May 1, 1894, and the Commercial National Bank, \$4,300, with interest from March 22, 1894. The court below allowed both claims, and directed a distribution of the balance pro rata. From this decree Mrs. Keller appeals, assigning for error the allowance of the bank's claim. It follows, if her appeal be successful, the payment to her will be increased \$4,300, with interest from March 22, 1894. Her averment is that no valid claim against the fund was exhibited before the court below by the bank. Therefore it was error to allow it. The claim of the bank was founded on a judgment entered by it in common pleas of Philadelphia county, against James Raymond Claghorn and Julia Claghorn, executors of James L. Claghorn, April 19, 1894, for \$10,000, conditioned for the payment of three promissory notes, amounting to \$7,750, of which J. Raymond Claghorn was drawer, and his father in his lifetime was indorser. It was admitted at the adjudication that J. Raymond Claghorn had reduced the amount of the real debt, by payments, to the sum of \$4,300, with interest from 22d March, 1894. It is argued by appellant: (1) That on the evidence, and from the record of the common pleas, the debt was that of J. Raymond Claghorn individually, and not of the estate. (2) That the judgment, from its terms, is against the executors personally, and not against them in their representative capacity; therefore it cannot be distributed from the fund.

It is settled that every judgment entered on a specialty, with warrant of attorney to confess judgment, must follow strictly the authority conferred by the warrant. The attorney who executes the warrant cannot change its terms or enlarge its scope. The bond and warrant are as follows:

"Know all men by these presents, that we, Julia S. Claghorn and J. Raymond Claghorn, executors of the last will of James L. Claghorn, deceased, are held and firmly bound unto the Commercial National Bank of the State of Pennsylvania in the sum of ten thousand dollars, lawful money of the United States of America, to be paid to the said obligees, their certain attorney, successors, or assigns, to which payment well and truly to be made we do jointly and severally bind ourselves and our successors in the trust firmly by these presents. Sealed with our seals. Dated the twelfth day of July, A. D. 1889.

"Whereas, the said bank held at the decease of James L. Claghorn sundry promissory notes of J. Raymond Claghorn, indorsed by the decedent; and whereas, the amount remaining unpaid is seven thousand seven hundred and fifty dollars, represented by three notes of J. Raymond Claghorn, each payable three months after date,—one dated May 9th, 1889, for \$1,500.00; one dated May 29th, 1889, for \$5,500.00; one dated June 21st, 1889, for \$750.00,—and the bank also holds as collateral the original notes indorsed by James L. Claghorn, and the said executors have agreed to execute the present bond and warrant to prevent the claim of the bank against said decedent's estate from being barred by the statute of limitations: Now, the condition of this obligation is such that if the said J. Raymond Claghorn, his heirs, executors, or administrators, shall pay at their respective maturity his three notes above designated, and shall also pay at maturity all renewals thereof, in whole or in part, until the indebtedness of decedent's estate to the bank is fully paid, then this said obligation shall be void, or else be and remain in full force and virtue. No judgment to be entered by virtue of the annexed warrant until default is made in the payment of the said notes or their renewals when such renewals are granted by the said bank.

"[Signed] Julia S. Claghorn. [Seal.]

"[Signed] J. Raymond Claghorn. [Seal.]"

Warrant of attorney:

"To James W. Paul, Esq., attorney of the court of common pleas at Philadelphia, in the state of Pennsylvania, or to any other attorney of the said court or of any other court there or elsewhere.

"Whereas, we, Julia S. Claghorn and J. Raymond Claghorn, executors of the last will and testament of James L. Claghorn, deceased, in and by a certain obligation bearing even date herewith, do stand bound unto the Commercial National Bank of the State of Pennsylvania in the sum of ten thousand dollars, lawful money of the United States of America, conditioned for the payment, at their respective maturity, of three promissory notes of J. Raymond Claghorn, all drawn payable three months after their respective dates,—one dated May 9th, 1889, for \$1,500.00; one dated May 29th, 1889, for \$3,500.00; one dated June 21st, 1889, for \$750.00,—and of the payments of any of the renewals of the said notes when renewed by the said bank: In default of any such payment these are to desire and authorize you to appear for us, our heirs, executors, or administrators, at the suit of the said bank, their successors or assigns, on an action of debt there or elsewhere brought, or to be brought, against us, our heirs, executors, or administrators, upon the said obligation, and confess judgment thereon against us, our heirs, executors, or administrators, for the sum of ten thousand dollars, by non sum informatus nihil dicit, or otherwise, as to you shall seem meet; and, for you or any of you so doing, this shall be your sufficient warrant.

"In witness whereof, we have hereunto set our hands and seals, this twelfth day of July. A. D. 1889.

"Julia S. Claghorn. [Seal.]

"J. Raymond Claghorn. [Seal.]"

It will be noticed: (1) That, by the bond, the undertaking is that "Julia S. Claghorn and J. Raymond Claghorn, executors of the last will and testament of James L. Claghorn, deceased, are held and firmly bound" unto the bank, and they further undertake that their successors in the trust shall be bound. It is further declared that the bond and warrant are executed to prevent the running of the statute against the estate of James L. Claghorn, who was indorser for his son, J. Raymond Claghorn. (2) The condition, in substance, is that, if J. Raymond Claghorn does not pay his debt to the bank, the estate will continue answerable. (3) The full authority in the warrant is that if Julia S. Claghorn and J. Raymond Claghorn, executors, do not pay the three notes of J. Raymond Claghorn at maturity, then any attorney is authorized to appear for them, their heirs, executors, or administrators, at the suit of the bank, against them, their heirs, executors, or administrators, and confess judgment thereon against them, their heirs, executors and administrators. In the warrant, the authority is to appear for them, their heirs, executors, and administrators, and to confess judgment against them, but not in their representative capacity. By the warrant, therefore, the judgment is against them personally. There is no judgment or adjudication by a court of record against the estate of James L. Claghorn. The bond itself may be construed as a promise that they will not plead the statute against the bank when the assets are for distribution. It amounts to nothing more. And they kept this promise. They did not plead the statute against the bank on the distribution. We have, then, a promise by the two executors, one of whom was the principal debtor, and his father, the surety, that they will not plead the statute in favor of the father's estate. To what extent does this promise bind the estate on a distribution, 11 years after the testator had contracted a simple debt, which in 6 years was barred by the statute?

In *Geyer v. Smith*, reported in a note in 1 Dall. 347, it was held, as early as 1790, on the authority of many English cases cited, that a creditor taking a bond from an executor or administrator discharges the old debt; that calling himself executor or administrator in the bond is mere surplussage; and that he is chargeable only in his own right. This was followed by *Jones v. Moore*, 5 Bin. 573, *Bailey v. Bailey*, 14 Serg. & R. 195, and *Scully v. Wallace*, 15 Serg. & R. 231, in each of which it was taken for granted, as said by Gibson, C. J., in *Fritz v. Thomas*, 1 Whart. 66, that an acknowledgment of the debt by the personal representative would take the case out of the statute, but the point was not adjudged. So, in the last-named case the court felt at liberty to decide the case directly, and it was held that

the executor or administrator "is answerable in his official character for no cause of action that was not created by the decedent himself." And, further, that the administrator "cannot charge himself personally without a new consideration. He cannot charge the estate on the foundation of the old one, to the prejudice of creditors whose fund might be materially lessened by it. He is not bound to plead the statute, because he may know the debt to be a just one; and, for that reason, the matter is left to his discretion. But it follows not that he may tie up his hands from using it when the time comes, by a mistaken concession, or an engagement which had no consideration to bind him personally or officially. * * * Indeed, there is no course open to us but to follow the principle out, or abandon it altogether; for, to be consistent, we must either return to the doctrine of revival without qualification, or maintain that an action on his own promise lies not against an executor or administrator in his official character." This decision has either been followed or recognized in every case in which the point has been raised since, commencing with *Reynolds v. Hamilton*, 7 Watts, 421, down to *Reed v. Reed*, 48 Pa. St. 239.

This, then, is a promise by the executors not to plead the statute of limitations against this creditor when he presented his claim. It does not bind the estate. They, under the authorities, were not even bound not to plead it on distribution, but might then have set it up in the face of their original promise. They did not do so, but a creditor (this appellant) did. Would it avail her when the executors waived the right to plead it? *Fritz v. Thomas*, supra, by plain implication, holds that the promise of the executors would not bar her right. But in *Kittera's Estate*, 17 Pa. St. 416, the point is directly decided. It was there held that distribution of an estate of a decedent in the orphans' court is, under the act of assembly of April 13, 1840, to be made "to and among the persons entitled to the same"; that the right of each creditor to be heard in support of his claim, and in opposition to every claimant who interferes with it, is necessarily involved in the right to demand payment out of the fund. "Each creditor or claimant has a right to appear and to be heard, so far as may be necessary for the protection of his own interest; and of this proceeding the administrator has not the control, nor is he responsible for errors in the distribution so decreed. At a time when the statute of limitations was not in favor, it was held that an executor or administrator was not bound to plead it. This was only applicable to actions in which the personal representative of the decedent was intrusted with the management of the defense, and in which the pleading was necessarily regulated by his own discretion. It has no place in a proceeding before the orphans' court. * * * It follows that, when the fund is not sufficient to pay all, each creditor has a right to oppose any

other claimant, by showing payment of the debt, or that it is barred by the statute of limitations." This was followed by Hoch's Appeal, 21 Pa. St. 280, and Ritter's Appeal, 23 Pa. St. 93. In this last case it was said that where the personal representative had in good faith actually paid a debt barred by the statute, without protest by legatees or creditors, equity would not refuse him credit therefor in his account. But it was expressly decided that he could not bar distributees from pleading the statute by refusing to plead it himself.

It will be seen from these most explicit decisions that the personal representative is not answerable for a cause of action not created by the decedent; that if, by a new promise, he revives a debt already barred, or prolongs the life of one not yet barred, the contract is his own, and he is personally answerable. And, although he is not bound to plead the statute where he believes the debt unpaid, yet, in the distribution of a fund, creditors whose interests are affected can plead it. Where, however, a suit is brought against him in his representative capacity on a debt barred by the statute, and he waives his right to plead it, the judgment is *de bonis testatoris*, and cannot be questioned thereafter on distribution of the estate.

It is argued that to disallow the bank's claim is to question collaterally the conclusiveness of a judgment of the common pleas. But this is a mistake. An inspection of the record shows that it is not a judgment against the estate, but against the executors personally; and assuming that the executors could have, by that form of proceeding, bound the estate, they framed no warrant to any attorney to confess such a judgment. It is not questioning a judgment collaterally to ascertain from the record against whom it is rendered, and whether it can be legally paid out of the fund for distribution.

We think it was error to not sustain the plea of the statute preferred by this appellant. Therefore the decree of the court below is reversed so far as it awards part of the fund to the appellee; and it is directed that, as the entire fund does not pay the amount allowed on appellant's claim, the whole fund be paid over to her, and, further, that appellee pay the costs of this appeal.

IN RE CLAGHORN'S ESTATE.

Appeal of COMMERCIAL NAT. BANK.

(Supreme Court of Pennsylvania. July 15, 1897.)

EXECUTORS AND ADMINISTRATORS—LIMITATION OF ACTIONS—PART PAYMENT—ESTOPPEL—FRAUD.

1. The recognition by an executor of debts of testator, by part payments thereon, does not interrupt the running of limitations in favor of the estate, but merely creates a personal liability of the executor.

2. Though executors, who are also sole beneficiaries of the estate, are estopped to plead lim-

itations in favor of the estate by postponing payment of a claim for their own advantage, such estoppel does not debar other creditors from such plea, where the estate is insolvent.

3. Money was deposited with testator for investment, and the securities purchased therewith were misappropriated by him. He rendered detailed statements to the depositor of investments alleged to have been made, and paid her from time to time money stated to have been derived therefrom. After his death, the executors, who had full knowledge of the facts, continued such statements and payments. *Held*, that limitations did not begin to run against the depositor's claim until discovery by her of the facts.

Appeal from orphans' court, Philadelphia county.

Proceedings for the distribution of the estate of James L. Claghorn, deceased. From a decree allowing the claim of Emma C. F. Keller, the Commercial National Bank, a creditor, appeals. Affirmed.

Isaac W. Yocum and Thomas H. Talbot, for appellant. John Weaver, John Sparhawk, Jr., and John G. Johnson, for appellee.

DEAN, J. James L. Claghorn, of Philadelphia, died August 25, 1884, leaving, to survive him, a widow, Julia S. Claghorn, and one son, J. Raymond Claghorn, then past his majority. He left a will, of which he appointed his widow and son executors. At his death he was possessed of a considerable estate, probably at that time, if it had been turned into cash, more than sufficient to pay his debts. But settlement of the estate was delayed by his representatives. No account was filed until one was compelled by the orphans' court, April 5, 1895. This account was very confused and unintelligible. It indistinguishably blended principal and income, administration and distribution. The auditing judge ordered a restatement of it, which account was presented December 4, 1895. It was not much improvement on the first; yet, as all parties seemed to think it was the best that could be got, it was by their consent adopted as a basis for adjudication and distribution by the court. It showed a balance of principal in the hands of the executors, after deducting costs and counsel fees, of \$21,962.58, to which was afterwards added a surcharge of \$2,905 against J. Raymond Claghorn, one of the executors. Two claims on this balance were adjudged sustained,—one of \$36,344.34, with interest from May 1, 1894, preferred by Mrs. Emma C. F. Keller; the other for \$4,300, with interest from March 22, 1894, by the Commercial National Bank. To them the fund was awarded, pro rata. Exceptions were filed to the adjudication by both the bank and Mrs. Keller, each objecting to the allowance of the claim of the other. The exceptions, after argument, were overruled by Judge Ashman, and the adjudication confirmed. From that decree the bank appeals, alleging error in (1) not finding Mrs. Keller's claim was barred by the statute of limitations; (2) in finding as a fact that securities of Mrs. Keller in possession of testator were converted to his own use.

It appeared from the testimony that Mrs. Keller was an intimate friend of testator's wife, and had great confidence in the business capacity and integrity of her friend's husband. For some years before his death, she had placed in his hands different sums of money, aggregating a large amount, for investment. These he reported to her as invested, specifying, for the larger part, the particular investments he had made in her name and for her account, and the income derived therefrom. Frequent payments on account of alleged income were made to her, amounting to over \$12,000; but the investments from which the income remittances came were not particularized in communications to her. And, although irregular, the remittances kept up from the father's death until about the year 1894. It does not appear just how long before the father's death these transactions commenced. As already noticed, James L. Claghorn died on August 25, 1884. Two letters to Mrs. Keller, which his son testified were written by him at his father's direction, were put in evidence. One, dated April 7, 1881, is as follows:

"My Dear Mrs. E. O. F. Keller: The account stands, February 1, 1881: Cash in hand to J. L. Claghorn, fully secured, interest 6 per cent. per annum, \$10,462.73; State Line & Sullivan Railroad bonds, 7 per cent., \$19,000 at par, worth to-day \$105; 86 shares Commercial National Bank, at \$67.50, \$5,800; \$70 asked Pennsylvania bonds, \$5,000; bond and mortgage, \$2,000; ground rent, \$1,200; loan on call, secured, 6 per cent., \$5,000,—aggregating \$48,762.73. It is very difficult to get 6 per cent., and be secure. We have done the best we could, and feel you are secure. As soon as a good investment offers, father will invest the funds in his hands. Ten thousand bonds were paid off last year, is the reason the amount in his hands is large. But you lose no interest, he preferring to pay you 6 per cent., even if he does not realize that much at present.

"Yours, in great haste, Raymond."

The other is dated March 20, 1883, and is as follows:

"My Dear Mrs. Keller: I have now made up father's accounts since July, 1882, and I find very little change in your account. The investments are the same. The only difference is the amount of cash on hand, in the hands of father, bearing six per cent., secured, which was July 1, 1882, \$10,054.01, instead of \$10,462.73; 86 shares Commercial Bank; 19,300 bonds State Line & Sullivan Railroad; Pennsylvania Railroad, \$5,000; bond and mortgage, \$2,000; ground rent, \$1,200; loan on call, secured, \$5,000. If you should spend four or five hundred dollars a year more of income for ten years, it would only amount to \$5,000 or \$4,000 in the aggregate. I do not see that any more could be derived from investments than at present. You had better be sure than take risks. I am going over to Boston on Sunday night, and Annie, I think, will go along. In fact, I know she will. Will stop at Brunswick.

Look us up. Kindly drop note when you will look in. Shall stay a day or so.

"Yours truly,

Raymond."

March 2, 1891, seven years after testator's death, J. Raymond Claghorn wrote a letter, of which the following is a copy, to Mrs. Keller: "My Dear Mrs. Keller: The following is a full statement of your account, with securities on hand, as it stood January 1st, which is the date at which I have settled the accounts of the estate. It has not varied of any consequence since then. Hope you will find it satisfactory. The securities are all good, and give very little concern. I have put opposite the different items of the annual income:

19,000 State Line & Sullivan R. R. Co. bonds, 6.....	\$1,140 00
2,000 Grand Rapids & Indiana five.....	100 00
136 shares the Commercial Bank of Phila.....	476 00
\$5,000 temporary loan, with collateral; has been five per cent.; is six.....	300 00
\$2,000 mortgage, 2,042 Woodstock street, Philadelphia, at 5 per cent....	100 00
\$9,043.79, being balance to your credit on books of estate of James L. Claghorn, deceased, upon which six per cent. has always been allowed..	542 63

Aggregating \$2,658 63

"Of course, you understand that, when father's estate is finally closed, the items to your credit will be turned over, either in cash or securities. Considering the condition of affairs, do you think your funds have shrunk much, if any? State Line bonds used to be seven per cent., but were reduced to six per cent. two years ago. Think first-class investment, for the bonds sold at ten per cent. premium; but, of course, all things are depressed at present, but that makes no difference when one wants to hold on."

On May 14, 1891, he again wrote:

"My Dear Mrs. Keller: Inclosed please find draft for \$300. Will send you the balance early next week, which I presume will be satisfactory to you. I do not think it will be necessary for you to give any note, as I will charge it in your account in the estate, which I presume will be entirely satisfactory to you."

The acting executor, the son, admits that the statements in all three letters, of investments, purporting to be in Mrs. Keller's name and for her account, were false. The larger part of the securities were hypothecated for loans to the son. Some of the investments were in the name of the father, with nothing to indicate Mrs. Keller's ownership. The uncontradicted testimony is that Mrs. Claghorn gave to her son a power of attorney to act for her, and that she concurred in all his acts in relation to the business of the estate. By the will of James L. Claghorn, his wife and son were the sole beneficiaries of his estate, and except as to household furniture, which was directly bequeathed to the wife, the son was appointed trustee to pay to her the income of the estate during her life. Then principal and income were to merge for his benefit. It was not until the remittances stopped, in 1894, that Mrs. Keller made in-

quiry as to her investment. She then discovered that the grossest deception had been practiced upon her, and demanded at law the accounting which is the subject of this litigation. After citation, but before account filed, Mrs. Claghorn and her son resigned as executors, and the son as trustee, and Henry C. Davis was appointed in their stead. He pleaded the statute of limitation as a bar to the claim of Mrs. Keller, in which plea he was joined by the bank, the remaining creditor. The court overruled the plea, on three grounds: (1) That the payments kept up for more than seven years after the death of the testator were a distinct recognition of the debt which subsisted at his death, and equivalent to a promise to pay; and (2) as the executors themselves were the beneficiaries of the estate, and the benefit or indulgence or postponed payment accrued to them individually, under the authority of *McWilliams' Appeal*, 117 Pa. St. 111, 11 Atl. 383, they were estopped from interposing the bar of the statute; (3) that a fraud had been practiced upon Mrs. Keller by both the testator and his executors, by misrepresentation, and in concealing from her the fact that her securities had been misappropriated, which fraud she did not discover until the year before the account was filed; therefore the statute, as against her, commenced to run only from her discovery of the fraud.

We do not concur with the learned court below in the first and second reasons given for the decree. As to the first, it is directly in conflict with all our authorities, from *Fritz v. Thomas*, 1 Whart. 66, down to *Light's Estate*, 136 Pa. St. 211, 20 Atl. 536, 537. All of them hold that the recognition of a debt barred by the statute, by the personal representative, is but a new promise, on which he must be sued personally. He is not answerable in his representative capacity for any cause of action not created by the decedent himself. If he revive the cause of action by a new promise, then the promise is essentially a new contract, which alone can be relied on to sustain the action.

As to the second reason, it would be sound if Mrs. Keller were the only creditor, for, the executors being the only beneficiaries, they would then, on the principle of *McWilliams' Appeal*, supra, relied on by the court below, be estopped; this, because it would be inequitable to permit them to benefit personally by the fraud as against the party defrauded. *McWilliams' Appeal* assumes the creditor knew his rights under the law, and was conscious of the peril from neglect to enforce them within the six years; but as by the act of the legatees, who alone were benefited, he deferred suit, they were estopped from pleading the statute, as representatives of the estate. There were no other creditors. The advantage accrued solely to the legatees. If, in this case, Mrs. Keller knew immediately after the death of testator that her securities

had been misappropriated, the statute would have run against her as to other creditors, even if, by cajolery and promises, the legatees had induced her to defer suit. The rule in *McWilliams' Appeal*, on such facts, could be invoked only to this extent: The bank could plead the statute against her, and, under the facts, its claim would then be paid in full. Then, as to the balance of the fund, the executors would be estopped from interposing the bar of the statute against her, because, as legatees, they had caused her to delay pressing her claim for more than six years.

But we think the third reason amply vindicates the decree. Putting aside the confidential relation, and the fact that the executors were the sole legatees, the statute, under the facts found, does not bar her claim. Her money was not loaned. It was received to be invested. The executors repeatedly, in the most explicit statements, represented to Mrs. Keller that it was invested, and she was informed of the special securities in her name. If this had been true, both father and son were mere custodians of her property, which they were bound to turn over to her on demand. She was not a mere contract creditor of the estate. She had loaned no money. They were simply depositaries of her funds for a special purpose, which purpose they represented had been executed. True, her claim against the estate because of the fraud had a legal existence during the whole 10 years, and the law required her to know this if she knew the fact that the securities had been appropriated. But the fraud was in the active, persistent efforts of the executors to conceal the fact of misappropriation. In this they succeeded. As to her, then, the statute commences to run only from the time she discovered the fact of misappropriation, for from that time alone did she know that she must assume the attitude of the ordinary contract creditor. The specific securities were beyond the reach of the law. Their proceeds had become part of the estate to be distributed. In this view, while the law abhors such conduct, it cannot be questioned that the executors were acting in their representative capacity; that is, they used their official position as a cloak to defraud one creditor, and thereby swell the assets for all creditors and legatees. No other creditor can successfully interpose the statute as against her, because her claim against the estate dates only from her discovery of the fraud. Then, only, so far as concerned her, did her right accrue to proceed against the estate.

While the executor and trustee appealed from the decree of the court below, and the appeal was pending at the argument here, it was afterwards, on the 20th of March, 1897, discontinued, so that the appellant now of record is the Commercial National Bank. As our decree in the case of *Keller's Appeal* (opinion handed down herewith) 37 Atl. 918, settles the form of final decree on all the exceptions, we simply dismiss this appeal; costs to be paid by appellant.

In re TASKER'S ESTATE.

(Supreme Court of Pennsylvania. July 15, 1897.)

ACCOMMODATION NOTE—EVIDENCE—FRAUD.

1. A finding that a note was discounted by a bank for the maker, and not loaned to it by him for accommodation, is not supported merely by the fact that the note was several times renewed; a witness testifying that the note was loaned to the bank without consideration, and the bank failing to produce its books to show that any consideration passed.

2. Evidence that a note was loaned to a bank for accommodation, because it was being reorganized as a national bank, and "needed paper," is insufficient to show that the loan was fraudulent on the part of the maker, as intended to deceive the bank examiner, so as to prevent the maker from setting up the facts in defense of a suit by the bank on the note, since the note might have been desired by the bank to borrow money on, or for other legitimate purposes.

Appeal from orphans' court, Philadelphia county.

Proceeding for the distribution of the estate of Thomas T. Tasker. From an adjudication of the account on the report of an auditor allowing the claim of B. F. Fisher, receiver of the Spring Garden National Bank, Stephen P. M. Tasker and others, executors, appeal. Reversed.

Thomas T. Tasker died on the 27th day of January, 1892, and by his will he appointed Stephen P. M. Tasker, William H. Tasker, and Mary E. Clark his executors, to whom letters were granted by the register of wills for the county of Philadelphia, and whose account was filed and audited before Ashman, J., an adjudication filed on the 20th day of November, 1895, and the account confirmed nisi. At the audit there was presented on behalf of B. F. Fisher, Esq., receiver of the Spring Garden National Bank, among other claims, one of \$5,000 upon a note of the decedent for that amount, drawn to the order of Stephen P. M. Tasker, dated January 5, 1891, and payable May 31, 1891. This note was the last of a series of renewals of one of like amount between the same parties, dated the 2d day of February, 1886, and payable at four months. The original note was procured by the president of the Spring Garden Bank, Francis W. Kennedy, from the decedent, and Stephen P. M. Tasker, his son, for the accommodation of the bank; and neither the decedent nor Stephen P. M. Tasker ever received any consideration either for the original note or for any subsequent renewal thereof. The transaction regarding these notes was shown by the testimony of Stephen P. M. Tasker, who was called in behalf of the estate, and by Mr. George W. Scouler, who had been note clerk of the Spring Garden National Bank, in behalf of the receiver. Mr. Tasker's evidence was of the conversation that occurred between himself and President Kennedy, which induced the making of the notes. Mr. Scouler did nothing more than to identify a book containing a record of notes

discounted, he having made the entries. The book was offered in evidence, and was submitted subject to the exception of counsel for the executors. The note clerk was then permitted to read entries in the book relating to the last renewal note, and to explain the meaning of those entries and the method then pursued by the bank of transacting its business regarding notes discounted by it. He admitted that the note of January 30, 1891, was a renewal of the original note, which Stephen P. M. Tasker testified was an accommodation to the bank, given without consideration; but the book admitted in evidence contained no entries respecting the original note, and there was no testimony whatever to show that either the maker or the indorser, or any other person, ever received any consideration for it. The auditing judge found from the evidence contained in the book that the original note had been renewed from time to time, and that, therefore, testimony that it was given without consideration, and for the necessities of the bank at a particular time, was flatly contradicted by the fact of these renewals, and he admitted the claim.

John Sparhawk, Jr., Sheldon Potter, and John G. Johnson, for appellants. John R. Read, Silas W. Pettit, and H. B. Gill, for appellee.

GREEN, J. On the hearing before the auditing judge, Stephen P. M. Tasker testified as follows: "I was a depositor many years in the Spring Garden Bank. Mr. Kennedy, the president, sent for me, and told me they were about to form the bank into a national bank, and needed paper. He asked me if I could get two notes from my father, for \$5,000 each. My father agreed to it, and sent two notes at \$5,000 each, drawn February 2, 1886, one at four months, and one at five months. They were not to be used at all. One of them (presented by Mr. Freedley) is a renewal of the original one. So is the note presented by Mr. Stone. Neither father nor I ever received any consideration for either note." If the foregoing testimony was true, the transaction was a loan by Thomas T. Tasker of his accommodation note to the bank, and the bank could in no possible circumstances be permitted to recover the money on the note for its own use from the maker. In the case of *Simons v. Fisher*, 5 C. C. A. 311, 55 Fed. 905, it was said by Acheson, J.: "Now, if a bank or its receiver can successfully maintain an action against an innocent maker of a promissory note which came to it by the hands of its own president, who, acting in its behalf and as its representative, procured the note for the accommodation of the bank in the course of its regular business, surely it can only be upon fuller proofs than this record discloses that the bank became a bona fide holder of the note for value." This judgment was affirmed in 28 U. S. App. 95, 12 C. C. A. 125, and 64 Fed. 311. The doctrine is too

manifestly sound to require argument in its support. The learned court below disposed of the testimony by saying that the auditing judge had found that the testimony was untrue, because the notes were successively renewed during the five years following, and that this was a flat contradiction of the testimony that the notes were borrowed by the bank for temporary use. That is all that is said by the auditing judge or the court below on this subject. We are not satisfied with this mode of disposing of either the testimony or the subject. We do not see that it follows necessarily, and as a matter of course, that, if a loaned note is renewed for a number of times, it must be assumed that it never was a loaned note. There may have been sufficient reasons for continuing the loan of the note, just as in the case of individuals who obtain accommodation indorsements from their friends, and continue to renew the paper in the same way through many successive years. So, this bank may have desired to continue this paper in its original shape, either because they had used it to borrow money upon, or to exhibit it as an apparent asset of the bank. We cannot know from anything on the record how the real fact is, but it is not at all satisfactory to have the positive testimony of a party to the original transaction, and who, for aught that appears to the contrary, is a perfectly respectable and truthful witness, swept entirely out of the case, and branded as false, simply by an assumption which may or may not be well founded, and with nothing on the record to sustain it. We cannot but regard it as an extremely suspicious circumstance, in the way of such an assumption, that the books of the bank, being in the custody of the receiver, and therefore entirely accessible, were not produced to explain the original transaction. If the note was really discounted for the maker, as a matter of course the proceeds would have been placed to the credit of the maker, and would have been subject to his check, and if he had needed the money, as must naturally be assumed, would have been drawn out very soon after the discount was obtained. Both the cash account of the bank and the personal account of the maker of the note would necessarily have shown how this was. Yet although the note clerk who was connected with the bank for 15 years was a witness on the stand, and was examined, he gave no testimony on this most important subject. He did give the entries from the discount book for February, 1891, and traced the note back to its immediate predecessor, given in September, 1890. But that testimony was of no value as to the real merits of the controversy. The original transaction occurred in February, 1886, and the absolute and uncontradicted testimony of the man who indorsed the first note fatally challenged the consideration of that note. He swore positively that it was given at the request of the president, as an accommodation to the bank, and that neither his father nor he had ever received any

consideration for it. If this testimony was untrue, the bank had the most ample and satisfactory means of disproving it in its own possession, and was clearly bound to use those means. No explanation is given of this singular omission, and we are at a loss to understand how any valid reason can be given for it. Assuredly, we will not make haste to discredit the positive testimony of a seemingly reputable and truthful witness, who is not contradicted in any respect, and who is not in any manner impeached, by a mere assumption that it is not true, when the bank and its receiver have in their possession the means of proving what the real truth of the transaction was, and fails to use those means. We know of no reason for disbelieving the testimony, and, on the present state of the record, we do not disbelieve it, and certainly cannot sanction a decree founded only upon such a disbelief.

It is rather intimated than decided by the auditing judge that, conceding the truth of the testimony of the witness Tasker, it would tend to establish a fraud on the part of the bank, in which Thomas T. Tasker participated, and therefore he could not escape liability by setting up the fraud. The court in banc very properly says nothing upon this subject. The record is utterly lacking to support such a contention. There is no evidence whatever that anything was said to Thomas T. Tasker upon that subject, or that he agreed to do anything of the kind. The witness does not say that it was intended to use the notes to deceive the bank examiner. It is entirely consistent with his testimony that the bank may have desired to use the notes to borrow money, to be used in the organization of a national bank. But it is not necessary to pursue the discussion, for the simple reason that there is no evidence to support the contention, and neither the auditing judge nor the court in banc bases the decree upon it. We are of opinion that the claim of the receiver of the bank is not sustained, and is not entitled to be paid out of the fund in the hands of the accountants. The decree of the court below is reversed, at the cost of the appellee, and the record is remitted, with instruction to distribute the estate in accordance with this opinion.

FINEBURG v. SECOND & THIRD
STREETS PASS. RY. CO.

(Supreme Court of Pennsylvania. July 15,
1897.)

TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESS.

In an action for injuries, the evidence of J., a witness for plaintiff, was contradictory in itself, and was contradicted by the evidence of five or six persons, and by all the circumstances. With the exception of his evidence, there was none to go to the jury on the charge of defendant's negligence. *Held*, that it was error not to call the credibility of J.'s testimony to the jury's attention.

Appeal from court of common pleas, Philadelphia county.

Action by Emanuel Fineburg, by Esther Fineburg, his mother and next friend, against the Second & Third Streets Passenger Railway Company, for personal injuries caused by defendant's negligence. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Wm. Henry Lex and John G. Johnson, for appellant. Frederick J. Shoyer, for appellee.

WILLIAMS, J. The injury complained of in this case was received while the defendant company was using horses as a motive power for its street cars. The verdict seems to be clearly against the weight of the evidence. This circumstance standing alone is not a ground for reversing the judgment; but the appellant alleges that the verdict may have resulted from the manner in which the case was submitted to the jury, and assigns error to the charge of the learned trial judge. Let us see, first, what case the evidence on the part of the plaintiff presented, and then look at the manner of its submission to the jury. Two witnesses were called by the plaintiff who saw the accident. They were Louis Rosenberg and Hanna Roberts. Rosenberg testified that the plaintiff ran across the street in front of the car, and that, while on or near the defendant's railway track, he fell, with one foot across one of the rails. Before he could lift his foot from the rail, the car was upon him, and his foot was injured. In the same breath he testifies that the distance between the car and the plaintiff, when he fell, was sufficient to have given the driver opportunity to bring his car to a full stop before reaching the place where the boy had fallen. This witness also admits, in effect, that, immediately after this accident happened, he gave an entirely different account of it, and that he then said the boy ran directly in front of the car, and was hit by one of the horses, and thrown down, and received the injury before he could move after falling. Hanna Roberts gave another and different account of the accident. She was at the southwest corner of Third and Catherine streets. The boy was then at the southeast corner of the same intersection. He started to cross over to where she stood, and, when just across the track, fell towards the curb on the side of the street where she was. She started towards him, but, before she could reach him, the car had passed over his foot. She was very near to him as he fell towards the curb, but she was unable to reach him in time. The injury had been inflicted, and the car had passed on, before she had taken the few steps that brought her to the place where he lay. It will thus be seen that the contradictory story of Rosenberg was all the testimony in the case on which a charge of negligence could rest. He was contradicted in regard to every statement tending to show want of care on the part of the driver,

and most effectually contradicted by all the circumstances surrounding the accident. There were three persons on the front platform besides the driver when the boy was injured. Not one of them saw him or knew of the injury till some time afterwards. The seats in the car were all full, but the passengers were equally in ignorance of the boy and his injury. There were two persons standing on the rear platform, who saw the boy picked up after the car had passed, and called the attention of the conductor to the circumstance; but, before they saw the conductor, the boy had been taken off the street. Mrs. Paynter, a witness called by the defendant, gives an account of the accident that harmonizes all the circumstances referred to, and accounts for the fact that none of the passengers or employes saw the boy fall, or knew of his injury at the time. She says she was at her window, two doors from the corner of Third and Catherine streets, and saw the accident. The boy started to cross the street, but, falling behind the horses, he came up against the body of the car, put his hand against it, ran alongside of it for a little, and, while running, fell so that the hind wheel passed over one of his feet. Sherry, with another witness called by the defendant, saw the boy dart out suddenly into the street, and thought he got in front of the horses, but that this was done so quickly as to make it impossible to stop the car to avoid the accident.

With the exception of the testimony of Rosenberg, there was no evidence in this case to justify its submission to the jury. If this testimony, so contradictory in itself, and so thoroughly contradicted by all the other evidence and by all the circumstances before the jury, was to be submitted as sufficient to justify a verdict, its credibility should have been called to their attention. The pertinent facts affecting its credit, and the contradictions of its statements by other witnesses, should have been adverted to. The learned judge alluded to him as an example of a class of witnesses whose testimony sustained the plaintiff's case. But he was not an example of a class. He stood absolutely alone. So far as the facts testified to by him affecting the charge of negligence against the company are concerned, every other witness called on both sides, some five or six in number, testified in a manner that tended with more or less directness to contradict him. In no particular relating to the failure of the driver to do his full duty is he corroborated by a single witness or a single circumstance. The attention of the jury should have been drawn to the situation and credibility of this witness, *Reichenbach v. Ruddach*, 127 Pa. St. 564, 18 Atl. 432; *Lerch v. Bard*, 177 Pa. St. 197, 35 Atl. 714. Slight inaccuracies in reviewing the evidence will not be regarded as error. *Knapp v. Griffin*, 140 Pa. St. 644, 21 Atl. 449. But if the charge is in the

nature of an argument on one side, or is inadequate in its treatment of the questions submitted, such defect will be ground for reversal. *Young v. Merkel*, 163 Pa. St. 513, 30 Atl. 196. There is no complaint of partiality in this case, but of an inadequate presentation of the case to the jury, so far at least as the credibility of Rosenberg's testimony was concerned. This objection is well taken, and may account for the verdict. Why the verdict was not promptly set aside, as against the weight of the evidence, it is not easy to see. The assignments of error are sustained. The judgment is reversed, and venire de novo is awarded.

DEVLIN v. PHOENIX IRON CO.

(Supreme Court of Pennsylvania. July 15, 1897.)

MASTER AND SERVANT—INJURIES TO EMPLOYEE— NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

1. Where employes in a mill permitted articles to accumulate, when not in use, on the floor, and to remain there two weeks or more, and there was a place provided by the employer for their storage, the employer was not liable for injuries to one of such employes who stumbled against such articles and fell.

2. In an iron mill, blooms were lifted from a pit, in which they were cast, by the use of bitts, and carried to a truck. Such bitts would grow smooth by use, and the proprietor of the mill kept on hand a supply of sharp bitts for the use of the workmen. *Held*, that a workman who had attached the bitts to blooms for about two years, and knew when they were unfit for use, and where the sharpened bitts were kept, could not recover for injuries caused by the falling of a bloom while being lifted by bitts which were, as he knew at the time, too smooth to hold the bloom.

Appeal from court of common pleas, Philadelphia county.

Action by William Devlin against the Phoenix Iron Company for personal injuries caused by defendant's negligence. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Carroll S. Tyson and John G. Johnson, for appellant. J. Whitaker Thompson and A. S. L. Shields, for appellee.

WILLIAMS, J. The plaintiff was an iron worker employed by the defendant company. It does not clearly appear how long he had been employed by the defendant, but it does appear that his work had been in the same room, and nearly in the same place, where the accident complained of happened, for two or three years. He had been, at least during all the time now spoken of, one of the gang of men at work in and around a pit in which blooms were cast, and from which they were lifted by machinery, and loaded upon trucks for removal to some other part of the works. As the "fourth man" of this gang, his business was to fasten the tongs upon the bloom which was to be lifted out of the pit, so that it could be

raised and swung over the truck upon which it was to be loaded for removal. This was done by the use of bitts which clasped the bloom so firmly as to sustain its weight while it was being lifted and carried to the truck. On the night of the accident, plaintiff was temporarily acting as "third man," whose business it was to guide the swinging bloom, by means of a long iron hook, into a position directly over the truck upon which it was to be loaded. While he was engaged in this way, the bloom, which was at a red heat, slipped from the tongs and fell to the ground. The plaintiff sprang backwards to escape the red-hot bloom, and fell. Before he could get out of its reach, it struck one of his legs, and he was burned. He says that when he sprang backwards he came in contact with an obstruction on the floor of the mill, which he could not see, and of which he had no knowledge, and that on this obstruction he stumbled and fell. The presence of this obstruction was one of the things he complains of at the trial, and another was the fact that the bitts were too smooth to grasp the bloom with sufficient firmness to support its weight. The defendant requested the learned judge of the court below to direct the jury to find in its favor, for the reason that no negligence on the part of the company had been shown, and because the plaintiff's negligence had contributed to his injury. The learned judge refused this point, and submitted the question of the defendant's negligence upon the evidence relating to the obstruction on which it was alleged the plaintiff fell. This obstruction consisted of a "round" of iron, about six inches in diameter and several feet in length. There was a chain with it, and a few pieces of scrap lying near it. None of these articles belonged to that part of the mill, but had been improperly allowed to accumulate there by the inattention or want of care of the workmen themselves. There was a place provided by the defendant company for the storage of each of these articles when not in use, but they had been suffered to remain for two weeks or more where they were at the time of the accident, greatly to the inconvenience and danger of those working about the pit, as the plaintiff himself testifies. While it was the duty of some of the workmen, it was clearly the right of any of them whose personal convenience or safety might be affected by their continued presence, to see to the removal of these articles to their appropriate places. It appears, however, according to the plaintiff's testimony, that the workmen most interested in their removal continued their work over and around these articles, neither attempting to remove them themselves, nor requesting others to do so for them. The company had constructed its mill according to a common and approved model. It was a safe place in which to conduct their business. If at any point it had been rendered unsafe by the neglect of the workmen to remove rubbish, or by permitting tools to accumulate where they

had dropped them, the negligence was not that of the employer, but of the employé. The trouble was not with the place. Neither the general construction nor the arrangement of its parts was complained of. There was a definite place where the round, chain, and scrap belonged. They did not belong, and they were not intended to be left, on the floor, for workmen to stumble over, but, after use, to be returned to their place of storage, and left there until again needed. The duty of the employer is to provide his workmen with a safe place in which to labor, suitable tools with which to work, and to see that any dangers peculiar to their use are fully made known to them. He has a right to rely on the exercise of common prudence by his workmen in the selection of material from a common stock provided for them, and in the use and care of the tools with which their work is done. *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. 157, 159; *Coal Co. v. Hayes*, 128 Pa. St. 294, 18 Atl. 387; *McCombs v. Railway Co.*, 130 Pa. St. 182, 18 Atl. 613. A workman is bound to take notice of an obvious danger, and cannot be required to continue at work in a dangerous place. *Reese v. Clark*, 146 Pa. St. 465, 23 Atl. 246. The proximate cause of the plaintiff's injury was the fall of the "bloom" from the tongs. The plaintiff says this fall was due to the circumstances that the bitts made use of were worn smooth, so that they did not grasp the mass to be lifted with sufficient firmness. But the plaintiff was familiar with this work. He had been engaged in attaching the tongs and bitts to the bloom for about two years, and knew thoroughly when bitts were unfit for use. He knew, and his employers knew, that bitts would grow smooth by use. In consequence of the knowledge, the company kept a supply of sharp bitts on hand for the use of their workmen; and he knew the fact, and the place where the sharpened bitts were kept in store. It was the duty of the workmen in the pit to discontinue the use of a bitt when it became smooth, and replace it from the general stock with a sharpened one. The plaintiff knew, as he testifies, that the bitts in use at the time of the accident were too smooth to grasp the bloom. Whose duty was it, upon these facts, to make the exchange? Not that of the employer, for his duty was discharged when he furnished the supply of suitable bitts that could be resorted to whenever it was necessary. The practical question when an old bitt became too smooth for use, and when a fresh one was required, was necessarily left to the judgment of those whose business it was to use them. The learned judge of the court below was of this opinion. The use by the workmen of bitts which were unsuitable, which they saw and knew to be so, was negligence that contributed to, if it did not actually cause, the plaintiff's injury. Without this negligence the accident could not have happened. Upon a careful consideration, we are of opinion that the defendant's point should have been answer-

ed in the affirmative. There was no evidence of negligence on the part of the company. There was very clear proof of the negligence of the plaintiff and his fellow workmen, in the presence of the obstruction upon which he stumbled, and in the use of unsuitable bitts, to which all of the witnesses attribute the falling of the bloom. The evidence therefore fully justifies the point presented. *Butler v. Railroad Co.*, 126 Pa. St. 160, 19 Atl. 37. The assignment of error is sustained, and the judgment entered in the court below is reversed.

In re SCHMID'S ESTATE.

In re DUNLAP'S APPEAL.

(Supreme Court of Pennsylvania. July 15, 1897.)

WILLS—CONSTRUCTION—NATURE OF ESTATE—DESCENT AND DISTRIBUTION—RIGHTS OF HEIRS.

1. Testator gave the residue of his estate to his wife, with full authority to sell the same, and execute deeds therefor, and provided that, "if any of the same be left over after her death, I order it to be divided amongst my children, share and share alike." *Held*, that the wife took a life estate only.

2. Where an heir dies after land left by his ancestor is sold under orders of the orphans' court, and confirmation of such sale, but before deed is made, his interest descends as land, and not as money.

Appeal from orphans' court, Lancaster county.

Judicial settlement of the account of Henry Smith and another, administrators de bonis non with the will annexed of the estate of Marks Schmid, deceased. From an order dismissing exceptions to and confirming the report of an auditor appointed to make distribution, Frank M. Dunlap appeals. *Affirmed*.

Frank M. Dunlap is the surviving husband of Emma Dunlap, who was the daughter of Marks and Fredericka Schmid, who resided in Lancaster city, Pa. Marks Schmid died June 24, 1890, leaving a widow and eight children surviving. In his will, after certain items, he directs as follows: "And the residue of my estate, real and personal, and wheresoever found, I give and bequeath unto my dear wife, Fredericka, giving her full power and authority to sell the same, and execute deed or deeds therefor; and if any of the same be left after her death, I order it to be divided amongst my children, share and share alike." Fredericka Schmid, the widow, died June 6, 1895, about five years after the decease of her husband, and her will was proven, in which she directed that the residue of her estate should be divided equally among her eight children, of whom Emma Dunlap was one. After the widow's decease, a large number of properties were sold by order of the orphans' court, upon a petition signed by all the heirs, under the act of June 12, 1893. The purchase money for said properties was to be paid April 1, 1896, and bail given and agreements made

for the fulfilling of the contracts. Emma Dunlap died April 3, 1896, leaving a husband surviving. Afterwards an auditor was appointed, who distributed the fund as real estate, and decided that Frank Dunlap should only have the life estate in his deceased wife's share. Exceptions were duly filed to the report of the auditor, which the court below dismissed. The appellant claims that the fund should have been distributed as personal estate, and that he should have been awarded his deceased wife's share absolutely.

B. Frank Eshleman and B. F. Davis, for appellant. John A. Coyle, for appellees.

GREEN, J. In the case of Brockley's Appeal (Pa. Sup.) 4 Atl. 210, not reported in the state reports, we certainly did hold that an estate precisely like this was an estate for life only. The words of the will in that case were: "I give and bequeath unto my dear wife, Konigunda, all my estate, real and personal, and wheresoever found, at the time of my death, giving her full power and authority to sell the whole or any part of my said real estate, and execute deed or deeds therefor; and in case any of my said estate be left after the death of my said wife I order it to be divided as follows." There the widow sold the real estate to one for \$1,500, and took a lease from him for life at a nominal rent of 1 cent per annum. The \$1,500 was never used by the widow, and the grantee still owed it to her at her death. He was also her administrator, and upon the settlement of his account as such he was surcharged with this amount as a part of the estate left after the death of the widow, and therefore belonging to the children. Upon exceptions filed the court below sustained the auditor's report, and on appeal to this court we sustained the decree in a brief per curiam. We said: "Although Mrs. Brockley did sell the real estate under a power given in the will of her husband, yet it is found as a fact that she did not use any part of the proceeds. She therefore held them as she had held the land, and in the language of the will they were 'left' as a part of the estate of her husband." It will be observed that in that case the widow did exercise in her lifetime the express power given to her by the will "to sell the whole or any part of my said real estate, and execute deed or deeds therefor." Yet, inasmuch as the proceeds of the sale were unused by the widow, we decided that she held them in the same way that she held the land, and gave them to the children as a part of the estate of the testator devised to them by his will. In the present case the widow still continued in the possession and use of the real estate devised to her by her husband up to the time of her death. It was, therefore, a part of his estate in her hands at the time of her death, unused and unsold, and was clearly subject to the operation of the

husband's will under the decision above cited. The words of his will on this subject are, "And if any of the same be left after her death, I order it to be divided amongst my children, share and share alike." This is the precise contingency contemplated and provided for by the will, and we know of no reason why the clear testamentary intent and purpose of the testator should be disregarded. There is no rule of law which requires it to be set aside. Her attempt to dispose of it by will cannot defeat the plain intent of the testator, and, as her will was practically the same as his in designating the persons who should ultimately take the property, there is no real conflict between the two wills on that subject. There will be no profit in entering into an examination of the numerous authorities cited in the argument. None of them really conflicts with the ruling in Brockley's Appeal and in this; and Follweiler's Appeal, 102 Pa. St. 581, is almost precisely the same as these, and so, also, is Zimmerman v. Anders, 6 Watts & S. 218. There are important differences in language and circumstances in the cases in which it is held that the wife took a fee where the devise was similar to that in the present case, but it is not necessary to review them in detail. It is enough to know that the cardinal rule of the interpretation of wills by the intent of the testator will be strictly followed and enforced by our ruling of the present contention.

Regarding the property as the real estate of the husband, the solution of the practical question involved in this contention is very simple. The property had been sold, and the several sales had been confirmed by the orphans' court, but the deeds had not been delivered, on the day of Emma Dunlap's death. Under all the authorities, no conversion was worked, and her interest passed as real estate, and not personal. In re Scott's Estate, 137 Pa. St. 454, 20 Atl. 623; Greenough v. Small, 137 Pa. St. 136, 20 Atl. 558; Overdeer's Adm'r v. Updegraff, 69 Pa. St. 118; Wentz's Appeal, 126 Pa. St. 541, 17 Atl. 875, and many other cases. Said Clark, J., in Greenough v. Small: "It is well settled that an orphans' court sale does not divest the title of the heirs until after confirmation thereof, and conveyance delivered under the order of the court. * * * The sale, even after confirmation, does not divest the title of the heirs of the decedent, for it remains in the power of the court until a deed has been executed and delivered. Until then the heirs' right to maintain ejectment even against the purchaser has not gone. * * * Until then no conversion takes place, and if the heir of the decedent dies, even subsequently to the confirmation of the report of sale, but before the deed, his interest descends as land, and not as money." Further discussion is unnecessary. The assignments of error are dismissed. Decree affirmed, and appeal dismissed, at the cost of the appellant.

**SMITH, Sheriff, v. ALTOONA & P. OON-
NECTING R. CO.**

(Supreme Court of Pennsylvania. July 15,
1897.)

**EXECUTIONS—SERVICE ON PUBLIC CORPORATIONS—
MILEAGE.**

1. Act June 16, 1836, § 72, providing that all executions against a corporation shall be executed as follows: "The officer charged with the execution of such writ shall go to the * * * principal office of such corporation * * * and demand of the * * * officer having charge of such office, the amount of such execution,"—authorizes the sheriff to serve execution against a public corporation by making demand at its principal office, wherever it may be, within the state, though section 73 of said act, authorizing sequestration of the corporation's property on return of nulla bona, is superseded by Act April 7, 1870, authorizing issue of a special *fi. fa.* on such return.

2. Under the provisions of the fee bill act, that the officer "shall have travelling expenses on each writ for each mile travelled," mileage is taxable on each of several writs served at the same time on the same defendant, there being a different plaintiff in each case.

Appeal from court of common pleas, Clearfield county.

Action by Frank Smith, sheriff, against the Altoona & Phillipsburg Connecting Railroad Company, to recover fees. Judgment for plaintiff. Defendant appeals. Affirmed.

J. B. McEnally and D. W. McCurdy, for appellant. W. C. Miller, for appellee.

DEAN, J. All the facts in this case appear in the case stated. On them the learned judge of the court below entered judgment for plaintiff, and defendant appeals. The appeal raises but two questions: (1) Had the sheriff authority, and was it his duty, to execute his writs by going outside the boundaries of Clearfield county to the principal office of the corporation in the city of Philadelphia, and there make demand? (2) If he had such authority, does the law authorize him to charge fees for service of each writ, and mileage thereon?

The first question is answered by an interpretation of the act of June 16, 1836, for it is conceded that if the sheriff was not authorized by that act to go to the general office of the corporation, outside his bailiwick, to make demand, he had no such authority at common law, nor by any other statute. The seventy-second section of that act enacts: "All executions which shall be issued against a corporation, shall be executed in manner following, to wit: (1) The officer charged with the execution of such writ, shall go to the banking-house, or other principal office of such corporation, during the usual office hours, and demand of the president or other chief officer, cashier, treasurer, secretary, chief clerk, or other officer having charge of such office, the amount of such execution with legal costs." While detached personal and other property of the corporation, after demand thus made, could be seized and sold on the writ, the franchises and corporate property necessary to the operation of a public or quasi public corporation could not be. By the seventy-third

section, however, on return of nulla bona as to the whole or part by the sheriff the court was authorized to appoint a sequestrator to sequester the goods, chattels, and credits, rents, issues, and profits, tolls and receipts, from any road, canal, bridge, or other works, property, or estate of such corporation. This enabled the execution creditors to reach the franchise and earnings of the company, the incorporeal hereditament; but, as an indispensable prerequisite, demand at the principal office was enjoined. The end sought is so obvious that no argument can obscure it. The proceeding authorized would take from the owners the entire corporate property, and place it in possession of a trustee for creditors. Before such a result—the complete transfer of property from the owner to his creditor—was effected, every principle on which "remedy by due course of law" is based required reasonable notice to the owner; and, very properly, the notice, to be effective, must be to those officers who have been intrusted by the stockholders with the management of the property. In the case of all carrying corporations, the corporate property might be in several counties, and the principal office in but one. No matter in which county the judgment may be entered, to answer its purpose the notice should be served on those officers having the management of the property; and the act expressly assumes that they will be found at the principal office, without regard to its location. And so stood the law until the act of April 7, 1870, which authorized a special *fi. fa.* to issue from the court only on application, commanding the sheriff to levy on personal, mixed, or real property, franchises and rights of such corporation, and sell the same; the levy to extend to and cover the property, franchises, and rights of such corporation in any and every county of the commonwealth, wherever the same might be; the levy and sale to have the same effect as though the property was located in the county where the writ issued. This superseded the proceedings by sequestration under the act of 1836, and it has been so decided in many cases, from Philadelphia & B. Cent. R. Co.'s Appeal, 70 Pa. St. 355. In 1872, the year after the passage of the act, down to East Side Bank v. Columbus Tanning Co., 170 Pa. St. 1, 32 Atl. 539, decided only one year ago. But the act of 1870 left untouched the preliminary proceedings directed under the seventy-second section of the act of 1836. Before sale of the property and franchises of the corporation under the act of 1870, demand must have been made at the principal office of the company, and return made by the sheriff, after which the special *fi. fa.* commanding a sale could issue. In *Guest v. Water Co.*, 142 Pa. St. 610, 21 Atl. 1001, our Brother McCollum very clearly shows the proceeding by special *fi. fa.* under act of 1870 was only a substitute for that provision in the act of 1836 which authorized sequestration. To the same effect are *Mausel v. Railway Co.*, 171 Pa. St. 606, 33 Atl. 377, and *Reynolds v. Lumber Co.*, 169 Pa. St. 626, 32 Atl. 537, and other cases.

Now, it must be conceded that at common law the sheriff would have had no authority to go outside the territorial limits of Clearfield county, and serve or make demand on this writ at the office of the company in Philadelphia. And it must be further assumed that the intention of the legislature to abrogate the common law by a statute must plainly appear,—more plainly, indeed, than its intention to repeal a prior statute. As stated by Judge Endlich in his work on Interpretation of Statutes (section 127), "All statutes in derogation of the common law, or out of the course of the common law, are to be strictly construed." But, even strictly construed, in view of the subject and purpose of the act of 1836, it seems to us clear that the legislature intended to enlarge the territorial jurisdiction of the sheriff in executing this particular writ. Without a restatement of the distinguishing features of public and private corporations, fully noticed in *Foster v. Fowler*, 60 Pa. St. 27, it is sufficient to say that this defendant, a railroad company, is a public corporation, which by law must have an office within the state, and a corporation whose functions so immediately concern the public that any interruption in the exercise of them must greatly inconvenience and damage the public; and further, being purely a common carrier, under its grant or franchise it could lawfully hold little or no property not indispensable to the exercise of its franchise. Prior to the act of 1836 the general property of such a corporation could be taken in execution and sold, the same as the property of an individual, but under the decision in *Ammant v. Turnpike Co.*, 13 Serg. & R. 210, it was, in substance, decided that, without a court of chancery, there could be no appropriation by the creditor of the franchise; and the hardship to the creditor in permitting the corporation to go on exercising its franchise by the collection of tolls, and perhaps accumulating profits, at the same time contracting debts which it refused to pay, was remarked on by Chief Justice Tilghman, who suggested that the remedy was exclusively for the legislature, and at the same time expressed the hope that the legislature would afford such remedy by statute. We have no doubt that this was the very mischief intended to be done away with by the act of 1836, and the franchise which before that time could not be reached by the creditor was placed within his grasp. And the remedy was confined to public corporations alone, because, from the very nature of their organization and functions, the mischief which demanded statutory remedy was peculiar to them. In fact, as stated by Judge Noyes, who rendered the judgment in the common pleas in *East Side Bank v. Columbus Tanning Co.*, 170 Pa. St. 1, 32 Atl. 539, it was doubtful if there was a private business corporation in existence in 1836. Therefore the intention of the act of 1836 was to create a distinct and appropriate method of procedure, whereby sequestration could be had of the

earnings of public corporations for the benefit of their creditors without disturbing them in the exercise of their corporate operations. But it was not intended that the corporate property should be immediately taken from the possession of the corporation officers and turned over to a sequestrator. Detached property, not necessary to conducting its public business, might be seized; but of this, as already noticed, there probably would be little or none. The sheriff was directed to serve and make demand on his writ at the principal office of the corporation, and then make return to the court, if his writ remained unpaid in whole or in part; and then came the appointment of the sequestrator. It is obvious that, in most cases, demand at the principal office had no graver consequences than the service of a rule to show cause why a sequestrator should not be appointed. The method of procedure accomplished the same end which would have been attained by a court of chancery in England when the creditor sought the aid of that court in the collection of his debt against a public corporation.

The return by the sheriff that his writ was unpaid, while it did not, beyond question, establish the insolvency of the corporation, did establish that all the property of the corporation was out of the reach of the creditor, except the franchise, and now the way was opened to get at that by sequestration, and sequestration could not be had until after demand at the principal office. Nor can the special *fi. fa.*, instead of it, under the act of 1870, issue without the precedent service of *fi. fa.* and demand at the principal office, issued under act of 1836. The whole proceeding is harmonious, appropriate, and, from the circumstances, well adapted to effect the purpose. It is highly favorable to the corporation, and somewhat burdensome to the creditor. But counsel for this appellant argues that the sheriff had no authority to go beyond the limits of his county; that it was his duty, if he found no principal office of the company within that county, to return his writ *nulla bona*, and thereupon it was the duty of the court to direct the special *fi. fa.* for the sale of the franchise and property of the corporation under the act of 1870. Under such limitation of the authority of the sheriff, there might have been a seizure and sale without the knowledge of the company. It might then very well have argued that such could not have been the intention of the act of 1836, but that the sheriff should have gone outside of his county for service of the writ at the principal office. The literal reading of the act does not limit the authority of the sheriff to any less territory than the boundaries of the commonwealth. It is not a case where by implication the authority is enlarged beyond the express language, but one where we are asked to say that by implication the authority is restricted within county bounds. Having in view the old law (the common law), the mischief, and the remedy, we hold that the act

of 1836, relative to *n. fas.* issued on judgments against public corporations, authorizes the sheriff to serve his writ and make demand at the principal office of the corporation, wherever the principal office may be situated within the commonwealth.

The complaint of appellant because of the taxation of fees and mileage on each writ is not sustained. The act known as the "Fee Bill Act" expressly says that the officer "shall have travelling expenses on each writ for each mile travelled." While it is decided that, where a number of writs between the same parties are executed at the same time by the officer, but one mileage is taxable, yet, as held by the learned judge of the court below, following *Terry v. Gregg*, 26 Pittsb. Leg. J. 94, this has no application to this case, where in each there is a different plaintiff. The judgment is affirmed.

MALONE v. LANCASTER GAS LIGHT & FUEL CO. et al.

(Supreme Court of Pennsylvania. July 15, 1897.)

GAS COMPANIES—ULTRA VIRES.

A corporation organized for the purpose of "manufacturing and supplying illuminating and heating gas" may deal in appliances for the consumption of gas as well as for its manufacture and distribution.

Appeal from court of common pleas, Lancaster county.

Bill by R. A. Malone, a stockholder in the Lancaster Gas Light & Fuel Company, for himself and for such other stockholders as may desire to become parties, against the Lancaster Gas Light & Fuel Company and others, directors and stockholders of said corporation, and other defendants unknown to plaintiff. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The following are the assignments of error, viz.: "(1) The learned court erred in its finding of fact (found in the opinion under 'Conclusions of Law') as follows: 'In order to distribute heating gas, there are required, not only pipes for the conveying of gas, but also, in our opinion, all other necessary appliances and fixtures for its reception and use by the patrons of the company. Gas stoves and gas heaters, therefore, are indispensable to the use of heating gas, and therefore are not foreign to nor inconsistent with the objects for which the company was incorporated.' (2) The learned court erred in its conclusion of law as follows: 'The application for the charter of the gas company says that the corporation was formed for the purpose of manufacturing and supplying illuminating and heating gas to the public in the city of Lancaster. This is, in effect, in our opinion, a charter to furnish heat as well as to furnish light to the citizens of this place.' (3) The learned court erred in its conclusion of law as follows: 'We hold, therefore, that the gas company had legal authority

to purchase the right to the use of the Backus heater as a part of its franchise.' (4) The learned court erred in its conclusion of law as follows: 'The increase, in our opinion, was not only regularly and lawfully made, but it was made for a valuable consideration, and that the effect has been without any prejudice to any of the rights of the plaintiff, or to any interest of the gas company.' (5) The learned court erred in not finding, as matter of law, as requested by plaintiff, as follows: 'That the increase of the capital stock of the gas company to the amount of \$125,000, and the increase of its bonded indebtedness to \$72,600, both issued for the license to use the Backus portable steam heater, radiating mantel and gas consuming appliances (neither of which purposes is within the chartered powers of the gas company, nor covered by the purposes for which said gas company was incorporated), are illegal and void.' (6) The learned court erred in entering the following decree: 'And now, April 5, 1897, it is ordered, adjudged, and decreed that the bill of R. A. Malone, plaintiff, against the Lancaster Gas Light & Fuel Company and John I. Hartman, P. T. Watt, H. S. Williamson, John A. Coyle, J. Gust. Zook, J. D. Skiles, J. Fred. Sener, N. M. Woods, D. McMullen, H. M. North, J. O. Hager, W. U. Hensel, P. B. Shaw, and J. H. Baumgardner, directors and stockholders of the said corporation, defendants, be dismissed, and that the costs of the said proceeding be paid by the plaintiff.'"

George Nauman and John E. Malone, for appellant. D. M. McMullen, Brown & Hensel, and H. M. North, for appellees.

MITCHELL, J. There is very little contest in this case over the facts or the law; the real controversy turning on the inferences to be drawn from the facts proved. It is a stockholder's bill to enjoin the issue of new stock and the increase of the corporation's bonded indebtedness, upon two grounds: First, that the increase is not in good faith for the purposes and in the interests of the corporation, but in pursuit of a scheme to acquire control of the corporation, and run it in the interest of a rival; and, secondly, that the new debt is to be created for the purchase of certain patent appliances, not for the manufacture or distribution of gas, but for its consumption, the dealing in which appliances is not within the company's charter purposes. It is beyond dispute that the increase of the stock and the bonded debt was duly authorized by the stockholders under all the formal requirements of the law; but plaintiff charges, on the first branch of the case, that the increase was procured fraudulently by the defendants other than the gas company, who, being stockholders, owners, and directors in the Edison Company, a rival electric light and heat company, acting through their agent, Shaw, bought up a majority of the shares in the Citizens and also in the Lancaster Company, and, having thus obtained control of the latter, issued the new

stock and bonds nominally to buy the Backus patent heating apparatus, but in reality to raise money to pay for the stock of the Citizens Company previously secured on options, and intended to be merged in the Edison for the profit of the latter. Of course, the burden of proof of such charge was upon the plaintiff, and it is sufficient to say that we agree with the learned court below that there was no evidence which in any degree sustained it. The agency of Shaw for the other defendants was affirmatively disproved both by him and them, and it was shown that 10 of the 14 defendants were not stockholders, owners, or directors of the rival company, the Edison, at the time Shaw acquired the control of the stock of the Lancaster Company, charged to be in the interest of the Edison. On this branch the complainant's case entirely failed of proof.

The second branch of the case raises a mixed question of law and fact, namely, the authority of the Lancaster Gas Company to purchase the right to use and deal in the steam heater, radiating mantel, and gas-consuming appliances covered by the Backus patents. It is argued for plaintiff that the charter purpose of the gas company is limited by the words "manufacturing and supplying illuminating and heating gas," and that nothing can be included which is not a necessary part or appliance for manufacturing or supplying. This is too narrow and literal a construction, and overlooks the fundamental object of the corporation,—the manufacture and supply of gas to customers for profit. It would be of no use to manufacture gas if there were no customers to buy, and hence the company may fairly supply, not only the gas itself, but, incidentally, such appliances and conveniences as will induce new customers to use gas, or old ones to use more. This is a legitimate mode of extending the company's business, in direct furtherance of its charter object. In considering such questions, much weight must be allowed to the judgment of the parties most interested,—the officers and stockholders of the corporation itself; and while they will not be permitted, as against the commonwealth or a dissenting stockholder, to go outside of their legitimate corporate business, yet, where the act questioned is of a nature to be fairly considered incidental or auxiliary to such business, it will not be unlawful because not within the literal terms of the corporate grant. This is the general rule even where corporate privileges are most strictly construed. "Corporations may transact, in addition to their main undertaking, all such subordinate and connected matters as are, if not essential, at least very convenient, to the due prosecution of the former." *Green's Brice, Ultra Vires* (2d Ed.) p. 86, c. 3, § 2, par. v. The illustration given by Mr. Brice is that railway companies may erect refreshment rooms or book stalls, and "adopt other similar measures for both providing for the comfort of their customers and adding to their own receipts." The American illustrations in the same line, which have

revolutionized modern travel, will occur to every one. In *Brown v. Winnisimmet Co.*, 11 Allen, 328, it was held that the contract of a ferry company to charter one of its boats for temporary use in another business was valid. Many illustrations are suggested in the opinion of Bigelow, C. J., who said: "We know of no rule or principle by which an act creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into contracts and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient, or profitable in the care and management of the property which it is authorized to hold." See, also, *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315. And in our own case of *Watts' Appeal*, 78 Pa. St. 370, a land company's charter purpose was to sell a large tract of land; but it was authorized, *inter alia*, "to aid in the development of the minerals and other materials," and also "to promote the clearing and settlement of the country." The directors, among other things, built sawmills and an hotel. It was held that their acts were not *ultra vires*; *Gordan, J.*, saying (page 392): "We know of no other material upon these lands more abundant or more obviously requiring development than the timber. Neither can we conceive of anything better calculated to develop this kind of material than sawmills. So we regard an hotel of some kind in so large a territory of wild lands as not only a convenience adding greatly to the settlement of the country, but a necessity." In the present case the stockholders of the gas company, by an almost unanimous vote, decided that the purchase of the Backus patents was to the advantage of the company's business as a manufacturer and distributor of gas; and the court below has found, as a matter of fact, that they were right. We cannot say, as matter of law, that they were wrong. Decree affirmed, with costs.

BAKER v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. July 15, 1897.)

CROSSING RAILROAD—CONTRIBUTORY NEGLIGENCE.

An adult with the senses of sight and hearing unimpaired, who, attempting in broad daylight to cross the three tracks of a railroad, is struck by a train on the last track, is guilty of contributory negligence; she having had an unobstructed view of the track, on which it was approaching, for 70 feet before she went on the first track, for 224 feet before going on the second track, and for 900 feet before going on the third track.

Appeal from court of common pleas, Perry county.

Action by Isaac Baker against the Pennsylvania Railroad Company for death of plaintiff's wife. Judgment for plaintiff, and defendant appeals. Reversed.

L. E. Atkinson and B. F. Junkin, for appellant. Chas. H. Smiley and Chas. A. Barnett, for appellee.

DEAN, J. Susan Baker, the wife of plaintiff, on 26th of September, 1892, was a passenger, west bound, on defendant's road, her destination being Losh's Station, where she arrived after daylight in the morning. When the train stopped at the station, she was aided in alighting on the platform by the conductor. At the time she had a basket on her arm. At that point there are three tracks. The north is for west, and the south for east, bound trains. The middle one is used principally for standing cars. There is a platform for passengers, along both north and south tracks, to accommodate east and west bound travel. A public road crosses the railroad at grade at the east of the platforms. Thirty-seven feet west of this a plank footwalk, five feet four inches wide, also crosses the railroad between the platforms, at grade. When last seen on the platform where she alighted, deceased was starting, with her basket on her arm, to walk across the footwalk in the direction of her home. She was not again seen by any witness until Wetzell, the fireman on the Keystone Express, running east towards the crossing, saw her. He testified that the engineer blew the whistle of the locomotive at the whistling post, a quarter of a mile west of the crossing, and then he (the fireman) commenced ringing the bell, and was ringing it when, at about 200 yards from the crossing, he saw Mrs. Baker, on the footwalk between the rails of the middle track. He did not think she would attempt to cross, but, as she did not stop, he hallooed to her. The engineer sounded the danger signal, but she kept on, and, with her foot on the south rail of the east-bound track, she was struck and killed. Although cars were standing on the middle track for some distance, the nearest one to her was about 70 feet west; so that her line of vision, when she stepped from the platform, extended along the east-bound track at least 160 feet. Every step in the direction she was going extended that vision, so that, when she reached the middle track, she could see up the east track at least 300 feet, and, just before she stepped over the first rail on the east track, she could see along it 900 feet. Her husband (this plaintiff) brought suit for damages, alleging negligence on part of defendant in permitting the cars to stand at that point on the middle track, whereby the view to the west by those using the crossing was obstructed, and in not giving warning by whistle or bell of the approaching train. As to the last point, several witnesses who were within hearing distance testified that they heard no sound. The defense was that ample warning was given, and

that the track was visible for a considerable distance, notwithstanding the cars on the middle track; and, further, if defendant were negligent, the uncontradicted evidence showed that deceased was guilty of contributory negligence; therefore there could be no recovery. The learned judge of the court below submitted the evidence as to negligence of defendant and contributory negligence of deceased to the jury. There was a verdict for plaintiff, from which defendant appeals, preferring several assignments of error. In our view, it is only necessary to discuss one of them.

The court was requested to instruct the jury that, under all the evidence, the plaintiff could not recover. This was declined. The purpose of the point was to secure an affirmance of defendant's averment of contributory negligence on part of deceased. The opinion of the learned judge of the court below on this question appears from this excerpt from the general charge. He says: "It is a reasonable rule, and one founded on public policy, that every person about to cross the tracks of a railroad company must stop, look, and listen before they attempt to go across, and they must not do this in a mere casual way, but must make an honest effort to see and hear, and thus avoid danger. Did Mrs. Baker do this? There is no evidence in the case that she did, and none that she did not. The law further presumes that every person exercises that ordinary care which is necessary to protect them from injury; that the love of life and health are such that every individual will exercise that care which would protect them from injury and death. But it is not a violent presumption, and it is one which may be overcome by surrounding circumstances; and, if from them you conclude that she did not stop, look, and listen, then she could not recover, neither can her husband recover." Was this correct instruction, in view of the undisputed facts? In broad day, an adult, with the senses of sight and hearing unimpaired, was about to cross three tracks of a railroad. A train was approaching a quarter of a mile distant. She could see it 70 feet off before she set foot on the track nearest her. Before she got off that track, she could see it for 160 feet. Before she put her foot on the next, the middle track, she could see it 224 feet distant. Before she stepped on the track whereon it was coming, she could see it 900 feet distant. Nevertheless, she stepped on the track, and was instantly killed. If she stopped and looked before she stepped on that track, she saw the train. If she did not stop and look, she was guilty of contributory negligence. If she stopped and looked, she saw it, and was negligent in attempting to cross before it passed. On the undisputed facts, there is no escape from the conclusion of contributory negligence. The presumption is that she stopped and looked. If we conclude that the presumption is not rebutted, then follows the inevitable one that she attempted to cross with a locomotive in full view.

The engineer and fireman both testify they saw her when 200 yards off, and, while they expected her to stop, she did not stop. As soon as they were conscious that she would persist in crossing, the brakes were put on, and the danger signal given, but too late. As to giving the signal, one of plaintiff's witnesses, working near by, corroborates them. No witness contradicts them. The probability is that she saw the train coming, and hastened to cross in front of it. But, however that may be, to leave the question to the jury was not submitting to them a disputed fact, but permitting them to find against the undisputed facts. It is argued that it was an inference from facts to be drawn by the jury. So it was in a certain sense. If one man aims a loaded pistol at another, and pulls the trigger, and the one aimed at falls with a bullet through his head, it is an inference that the one who pointed the pistol killed him, but it is the only inference to be drawn from the circumstances. So here there were but two inferences that could be drawn from the facts. Each unerringly pointed to contributory negligence. The jury should have been so instructed, and a verdict rendered for defendant. There are some close cases on this question of contributory negligence,—cases where it is difficult to draw the line between the functions of the court and jury; but this is not one of them. The judgment is reversed.

UEBERROTH v. UNANGST.

(Supreme Court of Pennsylvania. July 15, 1897.)

ASSUMPSIT—NECESSARY PARTIES.

Judgment for plaintiff cannot be sustained in an action by an administrator for the amount of intestate's life insurance in excess of what he owed defendant, it being agreed that it was assigned to defendant's wife; that, to the amount of the debt, it was collateral security therefor; and that the money was paid her by the insurance company,—and no claim being made to the balance by defendant, but it being claimed by him that intestate gave the balance to defendant's wife, and that he was merely holding it for her; she being a necessary party for the determination of the question of her right to retain it.

Appeal from court of common pleas, Northampton county.

Action by A. George Ueberroth, administrator of J. J. Ueberroth, deceased, against Eugene P. Unangst. Judgment for plaintiff. Defendant appeals. Reversed.

O. H. Myers and W. E. Doster, for appellant. Harry C. Cope, for appellee.

MITCHELL, J. This case displays a disregard of all known rules of procedure remarkable even in this day of loose and unscientific practice. The record shows no pleadings at all, properly so called, and the case came on for trial on the plaintiff's affidavit of claim and defendant's affidavit of defense. The former set out that plaintiff's

intestate was indebted to one Graham upon a promissory note, as collateral for which were pledged two policies of insurance upon the debtor's life; that the defendant bought the note from said Graham, who thereupon re-assigned the policies of insurance to the debtor, and the latter, at the request of defendant, assigned them to his daughter, defendant's wife, to hold as security for the payment of the debt; that on the death of plaintiff's decedent the insurance company paid the amount of the policies to the assignee, defendant's wife, who thereupon indorsed the check and gave it to defendant, who received the money and has refused to pay it over to plaintiff, though demand for it, less the amount due on said debt, has frequently been made. The affidavit of defense admitted the purchase of the note by defendant from Graham; the assignment of the policies to defendant's wife as security for the debt, including, however, in the debt the premiums subsequently paid to keep the policies alive; the payment of the money by the insurance company to defendant's wife, and the delivery of the check to defendant. So far there was no material conflict between the two affidavits, but the defendant then further averred that the assignment of the policies by plaintiff's decedent to defendant's wife was in writing and absolute, and that the surplus of the proceeds, after repaying defendant his advances of money, with interest, were, in consideration of natural love and affection, given by the decedent to his daughter (defendant's wife) for her own use and benefit; and that the said surplus received from the insurance company was the property of defendant's wife and held by him subject to her direction, and partly invested in her name. Of course, these affidavits, whose substance I have presented, stripped of irrelevant and immaterial matters, raised no definite issue, though they are perhaps sufficiently equivalent to a general issue on a plea of non assumpsit to enable us to get over this objection, if it was the only one. But unfortunately when the case came to trial in this slipshod form it was thrown into the jury box as if it were a formal issue between the defendant's wife and the administrator of her father's estate upon the right of the former to retain the proceeds of the policies of insurance (after repayment of the moneys advanced by her husband) as a gift from her father. This is the real controversy in the case, but there are neither pleadings nor parties upon which such an issue can be determined. It is admitted by both sides that the proceeds of the policies were first to be applied to the reimbursement of defendant's advances, and neither in the so-called pleadings nor in the evidence does it appear that he claims any further title or has any further interest in such proceeds, while his wife, who does claim them, and whose title is disputed, has not been made a party to be heard in her own behalf. This is not a mere formal defect, which was waived by going to trial, or which can

be cured by amendment now. The money was in the wife's hands under a written assignment by her father, and, whatever her title may prove to be as against her father's heirs, as between her and the defendant it is her money, and he is her debtor for the amount of it. Should he happen to die first, or should the question of her rights as a creditor arise in his lifetime, her claim could be incontestably established by his affidavit of defense and his testimony, as well as by the other evidence in this case; and his payment of this judgment would be no defense against her, for she is not a party, and not bound by it. He and his estate are therefore in legal as well as substantial danger of having to pay the same debt twice. But as the undisputed facts, upon the evidence of plaintiff as well as defendant, show that there was no cause of action at all against the defendant, the judgment cannot be allowed to stand. Judgment reversed.

In re WISE'S ESTATE.

(Supreme Court of Pennsylvania. July 15, 1897.)

GIFT CAUSA MORTIS—EVIDENCE.

Gift by husband to wife, shortly before his death, of securities, is established by testimony of disinterested persons to the actual delivery of the box containing the securities, and the subsequent continued possession by the wife, and decedent's repeated declarations, about the time of the gift, that all his property was to be his wife's, and that he regretted he had not made a will giving it all to her.

Appeal from orphans' court, Cumberland county.

In the matter of the estate of Joseph Wise, deceased. From a decree dismissing exceptions to and confirming the report of the auditor appointed to report as to whether Catherine Wise, administratrix, had failed to charge herself with all the personal estate of decedent, Edward J. Wise, one of the heirs, appeals. Affirmed.

H. S. Stuart and S. M. Leidich, for appellant. H. H. Mercer, for appellee.

MITCHELL, J. Transactions by which a decedent, shortly before his death, practically strips himself of all his available property, are naturally regarded with suspicion, and are to be scrutinized with a keen and somewhat incredulous eye. An alleged parol gift, therefore, from a husband to a wife, under such circumstances, should be proved by clear and convincing testimony. The claim in the present case, however, appears to have met this requirement. Two disinterested witnesses testified to the actual delivery of the box containing the securities, and the subsequent continued possession by the wife. Three other witnesses testified to decedent's repeated declarations, about the time of the gift, that all his property was to be his wife's, and one, at least, to his regret that he had not made a will giving it all to her. We do not regard this as

conflicting with the fact of a gift of the securities, because the evidence shows that the decedent had real estate, and perhaps some other personal property, that was not included in the gift, but would have passed by a will. These declarations would not, of course, establish a gift, but they are confirmatory of the intent with which the actual delivery of the securities testified to by the other witnesses was made. The evidence, as a whole, was sufficient, if believed, to sustain the claim of a gift. The auditor and the judge below believed it; and we have not been convinced that they were in error in so doing. Decree affirmed, with costs.

WOECKNER v. ERIE ELECTRIC MOTOR CO.

(Supreme Court of Pennsylvania. July 15, 1897.)

INJURY TO CHILD—RECOVERY BY PARENT—NEGIGENCE—EVIDENCE.

1. A parent, in an action for loss occasioned by injury to his child, can recover only for pecuniary loss sustained by him, and cannot recover for attention paid the child by other members of the family, which did not occasion him any expense.

2. Evidence is not admissible, in an action by a parent for injury to a child in a street, that on other occasions she had been allowed to play on the streets unattended; it appearing that in charge of an elder sister, old enough to be a reasonably competent care taker, she had been allowed to cross the street, and, after returning to the door of the house, had disobeyed the directions of her sister to follow her, and, unobserved, had run into the street, and on her escape being discovered, within a minute or two, her brother had been sent after her.

Appeal from court of common pleas, Erie county.

Action by E. A. Woeckner against the Erie Electric Motor Company. Judgment for plaintiff. Defendant appeals. Reversed.

S. A. Davenport and J. M. Sherwin, for appellant. T. A. Lamb and Brainerd & Higgins, for appellee.

FELL, J. The objection that, in estimating the damages, the jury was not confined to the pecuniary loss sustained by the plaintiff, is well founded. In an action by a parent to recover for loss occasioned by the injury to his child, the measure of damages is the pecuniary loss to him. His action is for the injury done him, not for the injury done his child, or for the loss or inconvenience to other members of his family, whose cares and burdens have been increased. It is based upon his duty to maintain, protect, and educate his child, and on his right to the earnings of the child during minority. The elements to be considered in assessing the damages are the expenses which he has incurred or is likely to incur in the support of the child on account of the injury and the loss which will probably result to him from the decrease in the earnings of the child to which he is entitled. These principles were fully recognized by the learned judge in his charge, but, by the an-

swers to points and the admission of testimony, the jury was allowed to consider, as elements of damage, the increased inconvenience and trouble caused other members of the family. The duties performed by them in the care of the injured child cost the plaintiff nothing, and caused him no pecuniary loss, and they cannot be made the ground of a recovery by him. It was said in the opinion in *Goodhart v. Railroad Co.*, 177 Pa. St. 10, 35 Atl. 192: "The expenses for which a plaintiff may recover must be such as have actually been paid, or such as, in the judgment of the jury, are reasonably necessary to be incurred. The plaintiff cannot recover for the nursing and attendance of the members of his own household, unless they are hired servants. The care of his wife and minor children in ministering to his needs involves the performance of the ordinary offices of affection, which is their duty; but it involves no legal liability on his part, and therefore affords no basis for a claim against a defendant for expenses incurred." If the increased attention required by the child had deprived the plaintiff of the services of other members of his family in his business, and thus caused him direct pecuniary loss, his claim for compensation would rest on substantially the same ground as if he had been required to employ additional help; but for the mere inconvenience to others, not affecting him pecuniarily, there can be no recovery.

To permit a child who is not of an age to understand and avoid danger to wander on the streets of a city unattended is such negligence on the part of parents as will defeat a recovery by them. Permission was given to prove that the child, on the occasion when she was injured, had been permitted to go on the street without a proper care taker. The offers of testimony rejected were to show that on other occasions she had been allowed to play on the streets unattended. This testimony would have been relevant had there been an issue whether, on this occasion, she was doing what she had habitually been permitted to do. But no such issue was raised. It was undisputed that she had escaped, and attempted to cross the street, notwithstanding the exercise of some care and vigilance by her parents. The circumstances were clearly shown, and there was no conflict in the testimony as to them. In charge of an elder sister, old enough to be a reasonably competent care taker, she had been allowed to cross the street, and, after returning to the door of her father's house, she disobeyed the direction of her sister to follow her, and, unobserved, ran into the street. Her escape was known within a moment or two, and an elder brother was sent after her. She was injured before he could reach her. As to this there was no dispute, and it was not error to exclude testimony to show that on other occasions she had not been protected from injury. The question whether her parents had exercised proper care on this occasion was very fully and fair-

ly submitted to the jury. The judge could not have said, as matter of law, that their negligence prevented a recovery. The first, second, fourth, and nineteenth assignments of error are sustained, and the judgment is reversed, with a venire facias de novo.

BOYD v. AMERICAN CARBON-BLACK CO. et al.

(Supreme Court of Pennsylvania. July 15, 1897.)

CORPORATIONS—PARTNERSHIP—ACCOUNTING—PARTIES—ADEQUATE REMEDY.

1. Though a corporation cannot legally enter into a partnership, yet, it having done so, it must account to the other partner, who has fully performed all the obligations of his contract.

2. A decree cannot be made, affecting one not a party to the suit.

3. Where one brings suit against a corporation as an individual member of a partnership between it and him, the fact that he is a stockholder and director in it does not authorize him, in such suit, to assert his rights as a stockholder.

4. Where a remedy by action at law would be cumbersome and inconvenient, it is inadequate, so as to authorize suit in equity.

Appeal from court of common pleas, McKean county.

Suit by Giles H. Boyd against the American Carbon-Black Company and others. Bill dismissed, and plaintiff appeals. Reversed.

Eugene Mullin, T. F. Mullin, J. P. Mullin, and E. W. Mullin, for appellant. Berry & Edgett, for appellees.

DEAN, J. By an agreement of June 18, 1891, Giles H. Boyd, the appellant, formed a partnership with the appellee the American Carbon-Black Company. Boyd was to furnish gas to the company from his lands in Seargeant township, McKean county, for the manufacture of carbon-gas black, at one-half cent per pound of all black manufactured at works to be erected by the company; he to have an option to acquire one-fifth interest in the company on paying one-fifth the cost of constructing and operating the plant. This interest he afterwards took. By a subsequent agreement, dated February 13, 1892, he stipulated not to sell gas to any other person or company for the manufacture of carbon black, gas black, or lamp black, from the same premises. In consideration of this, the company released him from the obligation of drilling more wells, which he had assumed under the first agreement. On March 11, 1892, the carbon-black company, theretofore only an association of individuals, was duly incorporated for the purpose of manufacturing "carbon black," etc.; and Boyd subscribed and paid for 50 shares of the capital stock, of the par value of \$100 per share, and then was duly elected a director. The corporation, by the name of the American Carbon-Black Company, succeeded to all the rights of the partnership under the two agreements. On April 5, 1893, another agreement was entered into between Boyd and the

corporation, by which it was stipulated that the parties to the agreement would erect another factory of a daily capacity of 30 barrels at Gallagher, Pa., the expense to be borne equally by Boyd and the corporation; the corporation agreeing to manufacture carbon black from surplus gas from Boyd's lands, market it, and divide the profits equally with Boyd; they to jointly drill gas wells. Accordingly a factory of 30 barrels' daily capacity was erected and put in operation. But in December, 1895, the corporation partly stopped operations at the second plant, and in June following suspended altogether at that point. Neither would it permit Boyd to operate it. In the meantime adjoining owners drilled wells, and are draining the gas underneath Boyd's lands. After stopping operations at Gallagher, the corporation entered into an agreement with the Columbian Black Company, another corporation, to sell to the Columbian all the black it manufactured at 4 cents per pound, and that the two corporations should divide profits and losses after deducting three-fourths of a cent per pound for expenses and losses, and that the American Carbon-Black Company should close down its factories for one year from January 1, 1896, and would manufacture, when running, to only one-half its capacity, on notice at any time from the Columbian. On October 5, 1896, Boyd filed a bill in equity against the American Carbon-Black Company and its officers, praying, on the facts as we have, in substance, stated them: (1) That the several agreements between him and the company, and the one between the two companies, be declared void, and that they be ordered to deliver them up for cancellation; (2) that an account be taken of all the rents, royalties, and profits properly due plaintiff, as well as his proportionate share of the money improperly paid to the Columbian Company; (3) that the partnership between him and defendant be declared dissolved, and an account be taken; (4) that a receiver be appointed to take charge of the partnership property, books, and business; (5) that defendants be decreed to pay whatever balance was found due; (6) that defendants be restrained by injunction from taking gas from plaintiff's land; (7) general relief. The defendants filed a general demurrer to the jurisdiction, and further demurred specifically on the grounds (1) that plaintiff had an adequate remedy at law for all his alleged complaints; (2) that no such partnership as averred by him could be lawfully entered into by a corporation, and therefore equity would not take jurisdiction either to decree dissolution, an account, or the appointment of a receiver. The court below, after argument, sustained the demurrer and dismissed the bill. From that decree we have this appeal.

Of course, the demurrer admits the truth of the averments in plaintiff's bill. We have, then, the facts that the contracts of partnership were made by the plaintiff with the corporation of which he was a stockholder and director, and a gross violation by defendants

not only of the contract of partnership, but of the contracts made with him for the purchase of gas from his premises by the partnership. The principal reason given by the learned judge of the court below for sustaining the demurrer is that the contract of partnership by the corporation was *ultra vires*; that no corporation has authority to share its corporate management with natural persons, in a partnership. And for this, ample authority is cited, and the rule cannot be questioned. But, conceding the full force of this rule, does that deprive the plaintiff, on the facts, of all remedy in equity? Assume that the partnership has not now, and never had, a legal existence. That is only because one of the partners had no power to enter into it. But, while it had no legal existence, it had one in fact, and the other partner fully performed. The corporation had the full benefit of the contract up to the time it concluded that it was more profitable to violate its agreements. 2 Beach, Priv. Corp. § 842, says: "It may be considered *prima facie ultra vires* for an incorporated company to enter into a partnership with other persons." But all the authorities hold that, notwithstanding the *prima facie*, if it be shown that the other partner had fully performed his obligations under the contract this plea will not avail. "A corporation may not avail itself of the defense, *ultra vires*, when the contract has been in good faith fully performed by the other party, and it has had the full benefit of the performance and of the contract." 27 Am. & Eng. Enc. Law, p. 363; Mor. Corp. § 688; Wright v. Pipe-Line Co., 101 Pa. St. 204; Oil Creek & A. R. R. Co. v. Pennsylvania Transp. Co., 83 Pa. St. 160.

Taking, as we must, every material averment of plaintiff's bill as an admitted fact, the defense, if it should prevail, would work a palpable injustice. While public policy demands that the courts should declare such contracts by corporations unlawful, and that they will make no decree which prolongs their life in fact for a single day, every principle of equity demands that the corporation receiving a benefit from such contract shall account for what it has received from him who has fully performed. The contract is not *malum in se*, but only *malum prohibitum*. It was illegal, but not iniquitous. If the corporation has had the benefit of \$15,000 paid by Boyd for the construction of the second plant, has received the proceeds of the manufactured product, and has used and continues to use his gas, it ought to and must account. It is wholly immaterial whether the partnership be declared dissolved because it is illegal to carry it on, or it be declared at an end in fact because of want of power on part of the corporation to enter it; in either case the plaintiff is entitled to his property in possession of defendants, and whatever money they have received more than their share. As they allege that the contracts with plaintiff were illegal, they can claim no rights of possession of the whole partnership assets, and plaintiff's prop-

erty under them, and must deliver them up to be canceled. As to the agreement with the Columbian Company, the court below properly held that, as that company was not a party to this suit, no decree affecting it could be made. In so far as the American Carbon-Black Company has made contracts with other parties injurious to its stockholders, such contracts are not involved in this issue. Plaintiff's plea here is as an individual member of an alleged partnership, and our decree is on that issue alone. While the fact that he was a stockholder and director in the corporation confers no authority on the corporation to defraud him in partnership transactions with itself, neither does that fact confer on him authority in this issue to assert his rights as a stockholder. It is possible, on the averments in the bill, plaintiff might have sustained an action at law, but, at best, that form of remedy would have been cumbersome and inconvenient, and therefore would not have been adequate. *Brush Electric Co.'s Appeal*. 114 Pa. St. 574, 7 Atl. 794. It is therefore directed that the decree of the court below, sustaining the demurrer and dismissing the bill, be reversed, and that plaintiff's bill be reinstated and taken pro confesso. Further, that the partnership which was in fact entered into and carried on between plaintiff and defendants under the three several agreements marked Exhibits A, B, and C be declared at an end, and that said contracts be surrendered by defendants for cancellation; that an account be taken of all the rents, royalties, income, and profits due plaintiff from said defendants, according to said contracts; that all the business of said partnership in fact be wound up, and all the assets of the same be turned into cash, and an account be then stated between the parties, and distribution of the cash be made as in and by the said contracts the parties have a right to demand; and that proper decrees for enforcing payment according to said distribution be made on the parties by the court below. It is further directed that under the equity rules a receiver be appointed by the court below to take into his possession the, in fact, partnership property, books, and accounts, to the end that a settlement may be had of its business, and that such further and other decree or decrees be entered by the court below as will promote equity between the parties, in accordance with this opinion. It is further ordered that appellees pay the costs of this appeal.

SHEELEY v. NEIDHAMMER.

(Supreme Court of Pennsylvania. July 15, 1897.)

WILLS—CONSTRUCTION—ESTATE TAIL.

Testator first provided, "I sell my * * * farm to my sons S. and W. for \$7,000," and of this he gave \$2,000 to each of the sons, and charged them with the balance, to be paid the estate. Next he directed that S. have possession of and operate the farm, and from its income

pay the money charged on it. Then he directed that, after the charges were paid, "W. is to receive the proceeds of the said one-half of the undivided farm, but is forever prohibited from selling the said half." And finally he says: "Nevertheless, the said W. to receive the proceeds during his natural life, and, when the children or legal heirs of the said W. come to the age of 21 years or more, then the said half * * * to belong to the children or legal heirs of the said W., forever." *Held*, that the devise created in W. an estate tail, enabling him to pass the entire estate, and bar the entail.

Appeal from court of common pleas, Cumberland county.

Action by W. H. Sheeley against J. R. Neidhammer for specific performance. Decree for plaintiff. Defendant appeals. Affirmed.

W. F. Sadler, for appellant. Caleb Brinton and L. S. Sadler, for appellee.

WILLIAMS, J. The single question presented by this appeal is, what estate did William H. Sheeley take in "the homestead farm," under the will of his father? The provisions of the will from which an answer to this question must be gathered are four in number. In the first of these the testator says: "I sell my homestead farm to my sons Samuel and William H. Sheeley for seven thousand dollars;" and of this sum he gives \$2,000 to each of the sons, and charges them with \$3,000, the balance of his valuation of the farm, to be paid to his estate. In the second provision he directs that Samuel shall have possession of, and operate, the farm, and pay out of the income derived therefrom the money charged upon it. The third provision directs that, after the charges upon the farm are all paid, "the said William H. Sheeley is to receive the proceeds of the said one half of the undivided farm, but is forever prohibited from selling the said half or any part of the said undivided farm, forever." By the fourth provision, the testator undertakes to define the interest he wishes William H. to have under his will, by these words: "Nevertheless, the said William H. Sheeley to receive the proceeds during his natural life, and, when the children or legal heirs of the said William H. Sheeley come to the age of twenty-one years or more, then the said half of the said farm to belong to the children or legal heirs of the said William H. Sheeley forever." If we take these several provisions together as expressive of the intention of the deviser in regard to the homestead farm, we are led to the conclusion that Samuel was to have a fee simple in an undivided one-half of it, and the possession and right to operate the other half so long as William lived. Until the \$3,000 charged on the farm was paid, Samuel was to use the entire net proceeds for their payment. After this was accomplished, one-half of the net proceeds was to be paid by him to his brother William so long as he lived. After William died, the title to the undivided one-half was to vest in his "children or legal heirs," and come into their possession when they became 21 years of age if their father was then deceased. But the father took only

for life, and with a distinct denial of the right of alienation. The trouble in the way of carrying out the apparent intention of the testator is in the words employed to vest the remainder after the termination of the life estate. The words are to "his children or legal heirs." The words "legal heirs" are in this connection equivalent to "descendants," and the entire phrase has the force of the word "issue." After the death of William, the undivided half fell upon his issue, as such. A gift to the issue of any person is a gift to the "heirs of his body." Both forms of expression embody the same idea. *Linn v. Alexander*, 59 Pa. St. 43; *Duer v. Boyd*, 1 Serg. & R. 203. If not so read, the words "or legal heirs" become meaningless. It was not the intent of the testator to provide an alternate class of distributees, but to secure to William's children, or their children or representatives, the one-half of the farm; and the words "or legal heirs," coupled with the word "children," expresses just this thought. It was the children, or other legal heirs descending, of William H. Sheeley, who were to take the fee after the termination of his life estate. *Braden v. Cannon*, 24 Pa. St. 168. The words employed by the testator must therefore be regarded as words of limitation, and having the same effect as a devise to one for life and to the heirs of his body in fee simple. *Haldeman v. Haldeman*, 40 Pa. St. 27. Such a devise would create in the first taker an estate tail, which, under the rule in *Shelley's Case* and our statute, would enable him to pass the entire estate and bar the entail.

It may be, and we think it very probable, that this construction defeats the intention of the testator, but such is the common result of the application of the rule in *Shelley's Case*. It is a highly artificial rule of construction, applied without regard to the actual purpose of the testator. Its wisdom is a question about which lawyers and judges differ, but it is too thoroughly imbedded in the law of this state to justify the courts in departing from it. If this is to be done, it must be by legislative action, so as not to disturb estates in which it has been already applied. The decree is affirmed; the appellant to pay the costs of this appeal.

In re THOMPSON'S ESTATE.

(Supreme Court of Pennsylvania. July 15, 1897.)

WILLS—PROPERTY LIABLE FOR DEBTS.

Testator gave his wife all his personal property, except as otherwise disposed of, and directed that she "take possession thereof immediately after my death, without inventory or appraisement," and hold it as her own "absolutely." He also gave her some land in fee and some for life. By the eighth item of his will, he made provision for payment of his debts out of certain specified property. Held that, on such property proving inadequate, the residue of the personality given the wife was liable, it being not specifically bequeathed and primarily liable for debts.

Appeal from orphans' court, Juniata county.

Petition by John Adams and another, executors of the estate of Jerome N. Thompson, deceased, for a decree defining and settling the contributory shares of the devisees and legatees to the unpaid debts out of the bequests and devises held by them respectively, to which the various devisees and legatees filed answers. From a definitive decree overruling exceptions to and confirming the report of an auditor designating the personal property bequeathed testator's widow, Jane Thompson, as the fund primarily liable for the payment of such debts, she appeals. Affirmed.

The will is as follows: "First. I confirm my wife, Jane Thompson, in the ownership of the farm situated in Walker township, bounded by lands of Daniel Zeigler, Isaac Auker, Reuben Diehl, and my home farm, said farm having been bought from George Pile, and desire that she shall retain the same as her own in fee simple. Second. I give and bequeath to my wife, Jane Thompson, all my personal property, except as hereinafter disposed of, and direct that she shall be entitled to take possession thereof immediately after my death, without inventory or appraisement, and hold the same as her own absolutely; and I direct my executors to deliver to her the bonds I hold against Charles A. Thompson, and request her not to distress him by insisting upon their payment if he secures their payment to her. Third. I give and devise to my wife, Jane Thompson, a lot in Mexico, having a brick house erected thereon, bounded on the west by Main street, on the south by the road leading to the dam, and on the north by lot of Austin Parker, said lot having been formerly owned by Dr. Cyrus McCurdy, to hold in fee simple. Fourth. I give and devise to my wife, Jane Thompson, my farm in Walker township, upon which I now live, bounded by lands of Charles Book, Reuben Diehl, Palmer Shellenberger, Jane Thompson, the village of Mexico, and the Juniata river, including the woodland which extends out to the land of Daniel Zeigler, for the term of her natural life; and at her death I give and devise said farm and woodland to Charles A. Thompson in fee simple, subject, however, to the payment of twenty dollars per annum to the elders of the United Presbyterian Church of Thompsonstown and Mexico, which said sum of twenty dollars per annum I direct to be applied to fencing and keeping in order the cemetery on the hill east of Mexico, in which my father and mother are buried; and I charge said annual payment of twenty dollars on said farm and woodland forever. Fifth. I give and devise to Jennie T. Wright my interest in the land, being one-half, which I own in common with John Motzer, in Walker township, bounded by lands of Josiah Gingrich, James Adams, Alton S. Adams, Lewis Haubert, and others, and the public road, to hold in fee simple. Sixth. I give and bequeath two of the bonds, of five hundred dollars each, which I hold against Charles A. Thompson, to the elders of the United Presbyterian Church

of Thompsonstown and Mexico, the interest thereof to go to the support of the regular pastor or supplies, & there is no pastor of said church, forever; and, if said bonds are paid, I direct the principal of said sum to be safely reinvested, and the interest applied to the same objects. I direct that the bonds bequeathed in this item shall not be collected by legal process as long as Charles pays the interest annually, and keeps them well secured. Seventh. I give and bequeath to Charles A. Thompson the eight-day clock which belonged to my father, James Thompson, deceased, and which now stands in our family room at my home. Eighth. I direct my executors herein-after named to sell all my real estate not specifically hereinbefore devised, at public or private sale, upon such reasonable terms as to them shall seem proper; and I authorize and empower them to make good and sufficient deeds therefor. I direct my just debts and funeral expenses to be paid out of the proceeds of said real estate, and I bequeath the residue of said proceeds of said real estate to my nephew, Wm. Porter Thompson, and my nieces, Martha Rumbaugh and Emma Wright, and the niece of my wife, Jennie T. Wright, share and share alike, each to receive the one-fourth thereof. Ninth. I appoint my friends John Adams and H. Latimer Wilson executors of this, my last will."

A codicil to the foregoing will: "I hereby limit the interest given in the fourth item of my will to Charles A. Thompson in my mansion farm to an estate for life, to begin after the death of my wife, Jane Thompson, with the remainder to his children; but, if he should die without leaving children to survive him. I then devise the remainder of said mansion farm to the sons of my nephew, W. Porter Thompson, to wit, Jerome N. Thompson and James G. Thompson."

The opinion of the orphans' court is as follows (Bell, P. J.):

"The auditor was clearly right in his conclusion that the testator, Jerome N. Thompson, had not in contemplation the question as to what property, aside from those mentioned in the eighth item of his will, should first be subject to the payment of his debts. His thought evidently was that he had made ample provision for all indebtedness in said item eight. The contingency of such provision proving inadequate seems never to have occurred to his mind. This being so, we think the auditor correctly decided that the indebtedness remaining unpaid, after the property mentioned in item eight had been exhausted, should be imposed on the fund primarily liable for the payment of debts, to wit, the personal property not specifically bequeathed.

"At the argument it was contended that the use of the word 'absolutely,' as qualifying the ownership of the widow in the personal property bequeathed to her, indicated an intention on the part of her husband that she should take said property free from liability for debts. But the better opinion would seem

to be that said term 'absolutely' was used, not in the sense imputed to it by counsel for the widow, but in contradistinction to the phrase employed in item fourth, 'for the term of her natural life,' as limiting the devise of real estate. 'Absolutely' was intended to define the duration and extent of the widow's estate; was employed to guard against the idea of a life estate only; had no reference to the question of debts, because that question had not occurred to the testator.

"Another reason urged at the argument why the personal property bequeathed to the widow should not be compelled to bear the burden of testator's unprovided for indebtedness was the use of the expression, 'She shall be entitled to take possession thereof immediately after my death without inventory or appraisalment.' This contention is not without some seeming force, but is not of sufficient weight, we think, to turn the scale in favor of the widow. If the testator had intended to give a preference to his widow in this matter of what property should be primarily liable for debts, he could have so indicated by the use of a few simple words. Why should he adopt the roundabout method of so indicating such purpose by saying that there was no need of an appraisalment? Was not the idea of the testator in dispensing with an inventory rather that as he had made ample provision, as he thought, for his debts, in item eighth, and as his wife was to have almost all the personal property, the holding of an appraisalment would be but an idle ceremony, annoying possibly to her, and subserving no useful purpose? The possible contingency of the insufficiency of the assets mentioned in item eighth to satisfy his indebtedness had not entered the testator's mind. Hence he made no reference to such contingency, and made no provision for its happening. But the present controversy has arisen because of the happening of this very contingency, unthought of and unprovided for by the testator; and, as we have before said, we see no other way of settling the question than by having recourse to the elementary principle that the primary fund for the payment of debts is personal property not specifically devised. In *Ann Myers' Appeal*, 48 Pa. 26, there was a similar provision that the wife should 'retain' as much of the personal property 'as she chose,' without an appraisalment, but the supreme court did not deem this a controlling feature in the case. This is all we deem necessary to add to what has been said by the auditor, in his report, on the question as to what property shall make good the deficiency arising from the fact that the property mentioned in item eight proved insufficient to pay the debts.

"The fee of the auditor does not strike us as excessive. Therefore the exception to the amount of same is overruled. But we think the executors and their counsel should be allowed some additional compensation. As the widow is the principal remaining creditor, the

executors will have little to do except to disburse some \$1,000, to be provided them by the widow. For such service \$35 should be ample compensation. Mr. McMeen, their counsel, prepared the papers on which this present proceeding was founded, and it will be incumbent on him to see that the estate is properly wound up. He likewise appeared in two suits against the estate. For such services he should be paid \$87.50. The report of the auditor is modified by adding thereto, as indebtedness of the estate: Due executors in full of their compensation, \$35; due Robert McMeen, Esq., in full of his compensation, \$87.50. With such modification the report of the auditor is confirmed absolutely, the exceptions to same being overruled; and it is ordered and decreed that the widow of said decedent, out of the personal property bequeathed to her in item second in said will, pay said indebtedness, set out in said auditor's report. Should any further decrees be necessary to effectuate the present order, due application for same can be made to this court."

Atkinson & Pennell, for appellant. J. C. Bucher, Will L. Hoopes, and J. Howard Neeley, for appellee.

PER CURIAM. It is unnecessary to recite the facts upon which the questions involved in this contention depend. They are sufficiently presented in the opinion of the learned president of the Twenty-Fourth judicial district, who specially presided at the hearing. From a careful consideration of the record, we are all satisfied there was no error in holding that the personal property bequeathed by the testator to his widow is primarily liable to payment of the residue of his debts, and in decreeing accordingly. There is nothing in the record that would justify us in sustaining any of the specifications; nor do we think any of the questions involved require further discussion; they have been sufficiently considered and correctly disposed of by the court below. For reasons given in the opinion referred to, the decree is affirmed, and appeal dismissed, at appellant's costs.

HARTMAN v. HARRIS et al.

(Supreme Court of Pennsylvania. July 15, 1897.)

RAILROAD CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE.

One struck, just as he goes on the crossing, by an engine coming from a direction in which he had not looked since 35 feet from the track (he having been looking for a train which he expected from the opposite direction), though he could have seen a distance of 855 feet in the direction from which the engine came, is barred from recovery, by contributory negligence.

Appeal from court of common pleas, Cumberland county.

Action by Jacob Hartman against John S. Harris and others, receivers of the Philadel-

phia & Reading Railroad Company, for personal injuries. Judgment for defendants. Plaintiff appeals. Affirmed.

J. W. Eckels and F. E. Beltzhoover, for appellant. J. W. Wetzel, for appellees.

GREEN, J. This case was nonsuited in the court below, on the ground of the plaintiff's contributory negligence. If that ruling was proper under the evidence, the judgment should be affirmed; otherwise, it should be reversed. The plaintiff approached the track on the morning of the 9th of October, 1895, between 7 and 8 o'clock. According to his own testimony, he reached a point 35 feet distant from the track, and there stopped, and looked both ways, and listened for an approaching train, which he knew to be due there at about 8 a. m. He did not see or hear any train or engine approaching. He had traveled the road very frequently, and was well acquainted with the schedule time of the next regular train. The train he was expecting approached from the east, and its schedule time was 8:10. He drove his horse on a walk from the point 35 feet distant, and, without stopping again, he went on the track, and was immediately struck by a locomotive coming from the west, with tender in front and caboose behind. He said he heard the danger signal whistle at the cattle chute, which was 186 feet distant, and, upon turning to look, the train was on him. It is manifest that the question of his contributory negligence turns upon his actions at and after leaving the point 35 feet distant, and also upon the physical situation along that distance. He had thrown back both of the side doors of his wagon at a point 300 feet distant, and kept them open, so that he could easily see and hear in either direction along the track from his wagon. At the point 35 feet distant from the track, there was a signboard set up, with the words "Railroad Crossing" on it. The plaintiff was asked: "Q. When you were at the point 35 feet from the railroad track, how far could you see west? A. Down to below the station. Q. You mean west of the station? A. Yes, sir. Q. How far could you see west of the station? A. Well, we can see down to where the next curve starts,—about 855 feet. Q. At a point 35 feet from the railroad track, you could see 855 feet, according to your engineer's measurements? A. Yes, sir. * * * Q. Then, we understand you that from any point 35 feet north of the track, until you reach the track, if you had looked, you could have seen an approaching train as far as the station west? A. Yes, sir, as far as the station." The plaintiff's engineer testified that it was 855 feet from the road crossing where the accident occurred to the point at which the curve commenced. This being the physical situation, the plaintiff was asked: "Q. Did you look up and down after you left that 35-foot point? A. As I drove, I was looking and listening all the while. Q. Look-

ing both ways? A. I was looking for that passenger train. Q. Did you look westward after you left the 35-foot point? A. I suppose, one time after I first stopped, I was looking that way, and then my attention was drawn the other way, on account of that passenger train coming in. * * * Q. Do you know now whether you looked westward at any time after you left the 35-foot point? A. When I started to go, I was looking westward. Then my attention was drawn the other way, on account of the approaching train from the other side. Q. Was there a train approaching from the other side? A. The time was in my mind that a passenger train was about due. I knew it was near eight o'clock, or just eight." The plaintiff's account of the accident was given thus in his testimony: "I was looking down towards Harrisburg, and, just as my horse got right on the track, he made a spring. I grabbed up the lines as well as I could, and took a better grip, and at the same time I looked out towards my right; and to my astonishment there was an engine with the tender in front coming towards me at a furious rate of speed, and in less time, or in about two seconds, I would suppose, because I don't know whether I drew my breath once or twice; and in less than no time— Of course, the whistle was sounded right at the cattle chute. Q. What sort of a whistle? A. A kind of a toot, toot,—a shrill whistle. Of course, that made the horse all the worse. I seen the condition I was in, and had not a moment's time to realize what to do or where to go, when I was struck, in about from the time I first seen the train and heard the whistle, and until I was struck, in about two seconds or three seconds." "Q. How far away were you from the railroad track when you heard the danger signal? A. Right on the track. Q. Did your horse stop on the track? A. It jumped down the track. * * * Q. You say you were driving your horse on a walk from 35 feet until you reached the track? A. Yes, sir."

It is perfectly manifest from the foregoing testimony that, when the plaintiff left the point 35 feet distant, he never once looked in the direction from which the engine was approaching; that he was going on a walk only; that he went directly upon the track, without again stopping or looking, and was immediately struck. He could see in that direction a distance of 855 feet, but, because he did not look, he did not see. He says, what was no doubt the fact, that he was looking in the opposite direction for a train that he was expecting, but which was not yet due, and he admits that it was this that diverted his attention to that side. As a matter of course, it was very unfortunate that he omitted to look in the opposite direction, and it is perfectly obvious that, if he had done so, the accident would not have occurred. The case is extremely plain, and is readily disposed of by a consideration of the plaintiff's testimony only. The

learned court below was clearly right in granting the nonsuit, and in refusing to take it off. No other course was open without a clear disregard of the large number of cases which have thoroughly settled the law applicable in just such circumstances. The assignments of error are dismissed. Judgment affirmed.

HANLON v. PHILADELPHIA & W. C. TURNPIKE-ROAD CO.

(Supreme Court of Pennsylvania. July 15, 1897.)

RAILROAD ON TURNPIKE—NEGLIGENCE—LIABILITY OF LESSOR.

1. It is a question for the jury whether the conductor and engineer on a steam dummy were negligent; the railroad being on a turnpike, one side of which was used for teams, and there being evidence that they, when 30 or 40 yards from a team, saw that the horses were frightened, and, instead of stopping, blew off steam as they proceeded.

2. A turnpike company is liable to one driving a team thereon for negligence in the operation of a passenger railroad thereon which it owns, though it has leased the railroad.

Appeal from court of common pleas, Philadelphia county.

Action by Alexander Hanlon against the Philadelphia & West Chester Turnpike-Road Company for personal injuries. Judgment for plaintiff. Defendant appeals. Affirmed.

J. McGregor Gibb and A. Lewis Smith, for appellant. Samuel Gustine Thompson, for appellee.

DEAN, J. The plaintiff, Alexander Hanlon, was sitting on top of a load of hay, which he was bringing into Philadelphia. His son was on a seat attached to the front of the wagon, driving the two horses. They had turned in from Coopertown road to the Philadelphia & West Chester Turnpike road. Upon this road there was a passenger railway operated by means of steam dummies, consisting of a combined steam engine and passenger car; the engine being at one end, and the car, with the usual projecting platform, at the other. The track was laid on the south side, leaving a space of at least 20 feet, which was the driving part of the road. Plaintiff had driven 25 or 30 yards from the toll gate when a dummy was seen coming in the opposite direction. The horses took fright, and, plunging around, broke the front wheels of the wagon, and ran away. Plaintiff was thrown to the ground and seriously injured. He testified that in plain view of the conductor and engineer, only 30 or 40 yards distant, his horses took fright; that he signaled them to stop, but they disregarded him, smiled in his face as if they enjoyed it, and made no effort to shut off the escaping steam, the cause of the fright. His son also testified to reckless indifference of those in charge of the engine when the horses began to rear and plunge. Averring that his injury was caused by negligence of defendant's conductor and engineer in operating the engine in the manner they did when they saw his peril, plain

tiff brought suit. At the trial the court submitted the evidence to the jury on the question as to whether negligence, under the circumstances, should be imputed to defendant. The jury found for plaintiff, and defendant appeals, assigning 10 errors to the charge of the court and answers to points. The substance of all those alleging error in submitting the evidence is embraced in the tenth. The court said to the jury: "If the people managing the car ought to have seen it [the fright of the horses], and did see it, and should have stopped their car, as prudent men, but went on and failed to stop it, thus causing the consequence which resulted, then they would be liable."

It necessarily must be a rare case where negligence can be imputed to a steam-railroad company because horses on a highway have taken fright at the escaping steam, ringing of the bell, or sounding of the whistle of the locomotive. Such noises are the inevitable consequences of steam propulsion, and one of the inconveniences to which the traveler by horseback or vehicle must submit. The public demand steam railroads. They cannot accomplish their purpose without at times affrighting animals on the highway. To say that, under ordinary circumstances, if an engineer sees a team of horses on the highway, giving evidence of fright, he must stop until the driver has quieted them, would be so palpably unreasonable that it would be a waste of words to discuss the question. Nor does appellee so contend. Appellant only assumes that this is the argument. The circumstances here are not the usual or ordinary ones from which spring accidents and injury from affrighted horses. The Philadelphia & West Chester Turnpike Company was incorporated to construct, and did construct and operate for many years, a turnpike road between Philadelphia and West Chester through an open country. This, of course, was for public travel on foot, and by horses and vehicles. Then the Delaware Passenger Railway was incorporated to construct a passenger railway on the roadbed of the turnpike company, with authority to operate it; both turnpike and railway to be operated at the same time,—neither one to the exclusion of the other. The railway was constructed and put in operation. Then, by special act of March 18, 1866, the turnpike company was given authority to purchase all the property rights and franchises of the railway company. The purchase was made, thus uniting in this defendant the franchises for both methods of travel on the same original turnpike bed or roadway; the turnpike company continuing to take tolls and operate the turnpike. Clearly, by this juxtaposition of the two methods of travel on the same line continuously between the two points,—the defendant collecting tolls from the public, and rental on the railway,—the relative rights and duties of those using the same highway by the two different methods, under one corporation, must be distinguished from the ordinary case of a traveler on a highway wholly independent

of a steam railway, which he only occasionally approaches. The roadbed in the case before us is intended to be used in common by the locomotive and the hay wagon. In the exercise of care, the driver of the locomotive is acting under wholly different circumstances from those attending the driver of a locomotive on an independent steam railroad. While here, so far as appears, the railway was not constructed for the passage of ordinary vehicles upon its tracks, and the right to use them for such purpose did not exist, yet the right to each to use its own trackway, alongside the other, on a common roadbed, the turnpike, must be conceded. To that extent the principle announced in *Ehrisman v. Railway Co.*, 150 Pa. St. 180, 24 Atl. 596, and the cases following it, is applicable: "So long as the right of a common user of the tracks exists in the public, it is the duty of the passenger railway companies to use such watchful care as will prevent accidents or injuries to persons who, without negligence on their own part, may not at the moment be able to get out of the way of a passing car. The degree of care to be exercised must necessarily vary with the circumstances, and therefore no unbending rule can be laid down." Here there was no common use of the track. There was a common use of the turnpike roadbed by steam and horse power side by side. There could be no negligence in running the locomotive in the usual method, nor in the mere fact of blowing off steam. Every driver of horses on the turnpike took the risk of fright and injury from such causes. But if, as there was testimony tending to prove, the engineer, running at the rate of three miles an hour, saw the horses take fright when he was 30 or 40 yards off, then recklessly blew off three or four spurts of steam when he approached nearer, as if to aggravate the terror of the horses and create an enjoyable spectacle for himself,—this, too, on a turnpike where plaintiff had as much right to safe passage as he,—we think, on such evidence, the question as to whether there was care according to the circumstances was for the jury. Not a single one of the cases cited by appellant has any bearing on the facts to establish which evidence was given in this case. *Yingst v. Railway Co.*, 167 Pa. St. 438, 31 Atl. 687, was the case of an electric railway company's cars frightening a horse which had safely crossed the railway on a road. There was no evidence of any reckless or wanton conduct on the part of the motorman. Says our Brother Green, in delivering the opinion: "The motorman was not responsible for the fright of the horse at sight of the car. He was not bound in advance to take precautions against a fright of which he had no knowledge, at least until he saw some evidence of the fright." Nor was this engineer guilty of any negligence here because the ordinary use of the steam affrighted the horses; but it was negligence to causelessly blow off steam to aggravate their fright when he approached nearer. The engineer and conduct-

or in their testimony contradict the plaintiff and his son, but this conflict of statement was for the jury. We can only say there was evidence for their consideration on the question of negligence. Whether running the locomotive reversed required a greater degree of care than head front was also a question for the jury, which the court, in a decided expression of opinion in favor of defendant, properly submitted to them. If there was any error in the language of the court, that "if the people of the car ought to have seen the fright of the horses," it did defendant no injury, for the conductor, in his testimony, admitted that he actually saw them in fright 75 to 100 feet distant. This was what plaintiff testified to, in substance, when he said the locomotive was 30 to 40 yards distant when the horses took fright. The jury could not, therefore, have based their finding on a presumption of fact, when both sides positively proved the fact. Taking the charge and answers to points as a whole, we are unable to discover any error which calls for a reversal.

It is urged that the defendant had, before the accident, leased its railroad to the West Chester Traction Company, which last-named company was then operating it; therefore the lessee alone was answerable, and not the defendant. Assuming it had authority to lease its franchise and property,—of which there is no evidence,—it did so for a compensation, a rental of \$12,000 per year. It still maintained its corporate organization, and only bargained with another company to run its railroad. No law is pointed out whereby the lessor, by the mere contract of letting, can exempt itself from corporate liability to the public. Undoubtedly there may be a statutory exemption from such liability, but the lessor cannot create such exemption, as against the public, by a mere contract with a third party to operate the road. The contract itself does not undertake to stipulate for such exemption and imposition of liability on the lessee; but, even if it did, such right to contract is not evidenced by any grant from the commonwealth, the creator of the defendant corporation. See *Van Steuben v. Railroad Co.*, 178 Pa. St. 374, 35 Atl. 902; *Nelson v. Railroad Co.*, 28 Vt. 721; *Railroad Co. v. Brown*, 17 Wall. 450. We think the court below committed no error in refusing to affirm appellant's second point, wherein the court was asked to instruct the jury that as, at the date of the accident, its lessee was operating the railroad, there could be no recovery against defendant. So the sixth assignment of error is overruled, and the judgment is affirmed.

CABOT v. KENT et al.

(Supreme Court of Rhode Island. July 13, 1897.)

GUARANTY—CONSTRUCTION.

Time is the essence of a guaranty to take back and pay the par value of stock upon January 1, 1895; hence the makers of such a guaranty are not bound to pay for the stock tendered after said date.

37 A.—60

Action by Arthur W. Cabot against Edwin F. Kent and another. Demurrer to plaintiff's declaration sustained.

Hayes & Hayes, for plaintiff. Wilson & Jenckes and Edwards & Angell, for defendants.

MATTESON, C. J. This is assumpsit on a guaranty in writing, which reads as follows: "Providence, R. I., February 9, 1894. Arthur W. Cabot, Esq., Providence, R. I.—Dear Sir: In consideration of your taking stock (fifty shares, of one hundred dollars par value each) and entering the employ and service of the Kent & Stanley Co., we do hereby guaranty you not less than six per cent. per annum in interest or dividends upon your investment for the present year, and also to take back said stock, and pay par therefor, upon January 1st, 1895, should you so elect. Arthur W. Stanley. Edwin F. Kent." The plaintiff has acknowledged satisfaction of the amount due for interest or dividends as provided in the guaranty. The declaration avers that the date January 1, 1895, was not inserted in the guaranty as an arbitrary date on which the plaintiff was to make an election, nor was it intended to be, nor was it, of the essence of the contract, but it was used as a date about when the books of the company would be balanced and the condition of the company ascertained, so that the plaintiff would have some basis for his election when made; and that on January 1, 1895, the plaintiff was unable to ascertain the condition of the company; and that, as soon thereafter as he did learn of its condition, he tendered the stock to the defendants, and demanded of them the amount of the par value thereof, to wit, \$5,000, etc. The defendants have demurred to the declaration: (1) Because it appears by it that the plaintiff did not elect to return the stock prior to January 1, 1895; and (2) because time was of the essence of the contract declared on.

The obligation assumed by the defendants in reference to the stock was to take it back on January 1, 1895, if the plaintiff elected to have them do so. It was analogous to an offer on the part of the defendants to purchase the stock on the date named, if the plaintiff wished to sell it to them at that time. In order to bind the defendants, it was necessary for the plaintiff to make known his election before the date limited for the purchase expired. We see no difference in principle between the case at bar and *Potts v. Whitehead*, 20 N. J. Eq. 55, in which the respondent had signed a paper by which, in consideration of one dollar recited to have been paid, he agreed that the complainant should have for 30 days the refusal of certain land, and that he would convey it on certain specified terms, and in which it was held that the effect of the writing was that of a refusal or offer of the land, and did not become a contract unless accepted within the 30 days. The court remarks: "There can be no question but that, when an offer is made

for a time limited in the offer itself, no acceptance afterwards will make it binding. Any offer without consideration may be withdrawn at any time before acceptance, and an offer which in its terms limits the time of acceptance is withdrawn by the expiration of the time. There is no authority, precedent, or principle by which the time can be extended without consent of the person making it." And, again: "If the contract is one made so as to be legally binding, then a court of equity, which in certain cases holds that time is not of the essence of contract, will often enforce it, although the plaintiff, through mistake or accident or mere remissness, when not accompanied by fraud, has omitted to comply with it on his part within the time limited. The authorities referred to on the part of the complainant clearly establish that, but do not give the slightest support to the doctrine that the time for accepting an offer, fixed in the offer, can never be extended." And see, also, *Mason v. Payne*, 47 Mo. 517; *Longworth v. Mitchell*, 26 Ohio St. 334, 342; *Britton v. Phillips*, 24 How. Prac. 111; *Lester v. Jewett*, 11 N. Y. 453; *Railroad v. Bartlett*, 3 Cush. 224; *Carter v. Phillips*, 144 Mass. 100, 10 N. E. 500; *Chaffee v. Railroad Co.*, 146 Mass. 224, 16 N. E. 34; *Pom. Spec. Perf.* § 387. But even if the obligation assumed by the defendants should be regarded as a contract, and not merely in the light of an offer, relating, as it did, to the repurchase of shares in a business corporation, subject to fluctuation in value, it is within the class of contracts in which time is considered, even in equity, as of the essence of the contract. *Campbell v. Railway Co.*, 5 Hare, 519; *Doloret v. Rothschild*, 1 Sim. & S. 590; *Goldsmith v. Guild*, 10 Allen, 239; *Pom. Spec. Perf.* §§ 384, 385. Moreover, this is a suit at law, and in executory contracts the time of performance is, at law, considered as of the essence of the contract. *Furlong v. Barnes*, 8 R. I. 229; *Hill v. Fisher*, 34 Me. 143. The doctrine that it is not to be so regarded in a given case is an equitable doctrine, to be administered in equity in case of the existence of equities calling for its application. *Goldsmith v. Guild*, 10 Allen, 239, 241; *Potts v. Whitehead*, 20 N. J. Eq. 60. Demurrer sustained, and case remitted to the common pleas division for further proceedings.

MIDWOOD et al. v. EXECUTIVE ASS'N OF WHOLESALE GROCERS OF NEW ENGLAND.

(Supreme Court of Rhode Island. June 21, 1897.)

ASSOCIATIONS—PARTNERSHIP.

A manufacturer sent to the treasurer of an association of wholesale grocers money to be distributed by way of rebate among members of the association who had bought goods of him. *Held*, that there was no community of interest between the members of the association, as to such fund, so as to render them liable as partners to one entitled to share in the fund.

Action of assumpsit by H. Midwood & Sons against the Executive Association of Wholesale Grocers of New England, composed of Charles Alexander and others, to recover certain rebates alleged by plaintiffs to be due them from defendant by reason of an arrangement alleged to have been entered into between plaintiffs and defendant through one Flanders, its president, in which defendant pleaded the general issue. A motion for a nonsuit made at the close of plaintiffs' evidence was granted, and plaintiffs petition for a new trial. Petition denied.

Edwards & Angell, for plaintiffs. Wilson & Jenckes, for defendant.

PER CURIAM. We think the nonsuit was properly granted. The testimony fails to show any community of interest between the members of the defendant association, which is necessary to constitute them partners. The funds received from the manufacturers for goods ordered by the members of the association, by way of rebates, did not belong to the association, but were sent to its treasurer for convenience of distribution, and were distributed among the members in proportion to the amount of goods which each had ordered from the manufacturer, those only receiving a rebate who had ordered goods of the kind made by the manufacturer paying the rebate. The funds so received were therefore not joint profits. Moreover, the testimony further shows that the plaintiffs were not members of the association, and consequently were not entitled to any part of the rebates. The letters upon which they relied, written to them by Flanders, do not render the defendant liable, the authority of Flanders to bind the association by these letters not appearing. Even if a payment had been made by Flanders to the plaintiffs, as is now alleged, his authority to make it for the association is not shown; nor does it appear that such payment was known to the association, or ratified by it. The petition for new trial is denied, and the case is remitted to the common pleas division, with direction to enter judgment for the defendant for costs.

COREY et al. v. HOWARD.

(Supreme Court of Rhode Island. Feb. 8, 1896.)

CANCELLATION OF RELEASE—FRAUD—ACTION BY MARRIED WOMAN.

1. A bill to set aside for fraud a release given by complainants to respondent of claims against the estate of a decedent, which does not aver that moneys drawn by respondent from the savings bank were the property of intestate, nor that the omission to include these moneys in the inventory of the estate was with intent to defraud, nor that the representation that there was no other property than that included in the inventory was false, nor that complainants relied on such representations, and were induced thereby to give the release, but leaves such facts to mere inference, is insufficient.

2. Under Gen. Laws, c. 10, § 16, a married woman may sue to set aside a release without joining her husband.

Bill by Sarah J. Corey and others against Richard W. Howard to set aside a release. Demurrer to bill sustained.

Dexter B. Potter, Stephen O. Edwards, and Walter F. Angell, for complainants. Albert R. Greene, for respondent.

PER CURIAM. This is a bill to set aside a release given by the complainants to the respondent on the ground of fraud. It does not aver that the moneys drawn from the savings banks by the respondent were the property of the intestate, nor that the omission to include these moneys in the inventory was with a fraudulent purpose, nor that the representation that there was no other property than that included in the inventory was false, and was made to the complainants, or was intended to be communicated to them, nor that they relied on such representation, and were induced thereby to give the release. These facts, if facts they are, are not averred, but are left to mere inference. We think the averment of these or similar facts is essential to the maintenance of the bill, since no rule is better established than that, when fraud is charged, the facts on which it is predicated must be stated, and that general allegations of fraud will not be sufficient. 1 Daniell, Ch. Prac. 324.

Gen. Laws R. I. c. 104, § 16, provides that "in all actions, suits and proceedings, whether at law or in equity, by or against a married woman, she shall sue and be sued alone;" that is to say, without joining her husband. We are of the opinion, therefore, that it is not necessary to make the husband of the complainant Annie H. Reed a party. Demurrer sustained.

STATE v. COTTRELL.

(Supreme Court of Rhode Island. Feb. 25, 1886.)

CRIMINAL LAW—EVIDENCE—NEWSPAPER REPORT BY JURYMAN—JURY—DISCHARGE—SUBSEQUENT AGREEMENT.

1. The fact that during a criminal trial the foreman reported the evidence for a newspaper was not ground for a new trial, where defendant consented to the taking of notes, and it did not appear that the report was in any respect different from what it would have been had the notes been taken for the personal use of the juryman.

2. The court directed the jury to be discharged at 8 o'clock if there was then no probability of their agreeing. When inquired of at 8 o'clock as to whether there was a probability of an agreement, the foreman answered that he did not know that there was. The jury were then informed by the keeper that they were discharged. They protested, and, without separating, continued to consider the case, and finally agreed on and sealed up their verdict. *Held*, that the verdict was properly received.

Edwin R. Cottrell was convicted of a crime, and petitions for a new trial. Denied.

Edwin Metcalf, Atty. Gen., for the State. Frank W. Tillinghast and Albert B. Crafts, for respondent.

PER CURIAM. The petition alleges several grounds for a new trial, but the only grounds that we consider entitled to weight are: First, that the foreman of the jury reported the evidence during the trial for the Providence Journal; and, second, that the jury agreed upon their verdict after they had been discharged by the keeper, under direction of the court.

In regard to the first, it appears that the counsel for the defendant consented to the taking of the notes of testimony, though it is not clear that he knew at the time that he gave his consent that the purpose of taking the notes was to furnish a report for the paper. It does not appear that the report was inaccurate, or "dressed up," or in any respect different from what it would have been if the notes had been taken for the personal use of the juryman. The court does not see that merely sending such a report to a newspaper could have had any effect different from what would have followed from his making it for his personal use, and therefore the court does not deem it a sufficient ground for granting a new trial.

In regard to the second ground, it appears that the direction of the court to the keeper who was left in charge of the jury was to discharge them at 8 o'clock if there was then no probability of their agreeing. The court thinks that the testimony shows that the jury, when inquired of at 8 o'clock whether there was any probability of their agreeing, answered, by their foreman, that they did not know that there was, but did not state that there was no probability. The court thinks that, so long as this point remained in doubt, the keeper was not authorized to discharge the jury, but should have kept them until he was informed by them that there was no probability of their agreeing. It also appears that the jury, when informed that they were discharged, immediately protested against it, and insisted upon further considering the case, and that they finally agreed without having separated, and sealed up their verdict. The court thinks that, in these circumstances, the verdict was properly received. The petition for a new trial is therefore denied.

READ v. NEW YORK, N. H. & H. R. CO.
et al.

(Supreme Court of Rhode Island. July 19, 1897.)

INJURY TO EMPLOYE—DEFECTS IN APPLIANCES.

Where plaintiff employé shows that he was injured by reason of the imperfect welding of a brake rod, he cannot recover if defendant's evidence shows that by reason of rust the defect was not discoverable by the usual methods of inspection, unless he introduces evidence in rebuttal of that of defendant, or shows that defendant's methods of inspection are not reasonable.

Tillinghast, J., dissenting.

Action by Charles N. Read against the New York, New Haven & Hartford Railroad Company and others. Judgment for plaintiff, and defendants move for new trial. Granted.

John M. Brennan and Dennis J. Holland, for plaintiff. James M. Ripley, Henry W. Hayes, and John Henshaw, for defendants.

PER CURIAM. According to the testimony, the defect in the brake rod, by the breaking of which the plaintiff was injured, consisted of a flaw due to the imperfect welding of the two pieces which composed the rod. The evidence on the part of the defendant tends to show that the flaw was not discoverable, owing to rust on the rod, by the usual methods of inspection. There is no evidence on the part of the plaintiff to rebut this, for, though the plaintiff testifies that the defect would have been discernible by the eye if it had been daylight, it is evident that this statement is merely his inference from the fact that the brake rod was so easily twisted off in his attempt to set the brake. If the defect was not discoverable by the customary modes of inspection, or, in other words, was a latent defect, the defendants were not guilty of negligence, and consequently the verdict was against the evidence on this point. The pieces of the rod were lost by the defendants in the removal of their repair shop, so that they could not be produced at the trial; and the plaintiff, as well as the defendants, was deprived of the benefit of the evidence which they would have afforded could they have been produced. We will grant a new trial instead of directing judgment for the defendants, that the plaintiff may, if he can, show that the defect was not a latent defect, or that the methods of inspection employed by the defendants were not the reasonable and usual methods.

TILLINGHAST, J., dissents.

GARRATT FORD CO. v. VERMONT MANUF'G CO. et al.

(Supreme Court of Rhode Island. July 12, 1897.)

FOREIGN CORPORATIONS—VALIDITY OF CONTRACTS.

A nonresident corporation may recover on a contract made in the state, though it has not complied with Gen. Laws, c. 253, §§ 36-41, requiring the appointment of a resident as its attorney.

Action by the Garratt Ford Company against the Vermont Manufacturing Company. To a refusal of the judge to make a certain charge, defendant petitions for a new trial. Dismissed.

Bassett & Mitchell, for plaintiff. Lee & Tillinghast, for defendant.

STINESS, J. The plaintiff, a corporation located in Boston, Mass., sold to the defendant a tank, through a salesman who took the or-

der in Providence, and it now seeks to recover the price in this suit. The defendant asked the judge presiding at the trial to charge that the plaintiff, being a foreign corporation, will have had not complied with the law of this state in appointing a resident of this state as its attorney (Gen. Laws, c. 253, §§ 36-41), was not entitled to maintain this action. To the refusal of the judge so to charge, the defendant asks for a new trial, on the ground of erroneous ruling.

The question whether a corporation of one state can do business in another state without complying with the laws of such state is one which has frequently arisen, and upon which decisions are conflicting, although many decisions turn upon the language of a statute. Thus, it is held that a statute prohibiting a foreign corporation from doing business in a state without complying with its terms makes such business illegal and void, and that no such corporation can maintain an action to enforce its illegal contracts; and, where the statute does not provide for the consequences of noncompliance, the argument is that the acts of the corporation must be void, or else the statute would be nugatory. In Massachusetts a penalty is imposed upon the agent doing business; but the statute (St. 1884, c. 330, § 3) says that a failure to comply with the conditions shall not affect the validity of an act of the corporation. *Rogers v. Simmons*, 155 Mass. 259, 29 N. E. 580. Some statutes declare the acts to be void. In such cases there can be no question of validity. Some cases hold that where the statute imposes a penalty upon the agent, but is silent as to the validity of the act, it is to be presumed that the legislature intended the penalty as a sufficient safeguard for compliance, and that to declare the acts of the corporation void would go further than the statute, and impose an additional penalty, by construction, which should not be done. A notable case of this kind is *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93, in which the court says: "The fair implication is that, in the judgment of the legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that state. It is not for the judiciary, at the instance or for the benefit of private parties, claiming under deeds executed by the person who had previously conveyed to the corporation, according to the forms prescribed for passing title to real estate, to inflict the additional and harsh penalty of forfeiting, for the benefit of such parties, the estate thus conveyed to the corporation, and by it conveyed to others. * * * If the legislature had intended to declare that no title should pass under a conveyance to a foreign corporation purchasing real estate before it acquires the right to engage in business in the state, and that such a conveyance should be an absolute nullity as between the grantor and grantee, leaving the grantor to deal with the property as if he had never sold it, that intention would have been

clearly manifested." To the same effect are *Foundry Co. v. Augustine* (Wash.) 31 Pac. 327; *Edison Gen. Electric Co. v. Canadian Pac. Nav. Co.* (Wash.) 24 Lawy. Rep. Ann. 315 (s. c. 36 Pac. 260), with a note which holds the contrary view. See, also, an instructive article by Mr. Gunn in *Am. Law Reg.* Jan. 1897, p. 19.

Without multiplying authorities, we think that the reasoning which we have quoted is conclusive, although we concede that the greater number of authorities are probably the other way. We think, moreover, that we find support for this view in similar legislation in this state. In *Gen. Laws R. I. c. 182, § 17*, it is declared, in the case of a foreign insurance company, that the contract shall be valid, and the same declaration is made as to resident insurance companies which fail to comply with the law. The argument is pressed that, because this declaration of validity is made in these cases, its omission in the statute before us leads to the inference of the invalidity of other contracts. We do not think that the legislature intended to make one class of contracts valid, and other contracts, under similar conditions, invalid. If the legislature intends to make such contracts as the one in suit invalid, it is easy to say so; but, in the absence of such a provision, it is a wide stretch of judicial construction for the court to hold that such a result was intended. The purpose of the statute is not to invalidate contracts, but to require foreign corporations to appoint an attorney in this state upon whom service of process may be made. This purpose seems to be adequately served by imposing a penalty upon the agent who ventures to do business for the company without complying with the law. While we do not question the right of the state to impose such conditions and penalties upon foreign companies doing business here as it may deem proper, subject to the provisions of the federal constitution as to the regulation of commerce among the states, yet, in view of the vast amount of business now done by such corporations, we think it is a conservative position to hold that the legislature did not intend to exempt our citizens from paying just debts, upon grounds of noncompliance with our statutes, which may have been fully known to the debtors, when the general assembly has not clearly expressed that intention, and the inference of it is not necessary to the object of the statute. We are referred to *Transfer Co. v. Perry*, 75 Fed. 898, in which it is claimed that our statute was construed to preclude a foreign corporation, which had not complied with it, from maintaining a suit. That case, however, was a bill in equity for an injunction to restrain police officers of Pawtucket, who had seized the property of the complainant for a violation of our statute against pool selling, from interfering with their business. Judge Colt, in the opinion, very properly said that a foreign corporation which has not complied with statutory provisions "cannot invoke the aid of this

court to prohibit the defendants from interfering with a business which it has no legal right to carry on." That is a very different thing from holding that a contract is void which, in its nature, is not contrary to public policy. Our decision is that the court did not err in refusing the instruction asked for, and that the petition for a new trial must be dismissed. Case remitted to the common pleas division, with direction to enter judgment on the verdict.

JOHNSON v. STATE.

(Court of Errors and Appeals of New Jersey.
July 16, 1897.)

STATUTES—PARTIAL INVALIDITY—JURY—SUMMONING—FILING OF LIST—EVIDENCE—FOOTPRINTS.

1. The provision of P. L. 1895, p. 807, that a county judge thereby created should have the right to sit as associate judge in cases formerly tried in courts of oyer and terminer, though constitutional if enacted alone, does not take effect where it forms a part of an unconstitutional provision that the county court presided over by such judge shall take the jurisdiction formerly had by the court of common pleas, the judge of which, as such, sits as an associate in the oyer and terminer, as the two provisions are so connected as to show that the legislature intended them as a whole.

2. The approval of the trial court of the conduct of the sheriff in excluding negroes from jury duty is not subject to review, where it does not appear that they were excluded because of their color.

3. The failure of the sheriff to file with the clerk a list of jurors summoned as required by Revision, p. 526, § 9, does not invalidate the selection and return of such jurors, where it does not appear that injury was done.

4. It is competent to exhibit to the jury the impression of defendant's boots in sand, where footprints of a peculiar character were seen in sand near the body of deceased.

Dixon, J., dissenting.

Error to supreme court.

Jacob S. Johnson was convicted of murder in the first degree. From a judgment of the supreme court (35 Atl. 787) affirming the conviction, he brings error. Affirmed.

Steele & Meehan, for plaintiff in error. Nelson Y. Dungan and James J. Bergen, for the State.

DEPUE, J. The prosecutor was indicted for murder, for causing the death of Sarah Ann Rogers. The indictment was found in the court of oyer and terminer of the county of Somerset at the term of September, 1895. On the traverse of this indictment the prosecutor was tried before said court, and convicted of murder in the first degree, and sentenced to death. The writ of error places under review the following assignments of error:

First, that the court before which the defendant below was tried and convicted had no legal existence; having been abolished by the act of 1895, commonly called the "County Court Act." By an act of the legislature passed June 13, 1895, the inferior courts of common pleas, the courts of oyer and terminer,

and courts of quarter sessions of the several counties of the state were abolished, and a county court established in each of the counties of the state, to be known and designated as the "[name of county] County Court," with the same jurisdiction, civil and criminal, as the courts which were abolished previously possessed. The act provided for one judge for each county, to be elected by the qualified voters of the county. It further provided that any county court might be held by any justice of the supreme court, or by any judge of a county court, or by such justice and judge sitting together, with a proviso that a justice of the supreme court should preside in the trial of indictments for crimes punishable by death. P. L. 1895, p. 807. Under the judicial system in existence prior to the act of 1895, a judge of the court of common pleas, as such a judge, sat as an associate in the oyer and terminer, and as a judge of the court of common pleas he sat in the quarter sessions. These judges were appointed and commissioned as judges of the court of common pleas. The appointment of a judge as judge of the court of oyer and terminer or court of quarter sessions was a thing unknown. The judges of the court of common pleas sat in the oyer as judges of the court of common pleas, just as the justice of the supreme court presided in that court,—not as a judge of the oyer and terminer, but in virtue of his commission as a justice of the supreme court. By the constitution as amended in 1875 the prerogative of appointing the judges of the court of common pleas was conferred upon the governor, with the advice and consent of the senate. The act of 1895 did not create a new court with a new jurisdiction. It simply created a court by a new name, and invested it with all the jurisdiction and functions exercised by the old court, and took from the executive the power to appoint its judges, and delegated it to a popular election. The power of the legislature to alter or abolish the court of common pleas as the public good may require is indisputable. *Kenny v. Hudspeth* (N. J. Sup.) 36 Atl. 662; same case (in this court) 37 Atl. 67. This power has been vindicated to the extent of permitting the legislature to vacate the commissions of those judges who were in office when the legislature intervened. But the capacity of the legislature to alter or abolish is not involved at this time. A court consists in its jurisdiction and functions, and not its title or name. The legislature in the act of 1895 carefully preserved the jurisdiction and functions of the old court in everything which is the essential quality of a court, gave the tribunal a new name, and transferred the selection of the incumbents of the judicial office from the executive to a popular election. The court of common pleas, as a court, and all its concomitants, such as the right of its judges to sit in the oyer and sessions, were retained by the act of 1895 precisely as they existed before. All that was done was a change of name and the mode of selecting the judges

who were to officiate in the court. The constitution having conferred upon the governor the prerogative of appointing, with the advice and consent of the senate, these judicial officers, it was not competent for the legislature by a subterfuge to divert this prerogative right to another source. When the constitution prescribes the manner in which an officer shall be appointed or elected, the constitutional prescription is exclusive, and it is not competent for the legislature to provide any other mode of obtaining or holding the office. *State v. Wrightson*, 56 N. J. Law, 127, 141, 28 Atl. 56. That is precisely what the act of 1895 purported to accomplish,—to leave these courts with a change of name, and the executive shorn of his prerogative of appointment. It was on this ground that the supreme court in *Schalk v. Wrightson*, 58 N. J. Law, 50, 32 Atl. 820, decided that the act of 1895 was unconstitutional and void. That decision is approved by this court. It is contended by counsel that, although the act of 1895 is unconstitutional with respect to the judges of the court of common pleas, it may be sustained with respect to the judges of the oyer and terminer and court of quarter sessions; these courts being without any constitutional protection or regulation, and the selection of the judges being wholly a matter of legislative discretion. The theory on which the argument proceeded was that the statute consisted of two parts, one of which, being unconstitutional, might be rejected, and the other retained. It is undoubtedly elementary law that the same statute may be in part constitutional and in part unconstitutional, and, if the parts are wholly independent of each other, that which is constitutional may stand, and that which is unconstitutional will be rejected; but if the different parts of the act are so intimately connected with and dependent upon each other as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not have passed the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent upon each other must fail. As was said by Mr. Justice Matthews in *Polindexter v. Greenhow*, 114 U. S. 270, 304, 5 Sup. Ct. 903, 931: "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void because unconstitutional; but these are cases where the parts are so distinctly separate that each can stand alone, and where the court is able to see and to declare that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one which they may never have been willing, by itself, to enact." *Sprague v. Thompson*, 118 U. S. 91, 6 Sup. Ct. 968; *Pollock v. Trust Co.*, 158 U. S. 601, 635, 15 Sup. Ct. 912. In *Warren v. Mayor of Charlestown*,

2 Gray, 84, it was held that: "When the parts of a statute are so mutually connected and dependent, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, if some parts are unconstitutional and void all the provisions which are thus dependent, conditional, or connected must fall with them." This rule with regard to an unconstitutional feature in a statute is elementary, and it applies in an eminent degree to the legislation in question. The judges who, under our judicial system prior to the act of 1895, sat as associates in the oyer and terminer, and as judges in the court of quarter sessions, were appointed and commissioned as judges of the court of common pleas; and it is inconceivable that it was the legislative scheme by the act of 1895 to leave the court of common pleas in existence, and its judges in commission, and create a new judicial officer, known as a "county court judge," to hold the courts of quarter sessions, and to sit as an associate to the supreme court justice in the court of oyer and terminer. That such was not the purpose of the legislature is demonstrated by the title of the act, which is as follows: "An act to abolish the inferior courts of common pleas, courts of oyer and terminer and general jail delivery and courts of general quarter sessions of the peace, to establish in their places a county court in each of the counties of this state, and to provide for and define the jurisdiction, powers and duties of such county courts." It is obvious from the title of the act, as well as its body, that it was the legislative purpose to abolish the old courts, and substitute the new court in their place. The legislative scheme, in its main feature,—that is, the extinguishment of the old courts,—having failed, the other part, which is not separable, must fall also.

The second ground assigned for reversal is the exclusion of negroes from jury duty, the prisoner being a colored man. There is no proof in the case to show that this exclusion was done designedly, or that such persons were omitted from the panel of jurors except in the same way that white citizens not selected were omitted. The conduct of the sheriff in the selection of the jurors was approved by the court below, and its decision is not subject to review. *Patterson v. State*, 48 N. J. Law, 382, 4 Atl. 449.

Third, that the sheriff did not deliver a list of the jurors actually summoned to the clerk, pursuant to section 9 of the act concerning juries. Revision, p. 526. By that section it is made the duty of the sheriff to deliver a list of the jurors by him summoned for service at such term, certified by him to be a true list, to the clerk of such court, who shall thereupon file the said list, and forthwith lay the same before the said court, and no person shall serve as a juror whose name is not contained in said list, if objection be made before such person

is sworn or affirmed. The jury for the general panel was drawn in the presence of the court, and the list of names so drawn, with the proper certificate attached, was filed with the county clerk, and a copy thereof retained by the sheriff. The persons so selected were by the sheriff duly summoned, and all were in attendance on the day fixed for the trial; objection having been made to the panel because the sheriff had not filed with the county clerk a list containing the names of the jurors summoned. The challenge was overruled, and the sheriff advised by the court to file the list, as he did on that day, as appears by the certificate of the clerk. From the jurors thus summoned were selected 48 persons, as required by law, a list of whom was served on the defendant, and from this list was drawn in the usual way the jury by whom the case was tried and determined. The claim by the prisoner is that, although the jury were properly chosen and duly summoned, they could not try the defendant, because of the fact that the jury that had been summoned was not certified to and filed by the sheriff with the county clerk. In disposing of this assignment of error, it is sufficient to say that the general panel of jurors in this case was drawn by the sheriff before the court of common pleas, pursuant to the fifth section of the act of April 21, 1876 (2 Gen. St. p. 1854, par. 50), and that the list of the general panel was certified to by the judges of the said court, pursuant to the statute, as jurors selected in all respects according to the provisions of the statute, a copy of which list was filed by the clerk in his office, and another copy delivered to the sheriff. The statute just referred to contains the only prescription of the mode in which the general panel shall be drawn. The other provisions of the statute are directory merely, and will not invalidate the selection and return of jurors unless it affirmatively appears that injury was done. *Gardner v. State*, 55 N. J. Law, 17, 30 Atl. 429; *Poulson v. Bank*, 40 N. J. Law, 563. The prisoner's counsel was informed by the list on file in the clerk's office of the names of the persons upon the general panel, and at the opening of court every juror whose name appeared on the general panel was present, and answered to his name. It may also be said that the sheriff was under no duty to deliver this list of jurors before the commencement of the term, the language of the section being, "as soon as may be after the commencement of the term," and no application was made to postpone the trial of the case until such a certificate might be made. The sheriff's failure to comply with this statutory requirement was a mere irregularity, which could in no wise have prejudiced the defendant in maintaining his defense upon the merits; and the statute forbids the reversal of a judgment upon an indictment for any imperfection, omission, defect in, or lack of form, or for any error except such as shall or may have prejudiced the defendant in maintaining his defense upon the merits. 1 Gen. St. p. 1138, § 89.

The fourth assignment of error relates to the judicial action of the trial court with respect to the introduction of certain evidence. The case was one depending wholly on circumstantial evidence. Certain witnesses testified to having seen certain footprints of a peculiar character in the dirt and soil near to the body of the woman who had been murdered, and, for the purpose of showing that such footprints had been made by this defendant, the state produced the boots that were worn by the prisoner on the night in question. Certain impressions in sand, made in the presence of the jury by the boots just mentioned, were exhibited to the jury, against objection taken by counsel of the defendant. This constitutes this assignment of error. The testimony of the witnesses with regard to the appearance of these footprints was undoubtedly competent. Such testimony involved in no sense the knowledge of an expert, and the exhibition of the boots worn by the defendant on the night in question, and the impress in the sand by way of illustration with them, were also competent. We agree with the opinion of the supreme court on this subject.

The counsel of the prosecutor also contends that on a review of the whole record, pursuant to the act of May 9, 1894 (1 Gen. St. p. 1154), the conviction should be set aside and a new trial ordered. We have examined this case carefully, and have reached the conclusion that the plaintiff in error has not suffered manifest injury, either in the rejection of testimony, or in the charge to the jury, or in the denial of any discretionary matter by the court, or upon the evidence adduced at the trial. We think that this case was fairly tried, and that the evidence justified the jury in their verdict. Finding no error in the record or proceedings, the judgment should be affirmed.

DIXON, J., dissenting.

In re HILL'S ESTATE.

(Prerogative Court of New Jersey. July 1, 1897.)

APPOINTMENT OF ADMINISTRATOR—APPEAL—EFFECT—RIGHTS OF SON.

1. Where, on the hearing of the application of a son of intestate for letters of administration, which was opposed by certain of the children, such letters were granted to the proctors of the two opposing factions, on the supposition that the next of kin, all of whom had been cited, and were present, consented to such action, consent to such appointment will not be imputed to such son where he, supposing that his proctor was insisting on his appointment, and not having been specially consulted on the subject, did not understand that such order of appointment was made solely on the ground of his supposed consent.

2. Pending an appeal from an order granting letters of administration, the court is without jurisdiction to order the discharge of the administrators so appointed, and to appoint others in their stead.

3. Where opposing applications for letters of administration are made by a son and a daughter, all else being equal, the son will be preferred.

Appeal from orphans' court, Mercer county: Woodruff, Judge.

Petition by Charles C. Hill for letters of administration in the matter of the estate of Susan Hill, deceased. From an order granting such letters to James J. Cahill and John Rellstab, and from orders discharging said administrators, and appointing Zillah Bowers and her husband, William, in their stead, petitioner appeals. Reversed.

Susan Hill died September 6, 1896, intestate. She left six children, Charles C., Henry, Elwood, Hamilton, Edward F., and Zillah, now married to Daniel J. Bowers. On September 22d Charles C. applied to the surrogate of Mercer county for letters of administration. His application had the written indorsement of all the children except Zillah, she having, on September 21st, filed a caveat against the granting of letters to Charles C. The matter was set down for hearing before the orphans' court on October 21, 1896, and, after several contingencies, came on for hearing on November 6th. On that day Hamilton and Elwood Hill were permitted to withdraw their consents to the appointment of Charles C. Letters were granted to James J. Cahill and John Rellstab, the former being the proctor of Charles C. Hill, and the latter the proctor of the children opposing the granting of letters to Charles C. Hill. On November 19th, Charles C., through another proctor, filed in the orphans' court a notice of appeal, following it with a petition of appeal in this court. This is the first appeal. On December 3d, Messrs. Cahill and Rellstab filed a petition in the orphans' court, setting out that when the order appointing them was made they thought that all the next of kin of Susan Hill, including Charles C., were consenting to such appointment; that Charles C. has taken an appeal from the order appointing him, and that they, therefore, asked to be discharged from their office. On December 14th they were so discharged. In the meantime Elwood and Hamilton had presented a petition to the orphans' court that Zillah Bowers should be appointed in the place of the administrators who had applied to be discharged. On January 8, 1897, the court appointed Zillah Bowers and Henry Hill, with the condition that, in case either of the parties so appointed should fail to give a bond within 10 days, the one so appointed who should give the bond should proceed with the administration of the estate. From this decree an appeal was taken by Charles C. This is the second appeal. Letters were issued by the surrogate to Zillah and her husband, William, although the latter had not been appointed as one of the administrators, but only required to enter into bond with his wife in case she qualified.

Samuel G. Naar, for appellant. Buchanan & Rellstab, for appellees.

REED, Vice Ordinary (after stating the facts). I will first speak of the appeal first

taken. It is, of course, true that the orphans' court could not pass by the next of kin, and appoint strangers to the blood of the intestate, without the consent of all the next of kin, or without proof that the nonconsenting parties were unfitted for the office. This is conceded by all parties. The court below obviously acted upon the supposition that all the next of kin had consented. No testimony was taken in respect to the fitness of Charles C. Hill for the office. The proctors on both sides undoubtedly supposed that the next of kin, who had all been cited, and were present in court, assented to the action of the court. The laudable intention of the court was to commit the administration of the estate to representatives of each of the two opposing classes of relatives, and to commit it to persons who, while representing the two classes, could act together in harmony. Had Charles C. Hill then expressed his dissent to the appointment, the court would not have made the questioned decree. The query now is whether he can be regarded as consenting to the decree because he was present; if so, he is not in a position in this court to ask for its reversal. I am of the opinion that under the circumstances such consent should not be imputed to him. He was represented by his lawyer, whom he supposed was insisting upon the right of his client to be the appointee. It does not appear that Charles C. was specially consulted about the compromise appointment. It is not clear, even if he understood the order of the court, that he knew that it was made solely upon the ground of his supposed consent. It would not, therefore, have occurred to him to express his dissent at the time, for he could not have supposed that such dissent would, in the least, have effected a change in the mind of the court. Taking into account that he is a layman, unused to judicial proceedings, and with a lawyer to act for him, it would be unfair, I think, to impute to him a consent to the decree from the fact that he was present in court at the time the decree was made. No consent, therefore, appearing, the decree cannot stand.

I now come to the transactions involved in the second appeal. The notice of appeal from the preceding decree was filed November 19th, and the petition of appeal was filed in this court on December 1st. On December 14th the administrators appointed under that decree were discharged, and on June 8th Zillah Bowers was appointed. In making the order for discharge, and the new order for the appointment of Zillah, I think the court was acting without jurisdiction. The constitution confers upon any person aggrieved by a decree of the orphans' court the right to appeal to the prerogative court. The nature and effect of an appeal is to be sought for in the civil law, whence it came. Appeals, properly so called, are a continuation of the same case; being only a transfer from one court to another for final trial and judgment. It was a mode of procedure unknown to the common law, and only known

in England in the court of chancery and other courts whose modes of proceeding were borrowed from the Roman civil law. Pow. App. Proc. 104. From this source came the practice in the ecclesiastical court, which, except as modified by legislation, is the practice of the probate courts in this state. The effect of an appeal is the transfer of the cause of action into the appellate tribunal. In respect to the matter appealed from, the transference leaves nothing in the trial court for subsequent action. Says Judge Elliott: "The overwhelming weight of authority is that an appeal, when properly perfected, remits a case wholly and absolutely from the trial court, and places it in the higher tribunal. It is difficult to conceive how it could be otherwise, since it is not possible that two courts can have authority over a single case at the same time. * * * The right to order process to enforce the judgment remains in the trial court, where there is no supersedeas or order staying proceedings; but all jurisdiction for questions involved in litigation, and embraced by the judgment, terminates with the removal of the cause to the appellate tribunal. The loss of jurisdiction is so complete as to require a party to seek relief from any error except an error in making the record, or in omitting something from the record, to apply to the higher courts. After the cause leaves the lower court, it cannot act upon any question involved in the appeal." Elliott, App. Proc. § 541. When either party has perfected an appeal from the decision of the probate court, it is erroneous for the probate court to grant an order affecting the rights of the parties as to the subject-matter of the appeal, for the reason that the proceedings before the probate court are stayed. Hicks v. Hicks, 12 Barb. 322. The appellant, who has duly complied with the statutory regulations, deprives the probate court of any power over the subject-matter during the pendency of the appeal. Green v. Clark, 24 Vt. 136.

The question remains whether this court will send the record back to the orphans' court, or will make the appointment of an administrator. It can do either. Dick. Prob. Prac. 201, 202. The usual practice is to complete the judicial act in this court as the proceeding is a trial de novo. Inasmuch as under an order of this court testimony has been taken to be used here, it is proper that the appointment should be here made, as it was in the case of Read v. Drake, 2 N. J. Eq. 78. To whom should the appointment be awarded? Inasmuch as none of the next of kin save Charles C. and Zillah seem to desire the appointment, the choice lies between the two named. Unless it appears that Charles C. is unfit, I think the appointment should go to him. While there is no iron-bound rule which absolutely requires the court to appoint one of several next of kin, yet age and sex, all else being equal, has usually controlled the judicial discretion in making the appointment. It is said that, other things being equal, the elder should be preferred to the younger, and a son

to a daughter. 2 Redf. Wills, 73. These are both in favor of Charles C. Zillah is also married. She cannot act unless her husband is joined with her. Vice Chancellor Van Fleet, in *Cramer v. Sharp*, 49 N. J. Eq. 558, 562, 24 Atl. 962, while refusing to express an opinion as to whether a married woman is competent to take a grant of administration, held that, if a grant is made to her, it must be in conjunction with her husband. When the question arises as to the advisability of the appointment of the widow or a child, the widow will be usually preferred; but, if the widow has married again, while it is no invincible objection to her being administratrix, yet that circumstance may induce the court to prefer a child. 2 Redf. Wills, 72; *Webb v. Needham*, 1 Addams, Ecc. 494, 496. Unless Charles C. is proved to be an unfit person to fill the office, he should be appointed. In my judgment, the circumstances which aroused the suspicion of those opposing his appointment have been satisfactorily explained in the testimony taken in this court. If this testimony had been before the orphans' court, and that court had not been misled by the supposed consent to the first appointment, I think it would not have hesitated to appoint Charles C. I shall advise a decree reversing the two decrees brought up by the two appeals, and a new decree appointing Charles C. Hill, he to give a bond in the sum of \$20,000.

WILSON v. STATE.

(Court of Errors and Appeals of New Jersey.
June 28, 1897.)

JURY—COMPETENCY—HOMICIDE—INTOXICATION AS A DEFENSE—INTENT.

1. A juror stated that he had formed an opinion, from reading the papers, that the prisoner ought to be hung, but that he had no prejudice against him, and would not find him guilty if the state failed to prove his guilt. *Held* to be no ground for challenge by the prisoner.

2. As between the two offenses of murder in the second degree and manslaughter, voluntary intoxication cannot be a legitimate subject of inquiry. What constitutes murder in the second degree by a sober man is equally murder in the second degree if committed by a drunken man.

3. When the character and extent of a crime are made by law to depend upon the state and condition of the defendant's mind at the time, and with reference to the act done, intoxication, as a circumstance affecting such state and condition of the mind, is a proper subject for inquiry and consideration by the jury. If, by law, deliberation and premeditation are essential elements of the crime, and by reason of drunkenness, or any other cause, it appears that the prisoner's mental state is such that he is incapable of such deliberation and premeditation, then the crime has not been committed. Intoxication is a mere circumstance to be considered in determining the presence or absence of premeditation.

4. The trial court properly charged "that if, at the time of doing the act, the evidence showed that the defendant was so intoxicated that his faculties were prostrated, and he was rendered incapable of forming a specific intent to take life, then, although it was no defense for crime, his offense may thereby be mitigated to murder in the second degree."

5. If the faculties of the accused are not so far

prostrated by intoxication as to render him incapable of forming an intention to kill, the jury would have no right to find that by reason of the intoxication the intention to kill was not present. (Syllabus by the Court.)

Error to court of oyer and terminer.

David Wilson was convicted of murder in the first degree in November, 1896, in the Morris county oyer and terminer, and sentenced to be executed, and brings error. Affirmed.

On the trial, Mr. Justice Magie charged the jury as follows:

"The Charge.

"The Court: The indictment in this case charges the defendant with the murder of Melinda Wilson, in this county, on the 6th day of June last. To support this indictment the state must prove the facts sufficient for that purpose by evidence beyond a reasonable doubt. A reasonable doubt would exist when the judgment of the jury, after a careful review of all the evidence, finds itself unconvinced of the guilt of the prisoner. If such a doubt exists, you are bound to give the benefit of it to the prisoner, but you are not bound to give him the benefit of anything but such a reasonable doubt. Under this indictment there may be a conviction of any grade of criminal homicide established by the evidence. If the evidence does not establish the guilt of a higher degree beyond a reasonable doubt, the defendant is entitled to the benefit of a reasonable doubt in that respect, and he should only be convicted of that degree of crime which the evidence establishes beyond a reasonable doubt. To make out the case the state must have established by evidence beyond a reasonable doubt, first, the death of Melinda Wilson at or about the 6th day of June. If the evidence is believed,—and there is no contradiction of it,—she was alive in the morning of that day. About one o'clock she was found by her son, lying, with her head covered with blood, in what he describes as a pool of blood, she being still living. Shortly after she was seen by other people, and Policeman Campbell stood by the door when she died. She was found dead by Dr. Wright and by Dr. Douglas, the coroner. If believed,—and, as I say, there is no contradiction of this evidence at all,—you may find her death proved beyond a reasonable doubt. If you believe the evidence of the physician who made the autopsy, there were wounds inflicted upon her head, fracturing her skull, producing an effusion of blood upon the brain, and causing death. If you believe that medical evidence,—and there is no contradiction,—her death was caused by wounds inflicted upon her head. The state must further prove by evidence beyond a reasonable doubt that these wounds were occasioned, and therefore the death caused, by some acts of the defendant, in order to sustain this charge against him. On that subject you have the evidence of Mrs. Stoutenburgh in respect to a quarrel between

the two in the course of that morning, the quarrel occurring on the stoop of the house. As I have the evidence, she declares that the defendant made some threat, to which the deceased replied that she was not afraid; she would see people as she chose. He said that he knew she was not afraid; she was not afraid of God, and he intended to send her to hell. She said she was not afraid, and, 'if you do send me to hell, you will have to go'; and he said, 'No; I am afraid of God, and I mean to save my soul.' If you believe that evidence, it is important with reference to the condition of the defendant's mind, and his attitude appearing towards the deceased. The son of the deceased went to the house during the course of the morning, and found the defendant in the kitchen. He had been there before, but I am directing your attention only to the occurrence then. You must consider all the other evidence, however. I do not mean to exclude from your consideration, but I am only calling your attention to the main points of the evidence. He asked a question about the deceased, and in his direct examination he said the reply of the defendant was that he did not know; that he (the boy) ought to know. In cross-examination he was asked the same question, and he said the defendant replied that she had gone out. Then the cross-examiner said to him: 'When you testified awhile ago, you said, "I asked him where was mamma. He said he didn't know; I ought to know." Now, which is the truth of those two? Answer. He told me I ought to know. Question. Well, now, did he say to you, when you came in there and asked him, "where is mamma?" did he say, "I don't know; you ought to know"? Answer. Yes, sir. Question. That is the truth, is it? How did you come to say just now he told you she had gone out? Answer. I made a mistake, I guess, because anybody makes mistakes,' etc. You will observe that when he was asked about the mother, whatever response he made, he did not disclose the fact—which was a fact—that the mother was lying in the next room, then, in a helpless condition from some injuries inflicted about her head. The boy went to the door, and, looking through a crack, discovered his mother's body upon the ground. He broke down the door, saw her condition, and ran to the police station. Mrs. Stoutenburgh was told by the boy, on the way, what had occurred. She went upstairs, and she saw, as she said, the defendant go to the door and try to pull it shut. She explained the difficulty of shutting it by the fact that the boy, in breaking the door down, had affected the lock and bolt in some way so that it would not go to. That the defendant saw her, and told her to go back,—'Go back; what was she doing there,'—and then told her the deceased was sleeping, he standing at the door where she was lying on the floor; she was asleep, and that he did not want to wake her up. You then have the evidence of the policemen. After being told of this occurrence,

Morrison and Campbell went towards the house, and on the way were attracted to this man, the defendant, going into the West End Hotel. They followed him there. He was in the act of taking a drink, or had taken it, when Morrison told him that he wanted him, and put him under arrest. At that time he told Morrison he had killed her, and he was glad of it, and would hang for it. Immediately after that, in connection with the same topic, he said, 'She would do more for him than for me,' though he did not explain what he meant by that. He went to the house with Morrison, and at the house took Morrison to the door of this room, threw it open, and said, 'There she is.' He told Morrison that he had done it with an ax. He went with Morrison into the kitchen, and said he did not know where the ax was, but, looking, found it behind the stove, and came and gave it to Morrison; and at police headquarters, to which he was taken, he repeatedly said that he had killed her. No contest by the counsel who have so zealously and ably defended the prisoner under the assignment of the court is made over these facts, and, if you believe this evidence, you may find proved that the death was occasioned by the defendant's act, beyond a reasonable doubt. Upon facts of this sort, if found by you, as I have stated, the law presumes the killing to be a criminal homicide.

"Criminal homicides in New Jersey are divided into two classes,—murder and manslaughter. The presumption in the case of criminal homicide is that it is murder. To reduce the crime to the grade of manslaughter, the evidence must show a lack of what the law calls 'malice.' Malice, as the law uses the term in defining these crimes, consists in the intent to do bodily harm. Intent to do bodily harm is malice. Manslaughter is a criminal homicide, but manslaughter is without intent to do bodily harm. Murder is a criminal homicide with malice; that is, with an intent to do bodily harm. Of course, you know intent is an act of the mind, which cannot be seen, but can only be inferred from the conduct and acts of the party. In this case, if you find that the death of the deceased ensued upon blows struck with an ax upon the head with vigor enough to fracture the skull in the way the doctors have described, you may infer an intent to do bodily harm, and therefore malice. That the criminal homicide is murder has not been rebutted in this case, and no contention is made that any verdict of guilty of manslaughter would be proper. So you may find that, if the defendant did the act, he is guilty of murder, the presumption of the law, which remains uncontested, the evidence indicating no lack of malice, unless the evidence furnishes some defense.

"It is contended in defendant's behalf that at the time he was intoxicated; that he had been drinking on the Tuesday previous to the Saturday when this thing occurred, and had

continued drinking during the intermediate time. It is my duty to tell you, gentlemen, that intoxication willfully entered upon furnishes no excuse for crime, and no defense against the consequences which the law denounces against crime. A criminal homicide, as I have stated, is presumed to be murder. The presumption is that it is murder in the second degree. To constitute murder in the first degree, and to justify a verdict of murder in the first degree, the state must make out by proof beyond a reasonable doubt, such as I have described to you, those ingredients which distinguish murder in the first degree from murder in the second degree; and that requires me to instruct, and you to understand, the difference between those two degrees. It is unnecessary to define all the cases which, under our statute, constitute murder in the first degree. So far as this case is concerned, it is quite sufficient to describe one class of them. That class consists of every killing of a human being, willfully, deliberately, and with premeditation. That has been defined by our courts in cases like that before us as including such killings as are those with an intent to take the life of the deceased; not a mere intent to do bodily harm, but an intent to take the life of the deceased; an intent carried out willfully, with deliberation and with premeditation. As I have already stated, an intent is an act of the mind, which cannot be seen by the human eye, and which we can only learn of by inference drawn from conduct, words, and acts. So, with reference to the intent with which these blows were struck, you may look at all the evidence you find establishing facts in this case,—the fact of previous threats, and the particular fact of the threat of that morning, that he would send her to hell, in connection with all the conversation that I have detailed to you before. The use of the ax, if an ax was used, was likely to produce death. The repeated blows, if repeated blows were necessary, as the doctors say, to produce the several wounds and fractures of the skull. From that and any other evidence you may determine with what intent the ax was used, and if it was an intent to take life, shown by the use of that kind of weapon and by repeated blows, then, gentlemen, you may find such an intent as would be naturally inferred from the acts, and that intent to be one to take life; and if you find it to be a willful intent, and deliberate, from the threats of the morning,—premeditated, from threats before,—then, gentlemen, you may find that the ingredients of murder in the first degree are hereby established. But it is said in behalf of the defendant that he was so intoxicated that these ingredients of which I have spoken were not established, and ought not to be found by you. This is not a defense put in by the defendant, because, as I have stated to you, intoxication in no respect is a defense for crime. It is an essential ingredient, as I have stated to you, of the crime of murder in the first degree,

that there should be an intent to take life. Any intoxication may be considered with reference to the existence of that intent, and its willful, deliberate, and premeditated character; and I charge you that if, at the time of doing the act, the evidence shows you that this defendant was so intoxicated that his faculties were prostrated, and he was rendered incapable of forming a specific intent to take life, which I have stated is an essential ingredient of this crime, then, although it is no defense and no justification for crime, his offense may thereby be mitigated to murder in the second degree. But I charge you, gentlemen, that in dealing with such a condition you ought to use great caution not to give immunity to persons who commit crime when they are inflamed by intoxicating drink. You must discriminate between the conditions of mind merely excited by intoxicating drink, and yet capable of forming a specific intent to take life, and such prostration of the faculties as renders a man incapable of forming the intent. Now, the proof is before you, and you must determine from this evidence whether the faculties of the defendant were thus prostrated, so that he was incapable of forming this intent. It is said that he had been drinking. There is no question, from all the evidence here, that that fact may be inferred; but to what extent there is no evidence except the evidence of the defendant. Some witnesses think he was drunk. Others did not notice that he was drunk, although they did think he had been drinking. The defendant says that he forgets what occurred; that his mind is a blank on that subject. The defendant is a competent witness in his own behalf, and you must take his evidence into consideration. You have the right, however, in determining what weight should be given to it, to remember the position in which he is placed, and the interest he has in respect to the verdict which you may render, and you must first determine whether that story is truthful. Immediately after the occurrence, if you believe the police officers, he told what he had done. If that be so, had he forgotten it then? Directly thereafter he told them the mode in which it was done, and the weapon that was used. Had he forgotten it then? Directly after that he took them to, and produced, the weapon. Directly afterwards, at the headquarters, he said that he had killed her. If you believe, however, that he now forgets it, does that indicate that at that time his faculties were so prostrated that he was incapable of forming the specific intent to take life which you would otherwise infer from the use of the ax directed upon the head with sufficient force to fracture the skull with repeated blows? If he was thus capable, intoxication was no excuse; for, although you may think that his excitement by reason of intoxication led him further than it would if he had been not intoxicated, the fact that he was capable of forming the specific intent is a fact that establishes the ingredient neces-

sary to the crime of murder in the first degree.

"Now, gentlemen, I have gone over this case with the utmost care, to give to the defendant the benefit of all that appears in this evidence. I must now leave it in your hands. Of course, if there is no evidence that satisfies your judgment beyond a reasonable doubt that the defendant committed this act, then your verdict must be for him; but, if the evidence convinces your judgment beyond a reasonable doubt that the defendant took the life of the deceased, then, gentlemen, the presumption is that it was murder in the first or second degree, and he must be convicted of one of those degrees, there being no evidence here which would reduce the crime to manslaughter. If the evidence convinces your judgment beyond a reasonable doubt that he had a willful, deliberate, and premeditated intent to take the life of the deceased, then, gentlemen, it is murder of the first degree. Are there any facts that I have omitted to state that counsel think desirable to be stated, or any facts which counsel think I have misstated? If none, I will pass to the requests to charge.

"Requests to Charge.

"Defendant's counsel requests the court to charge as follows: That if the jury believe from the evidence that the defendant at the time of the commission of the crime was, by reason of intoxication, unable to decide between right and wrong, they should not convict of murder in the first degree. Second. If the jury believe that Wilson at the time of the killing was, by reason of intoxication, unable to form a willful, deliberate, and premeditated design, they should not convict of murder in the first degree. Third. That, while intoxication does not excuse crime, if it has been shown that Wilson was intoxicated to such an extent as to render him incapable of judging of the nature and quality of his act the jury should find a verdict of murder in the second degree. Fourth. If the jury believes from the evidence that Wilson at the time of the killing was intoxicated to such an extent as to render him incapable of judging of his acts, or their legitimate consequences, he should not be convicted of murder in the first degree. Fifth. That, in order to reduce the offense from murder in the first to murder in the second degree, it is not essential that Wilson should have been intoxicated at the time of the killing to such an extent as to have been totally unconscious of his acts.

"The first request I decline, except as I have charged. The second I decline, but in place of it I charge the first point in the Warner Case, 56 N. J. Law, 686, 29 Atl. 505, the case in the court of errors. This is the law laid down by that court: 'If an intoxicated person has the capacity to form an intent to take life, and conceives and executes such intent, it is no ground for reducing the degree

of his crime to murder of the second degree that he was induced to conceive it or to conceive it more suddenly by reason of his intoxication.' The third, fourth, and fifth requests I decline to charge otherwise than as I have charged."

E. A. Quayle and C. A. Reed, for plaintiff in error. J. S. Salmon, for the State.

VAN SYCKEL, J. The grounds relied upon for the reversal of the judgment in this case are: First, the refusal of the trial court to sustain challenges to jurors; second, that in the foregoing charge to the jury the court erred in its instructions in respect to the subject of intoxication of the prisoner at the time he committed the homicide.

The question in relation to the challenge of jurors is presented as follows: Juror Peter Cook, challenged to the favor, having been duly sworn, testified as follows: "Direct Examination (by Mr. Quayle). Q. Where do you live? A. Budd's Lake. Q. Have you formed any opinion in this case? A. I have. Q. What is that opinion? A. Well, my opinion is, he ought to be hung, according to the papers,—what I have seen in the papers. Q. Well, do you think that evidence could convince you to the contrary, if produced here on the witness stand? A. Well, if they have got clean proof of it, they might. Then I might be convinced. Q. What do you think? A. Well, if they have got evidence enough to prove he is not guilty, why, then, of course, I will have to go according to the evidence; but in my own mind I possess an opinion, according to the papers, that he ought to be hung. Q. And you have already given expression to that, have you? Would it take more than the ordinary amount of evidence, then, to convince you to the contrary? A. Well, I don't know, really. It would have to be quite strong evidence to convince me, any way. Q. Quite strong? A. Yes. Q. Stronger than the ordinary amount of evidence? A. Yes, sir. Q. Have you any prejudice on account of his color? A. Not at all. Q. Or general appearance? A. No shape or manner. Q. That's all. Cross-Examination (by the prosecutor). Q. If the evidence on the part of the state should fail to prove the case against him as it has been stated from which your impression has been formed, would you still feel as you do? A. Well, I don't know really how I could. If the state failed to prove him guilty, I could not fetch out a verdict that he was guilty. Q. Then you feel that you could consider the evidence that may be produced here, and weigh it, and upon that evidence decide whether he is guilty or not? A. Yes, sir. Q. And, if the state fails to prove the case against him, you would not then feel that he should be convicted? A. Oh, no, no; I could not. The Court: The challenge is overruled."

Since the time of the case of State v. Spencer, it has been the accepted law of this state that it is not a ground of principal challenge

to a juror that he has expressed an opinion on the matter to be tried, if it was not done through malice or ill will. In that case, reported in 21 N. J. Law, 196, Chief Justice Hornblower said, "A declaration of opinion, to disqualify a juror, therefore, must be such an one as implies malice or ill will against the prisoner, thereby showing that the person challenged does not stand indifferent between the state and him." This declaration was approved, without any qualification, by our supreme court, in an opinion delivered by Chief Justice Green, in *State v. Fox*, 25 N. J. Law, 566. This question was again raised in *Moschell v. State*, 53 N. J. Law, 498, 22 Atl. 50, and the rule adopted in the cases above cited was inflexibly adhered to. We are of opinion that the practice in this respect which has so long prevailed in our courts is well-founded and wise, and that no departure from it should be sanctioned. The juror challenged in this case disclaimed malice or ill will, and there is nothing in his examination which rendered him subject to a successful challenge, and it was therefore properly overruled.

The language in the charge of the court to which exception is taken is: "It is an essential ingredient, as I have stated to you, of the crime of murder in the first degree, that there should be an intent to take life. Any intoxication may be considered with reference to the existence of that intent, and its willful, deliberate, and premeditated character; and I charge you that if at the time of doing the act the evidence shows you that this defendant was so intoxicated that his faculties were prostrated, and he was rendered incapable of forming a specific intent to take life, which I have stated is an essential ingredient of this crime, then, although it is no defense and no justification for crime, his offense may thereby be mitigated to murder in the second degree." There is no rule of the English common law more firmly settled than that voluntary intoxication does not excuse or palliate crime. Lord Coke, Sir Matthew Hale, Sir William Blackstone, and Lord Bacon unite in pronouncing the law of England to be "that such a person shall have no privileges by his voluntarily contracted madness, but shall have the same judgment as if he were in his right senses." The cases of *Rex v. Carroll*, 7 Car. & P. 145, and *Rex v. Meakin*, Id. 297, show how rigorously the rule was adhered to. In the former case Justices Park and Littledale declared that, if it were to be considered law that the fact of a defendant being intoxicated is a proper circumstance to be taken into consideration on the question of premeditation, there would be no safety for human life. The statement that voluntary drunkenness is no excuse or justification for any crime is too firmly established by a long series of cases both in England and in this country to be now a subject of controversy. The apparent confusion upon the subject which is introduced by the decisions in some of our states arises in a measure from an inaccurate statement of the position intended

to be assumed by the court. When the English courts declared that voluntary intoxication was an aggravation of the offense committed, they did not intend to assert that a criminal act committed by a drunken man constituted a higher crime than the same act committed by a sober man. It was an expression used to emphasize the rule that voluntary intoxication did not excuse. In my examination, no case has been found sustaining a contrary view. The true rule, in my judgment, to be deduced from a mass of authorities is that there is a situation in which the fact of drunkenness is entitled to weight, not as an excuse for crime, nor in extenuation of it, but as a fact tending to show that the crime imputed was not committed. When the character and extent of a crime is made by law to depend upon the state and condition of the defendant's mind at the time, and with reference to the act done, intoxication, as a circumstance affecting such state and condition of the mind, is a proper subject for inquiry and consideration by the jury. If, by law, deliberation and premeditation are essential elements of the crime, and by reason of drunkenness or any other cause it appears that the prisoner's mental state is such that he is incapable of such deliberation and premeditation, then the crime has not been committed; there is a failure on the part of the state to prove the crime into which premeditation must enter. Intoxication is a mere circumstance to be considered in determining whether premeditation was present or absent. As between the two offenses of murder in the second degree and manslaughter, voluntary intoxication cannot be a legitimate subject of inquiry. What constitutes murder in the second degree by a sober man is equally murder in the second degree if committed by a drunken man. *People v. Rogers*, 18 N. Y. 1; *State v. Tatro*, 50 Vt. 483; *State v. Johnson*, 40 Conn. 136; *State v. Mowry* (Kan. Sup.) 10 Cr. Law Mag. 23 (s. c., 15 Pac. 282), and the numerous cases cited in the notes to that case. In the *Warner Case*, which was affirmed in this court, the trial judge charged the jury that if the defendant's mind, by reason of intoxication, was in such a condition that he could not conceive the purpose of taking life, he was guilty only of murder in the second degree. *Warner v. State*, 56 N. J. Law, 686, 29 Atl. 505. In *State v. Martin* the defendant was charged with homicide, and tried in the Essexoyer and terminer in 1881. Mr. Justice Depue charged the jury as follows upon this subject: "If the evidence is sufficient to satisfy the jury that the intoxication of the accused at the time of the homicide was so great as to prostrate his faculties, and render him incapable of forming the specific intent to kill which is the essential ingredient of murder of the first degree, the prisoner will not be entitled to acquittal, but his offense will be murder in the second degree. You should carefully discriminate between that excitable condition of the mind produced by drink, which is not incapable of

forming an intent, but determines to act on a slight provocation, and such prostration of the faculties by intoxication as puts the accused in such a state that he is incapable of forming an intention from which he shall act." 4 N. J. Law J. p. 339. This case was taken by writ of error to the supreme court, and the judgment there affirmed in November, 1883. As observed by the learned judge in the Martin Case, this rule should be applied with caution, that no undue or dangerous immunity or license be given to crime by persons whose passions are inflamed by drink. So long as the mind of the criminal is capable of conceiving the purpose to kill, he must be held to the responsibility of one who is sober, and that is the language of the cases upon this subject. In *Marshall v. State*, 59 Ga. 154, Mr. Justice Bleckley said, "To be too drunk to form the intent to kill, the slayer must be too drunk to form the intent to shoot." This utterance was cited with approval in *Hanvey v. State*, 68 Ga. 614. If the faculties of the accused are not so far prostrated by intoxication as to render him incapable of forming an intention to kill, the jury would have no right to find that by reason of the intoxication the intention to kill was not present. In the case submitted the trial judge charged the jury in the language of the court in the Martin Case, and in that respect there was no error. The judgment below should be affirmed.

CREVIER v. BEBERDICK et al.

(Supreme Court of New Jersey. June 3, 1897.)

NOTE OF MARRIED WOMAN—VALIDITY.

A mortgage on the lands of the husband is held against husband and wife, and they unite in a note that pays off such incumbrance. *Held*, that such a contract was within the capacity of a feme covert, as it was a benefit to her dower right, and that it was not affected by the fact that her husband acted as her agent, and that she signed the note, and gave it to him without further knowledge or inquiry.

(Syllabus by the Court.)

Action by Anton Beberdick and others against Alice Crevier. Verdict for plaintiffs. Order to show cause why a new trial should be granted. Discharged.

Argued February term, 1897, before VAN SYCKEL, LIPPINCOTT, and GARRISON, JJ.

J. F. Minturn, for the rule. Babbitt & Lawrence, opposed.

GARRISON, J. This is an action on a promissory note made by the defendant to the plaintiffs. The defense pleaded that the defendant's contract with the plaintiffs was that of surety for her husband, the joint maker. Coverture was not pleaded, but was assumed as the basis of this defense. The plaintiffs rested their case upon proof of the direct written promise to pay. At the close of the testimony for the defendant and its rebuttal, the transaction presented was, in its undis-

puted form, deemed by the trial court to afford no ground of defense. For this ruling, a new trial is now sought.

The transaction was this: Crevier and his wife (who is now his widow) had made a mortgage to the plaintiffs to secure \$24,000 upon lands of Crevier. This mortgage was discharged and canceled upon the delivery by Crevier to the plaintiffs of a second mortgage made by Mr. and Mrs. Crevier on other property for \$7,000, a check drawn by Mrs. Crevier alone for \$12,000, and the note in suit for \$5,000, made by the defendant and her husband. The effect was to extinguish the plaintiffs' mortgage, and that, in turn, freed the defendant's inchoate right of dower, and hence was a benefit to her. *Perkins v. Elliott*, 23 N. J. Eq. 526.

The defendant does not deny that this was the purpose for which the note was given by her husband to the plaintiffs, and, of course, cannot deny the legal result above stated. The defense lies wholly in the circumstance, stated by the defendant, that when her husband came to her with the note in question, saying, "I would like you to sign that," she did so, without getting "any part of the five thousand dollars represented by the note," about which she "asked nothing and knew nothing else."

The assumption that this constitutes any defense ignores, as it seems to me, the doctrine established by the case just cited, while it certainly does not tend, in the remotest degree, to sustain the defendant's plea, viz. that she made a contract of suretyship, from which her estate received no benefit. If any effect could be given to the isolated fact of which the defense consists, it would be that she had made no contract at all. This, however, would wipe out the law of agency. The case shows beyond any question that the husband of the defendant was attending to the business out of which this transaction grew, and that while she was not personally participating in the details, she signed all necessary papers, including a check for \$12,000 and this note. The defendant does not repudiate her husband's agency, or put in question the right of the plaintiffs to deal with him as such, but simply claims that the written contract that she intrusted to her agent was beyond her capacity, because she chose to make no inquiry of him, or otherwise to obtain independent knowledge upon which to base her conduct. This does not vary the rule laid down by the case cited. A wife has a perfect right to act through her husband's agency, and to rely upon him, if she will; and, as no one can prevent her from so doing, neither can any one be injured by the mere fact that she has chosen so to do. I take it that, where neither fraud, imposition, nor negligence exists, an obligation of a married woman beneficial to her separate estate cannot be repudiated by her solely because she had entered into it upon the advice and through the agency of her husband; and that is all that is here claimed.

In my opinion, the case shows a contract within the defendant's capacity to make, and that she did make it; and, further, that her reasons for making it, and her relations to the agency she selected in making it, are possessed of no legal significance.

The rule to show cause should be discharged.

CHATTERTON et al. v. MASON et al.

(Court of Appeals of Maryland. June 23, 1897.)

FRAUDULENT CONVEYANCES — CONSIDERATION — PROOF OF DEBTS—RIGHTS OF GRANTEE—PERSONAL DECREE — JUDGMENTS—PROOF — EQUITY PRACTICE.

1. In consideration of a large sum of money paid in cash, a son sold his father all his property. A deed and bill of sale were executed and filed early the next day, after a large part of the property, consisting of a stock of goods, had been attached. The father knew of the attachment, and that the son had many other debts that would soon mature. After the sale, a corporation was organized, of which the father was president, and the son general manager. It was proved that the corporation used a part of the goods purchased by the father, who refused to say what became of the goods he purchased. *Held*, the sale was fraudulent and void as against the son's creditors.

2. Code, art. 16, § 223, requiring evidence to remain in court 10 days, subject to exceptions, before the hearing of the cause, does not apply where, after hearing and argument, a case is remanded, for formal proof of plaintiff's claims, to the examiner before whom the parties appeared, and defendants did not desire to take further evidence; and hence a decree may be entered on the report of the examiner made the day after the remanding of the case and the making of such proof.

3. The recovery of a judgment is proved by a certified copy thereof.

4. Debts against a firm are proved to be in existence when deeds are made, where it is shown that the firm sold out its entire business the same day the deeds were executed.

5. Where a bill to set aside a transfer as in fraud of creditors not only contains no special prayer for a personal decree against the transferee for the value of the goods, he having disposed of same, but contains no allegations that could have informed the transferee that any such claim would be made, it was error to render such a decree.

6. A grantee should be credited for the payment of the claim of one of the grantor's creditors, who had rightfully attached the property, prior to the sale thereof, on a suit by the grantor's other creditors entitled to recover of such grantee for fraudulent acquisition of the property.

7. In a suit by a grantor's creditors entitled to recover of a grantee the value of property fraudulently conveyed, such grantee, who has paid the claims of any of the grantor's creditors, should be credited with the pro rata share to which such creditors would be entitled if the value of the conveyed property had been distributed ratably among all the creditors.

8. A grantee accounting with his grantor's creditors for property fraudulently conveyed is not entitled to credit for money paid the grantor for counsel fees, nor for money paid for the grantor's living expenses.

Appeal from circuit court of Baltimore city.

Bill by William H. Castle and others against John H. Chatterton and Robert M. Chatterton. During the progress of the suit, additional parties appeared, and John T. Mason and John

Hinkley were appointed receivers. From a decree in favor of plaintiffs, defendants appeal. Reversed in part.

Argued before McSHERRY, C. J., and BRYAN, PAGE, ROBERTS, and BOYD, JJ.

Julian J. Alexander and D. Meredith Reese, for appellants. John Hinkley, John T. Mason, A. Bernard Chancellor, Joseph C. France, Charles W. Field, Charles A. Hayden, and Alex. Hardcastle, for appellees.

BOYD, J. The bill was originally filed in this case by William H. Castle, C. O. Baxter & Co., and Glanton & Cotton against John H. Chatterton and Robert M. Chatterton. It alleges that the firm of Newkirk & Roth, on the 10th day of January, 1894, issued an attachment against John H. Chatterton, which was levied on certain goods and chattels; that John H. Chatterton, by deed of January 11, 1894, conveyed to his father, Robert M. Chatterton, for the alleged consideration of \$1,000, two lots of ground in Baltimore city, and transferred to him by a bill of sale certain goods and chattels, for an alleged consideration of \$8,000; that on the 8th day of May, 1894, the plaintiffs issued executions on judgments obtained by them, respectively, on the 25th day of April, 1894; that said William H. Castle had filed, or was about to file, a motion to quash the attachment; that, by reason of said judgments and executions, they had acquired liens on all the property mentioned in the deed and bill of sale, subject to the decision of said motion to quash, and to the result of this bill. They then charge that the deed and bill of sale were made by John H. Chatterton, and received by Robert M. Chatterton, "for the purpose of hindering, delaying, and defrauding the plaintiffs and others who are creditors of the said John H. Chatterton, and who were so at the time of the making of said deed," and require the defendants "to answer fully and particularly and discover and show upon what considerations the said deeds were made, and for what reasons, purposes, trusts, confidences, and whether there was any agreement or understanding between the said defendants in regard to the payment of said creditors or in regard to the reconveyance of said property to said John H. Chatterton," etc. The prayers are that "(a) defendants may answer this bill: (b) that they may discover and show the matters and things hereinbefore required of them: (c) that said two deeds may be declared void as against the plaintiffs and other creditors of said John H. Chatterton who may come into the case; (d) and that the plaintiffs may have such other and further relief as the case may require." With the bill were filed certified copies of the deed and bill of sale, and short copies of the three judgments. The defendants filed separate answers, but they are practically the same. They admit the execution of the deed and bill of sale, but deny that they were executed to hinder, delay, and defraud the creditors of John H. Chatterton, and allege

that they were bona fide and for the considerations named in them. They say they were not made upon any trusts or confidences, and that there is no agreement or understanding between them in regard to the payment of the creditors or the reconveyance of said property to John H. Chatterton. They neither admit nor deny that the judgments were obtained and executions issued as alleged, but call for full proof of the same, and deny that any lien had been acquired by them on said property. On April 30, 1895, four other creditors obtained permission to be made parties. Two of them filed short copies of judgments; another filed a copy of a note; and the other, copies of three notes. The plaintiffs commenced to take testimony by calling John H. Chatterton, and afterwards called Robert M. Chatterton. On September 26, 1896, the examiner, at the request of the solicitors of the respective parties, closed the depositions, and returned them to the court, only the two Chattertons having been examined. In October of that year 14 other parties filed a petition, alleging that they were creditors, and asking to be made parties, which was done, and several others were admitted as parties on other orders. The case was finally set down for hearing, and, after argument, the court passed an order remanding the cause to the examiner, "to the end that the respective parties complainant in the said cause shall offer before him lawful proof of their respective claims against the firm of John H. Chatterton & Co., and for no other purpose." The next day the examiner returned the testimony, which consisted of certified copies of the judgments of such creditors as had judgments, including those of the original plaintiffs, the promissory notes and open accounts of others who had been made parties, and the deposition of one witness who testified that he believed that all the notes filed were signed by J. H. Chatterton, with the exception of one; that all the claims had been admitted by J. H. Chatterton to be proper claims against the firm of J. H. Chatterton & Co. J. H. Chatterton traded in that name, but had no partner. The same day the court passed a final decree, declaring the deed and bill of sale fraudulent and void as against the creditors of John H. Chatterton, who were such on the 11th day of January, 1894, and appointing receivers to take charge of the real and leasehold estate, and to collect from Robert M. Chatterton the sum of \$9,490, being the sum of \$8,000, the value of the chattels as found by the court, with interest from January 11, 1894. The decree recited that it appeared that personal property of the value of \$8,000 had been delivered to Robert M. Chatterton, and by him disposed of, and directed him to pay the said sum of \$9,490 to the receivers.

Assuming that there was sufficient evidence to show that the several debts due the plaintiffs had been contracted prior to the making of the deed and bill of sale, the facts justified the court below in setting them aside. The bona fides of the transfer of property is as

much a subject of inquiry in a case of this character as the consideration. If it be established that the deed was made by the grantor, and accepted by the grantee, with intent to hinder, delay, and defraud the creditors of the former, it matters not that full consideration has been paid. A consideration may for the time being hide a fraud, but it will not protect the participants in a fraudulent transaction when once discovered. The difficulty oftentimes is to determine the intent with which an act is done, but, in reaching a conclusion as to that, courts must be governed by all the facts and surrounding circumstances. When a result is reached which an ordinarily intelligent person must have foreseen, he will generally be presumed to have intended that such result would follow his act. In this case the purchase of the property of John H. Chatterton, by his father, Robert M. Chatterton, and the payment of the purchase money, must, under the circumstances, necessarily have resulted in interfering with the creditors of the former in securing their claims, or such part thereof as his property would meet. No surer means could have been adopted than by converting tangible property, that could be reached by process of law, into cash, that could be stored away in boxes of safe-deposit companies, rented in fictitious names, as was done in this case, or otherwise concealed. The fact was that John H. Chatterton owed over \$40,000, and had, according to the valuation fixed by his father and himself, \$9,000 worth of property. That he was seeking to place his property beyond the reach of his creditors is too clear for controversy. He cannot excuse himself by alleging that the claims on which the attachments were issued were not due. If that was true, and if they had no right to attach by reason of some fraudulent act of his, the attachments could have been defeated. If his object was to protect his creditors, he could have made an assignment for their benefit. But he not only did not do that, but, according to his statement, he used a considerable part of the money he received from his father in settling the attachments, although he claims they were illegally issued. By converting his property into cash, he was enabled to pay only such creditors as he chose to pay; and, if we look at the petition of the defendants filed after the decree, he seems to have chosen to pay only such as had attached the property, or were endeavoring to throw him into insolvency. The father, however, denied that he knew the amount of the indebtedness of his son, or that he was a party to any fraud. An attachment had been issued against the son, and levied on the stock of goods, or a part of it, and the father was present when the levy was made. He said he was in the habit of going to his son's place very often, "perhaps once or twice or three times a week, when I happened to be in town." In answer to the question, "At whose instance did you make this alleged purchase?" he said, "I can't say that it was made

at any one's instance. It was a natural result of the circumstances." The attachment issued before his purchase was for over \$2,000, and he was apparently indifferent as to the result of it. It was issued January 10, 1894, and the deed and bill of sale were executed the next day, and filed for record at 9:40 a. m. of that day. Was such haste to be expected of a father dealing with a son if he was not seeking to record these instruments before other creditors proceeded? When we see how far he trusted his son to protect the property for which he had paid the \$9,000, we can reach no other conclusion as to the cause of the haste in recording the instruments than that he was anticipating proceedings by other creditors. His own testimony shows he knew that other claims against his son would soon mature. He said a calendar was kept on the desk with the payments of each day marked on it, and he looked over it, and found that every payment had been marked out or paid up to that date. He was asked, "You say that you looked at the calendar. Did you examine it for the payments noted there for the balance of the current month?" To which he replied, "Yes." He was then asked, "What did you see?" He replied, "I saw that there was payment to be made for the balance of the month." And in answer to the question, "Did you make any provision for the payment of these maturing claims in the deal which you had with your son?" he replied, "No further than that the money he had would meet them,—the amount of money I paid him." He also said that he did not remember that he had made any inquiry of his son as to his indebtedness before he made the purchase. The subsequent conduct of both defendants throws considerable light on the transaction. In June, 1894, the Chatterton Manufacturing Company was incorporated, with an authorized capital of \$20,000. Robert M. Chatterton was made president, John H. Chatterton secretary and general manager, and his brother treasurer. Only \$9,300 of the capital was paid, which was done with cash and stock, according to the evidence of John H. Chatterton on cross-examination, although he had previously sworn it was paid for in money. He was asked the question, "Was not \$9,000 paid in the same stock of goods that you have turned over to your father, and the remaining \$300 in cash?" To which he replied, "Won't answer that question." He had, however, admitted that the company did use a good many of the goods that he had when he made the deeds to his father. Robert M. Chatterton was asked what became of the stock of goods purchased from his son, and he declined to answer. He was also asked how much of that stock of goods was transferred to the Chatterton Manufacturing Company, but he declined to answer that, and also the question as to how he paid for his stock in that company. We thus find that at least a part, and we might well conclude from the refusal of these parties to answer that the greater part, of

the goods and chattels purchased by the father, in the course of a few months, returned to the control of the son, as manager of the corporation, and find the father, when accused of participating in the fraud, refusing to answer such questions as those stated above. An innocent man resting under such charges would be glad to have the opportunity of explaining fully all his connection with the transaction. The results in this case show how easy it would be for a debtor to pay as many or as few of his creditors as he chooses to pay, if such transactions are to be upheld, especially when such relationship as father and son exists. Robert M. Chatterton certainly knew he was putting it in the power of his son to do just what he did do,—take the money under his own control, and do with it as he pleased. Taking all the facts and surrounding circumstances into consideration, we think the court below was right in determining that the transaction was fraudulent and void as against the creditors of John H. Chatterton, who were such on the 11th day of January, 1894.

But it is contended that there was no legal evidence of the plaintiffs' claims in the case when the decree was passed, because the testimony taken on February 20, 1897, did not lie in court subject to exception for 10 days, as required by equity rule 43 (now section 223, art. 16, Code Pub. Gen. Laws). It was within the discretion of the court to permit the plaintiffs to offer lawful proof of their claims, and from the exercise of that discretion there could be no appeal; and we think the court had the right to limit the taking of the testimony to that particular purpose. The order of the court stated: "And, upon the filing with said examiner of such formal proofs of said parties complainant as aforesaid, he (the said examiner) is hereby directed to return forthwith the papers and testimony of the said cause, with the claims proven as aforesaid to this court, for the passage of a final decree in the premises." No further hearing of the case was intended, and therefore the equity rule above referred to, requiring evidence to remain in court 10 days, subject to exceptions, before the cause shall be taken up for hearing, did not apply. The solicitors for the respective parties were before the examiner. In fact, the testimony was taken in the office of one of those for the defendants. They knew what the order of the court was, or must be presumed to have known it, as the testimony was taken under it; and, if they desired to rebut the evidence offered by the plaintiffs, they should have at once made application to the court for leave to take such testimony, and they could have excepted at once to that taken by the plaintiffs. But they did not do either, although the return of the examiner shows that he closed the depositions at the request of the solicitors of the respective parties. The decree was passed the same day, and four days after Robert M. Chatterton filed a petition to strike

out and annul the decree, and to quash an execution that had been in the meantime issued against him. The petition relied entirely upon equity rule 43, and does not state or suggest that he desired to take further testimony, or except to that taken. On the 8th day of March, the two defendants filed another petition, in which they set out what was done with the \$9,000, and ask that Robert M. Chatterton be allowed for payments made to creditors of John H. Chatterton with said money, but do not then ask leave to take testimony in rebuttal of that taken by the plaintiffs. So, although we think it would be the duty of a court which remanded a cause for further testimony to be taken in the interest of one side to allow the other side to rebut or explain it, if proper application be made, yet, if that be not done, such party has no reason to complain. We think the copies of the judgments of the original plaintiffs certified by the clerk under the seal of the court were sufficient to prove the recovery of such judgments, and there were no exceptions filed to them. It is not necessary to refer to the claims of the plaintiffs who were admitted after the bill was filed, as the decree does not necessarily establish their validity, and it would be necessary that the claims of one or more of the original plaintiffs be established to entitle them to a decree.

We had some question as to whether it was sufficiently shown that the debts on which these judgments were rendered existed at the time the deeds were made, but we think John H. Chatterton's testimony sufficiently establishes that fact. He testified that he sold out the business he was engaged in as J. H. Chatterton & Co. to his father on January 12, 1894, the date of the deeds, and he spoke of the amount he owed at that time. These claims were against J. H. Chatterton & Co., and must have been contracted before he sold out the business. While it might have been made clearer by proof of the exact dates the debts were contracted, we are satisfied from the evidence that they existed before the deeds were made.

So much of the decree, then, as declared the deed and bill of sale void, we think, was properly passed. But we are of opinion that there was error in that part which decreed payment by Robert M. Chatterton of the sum of \$9,400. We have quoted above the prayers of the bill, and it is manifest that the payment of this sum could not have been decreed under the special prayers. The general rule is that the relief to be given under a prayer for general relief must be agreeable to the case made by the bill, and not differing from it or inconsistent with it, and must be warranted by the allegations of the bill. The authorities in this state will be found collected in the recent work of Miller on Equity Procedure (sections 100 and 101), and need not be repeated here. The bill alleges that the plaintiffs had acquired liens on the property conveyed by the deeds, subject to the decl-

sions of the motion to quash the attachment, and asks to have the deed and bill of sale set aside as fraudulent and void against the creditors of John H. Chatterton. It is nowhere intimated that a personal decree would be asked against Robert M. Chatterton for the purchase money paid by him for the goods and chattels, with interest thereon, and there were no allegations in the bill that could have informed or given him notice that any such claim would be made. The bill alleges that, under the attachment issued the day before the deed and bill of sale were executed, goods valued at \$4,495.95 had been levied on. They were a part of the goods purchased by Robert M. Chatterton. There is nothing in the record to show that he was in any wise responsible for that attachment, and if it was properly issued, or if it was necessary to settle with the plaintiffs to free the property from the attachment, it would be manifestly unjust to charge him with the entire value of the property without deducting what was necessarily paid to release the attachment. He was entitled to some notice that the plaintiffs in this case would seek to hold him responsible for the entire value of the property, and to show, if he could, that he was entitled to credits on it. When it was discovered by the plaintiffs that the property had been sold or disposed of, they should have applied to the court for leave to amend their bill, if they desired to get a personal decree against Robert M. Chatterton, and have made the necessary allegations to obtain a decree of that character. He could then answer it, and offer evidence of any credits he may be entitled to, and might possibly show that some of the goods taken under the attachment never came into his possession.

As the case must be remanded, it will be proper to indicate our views as to how far he is entitled to credits for payments made creditors with money furnished by him, so far as we are informed by the record. In the first place, he should be allowed for what was necessarily paid Newkirk & Roth, who had attached the property prior to his purchase. The court should be satisfied that they had such a standing in court as to make a settlement of their case necessary or proper. Such a credit would undoubtedly be equitable, as the plaintiffs and other creditors would be in no worse position when that is allowed than they would have been if John H. Chatterton had made an assignment for their benefit after the attachment was laid. Then he would be entitled to the distributive shares of any other creditors that were settled with out of money paid by him. For illustration, if the claims of all the creditors of John H. Chatterton, when the deed and bill of sale were made, amounted to \$40,000, exclusive of Newkirk & Roth's claim, and there is \$7,200 for distribution, after deducting costs and any amount properly paid Newkirk & Roth, as above indicated, there would be a distribution of 18 per cent. to each of the creditors. Robert M. Chatterton would

then be entitled to a credit of that percentage on all proper claims of the creditors of John H. Chatterton which had been paid or settled with out of the money furnished by him, provided he paid, at least, that amount in such settlements. If the evidence shows that there was no necessity to settle with Newkirk & Roth, but that the attachment had been improperly issued, and could probably have been defeated, then he would only be entitled to a credit on that claim for whatever the distributive share will be, of all creditors, after that claim is added. Of course, the burden is on Robert M. Chatterton to show that his money was paid to such creditors as he may get credit for, as well as that they were bona fide creditors of John H. Chatterton when the transfers were made. He is not entitled to be credited with the amounts he or his son saw proper to pay to the creditors who attached after the deed and bill of sale were made, or to those who instituted or threatened insolvency proceedings, beyond what their distributive shares may be. Nor is he entitled to deduct out of this fund counsel fees paid by him to his son, and, of course, he cannot deduct any amount expended by his son for living expenses.

We think the above equitable, and in line with *Milholland v. Tiffany*, 64 Md. 455, 2 Atl. 831, and *Cone v. Cross*, 72 Md. 102, 19 Atl. 391. The practical difficulty we see in the way of these allowances is that it may be impossible to tell before an audit is made how much the distributive shares to which Robert M. Chatterton is entitled to be subrogated will amount to, and an audit cannot be made until the money is paid. If such be the case, the court, in passing a personal decree, should require him to pay in the whole amount found to be due, after deducting the amount allowed on account of the Newkirk & Roth attachment, and any other amounts that he may be able to show should properly be deducted, if there be any such. Then there can be distributed to his use such amounts as the creditors who were settled with out of his money would have been entitled to if they had not been thus paid or settled with, which should be returned to him. Of course, the plaintiffs are not limited in their recovery to the purchase money Robert M. Chatterton paid for the goods, if they can show they were worth more. The decree will be affirmed in so far as it declares the deed and bill of sale fraudulent and void as to all creditors of John H. Chatterton who were such on the 11th day of January, 1894, and appoints receivers, but that part of it requiring Robert M. Chatterton to pay the sum of \$9,490 must be reversed, for the reasons we have given. The bill can be amended to meet our views as to the necessity of a special prayer to require the payment of such amount as may be found to be due, if the goods cannot be recovered. Decree affirmed in part, and reversed in part, and cause remanded; each party to pay one-half of the costs.

JONES et al. v. MUNROE et al.

(Court of Appeals of Maryland. June 24, 1897.)

STATUTES—REPEAL BY IMPLICATION—ANNAPOLIS MUNICIPAL ELECTIONS.

Acts 1894, c. 533, after declaring that certain statutes shall not apply to municipal elections in the city of Annapolis, provides that the corporation shall appoint the persons to be judges of its municipal elections, and the necessary clerks; that in performing their duties they are to conform to the provisions of the Code, and that the supervisors of election in Anne Arundel county are relieved of duties in connection with such elections. *Held* not repealed by Acts 1896, c. 202, which devises an entirely new scheme for all elections in the state, and declares that all laws inconsistent therewith are repealed, but which provides (section 13) that in any city other than Baltimore, in which the municipal elections "are now regulated by the public local laws of the state," the conduct of such elections shall continue to be so regulated, and such local law shall continue in force.

Appeal from circuit court, Anne Arundel county.

Petition by Samuel Jones and others against Frank A. Munroe and others for a writ of mandamus. From a judgment granting the writ, defendants appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Dennis Claude, for appellants. James M. Munroe, for appellees.

PAGE, J. The petition in this case was filed by persons who are candidates for certain positions in the municipal government of Annapolis. It alleges that the election will take place on the 12th day of July next, but that the supervisors of election for Anne Arundel county, and other election officials who served as judges and clerks of election at the last general election, refuse to take "any action in regard to the conduct of said election, because they are not satisfied with regard to the extent of their authority over the same." The petitioners pray for a writ of mandamus requiring the defendants to proceed to do such things as may be required under Acts 1896, c. 202, to conduct the election according to the provisions of that act. The answers of the defendants admit the facts set forth in the petition, but allege that the municipal elections of the city of Annapolis, under the provisions of section 13, c. 202, Acts 1896, are excepted from the jurisdiction and control of the supervisors of election and of the judges and clerks of election appointed by them, and are controlled by the provisions of chapter 533, Acts 1894. The only question in the case, therefore, is whether the act of 1894 (chapter 533) has been repealed by the act of 1896 (chapter 202). The former act provides that section 160, art. 33, of the Code, as enacted by chapter 538, Acts 1890, and the provisions of new section 166 of the same article, as enacted by chapter 701, Acts 1892, shall not apply to municipal elections in the city of Annapolis. It further provides that the corporation shall

appoint those persons to be judges of its municipal elections, any two of whom shall have power to hold such election; also appoint the necessary clerks. The judges and clerks so appointed are to qualify before the mayor or any justice of the peace of the city, and in the execution of their duties, and in the manner of conducting elections, they are to conform "in every respect to the provisions of the Code," etc. The city of Annapolis is to pay all the expenses of the election, and provide ballots and all other materials and machinery necessary for the holding of said municipal elections. And it is further provided, "The supervisors of election in Anne Arundel county are relieved from all duties and responsibilities in connection with said municipal elections." It is contended this act is repealed by Acts 1896, c. 202. This act of 1896, it is true, devised an entirely new scheme for all elections in the state of Maryland, and, unless there is something in it effective to retain the act of 1894, above referred to, the latter act must be repealed, inasmuch as by the third section of the act of 1896 (chapter 202) it is provided that that act shall take effect from the date of its passage, "and all public general laws or public local laws or parts thereof which are inconsistent" with its provisions "are hereby repealed." The thirteenth section of the act of 1896, however, provides "that in any incorporated city or town in this state (other than the city of Baltimore), in which the municipal or charter elections thereof are now regulated by the public local laws of the state, the conduct of such municipal or charter elections shall continue to be so regulated as heretofore and such local law shall continue in force therein." Without extending this opinion, we content ourselves with saying we think this section leaves unrepealed and in full force the act of 1894 (chapter 533). That act, as has been stated, requires that the judges of election shall be appointed by the corporation of city of Annapolis, and not by the supervisors; and also the necessary clerks. In the execution of their duties, and in the manner of conducting the elections, the act of 1896 (chapter 202) must control them, so that they conform as far as possible in every respect to its provisions, and they are also subject to the same penalties as other judges and clerks of election in the state. The order of the court below must therefore be affirmed. Order affirmed, with costs.

MAYOR, ETC., OF HAGERSTOWN et al. v. WITMER et al.

(Court of Appeals of Maryland. June 23, 1897.)

DOGS RUNNING AT LARGE—VALIDITY OF ORDINANCE.

1. Though a city charter contains no express provision prohibiting dogs from running at large, an ordinance to that effect may be passed under the general power to abate nuisances.

2. An ordinance providing for the impounding of all dogs running at large in a city, for the noti-

fication to owners whose names are engraved on the dogs' collars, and for the killing of dogs not redeemed by the payment of one dollar within 24 hours after such impounding, is not unconstitutional, nor so unreasonable as that it should be declared void, as there can be but a qualified property in dogs.

Appeal from circuit court, Washington county.

Injunction by Frank Witmer and others against the mayor and council of Hagerstown and others. From judgment for plaintiffs, defendants appeal. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, ROBERTS, and BOYD, JJ.

A. C. Strite, for appellants. W. J. Witzemberger and J. Marbourg Keedy, for appellees.

BOYD, J. The appellees filed a bill against the appellants to restrain and enjoin them "from doing or performing any act or acts contemplated to be by them done or performed" by an ordinance entitled "An ordinance regulating the running at large, catching, impounding and killing dogs within the corporate limits of Hagerstown." The object of the proceeding is to test the validity of the ordinance, and therefore we need not stop to discuss any technical objections that might be urged to the form of the bill, or other pleadings, especially as the only point suggested has been remedied by an agreement filed in this court to correct an omission from the record. The ordinance, after enacting that dogs shall not be permitted to run at large within the corporate limits of Hagerstown, provides for the appointment of not more than three persons to "seize and kill, subject to the subsequent provisions of this ordinance, all dogs running at large within the corporate limits of the city of Hagerstown. All dogs so seized by them shall be detained in a suitable place, to be provided by him or them, for a period of twenty-four hours. They shall notify every owner of any dog who has a collar upon his dog's neck with the owner's name engraven thereon of such seizure, that the same may be ransomed upon the payment of the fees hereinafter specified." It is further enacted by section 3 "that any owner of any dog seized under the provisions of this ordinance may redeem the same upon the payment to the person so seizing and impounding said dog the sum of one dollar. All dogs not redeemed shall be killed as hereinafter required," and by section 5 "that it shall be the duty of every man appointed to seize dogs under the provisions of this ordinance to kill all dogs not ransomed at 10 a. m. of the morning of the day after they shall have been detained twenty-four hours, in the most humane manner possible." The charter of Hagerstown contains no express provision prohibiting dogs from running at large. The only reference made to them is a power "to levy a tax and impose a license on dogs." It does, however, vest the mayor and council with

power "to pass all ordinances necessary for the good government of the town; to prevent, remove, and abate all nuisances or obstructions in or upon the streets," etc. And, after enumerating the above and other powers, section 171 of article 22 of the Local Code, which includes this charter, provides that "for the purpose of carrying out the foregoing powers, and for the preservation of the cleanliness, health, peace and good order of the community, and for the protection of the lives and property of the citizens, and to suppress, abate or discontinue, or cause to be suppressed, abated or discontinued, all nuisances within the corporate and sanitary limits of said town,—they may pass all ordinances or by-laws from time to time necessary." To insure the observance of such ordinances, it authorizes the imposition of fines, and imprisonment in default of the payment of fines imposed. If dogs by running at large had become nuisances, or offended any of the other provisions of the charter quoted above, it would seem clear that the mayor and council could adopt reasonable measures to abate the nuisance or remedy the evil, although there is no express provision in the charter prohibiting them from running at large. We held in *Cochrane v. Frostburg*, 81 Md. 54, 31 Atl. 703, that the mayor and city council of Frostburg had power to prevent cattle from running at large under the general authority to pass ordinances to remove nuisances from the streets, and to ordain and enforce all ordinances, rules, and regulations necessary for the peace, good order, health, and safety of the town, and of the people and property therein. That being so with reference to such animals as cows, it would seem to be equally clear that, under such powers as the mayor and council of Hagerstown have, dogs can be prohibited from running at large on the streets and alleys of the city.

It was said by the learned judge who decided the case below that: "I am not to be understood as deciding that the municipal authorities have not the power to provide for the impounding of all dogs or other animals running at large upon the streets, for the killing of such as have no owners, and for the removal and suppression of those having owners from the streets and highways of the town;" but he was of the opinion that the ordinance was void, because it did not provide for notice to the owners of the dogs taken under its provisions. It seems to us that when it is determined, as we do, that the power was vested in the mayor and council to prevent dogs from running at large, and to enforce it by impounding them, the case is practically determined in favor of the city. It is true that dogs are now generally recognized as property. At common law civil actions could always be maintained for their recovery, although they were not regarded as the subjects of larceny. But they are of a qualified kind of property, and such as is peculiarly the subject of police regulations. They have never ranked with such do-

mestic animals as horses, cattle, and sheep, in which the owner has an unqualified and complete property. Various reasons have been assigned for the distinction, among which are that dogs are not used for food, husbandry, or as beasts of burden, but are generally used either for the mere whim or pleasure of the owner, or for such purposes as are calculated to arouse their natural ferocity to some extent, such as hunting, protection, etc. But probably the most potent reason for subjecting them to more control than other domestic animals is the fact that they are so subject to hydrophobia, which is so readily communicated not only to other animals, but to human beings, when bitten by a dog afflicted with that most terrible disease. Fortunately, cases are rare, as compared with the number of dogs that are to be found in most places, but the damage that may be done by one mad dog is fearful to contemplate. Conceding, then, that the appellant corporation has the power to prohibit dogs from running at large, and knowing that the law does make a distinction between them and other domestic animals, courts cannot say, as a question of law, that an ordinance of this character is wholly unreasonable and void, as we would have to do to set it aside. We cannot assume that it may not be reasonably necessary to prohibit dogs from running at large in a city the size of Hagerstown, nor can we say that can be accomplished without some such provisions as those included in this ordinance. There are various kinds of dogs. Some are very valuable, others utterly worthless; some whose owners might readily come to their relief if seized for running at large, while there are others that either have no owners, or, if they have, would not be acknowledged by them if a fine might be the result of such recognition. In the case of *Sentell v. Railroad Co.* (decided by the supreme court of the United States on April 26, 1897) 17 Sup. Ct. 693, the court said it was practically impossible by statute to distinguish between valuable and worthless dogs, and, "acting upon the principle that there is but a qualified property in them, and that while private interests require that the valuable one shall be protected, public interests demand that the worthless shall be exterminated, they have, from time immemorial, been considered as holding their lives at the will of the legislature, and properly falling within the police power of the several states." Again, it was said that legislation on the subject "is based upon the theory that the owner of a really valuable dog will feel sufficient interest in him to comply with any reasonable regulation designed to distinguish him from the common herd." To show how far the courts of other states have sustained laws of this character, we will briefly refer to some of the cases. In *Jenkins v. Ballantyne*, 8 Utah, 245, 30 Pac. 760, it was held that an ordinance making a dog liable to be killed by any person unless registered and collared as provided by the ordinance, is not in violation of the con-

stitutional provision against depriving a person of property without due process of law, but is a valid police regulation. In *Nehr v. State*, 35 Neb. 638, 53 N. W. 589, a statute was declared valid which provided that, if a dog be found running at large without a good and sufficient collar, with a metallic plate on which the name of the owner is plainly inscribed, no action could be maintained for killing him. In *Blair v. Forehand*, 100 Mass. 136, it was decided that authority to regulate the keeping of dogs under the penalty of having them summarily destroyed, without previous adjudication, is within the police power vested in the legislature by the constitution of the commonwealth. In *Morey v. Brown*, 42 N. H. 373, a statute providing that dogs may be summarily killed if found uncollared, etc., was held to be constitutional. In *Julienne v. City of Jackson*, 69 Miss. 34, 10 South. 43, it was held that a municipal corporation may, in the exercise of the police power, provide by ordinance that unmuzzled dogs running at large shall be killed; that such ordinance did not violate the constitutional right of the owner, although his property is destroyed without notice. In *State v. City of Topeka*, 36 Kan. 76, 12 Pac. 310, it was decided that statutes and ordinances regulating, restricting, or prohibiting dogs from running at large in cities, and authorizing the summary killing of those so running at large, were constitutional. In the case of *Sentell v. Railroad Co.*, supra, many of the cases we have cited were referred to, and the principles announced by them fully sustained. Among other reasons for such legislation that court said: "Although dogs are ordinarily harmless, they preserve some of their hereditary wolfish instincts, which occasionally break forth in the destruction of sheep and other helpless animals. Others, too small to attack these animals, are simply vicious, noisy, and pestilent. As their depredations are often committed at night, it is usually impossible to identify the dog, or to fix the liability upon the owner, who, moreover, is likely to be peculiarly irresponsible. In short, the damages are usually such as are beyond the reach of judicial process, and legislation of a drastic nature is necessary to protect persons and property from destruction and annoyance. Such legislation is clearly within the police power of the state. It ordinarily takes the form of a license tax, and the identification of a dog by a collar and tag, upon which the name of the owner is sometimes required to be engraved; but other remedies are not uncommon." In *Hubbard v. Preston*, 90 Mich. 221, 51 N. W. 209, as reported in 15 *Lawy. Rep. Ann.* 249, there is an excellent note on the subject, where many authorities are collected. The cases are practically unanimous in holding that laws providing for the summary destruction of dogs at large contrary to statutes or ordinances are constitutional, and within the police power of the state.

The ordinance before us requires notice of seizure to be given to the owner of any dog upon which there is a collar with the owner's name engraven thereon, so it can be ransomed by the payment of the sum of one dollar. The same protection against the destruction of dogs is thus given owners as is done in cases above cited, where collars were required to be worn as evidence of the payment of the license fees. Section 3 provides that any owner of any dog seized may redeem the same upon the payment to the person so seizing and impounding said dog the sum of one dollar. A reasonable construction of that section would require that when the owner is known he at least be notified of the seizure of his dog. If a dog be of any value to his owner, its absence for 24 hours, or more, will most likely be observed by himself, or some member of his family, and he can inquire at the pound for it. The worst that is likely to happen in such cases will be the payment of the dollar as a ransom fee. The mayor and council can forbid dogs from running at large, and impose heavier penalties than that fee for the violation of the law; or they can, under the express provisions of their charter, require licenses to be taken out, and, if necessary or proper for the enforcement of such requirement, direct that unlicensed dogs be killed, and that, too, without notice to the owners. But, while this is true, an ordinance embracing such drastic features should be very cautiously enforced. As many of the provisions of the one before us are, to say the least, severe, it should be construed liberally in favor of the owners of dogs, if any cases arise under it, and it ought not to be extended beyond what is absolutely required by its terms. But under the authorities we cannot say that it is unconstitutional, and cannot hold it to be so unreasonable in its terms as to justify us in declaring it void. It may not be a wise law, and may possibly work hardship on some owners of dogs, but, if that be so, it can be remedied by the people themselves, as the mayor and council are only their representatives. It is not subject to our control, certainly not as the case is now presented to us. So far as we are informed by the record, nothing has been attempted to be done under it; yet we are asked to declare the whole ordinance null and void on its face. This we cannot do for the reasons we have given. Being of the opinion that the mayor and council had the power to pass an ordinance on this subject, and that the one before us is not unconstitutional, or in conflict with the charter, or so plainly unreasonable as to justify us in declaring it void, the decree will be reversed, and the bill dismissed. Decree reversed, and bill dismissed, with costs to the appellants.

MURPHY v. LITTLE.

(Supreme Court of Vermont. Chittenden. Jan. Term, 1897.)

NOTICE TO QUIT—WAIVER—PAYMENT OF RENT.

A tenant at will, whose rent had been \$100 per month in advance, after notice to quit, and notice that, if he remained, he would be required to pay \$200 per month, on May 1st sent the landlord a check for \$100 in a letter as follows: "Inclosed \$100.00 for May rent"; and on May 31st he sent another check in a letter as follows: "Find check for \$100.00 for June rent." Both checks were received, retained, and collected by the landlord. *Held*, that such acceptance of such checks operated as a waiver of the notice to quit, and of the notice of proposed increase of rent, and constituted a satisfaction in advance of the rent for May and June.

Exceptions from Chittenden county court; Taft, Judge.

Justice ejectment by Thomas H. Murphy against John F. Little. A verdict was ordered for plaintiff, and judgment rendered thereon, and defendant excepts. Reversed.

E. R. Hard and Seneca Haselton, for plaintiff. R. E. Brown, for defendant.

THOMPSON, J. At the time the plaintiff purchased the property in question of John J. Thompson, the defendant was in possession thereof under a parol lease from Thompson for one year, beginning July 20, 1892, and ending July 20, 1893, at an annual rent of \$1,200, payable in installments of \$100 on the 1st day of each month, in advance. Under this lease the defendant was a tenant at will only. V. S. § 2218; *Amsden v. Blaisdell*, 60 Vt. 386, 15 Atl. 332. The premises were conveyed to the plaintiff by Thompson February 23, 1893. Subsequent to the conveyance the plaintiff accepted rent of the defendant for the months of March and April, and thereby the relation of landlord and tenant was created between them, subject to the terms of the original lease. March 10, 1893, the plaintiff gave the defendant written notice to quit the premises on May 1, 1893, and April 1, 1893, he further notified him in writing that, if the notice to quit was not complied with, the rent would be \$200 per month after May 1, 1893. The defendant did not quit the premises pursuant to the notice to quit. The evidence tended to show that after May 1, 1893, there was a controversy between the plaintiff and defendant in respect to the rent the latter was bound to pay for his occupation of the premises subsequent to that date. May 1, 1893, the defendant sent the plaintiff a check for \$100 in a letter addressed to him, the body of which was as follows: "Inclosed \$100.00 for May rent." Again, May 31, 1893, the defendant sent the plaintiff a check for \$100 in a letter addressed to him, the body of which was as follows: "Find check for \$100.00 for June rent." The plaintiff received both these checks, retained them, and collected the money thereon. It is now contended by the defendant that the acceptance of these two checks by the plaintiff, under the explicit declaration of the letters ac-

companying them, that they were for the May and June rent, operates as an accord and satisfaction of the rent for these months. We think the construction to be given these letters is that the checks were offered, and, if accepted, were to be taken, for the entire rent of these months. Hence the acceptance and retention of the checks by the plaintiff operated as a satisfaction in advance of the rent for May and June. The plaintiff could not escape the legal effect of his acceptance of the amount offered by writing to the defendant for further payment of rent for these months. The satisfaction of the rent operated at once when the checks were accepted and retained by the plaintiff. *Lumber Co. v. Brown*, 68 Vt. 239, 35 Atl. 56. Under the circumstances of this case, the acceptance of the rent for May and June operated as a waiver of the notice to quit, and the notice in respect to the proposed increase of rent. This suit was brought June 5, 1893. At that time there was no notice to quit operative on the defendant, nor was there any rent due, it having been paid in advance for the entire month of June. It was therefore error for the county court to direct a verdict for the plaintiff. Judgment reversed and cause remanded.

KELLEY v. DOWNING.

(Supreme Court of Vermont. Washington. Oct. Term, 1896.)

EVIDENCE—COMPETENCY—TRIAL—MISCONDUCT OF JURY.

1. When the only issue is whether horses were traded on the condition that the one plaintiff received would work well on a milk cart, evidence of what plaintiff thought he could do with the horse is immaterial.
2. Evidence of an expert as to the effect of a runaway upon the horse's disposition was inadmissible.
3. A plaintiff trading for a horse on condition that she worked well on a milk cart may testify that she kicked and balked when used with another, where defendant suggested that she be so used.
4. A court may refuse to discharge the panel for the reason that after an adjournment one of the jurors and plaintiff had a conversation, which had no reference to the case.

Exceptions from Washington county court.

Replevin by J. H. Kelley against Fred Downing. From judgment for plaintiff, defendant brings exceptions. Overruled.

The plaintiff's evidence tended to show that he exchanged horses with the defendant on the condition that the plaintiff might try the horse he received until 9 o'clock the next morning, and, if she worked well on a milk cart, the trade should be binding. The defendant's evidence tended to show that the exchange was absolute. The trade was made on an occasion when the defendant was making an unsuccessful attempt to use the horse, and the negotiations were opened by the plaintiff's proposal to the defendant, "Come up here, and trade for a horse that you can use." The defendant offered

to ask the plaintiff as a witness upon the trial whether he did not come to the opinion on the spot that he could manage the horse, although the defendant could not. The question was excluded, and the defendant excepted. The horse delivered to the plaintiff had run away, and been severely frightened, and, according to the defendant's evidence, had never, before the runaway, balked or kicked. The defendant introduced a witness acquainted with the horse, and qualified to speak as an expert, by whom he offered to show what the effect of such a runaway would be upon the disposition of such a horse. The evidence was excluded, and the defendant excepted. Upon the adjournment of court at the end of the first day's session, the plaintiff had a private conversation with one of the jurors, which the juror testified had no reference to the case. The defendant, at the opening of the court the next morning, moved that the panel be discharged. The motion was denied, and the defendant excepted.

W. E. Barney and Richard A. Hoar, for plaintiff. John W. Gordon, for defendant.

START, J. The plaintiff claimed that he exchanged horses with the defendant on condition that the horse received of defendant would work on a milk cart. The defendant claimed that the exchange was absolute. On this issue, what the plaintiff thought before the exchange about his being able to handle the horse was immaterial, and the testimony was properly excluded. For like reason the expert evidence offered by the defendant to show the effect of a runaway upon a horse's disposition was properly excluded. So far as appears from the exceptions, the only question about which the parties were at issue was whether the exchange was conditional in the respect claimed by the plaintiff, and the testimony offered and excluded could have no bearing upon this issue. It not appearing that there was any issue to which this testimony was pertinent, error does not appear. The plaintiff having testified that the defendant suggested that the horse be used with another, it was no error to allow him to testify that he did so, and the horse kicked and balked when so used. The juror Ellis was not legally disqualified by reason of the talk he had with the plaintiff; and while the court, in its discretion, could have discharged the panel, and called another, its declining to do so was not error. Judgment affirmed.

BIGELOW v. CROSS.

(Supreme Court of Vermont. Caledonia. Oct. Term, 1896.)

BREACH OF CONTRACT.

Plaintiff's testator paid defendant, an adjoining lot owner, \$100 on condition to be paid back,

with interest, whenever defendant should extend the front of his building. Defendant afterwards erected a framework, and partly boarded it, for an addition. When plaintiff demanded repayment, defendant stated that he would pay it if he went on with the addition, but he might decide to remove it, whereupon plaintiff brought suit, two weeks after which defendant removed the structure. Held, that plaintiff could recover.

Exceptions from Caledonia county court; Ross, Chief Judge.

Action by C. D. Bigelow, executor, against George H. Cross. From a judgment for defendant, plaintiff excepts. Reversed.

W. P. Stafford, for plaintiff. Dunnett & Slack, for defendant.

START, J. It appears from the agreed statement of facts that on the 20th day of January, 1892, the defendant owned a building and lot on the west side of Main street, in the village of St. Johnsbury, immediately north of a dwelling house and lot owned by the testator; that the fronts of these buildings were about equally distant from the street, and about nine or ten feet from the sidewalk; that, on the day and year above named, the testator paid the defendant \$100, in consideration of the defendant's agreement not to extend the front of his building beyond its then bounds, and that the defendant executed a writing acknowledging the receipt of the money, and agreeing to refund the same, with interest, in case he violated his agreement. On the 11th day of November, 1895, the defendant made a contract with a builder to erect a one-story addition onto the front of his building, to extend 8½ feet towards the sidewalk. Pursuant to this contract, the foundation was laid, a frame erected thereon, and the sides, front, and roof of the same partly boarded. The structure remained in this condition until two weeks after the date of the writ, when the defendant had it taken down. On the day of the date of the writ, the plaintiff demanded the \$100 and interest. Payment was refused, and this action was thereupon brought. When the defendant refused to refund the money, he stated that he had stopped work on the addition, and it was uncertain whether he would complete it or remove it, and that he would pay the \$100 if he went on with the addition, but, if he did not, he did not want to pay it.

The defendant's counsel insists that there was no breach of the defendant's agreement at the time the suit was brought, because the extension of the building towards the street was not a completed structure, and that nothing short of a substantially completed structure would entitle the plaintiff to a return of the money. If this is the true construction of the contract, there would seem to be no good reason why the defendant might not at all times maintain an incomplete structure that would obstruct the plaintiff's view as effectually as a completed structure, and thereby defeat the object and the purpose of the contract for which the testator paid the \$100; but

this is not the true construction of the contract. It is clear that the purpose of the agreement was to prevent the defendant from injuring the testator's premises by making them unsightly, and obstructing the view. The incomplete structure obstructed the view as effectually as a completed structure would, and was of such a character as to constitute a breach of the agreement; and the fact that the defendant removed the structure after the right to the return of the money had become absolute, and a suit brought for its recovery, will not defeat the action. The defendant had no right to extend the front of his building, and keep the money. He did extend it, and suffered it to so remain for two weeks after the money was demanded, its return refused, and the suit brought for its recovery. Under these circumstances, full effect will be given to the contract by awarding a return of the money and interest thereon, and leaving the defendant in the enjoyment of his original rights. Judgment reversed. Judgment for the plaintiff to recover \$129 and his costs.

JARTMAN v. PACIFIC FIRE INS. CO.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

JUDGMENTS—OPENING DEFAULTS.

It is not abuse of discretion to refuse to open a default of a defendant whose agent caused no appearance to be made, mistakenly believing that the writ issued was so defective as to be no foundation to the suit, where the amount involved is small.

Appeal from court of common pleas, Hartford county; John Walsh, Judge.

Action by William Jartman against the Pacific Fire Insurance Company on a policy of insurance. From an order denying a motion to open up a judgment, defendant appeals. Affirmed.

The plaintiff had a policy issued by the defendant insuring him against loss by fire on his household goods. During the life of the policy his goods were damaged by fire. He brought a suit on the policy to recover the loss, claiming to recover \$200 damages. The complaint was duly served on the insurance commissioner of this state, and was returned to and entered in the docket of the court of common pleas in Hartford county at its September term, 1896. The case was continued from time to time till the January term, 1897, when, the defendant having failed to appear, judgment was rendered by default for the plaintiff to recover the sum of \$103.75.

On the 13th day of February, 1897, the defendant moved the said court to open the default. The court heard the parties on the motion, with their witnesses and counsel, and on consideration refused to grant it. The defendant gave notice of an appeal from that judgment to this court. For the purpose of making that appeal the counsel for the defendant asked the court for a finding of facts,

and themselves prepared and submitted to the judge of that court a proposed finding of the facts in the matter, as they claimed them to be, as follows: "(1) On August 7, 1896, the plaintiff brought an action against the defendant, to recover damages for an alleged loss by fire upon the premises occupied by the plaintiff. Said writ was made returnable to the first Tuesday of September, 1896, and was served by leaving a copy with the insurance commissioner of this state. Said commissioner mailed a writing purporting to be a copy of said process to the defendant at New York, but in said copy there was left blank the time or date that defendant was summoned to appear in court to answer to said complaint. (2) Upon receiving said copy from the insurance commissioner, the defendant, by its proper officer, communicated by letter with the representative or agent of said company in this state, one Granville W. Goodsell, of Bridgeport, notifying him of the institution of said suit, and directing him to protect the interests of the defendant therein. (3) Said Goodsell, after inspecting said writ, erroneously supposed and believed that it was not necessary to enter an appearance in said action, because of the omission of any specified time upon which to appear and answer; and, having previously been negotiating a compromise of the plaintiff's claim, having had several conferences with plaintiff's counsel upon the subject of said claimed loss, said Goodsell erroneously supposed and believed that said writ had been sent to said company for the purpose of hastening a settlement of the claim, and erroneously believed that no suit was actually pending in said court; and solely on that account, and because of his ignorance of the legal status of said claim as then being prosecuted against the defendant, he failed to enter an appearance in said cause in behalf of the defendant, or to employ counsel to appear in said cause. (4) The defendant, at all times since said action was brought, has believed that its said agent in Connecticut had protected its interests in respect to the claim made by the plaintiff, and in respect to said suit, in every proper way, and that he had taken such steps as would insure it a trial upon the merits of said cause, and had no knowledge of the judgment by default rendered in said cause, or that the status of said case was such as that a judgment by default could be rendered therein, until notified by counsel for plaintiff by letter dated February 2, 1897, of the fact that a judgment by default was rendered in said cause on the 13th day of January, 1897. (5) Immediately upon receipt of said notice defendant employed counsel, and through its counsel at once took steps to procure the opening of said judgment, claiming to have a legal defense to said action. The court denied said motion, and held that upon the facts hereinbefore set forth the defendant was guilty of negligence in failing to cause an appearance to be made in said cause."

The judge made a finding different from the

finding proposed by counsel. It is this: "(1) The plaintiff held a policy of insurance duly issued by the defendant on his clothing and household furniture, and by a fire which occurred on the 15th day of July, 1896, the property so insured by the defendant was damaged. (2) The defendant had notice of said loss, and, through its agent, negotiations were opened with the plaintiff with the view to the adjustment and payment of said loss; but a difference arose as to the actual amount of damage, and all attempts for an amicable adjustment of the same were abandoned about the 18th day of July, 1896. (3) On the 26th day of August, 1896, the plaintiff brought an action against the defendant to recover the loss caused by said fire by writ and complaint returnable to this court on the first Monday of September, 1896, and service was duly made of the same, as required by statute, by a deputy sheriff of said county leaving a true and attested copy of the writ and complaint with the insurance commissioner of this state. (4) The insurance commissioner, instead of forwarding to the defendant the attested copy of the writ and complaint served upon him by the officer, had his chief clerk make a copy of the same, and forward it to the defendant, and in the copy so made by said chief clerk by mistake the return day was represented as being 'the ——— Monday of September, 1896,' omitting the word 'first' before Monday. (5) The copy of the writ and complaint was served on the insurance commissioner on the 26th day of August, 1896, who on the same day forwarded a copy of the same with the word 'first' omitted therefrom, as aforesaid, by mail to the defendant at its principal office in New York City, by whom it was received in due course of mail. (6) The defendant, upon receiving said copy of the writ and complaint from the insurance commissioner, wrote by its president to Granville W. Goodsell of Bridgeport, the agent of said defendant in this state, a letter in relation thereto, of which the following is a copy: 'New York, August 26, 1896. G. W. Goodsell, Esq., Special Agent, Bridgeport, Conn.—Dear Sir: We have to-day received from the insurance department of your state papers in re claim of William Jartman. This is the loss under policy No. 10,259, New Britain, Conn., which agent reported July 15th, probable loss \$25 to \$50. The amount demanded in the complaint is \$200. We presume that you have this matter in mind, and will see that same has prompt attention. The summons reads: "To appear before the honorable court of common pleas, Hartford, on ——— Monday of September, 1896." We can send you the papers if you desire, but presume that you are entirely familiar with the case. Respectfully, Frank T. Stinson, President.' (7) Said Goodsell made no attempt to ascertain when said action was actually returnable, and took no steps to employ an attorney to ascertain what course would be proper, under the circumstances, to pursue. (8) The original writ and complaint was duly returned to this court,

and remained on the docket without any appearance by or on behalf of the defendant from the first Monday of September, 1896, until the 13th day of January, 1897, a period of more than four months, when the same was defaulted. (9) Upon a hearing in damages the plaintiff claimed to have proved by himself and another witness that he sustained a loss by fire as aforesaid of \$130.75. The court, after hearing the evidence, did not allow that sum, but rendered judgment for \$100.75 in favor of the plaintiff. (10) On the 13th day of February, 1897, the defendant filed a motion to open the judgment so rendered, and to restore said cause to the docket, as by said motion fully appears. (11) The allegation in said motion that the copy of the writ and complaint left with said insurance commissioner did not specify on what date the defendant was required to appear in court is not true, and the only omission in the copy sent the defendant was that hereinbefore mentioned. (12) The allegation in said motion that the defendant's agent had, at the time of the service of said writ and complaint, "negotiations pending with counsel for the plaintiff for a settlement of plaintiff's claim, and supposed and erroneously believed that said writ was merely designed to hasten the pending negotiations, and was not aware that any suit was actually pending," is not true. All negotiations for settlement had been abandoned three weeks before bringing this suit, and the agent was expressly notified of the pending of this action. (13) The allegation in said motion that the defendant is prepared to show that in fact the plaintiff's loss did not exceed \$15, is inconsistent with the defendant's letter to its said agent, in which it states that on the day of the fire its local agent reported the loss as from \$25 to \$50; and the plaintiff has proved an actual loss of more than double the highest sum thus named. (14) No evidence was offered by the defendant to show that its said agent in any way led it to believe that he had taken any steps to protect its interests in relation to the plaintiff's claim, or that he had taken any steps to insure it a trial upon the merits of the action, or that any fraud or deceit had been practiced upon it by said agent in reference to this action. (15) No evidence was offered by the defendant to show that it ever received any reply from its said agent to the letter sent him instructing him to see that this action had prompt attention; and no evidence was offered to show that during said four months, while the action remained undefended, there was any attempt made by the defendant to ascertain the status of the case, or the action taken by its agent in reference thereto. (16) The motion of the defendant to open the judgment was sworn to by its said agent, Goodsell, but no oral testimony was offered in support of it; and the averments therein, so far as the same have not been disproved, and as found true by the court, are as follows: (17) The defendant's agent for the state of Connecticut, to whom the defendant intrusted

the matter of looking after its interest in the action, erroneously supposed and believed that it was not incumbent upon him to enter an appearance in said cause on account of the omission of any specified date on which the defendant should appear; and because of his ignorance of the legal status of the matters between the plaintiff and defendant by the issuance of said writ he failed to enter any appearance for the defendant. (18) The defendant had not knowledge that a judgment by default had been rendered in said action, or that the status of the said cause was such that a judgment by default could be rendered therein, until notified by counsel for the plaintiff in a letter dated February 2, 1897, that a judgment by default had been rendered by this court on the 18th day of January, 1897. (19) Immediately upon receipt of such notice defendant employed counsel, and filed the motion to have said judgment opened. (20) The court finds that the defendant, through its said agent, was guilty of negligence in not taking any steps to ascertain the actual return day of the original writ; and in not taking steps to ascertain if a mistake had not been made in the copy of the writ and complaint sent to it by the insurance commissioner; and in not consulting with or employing counsel in reference to said action. (21) The court further finds that the defendant itself was guilty of negligence in not having for four months taken any steps to ascertain what, if any, action had been taken by its said agent in reference to defending said action, or whether the instructions given by it to said agent had been carried out, and in not appearing or having counsel appear to defend said action. Upon the foregoing facts the court denied the motion to open the judgment, and restore the case to the docket."

This finding was filed on the 31st day of March, 1897. Subsequently there were various motions to change the finding, which were heard, and rulings made thereon. The present case is an appeal to this court from the judgment of the court of common pleas, accompanied by a motion to correct the finding. The exceptions and reasons of appeal are as follows: "(1) The court erred in holding and deciding that the written motion of defendant, on file and duly sworn to as required by law, did not, in the absence of other evidence, furnish prima facie evidence of the truth of the allegations therein contained. (2) The court erred in holding and deciding, without other evidence than the written motion of the defendant on file, and the letter from the defendant to one Goodsell set forth in said finding, that the defendant had not a valid defense to said action; and in holding and deciding that the ex parte evidence originally offered by the plaintiff in said action could be lawfully resorted to by the court upon this proceeding, in determining whether in fact the defendant had a valid defense thereto. (3) The court erred in holding and deciding that the allegations of said written

motion of the defendant, duly sworn to, did not furnish prima facie evidence of the fact that defendant had a legal defense to said action. (4) The court erred in holding and deciding that upon the facts found the defendant was guilty of negligence in failing to enter an appearance in said cause. (5) The court erred in finding, without any evidence in opposition to the allegations of said written motion, that 'all attempts for an amicable adjustment of the same were abandoned about the 18th day of July, 1896,' as set forth in the second paragraph of the finding; and in finding that 'the allegation of said motion that the defendant's agent had at the time of the service of said writ and complaint negotiations pending with counsel for the plaintiff for a settlement of plaintiff's claim, and supposed and erroneously believed that said writ was merely designed to hasten the pending negotiations, and was not aware that any suit was actually pending,' was not true, as set forth in the twelfth paragraph of the finding; and in finding that 'all negotiations for settlement had been abandoned three weeks before bringing this suit, and the agent was expressly notified of the pending of this action,' as set forth in said second paragraph. (6) The court erred in refusing to find, in the absence of any opposing evidence, that the facts contained in paragraphs 3, 4, 5, and 7 of defendant's written motion were proven, and true. (7) The court erred in refusing to find as requested in paragraphs 3 and 4 of the defendant's requests, and in paragraphs 8 and 9 of defendant's proposed amendments to said finding."

Stiles Judson, Jr., for appellant. Edward Gaffney, for appellee.

ANDREWS, C. J. (after stating the facts). An application to open a default is, when not based on a pure error of law, addressed to the sound discretion of the court. On the defendant's own claim, it received in due season what purported to be a copy of the writ requiring it to appear before the court of common pleas to be held on the — Monday of the following month, and immediately forwarded it to one whom, in its "proposed finding," is styled "the representative or agent of said company in this state," for proper action. This representative took no action, under the mistaken belief that the copy was correct, and that a writ with such a blank could not be the foundation of a suit. Some one must lose by this mistake,—either the plaintiff, who has recovered judgment on a proper writ, and necessarily at an expense considerable in view of the amount in controversy, or the defendant, who has thus been held liable for a claim against which it had a good defense. In our opinion, the judge of the court of common pleas was justified in ruling that the company, rather than the plaintiff, must be the party to suffer from the blunder of its representative. He should have con-

sulted counsel before committing his principal to a policy of inaction. *Woods v. Brzezinski*, 57 Conn. 471, 18 Atl. 252. The amount of the judgment was not large enough to involve the defendant in any serious loss, while, if the default had been opened, the plaintiff would necessarily have been put to such new expense as, in the event of his ultimate recovery, would have materially reduced, if not consumed, the fruits of his litigation. Under these circumstances, even if every other claim of the defendant had been supported, the trial court did not exceed the limits of judicial discretion in refusing to open the default. It is therefore unnecessary to consider the numerous subordinate questions which are raised upon the record. There is no error. The other judges concurred.

GILLETTE v. GOODSPEED.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

FERRIES — NEGLIGENCE — BAILEMENTS — RIGHTS OF BAILEE.

1. In view of Gen. St. c. 162, p. 604, making it the duty of ferry commissioners to compel ferrymen to equip their boats with apparatus necessary for the safety of teams, the court will not say that it was negligence in a ferryman not to furnish chains or barriers at the ends of his boat, where the ferry commissioners have made no such requirement for more than 20 years.

2. A bailee is entitled to recover the full amount of an injury done to the subject of the bailment.

Appeal from superior court, Middlesex county; Ralph Wheeler, Judge.

Action by Wilbert H. Gillette against William R. Goodspeed, a ferryman, for an accident due to the defective construction of his boat. Judgment for plaintiff, and appeal by defendant. Error.

The finding of facts was as follows: The defendant was on October 16, 1895, a ferryman, and carrier of passengers and teams by boat propelled by steam, on the Connecticut river, between the towns of East Haddam and Haddam, and received on his boat for transportation the plaintiff and his horse, and a carriage which the plaintiff had borrowed of its owner for temporary use, and was then using; taking the usual toll for transportation of passenger, horse, and vehicle. The plaintiff, at about 7:30 o'clock in the evening, led his horse, with the carriage, on the boat, stopping about midway of the boat, and there held the horse by the reins under the mouth and by the nose. There was no chain, gate, or guard of any kind at either end of the boat, and none had been provided by the defendant. No one tendered the plaintiff any assistance, nor was any offer made to him by the defendant, or by his employés in the management of the boat, to tie or fasten the horse in any way, or to take the charge or custody of the property, and the plaintiff was left in the care of it while the boat was on its passage across the river. On the way over the river the horse took a sudden

fright at some noise or other, started suddenly, and went forward off the end of the boat, and was drowned. The carriage went overboard with him, and was injured. The plaintiff held the horse in the manner above described, and as well as he was able, until he reached the end of the boat, but was unable to control him, and was compelled to let go his hold to save himself. Had the boat been provided with a chain or gate, or other reasonably safe guard, at the end, the plaintiff by reason of it would have been able to control the horse, and the horse and carriage would not have gone overboard. The want of such chain, gate, or guard was the proximate cause of the plaintiff's loss. The plaintiff exercised reasonable care in the custody and control of the horse, and was free from any negligence whatever amounting to a want of ordinary care, and contributing to his injury. The defendant did not exercise due or reasonable care, and was negligent in failing to provide and make use of sufficient guards at the ends of the boat for the safe transportation of teams left, as was the plaintiff's, in the custody and care of their owners or drivers, and the plaintiff's injury was due to the defendant's negligence in that regard. Testimony introduced without objection shows that the equipment of the boat on which the accident occurred is the same as has been used on the defendant's ferry for much the greater part of 23 years, and that during that time 125,000 horses were transported without accident or loss. The defendant has not failed to meet any requirements made either by the United States government inspectors or by the state ferry commissioners in the management of the ferry. The defendant provided the boat with certain rings, fastened in the timbers of the boat, to which horses might be tied by the necks, and also certain rings to which axles of carriages might be chained, and had also ropes and chains in the cabin of the boat, where they were usually kept (but not at the time connected with the rings), which might have been used for the purposes mentioned; but the defendant's employés did not offer to use them, or suggest their use. If the means provided to secure the safety of teams had been employed on this occasion, the horse would not have gone off the boat. There are other ferryboats used on the river, equipped as was the defendant's boat, while some of the boats there used have chains or guards of some kind at the ends. Horses securely fastened to the rings on the boat would be less likely to go overboard than they would be if held by the owners or drivers, no guard of any kind being used at the end of the boat; but horses so tied or fastened are liable to injure themselves, and, in view of all risks of danger, horses are probably safer when held by men of ordinary strength than they are when fastened to the boat. The plaintiff had for several years crossed on the ferryboat frequently with a team, and knew about the rings on the boat for the fastening of horses, but knew also that it was not the practice of the

officers or employes on the boat to use them. He did not ask to have his horse tied or carriage chained to the boat. He had crossed on the boat on the morning of that day with the horse, which then showed no signs of fear, and he believed him gentle and kind. It was the custom of the officers and employes on the boat to leave teams in the custody of owners, and it was only when a horse showed some sign of fear, or when there appeared some special reason for interference, that they would offer to take charge of a team, or render any assistance in caring for it. The employes of the defendant on this occasion exercised reasonable care in respect to noises on the boat. The plaintiff testified that he had always regarded the boat as in a dangerous condition, and as not a safe boat for the carrying of teams, but that he had never made complaint to the defendant on that account. It is found that in the seven years prior to the accident, during which time the plaintiff had crossed the ferry as often as once a week, officers of the boat had perhaps four or five times asked him whether he would have his horse tied, and that he had declined on all those occasions but one. Once he accepted the suggestion, and the colt which he had was tied. He had not declined to have this horse fastened, and it was not shown what kind of a horse he had when suggestions of fastening were made to him and declined, or under what circumstances they were made. It is not found that there was any contract between the plaintiff and defendant, either express, or implied from their conduct or course of business, modifying or varying for this occasion the contract between a ferryman and his passenger accompanied by a team, or that the plaintiff had expressly or impliedly waived any right of safe transportation due him as a passenger on the ferry with his team at the time of this crossing. Upon the foregoing facts the defendant made, among others, the claim that he had provided a reasonably safe boat for the transportation of passengers and teams, and so was not liable in this action, and that, the carriage not being the plaintiff's property, he was not entitled to recover damages for injury to it. The court gave judgment for the plaintiff, and included in it an item of \$70 for injury to the carriage.

Rollin U. Tyler, for appellant. John M. Murdoch, for appellee.

BALDWIN, J. (after stating the facts). A ferry can only be maintained by authority from the state, and is the proper subject of public regulation. *Enfield Toll-Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 64. Our laws provide that every ferry shall be furnished with a boat, properly provided and manned, sufficient for the safe and speedy transportation of passengers, their teams, and other property; that two commissioners shall be appointed for each ferry, who shall, as often as they deem necessary, carefully inquire into its man-

agement, inspect the boats, and see that it is kept according to law; that, should they at any time find that it is not so maintained, they shall order the town or towns in which it is situated to make the defect good within such time as they shall appoint; and that, if this order is not obeyed, they shall themselves cause the deficiency to be repaired or supplied as soon as possible,—the expense to be liquidated by the superior court, which shall issue execution therefor in their favor against the defaulting town or towns. It is further provided that any person who is bound to maintain a ferry between towns may be compelled by them so to do, and to reimburse them for all charges legally incurred by them by reason thereof, and that if he should, in the opinion of the commissioners, neglect to maintain it according to law, they can make an order against him for its maintenance, on pain of his forfeiting all his interest to the town or towns in or between which the ferry is situated. Gen. St. c. 162, p. 604. A special tribunal has thus been erected for the inspection of ferry boats, with power to pass summary orders for any changes in them deemed necessary for the safety of passengers or their teams, and to enforce them, in case of need, at the expense of the town or towns in which the ferry landings may be. The defendant's boat was provided with rings, ropes, and chains for securing horses and vehicles. It has been thus equipped for many years, during which it had transported over 100,000 horses without injury to any. It is found that horses fastened to such rings are less likely to go overboard than if held by their owners, but are liable to injure themselves, and, in view of all risks of danger, are probably not so safe as when held by men of ordinary strength. The complaint charges the defendant with fault in two particulars: One is the making of unnecessary noise in the use of the steam power by which the boat was run, but the finding is that in this respect there was no want of reasonable care. The other is neglect to provide the ends of the boat with any chain, gate, or other guard. By this averment the plaintiff asks the courts to pass upon a matter peculiarly within the jurisdiction of the ferry commissioners. Whether a certain ferryboat should be equipped with a certain kind of apparatus, or safeguard, in preference to any other, for the protection of horses, is a practical question, which can best be determined by those specially familiar with the ferry business, and the particular local circumstances affecting the particular ferry. It is found that the defendant has not failed to meet every requirement of the commissioners on his ferry. It must be assumed that those public officers have done their duty. If they have not ordered him to replace or supplement his apparatus for securing horses and teams from risk of injury, by gates, chains, or other guards at either end of the boat, it is presumably because they deem it unnecessary or unwise. Any such safeguards, if maintained throughout the trip, must to some extent be an impediment to a

speedy landing; and, if removed before the shore were reached, the act of their withdrawal might lead horses to suppose the time had come to start, and so become uneasy and restive. The balancing of advantages and disadvantages between the adoption of one or another method of promoting the convenience and safety of travelers, in these respects, is an appropriate function of the commissioners set by the state to oversee this ferry. The finding of the superior court that the defendant was negligent in not providing gates, chains, or other barriers at the end of the boat cannot support the judgment unless it further appears that he was under a legal obligation to make such a provision. Guards of this description certainly cannot be said to be necessary in every ferry-boat. The ferryman is not an insurer of the safety of passengers, or of the property in their keeping. *Evans v. Goodrich*, 46 Minn. 388, 49 N. W. 188; *Loftus v. Ferry Co.*, 84 N. Y. 455. The only negligence on the part of the defendant which is stated in the finding is a failure to perform the duty which it was assumed that the law imposed upon him, of equipping his boat at both ends with guards. It is found that he provided for the protection of the plaintiff's team means which, if used, would have prevented the accident, and that the plaintiff knew of these means, and did not use them, believing his horse to be kind and gentle. It is not found that the defendant was negligent, under such circumstances, in failing to ask the plaintiff to thus secure his team, and a finding of negligence on such ground could hardly be defended. The question of negligence depends wholly on the ruling of the court that it was the duty of the defendant to provide his boat at all times with the guards specified. Had it appeared that the attention of the ferry commissioners had been directed to this matter, and an order made regulating the use of guards, a compliance with that order might have protected the defendant; and certainly would, unless the evidence showed that for reasons peculiar to this case the requirements of ordinary prudence called for additional and special precaution. *Nolan v. Railroad Co.*, 53 Conn. 461, 473, 4 Atl. 106; *Dyson v. Railroad Co.*, 57 Conn. 9, 22, 17 Atl. 137; *Rowen v. Railroad Co.*, 59 Conn. 364, 369, 21 Atl. 1073; *Bates v. Railroad Co.*, 60 Conn. 259, 266, 22 Atl. 588. And in the absence of any such order the presumption arising from the failure of the commissioners, for more than 20 years, to prescribe this special equipment, is entitled to some weight in deciding the question of legal duty. We do not think that guards of the kind described are so clearly requisite to the safe transportation of property by ferrymen that the law imposes upon each one the duty of providing such guards. There is nothing in the present case to indicate any special duty belonging to this ferryman. It follows that the plaintiff failed to prove any actionable negligence.

Had the plaintiff been entitled to recover, it would have been proper to include—as was in fact done—the value of the wagon in the dam-

ages assessed. If goods in the hands of a bailee are lost by the wrongful act of a third party, the latter is liable to him for their full value unless the owner interposes by a suit for his own protection. The sum recovered by the bailee above what is necessary to compensate him for the loss of his possession and special property he will hold in trust for the owner, and the wrongdoer cannot complain that he is made to pay greater damages than the plaintiff has sustained, because the plaintiff, for all the purposes of the action, represents the owner, and occupies his place. *White v. Webb*, 15 Conn. 302. There is error, and a new trial is ordered. The other judges concurred.

STATE v. CLARKE.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

* MUNICIPAL ORDINANCES—UNCERTAINTY.

An ordinance prohibiting the erection or use of "any awning, except the same be upon a suitable frame, and attached entirely to the building, which awning shall not when extended be less than six feet from the sidewalk," is void for uncertainty, because the word "suitable" has no definite meaning in the connection in which it is used.

Appeal from superior court, Middlesex county; John M. Thayer, Judge.

Dennison W. Clarke was convicted of the violation of an ordinance of the city of Middletown, and he appeals. Reversed.

Frank D. Haines, for appellant. John M. Murdoch, State's Atty., and M. Eugene Culver, for the State.

TORRANCE, J. The defendant was prosecuted in the city court of Middletown for the violation of an ordinance of that city, and was convicted. He appealed to the superior court, and was there, upon a trial to the jury, convicted, and judgment was rendered against him, from which judgment the present appeal is taken.

The complaint charges that the defendant, on the 11th day of March, 1897, within the limits of the city, "did, and for a long time previous thereto has unlawfully erected and maintained an awning over the sidewalk in front of the premises * * * occupied by him, which awning is not upon a suitable frame, and attached entirely to the building so occupied by him as aforesaid, * * * against the peace and contrary to the form of the provisions of the ordinance of said city in such case made and provided." That part of the ordinance upon which this complaint is based reads as follows: "The following acts are declared to be acts of nuisance of the first class: * * * The erection or maintaining any awning, except the same be upon a suitable frame, and attached entirely to the building, which awning shall not, when extended, be less than six feet from the sidewalk." The facts in the case, and they were really undisputed on the trial, are these: On the date alleged in the com-

plaint, and for a long time prior thereto, the defendant maintained an awning over the sidewalk in front of his store, "which awning rolled up and down upon a wooden frame, which was attached to the building, and extended across the sidewalk, to wooden posts set near the curbstone, which posts furnished the support for the outer side of the frame." The awning was not permanently attached to this frame, but "was at one end attached to a 2x4 scantling, which was nailed to the building, and at the other end was attached to a wooden roller, which rolled out upon the frame above described when the awning was extended, and which was drawn up to the building by means of ropes, thus rolling up the awning upon it when the awning was not needed as a shade." "No part of the frame, unless the posts aforesaid be considered a part of it, was within six feet of the sidewalk." These posts, "in addition to supporting the frame, were used as hitching posts for horses," and the frame and posts "had existed in the same condition for many years." "No evidence was offered by the state to show that the said awning or frame had ever in any way interfered with the health, safety, comfort, or convenience of the public at large, or that the awning or said frame was on the day in question a nuisance in fact, or had ever been so."

Upon this state of facts, the defendant requested the court, among other things, to instruct the jury in substance as follows: (1) That the ordinance in question was invalid and void for uncertainty and ambiguity. (2) That it was invalid and void for uncertainty, "because the word 'suitable' has no definite and determined meaning in the connection in which it is placed, and the defendant could not know that he had done any act which was prohibited by the ordinance." (3) That the charter gave the city no power to pass this ordinance, and that the ordinance itself was unreasonable, unjust, and oppressive. (4) That the ordinance is invalid, "because it attempts to declare that to be a nuisance which is not a nuisance." The court refused to comply with any of these requests.

We are of opinion that the court erred in not instructing the jury, as requested, that the ordinance was void for uncertainty. If it be assumed, as claimed by the state, that the city, under its charter, is empowered to pass an ordinance regulating the erection and use of awnings, it may still perhaps admit of doubt whether it could, by an ordinance, declare that to be a nuisance which was not in fact a nuisance; but, for the purposes of the argument merely, it will be assumed that the city had power to pass the ordinance now in question in its present form. In Webster's International Dictionary the word "awning" is defined as follows: "A roof-like cover, usually of canvas, extended over or before any place, as a shelter from the sun, rain, or wind;" and in the Century Dictionary as follows: "A movable roof-like covering of canvas or other cloth, spread over any place,

or in front of a window, door, etc., as a protection from the sun's rays." As thus defined, "awning" means the covering which shelters or protects, as distinct from its frame or support; and this covering may extend over, or hang in front of, the protected place. It is in the sense of the covering, as distinct from its frame, that the word "awning" is used in this ordinance, for it speaks of the one as distinct from the other. The ordinance does not prohibit all awnings, but only those which do not conform to its requirements. It permits awnings under certain conditions, and, in effect, it punishes as a crime the erection or use of awnings which fail in any way to comply with those conditions. This being so, the conditions ought to be stated with such reasonable certainty that the man of ordinary intelligence may with reasonable efforts understand them, and be able to guide his conduct by them. They should be stated so clearly and unambiguously that the average man may with due care know whether, in erecting and using his awning, he has or has not committed an act which subjects him to fine and imprisonment in a criminal prosecution. An ordinance of this kind, which limits to a certain extent the use of property, and visits the offender against its provisions with such consequences, ought to be strictly construed; and, when thus construed and tested by the rule above stated, we think this ordinance should be held to be invalid. The ordinance in effect prohibits the use and erection of any awning "except the same be upon a suitable frame, and attached entirely to the building, and which awning shall not, when extended, be less than six feet from the sidewalk." Here are three conditions to be complied with, namely: (1) The awning must "be upon a suitable frame." (2) Taking the ordinance just as it reads, the "awning" is to be "attached entirely to the building." (3) The awning "shall not, when extended, be less than six feet from the sidewalk." Taking these conditions in reverse order, what does the third mean? Does it mean that the awning, or the frame, or both, must be at least six feet above the sidewalk, or six feet laterally from the sidewalk, or both? What is the precise meaning of the second condition? What is it that is to be "attached entirely to the building,"—the awning, or the frame, or both? What is meant by the phrase "entirely attached"? Does it mean that every part of the awning, or the frame, or both, are to be attached to the building? To the person who desires to exercise his property rights, and to have the benefit of an awning, and yet to obey the ordinance, these questions must be quite perplexing, and the ordinance does not clearly and certainly answer them, so as to be a guide to the average man using due care in the premises. If, however, it can be fairly said that these doubts and uncertainties are the ordinary ones that arise as to the construction of every law, that they may be obviated by a reasonable construction

of it, and that they are not of such a nature as to warrant this court in holding the ordinance to be void on account of them,—with reference to these two conditions this claim may be true, but it is not true as to the first condition. That requires the awning to be "upon a suitable frame," and the ordinance furnishes no criterion by which the question of suitability can possibly be determined. It does not define the word "suitable," as here used, and the law does not define it. Indeed, when it is thus used, it is incapable of any general or legal definition. *Batters v. Dunning*, 49 Conn. 479; *Smith's Appeal*, 65 Conn. 135, 31 Atl. 529. Its use, of necessity, implies the judgment of some tribunal or person who is to determine the question of suitability, and yet neither the charter nor the ordinances of the city empowers any person or tribunal to exercise such judgment. This term "suitable," as here used, seems altogether too vague and indefinite to serve as the basis of an ordinance so highly penal in its consequences as this one is. On the whole, we are of opinion that the ordinance in question is void for uncertainty, and that the court below erred in not instructing the jury to that effect. There is error in the judgment complained of, and it is reversed. The other judges concurred.

FESSENDEN, State's Attorney, v. BOSSA et al.
(Supreme Court of Errors of Connecticut. July 18, 1897.)

INTOXICATING LIQUORS—LICENSE ELECTION—
MARKED BALLOTS.

Pub. Acts 1895, p. 648, c. 308, § 4, requiring that votes on the question of licensing the sale of liquors, cast as by the act provided, "shall be counted and returned as now provided by law," has reference to the methods used prior to its enactment, and does not authorize the rejection of double or marked license ballots, as it does not refer to section 9 of the general election law (Pub. Acts 1895, p. 619, c. 267), providing for the rejection of double or marked ballots cast for candidates for office or for educational purposes.

Appeal from superior court, Fairfield county; Ralph Wheeler, Judge.

Application by Samuel Fessenden, state's attorney, for an alternative writ of mandamus requiring Norbert Bossa and others, the respondents, to correct their return, declaration, and certificate of the result of a town vote on the license question, tried to the court upon motion of the respondents to quash the alternative writ. The court granted the motion, and denied the application, and the petitioner appealed for alleged errors in the rulings of the court. No error.

Julius B. Curtis and Louis J. Curtis, for appellant. John H. Light, for appellees.

TORRANCE, J. This is an appeal from a judgment denying an application for a peremptory writ of mandamus. The substance of the application and of the alternative writ may be stated as follows: At the annual town

meeting of the town of New Canaan held on the first Monday of October, 1896, pursuant to legal notice to that effect, a vote by ballot was taken to determine whether any person should be licensed to sell spirituous and intoxicating liquors in said town. The respondent Bossa was the moderator of said meeting, and the respondents Noble, Kirk, Hoyt, and Weed were the counters of said ballots. Of the legal ballots cast at said meeting, there were 264 against, and 265 in favor of, the issue of such licenses. "The said counters did unlawfully count and make return of two illegal ballots in favor of 'No License,' one of which said two ballots was a double ballot, and the other of said ballots was a ballot which, by the person voting the same, was placed in a small sealed envelope, and with said small sealed envelope was placed in the official envelope, and so deposited in the ballot box, and was, by reason of said fact, so marked as that the person who cast the same could easily and readily be identified. The said two illegal ballots were by said counters added to and counted with the 264 legal 'No License' ballots, aforesaid; and the result of said balloting was by said moderator declared to be 266 ballots in favor of 'No License,' and 265 ballots in favor of 'License,' when in fact the lawful result of said balloting was 264 ballots in favor of 'No License,' and 265 ballots in favor of 'License.' The said moderator accepted said illegal return from said counters, and declared the result of said balloting to be 266 ballots in favor of 'No License,' and 265 ballots in favor of 'License,' and so certified the result to the town clerk of said New Canaan." The respondent Jones is town clerk of said town, "and, as such town clerk, has received and recorded said illegal declaration of said moderator, and has transmitted the same to the county commissioners of Fairfield county, and to the secretary of state, and said town clerk has the custody of said ballots. Said counters have refused to change their said return by making the same in conformity with the legal voting as aforesaid, and said moderator refuses to correct his declaration of the result of said balloting, or to correct his certificate filed with the town clerk, making the same in conformity with said vote." The alternative writ required the counters to return to Bossa, the moderator, "the lawful result of said balloting, namely, 265 ballots in favor of 'License,' and 264 ballots in favor of 'No License.'" It required the moderator "to certify said result to said town clerk," and it required the town clerk to "receive such certificate from said Bossa, and transmit the same to the secretary of state and the county commissioners of Fairfield county," or that the respondents should signify cause to the contrary to the court, on or before December 11, 1896. The respondents filed a motion to quash the alternative writ, the substance of which motion may be stated as follows: The facts alleged in the alternative writ, and in the application therefor, show (1) that the respondents are not

by law authorized or required to do what they are in the alternative writ required to do; (2) that the counters counted the ballots, and certified the same to the moderator, who, in turn, received said certificate, and certified the same to the town clerk, as required by law; (3) that the two ballots counted in favor of "No License" "were not illegal ballots under the law regulating balloting for 'License' or 'No License,' and that they were properly counted and returned"; (4) that the respondents have no power to do that which the alternative writ commands them to do. The court granted the motion to quash, and denied the application for a peremptory mandamus.

One of the decisive questions in this case is whether the two so-called "illegal ballots" were rightfully counted in favor of "No License." If they were, the decision of the court below must stand, and all other questions in the case become of no importance upon this appeal. Section 9 of chapter 267 of the Public Acts of 1895 (page 619), concerning elections, provides that "if more than one ballot containing the title of the same office, or for the same educational purpose, shall be found in any envelope, neither of such ballots shall be counted for any person, or for such purpose and all such ballots shall be rejected for being double ballots"; and, further, that, "if any envelope or ballot shall contain any mark or device so that the same may be identified in such a manner as to indicate who might have cast the same, the ballot so marked, or the ballot contained in any envelope so marked, shall not be counted, but shall be kept by the moderator and returned to the town clerk in a separate package from the ballots which are counted at such election." Counsel for the appellant claim that these provisions are, by chapter 308 of the Public Acts of 1895 (page 648), made applicable to the ballots cast for or against license, chiefly because that act provides (section 4) that "the license votes thus cast shall be counted and returned as now provided by law." We are of opinion that this claim is not well founded. From 1874 until the passage of the act of 1895, contained in chapter 308, aforesaid, the law only required that the vote upon the question of license or no license should be taken by ballot, without providing otherwise, specifically and expressly, how such vote should be taken. Gen. St. § 3050. Under this law it was held, in the case of *Donovan v. County Com'rs*, 60 Conn. 339, 22 Atl. 847, that the provisions of the act of 1889 concerning elections (Pub. Acts 1889, c. 247) did not apply to votes taken under section 3050 of the General Statutes. Chapter 308 of the Public Acts of 1895 now provides somewhat specifically how the license vote by ballot shall be taken, and it makes, by reference, some parts of the law relating to elections a part of itself. It requires the selectmen to provide a suitable box, marked "License," for the

reception of the license votes. It provides for the appointment of box tenders and checkers, and makes their duties "the same as are imposed upon the box tenders and checkers for the ballot box for town officers." It provides for a sufficient supply of official envelopes and ballots of the kind described in the act, and declares that "the duties of the tenders of the envelope booth shall be the same in regard to license envelopes as the law now imposes, or may impose upon them in regard to official envelopes for town officers"; and, further, that "the duties of all other town or election officers shall be the same in regard to the 'License' envelopes that they are in regard to the other official envelopes." It further provides in the last section as follows: "The ballots provided for in this act shall be the only legal ballots to be used in voting on the question of license, and shall be enclosed and sealed in the official license envelope provided for in this act by the voter, while within the voting booth, and deposited in the ballot box provided for the license vote, under the same provisions of law that apply to envelopes for the town officers. The license votes thus cast shall be counted and returned as now provided by law."

The foregoing is the substance of the material parts of the entire act, and among them we find nothing that, either expressly or by necessary implication, makes the provisions of the election law relating to the invalidity and rejection of double ballots or marked ballots a part of this act, or makes such provisions at all applicable to license ballots. As before intimated, the clause mainly relied upon by counsel for the appellants in support of their contention is the one which provides that the license votes shall be counted and returned "as now provided by law." Their claim, in substance, is that this should be so construed as to make all the provisions of the election law relating to the counting of ballots, and to the rejection of double ballots and marked ballots, applicable to the license ballots. Prior to the passage of the act in question, the law did not provide expressly and specifically how the license balloting should be conducted, nor how the license ballots should be counted, nor when nor where the result of the ballot should be declared. It did, however, provide that the question of license or no license should be determined by ballot, and that the ballot should be taken only at an annual town meeting, after due notice that it would be so taken. This clearly implied that a full and fair opportunity to cast such a ballot would be given at such a meeting; that the ballots cast would be fairly counted; and that the result of the ballot would be ascertained and declared before the meeting adjourned. In this condition of the law, the statutory provisions of the general election law did not apply to license ballots. *Donovan v. County Com'rs*, supra. They were not made void if double or marked, nor were the officers

in charge of the license ballot expressly required to reject them for being double or marked, within the meaning of the general election law. Such, in a general way, was the law governing license ballots when the act now in question (chapter 308 of the Public Acts of 1895) was passed. That act did not specifically provide how the license votes should be counted; it simply provided that they should be counted, and counted "as now provided by law." The appellant claims that the clause "as now provided by law" here means "as now provided by the general election law"; but, looking at the entire act in the light of the previous legislation on this subject, we think it means that the license votes shall be counted in the same way as the law "now" requires such votes to be counted. In other words, the act expressly requires, as the former law did not, that a count shall be made, but it does not change the mode of making it. The license ballots are to be counted as they have theretofore been counted. This seems to be the plain, apparent meaning of this act upon the point in question, and the construction contended for by the appellant seems to be a forced and unnatural one. It would have been very easy for the legislature to have said in this act, had it so intended, that the provisions of the general election law with reference to the counting and rejection of ballots should apply to license ballots, but it apparently carefully refrained from saying so. It embodies, by reference, certain parts of the general election laws, but it does not embody those relating to the counting and rejection of ballots. Where the legislature in express terms says that a ballot shall be void for some cause, the courts must undoubtedly hold it to be void; but no voter is to be disfranchised on a doubtful construction, and statutes tending to limit the exercise of the ballot should be liberally construed in his favor. Unless a ballot comes clearly within the prohibition of some statute, it should be counted, if from it the wish or will of the voter can be ascertained. Under the facts in this case, we are of opinion that the two ballots complained of were rightfully counted. As this is decisive of this appeal, it becomes unnecessary to consider the other questions raised upon the record, and upon them we express no opinion. There is no error. The other judges concurred.

THRESHER v. DYER.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

APPEAL—REVIEW—GIFT TO WIFE—LIABILITY OF HUSBAND.

1. Compliance with Pub. Acts 1895, c. 100, p. 493, providing for a statement by the stenographer of the evidence introduced before the trial court, does not give the supreme court jurisdiction to retry facts on the testimony.

2. The mere fact of a gift of a check to a wife does not raise a presumption that the husband appropriated it, sufficient to support an action

against his estate, 30 years after his wife's death, for an accounting against him as trustee.

8. Proof of the delivery of a check to a payee does not prove a gift of the amount represented by the check, where, as far as shown, the check remained unacted on in the hands of the payee.

Appeal from superior court, New London county; John M. Thayer, Judge.

Action by Seneca H. Thresher, administrator of the estate of Sarah C. Dyer, against Clinton M. Dyer, executor of the estate of Charles E. Dyer. From judgment for defendant, plaintiff appeals. Affirmed.

The complaint alleged the following facts: Charles E. Dyer and Sarah C. Buckingham intermarried at Norwich, September 2, 1863. On said day Charles E. Dyer, as trustee of the personal estate of his wife, received the sum of \$5,000, belonging to said Sarah C. Dyer. Sarah C. Dyer died, intestate, October, 1864, and the use of said \$5,000 was vested in said Charles E. Dyer during life. Charles E. Dyer died January 15, 1895, and said sum of \$5,000 is now due from his estate to the estate of said Sarah C. Dyer, and has never been paid. The defendant, Clinton M. Dyer, has duly qualified as the executor of Charles E. Dyer. The plaintiff, Seneca H. Thresher, has duly qualified as administrator of the estate of Sarah C. Dyer, and on May 18, 1895, and within the time limited for presentation of claims by the probate court, presented to the defendant, as such executor, said claim against the estate of Charles E. Dyer for said amount of \$5,000, which claim was disallowed by the defendant as executor. The plaintiff claimed \$6,000 damages. The answer admitted the marriage, the deaths of Sarah C. and Charles E. Dyer, the appointments of the plaintiff and defendant, respectively, as administrator and executor, and the presentation and disallowance of the claim as alleged, and denied the allegations that Charles E. Dyer, as trustee of the personal estate of his wife, had received the sum of \$5,000 belonging to her; that the use of said sum, on October 13, 1864, was vested in Charles E. Dyer during life; and that said sum is now due from the estate of Charles E. Dyer to the estate of Sarah C. Dyer. Upon rendering judgment for the defendant, the court (Thayer, J.) found, as the facts upon which the judgment was founded, the facts admitted by the pleadings and further facts as follows: "The father of said Sarah C., at the time of said marriage, gave her, as a wedding present, his check for \$5,000. No administration was taken out on the estate of Sarah C. during the lifetime of her husband, nor until the present plaintiff was appointed administrator. The evidence failed to prove, and the court does not find therefrom, that said Charles E. Dyer ever received said check, or the proceeds thereof, or any portion of the same." The finding also stated: "The plaintiff claimed to have proved that said Dyer received the proceeds of said check, and claimed, as matter of law, that he held it as stat-

utory trustee for his wife; that upon his death it vested in her administrator; and that the plaintiff was entitled to recover from the defendant the amount of said check. As above set forth the court did not find the fact to be as claimed by the plaintiff, and rendered judgment for the defendant to recover his costs." The plaintiff excepted to the refusal of the court to find that said Charles E. Dyer had received said \$5,000, or any portion of the same; and, at plaintiff's request, a certain portion of the testimony bearing on the question of fact is certified, and, together with another portion of the testimony, certified at request of defendant, is made a part of the record in this appeal. The errors assigned in the appeal consist of alleged errors based on the contingency of this court finding as a fact that Charles E. Dyer, as statutory trustee, received \$5,000, belonging to his wife, except the following: "The court erred in disregarding all the testimony (it being wholly uncontradicted and unimpeached) bearing upon the question whether the said Charles E. Dyer ever received said \$5,000."

Solomon Lucas and Seneca S. Thresher, for appellant. Frank T. Brown and W. A. Briscoe, for appellee.

HAMERSLEY, J. (after stating the facts). Apparently, the testimony certified fully justified the trial court in the conclusion of fact which it reached, but we cannot pass on this question. It is firmly settled by the decisions of this court that our jurisdiction does not extend to the retrial, upon the testimony, of the facts, based on some evidence on which the judgment of a trial court, proceeding according to the rules of law, is founded; and it is immaterial whether such retrial is sought under the claim that the court erred in reaching a conclusion of fact from the testimony, or under a claim of error in law, because a judgment plainly valid upon the facts settled by the trial court would be as plainly invalid if it had been rendered on different facts, such as might be settled by this court after a retrial on the evidence. The thing actually sought in either case is a retrial of facts by an appellate court whose jurisdiction relates only to the correction of errors in law. *Weeden v. Hawes*, 10 Conn. 50, 54; *Dudley v. Deming*, 34 Conn. 169, 174; *Styles v. Tyler*, 64 Conn. 432, 442, 450, 451, 30 Atl. 165; *Ketchum v. Packer*, 65 Conn. 544, 553, 33 Atl. 499; *Carroll v. Weaver*, 65 Conn. 76, 79, 31 Atl. 489; *Curtis v. Bradley*, 65 Conn. 99, 104, 31 Atl. 591; *Peltier v. Bradley*, *Dann & Carrington Co.*, 67 Conn. 42, 49, 34 Atl. 712; *Scott v. Spiegel*, 67 Conn. 349, 357, 35 Atl. 262; *Enfield v. Town of Ellington*, 67 Conn. 459, 464, 34 Atl. 818; *Neilson v. Railway Co.*, 67 Conn. 466, 470, 34 Atl. 820; *Atwater v. News Co.*, 67 Conn. 504, 524, 34 Atl. 865. In Pub. Acts 1895, c. 100, p. 493, provision is made for including in the process of this court a detailed

statement of what took place upon the trial, furnished by the official stenographer, and certified by the judge. While the testimony so certified cannot affect the facts on which the judgment rests, it may serve to supplement the story of the trial as told by the judge in the finding. In adjudicating the essential facts on which the judgment is founded, the trial court exercises its jurisdiction of fact, over which this court, if it appears that it proceeded according to the rules of law, has no control, its only province being to determine whether those facts legally support the judgment. Gen. St. §§ 1107, 1111, furnish ample provision for the inclusion of such facts in the judgment, for the purpose of presenting the question whether the judgment is the true voice of the law upon the facts found. But, in preparing the finding,—i. e. reciting the incidents of the trial,—the trial judge is not merely exercising the jurisdiction of fact belonging to his court; he is preparing a statement for this court as a necessary part of the process of this court, and it is an incident of the jurisdiction of this court to obtain a correct recital in its process. Prior to the use of an official stenographer, the judge's notes were the only official source from which a history of the proceedings not on record could be obtained. Now, the notes of the stenographer certified by the judge as authentic can be made a part of the process, and may be considered by this court in connection with the recital of the judge; not for the purpose of retrying the facts on which the judgment is founded, but in determining whether the alleged errors in law did intervene in the conduct of the trial. For such purpose the whole authentic story of the trial, as it appears in the process of appeal may be considered. A statement of the testimony as actually given is only necessary where the error in law of finding a material fact in the absence of evidence is claimed. Occasionally such statement may be useful in showing the conditions under which rulings in respect to evidence have been made, and possibly in showing how principles of law, such as the burden of proof, or the legal effect of a contract found, entered into and influenced erroneously the conclusions of fact, or in explaining the meaning of language used by the judge in the finding. But in most cases, burdening the appeal with testimony serves merely a useless and unjustifiable expense, and always so when, as in this case, its real purpose is to obtain from this court a retrial of the facts and testimony. As was said in *Styles v. Tyler* supra: "It must be remembered, however, that while the prescription of the contents of the record is a matter of procedure, and may be wholly within the legislative discretion, yet the mere incorporation in the record of matter not pertinent to the correction of errors in law cannot affect the judgment of this court in the exercise of its jurisdic-

tion;" and by a unanimous court, in *Atwater v. News Co.*, supra: "A retrial upon the testimony and the adjudication of essential facts on which a judgment is founded, by whatever name it may be called, is a trial of the facts in that cause, whether its effect be limited to ordering a new trial, or extends to the rendition of a final judgment on the facts so adjudicated, and is inconsistent with the primary distinction drawn by the constitution between the jurisdiction original and appellate of courts for the full trial and adjudication of causes, and the jurisdiction of a court of last resort for correcting errors in law which may have intervened in the course of a trial."

If we correctly understood the brief of the plaintiff's counsel, a claim is made that, Mrs. Dyer having received, on the day of her marriage, as a wedding present from her father, his check for \$5,000, her husband, Charles E. Dyer, forthwith became the legal owner of a chose in action, as statutory trustee of the personal property of his wife; that, as such trustee, it was his duty to obtain possession of the check, compel its payment, and account for its proceeds; and so, in this suit by the administrator of the wife's estate against the executor of the husband, the plaintiff, having proved the reception of the check by Mrs. Dyer, established a prima facie case, and the burden of proof was then on the defendant to show that Mr. Dyer did not in fact perform the duties imposed on him as trustee in obtaining possession of the check and its proceeds. Therefore, in rendering judgment for the defendant, because "the evidence fails to prove, and the court does not find therefrom, that said Charles E. Dyer ever received said check, or the proceeds thereof," the court, as appears from the record, applied an erroneous rule of burden of proof. It may be true that, under the law defining the property rights of these parties, Mr. Dyer might have commenced his married life by instituting a bill in equity to compel his wife to hand over to him any chose in action belonging to her (*Sherwood v. Sherwood*, 32 Conn. 1); but it is not true that, in declining to take such course, and in permitting his wife to enjoy and dispose of, for her own purposes, a wedding gift, he violated his duty as trustee; and, if his failure to appropriate the gift is not necessarily a breach of trust, the mere fact of the gift to his wife cannot raise a presumption that he did appropriate it, sufficient to support an action against his estate 30 years after his wife's death. The plaintiff does not even prove that Mrs. Dyer was the owner of the alleged chose in action. Her ownership, if any, was by virtue of a gift. Such gift is not completed by the mere delivery of a check, which remains unacted on in the hands of the payee. *Jones v. Lock*, 1 Ch. App. 25; *Simmons v. Society*, 31 Ohio St. 457, 61; *Gerry v. Howe*, 130 Mass. 350. The

plaintiff's proof ends with the delivery of the check. There is no error in the judgment of the superior court. The other judges concurred.

McNAMARA v. LYON.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

REPLEVIN—POSSESSION—DETAINER—FINDINGS.

1. A plaintiff in replevin may recover, though the court made no express finding that he is entitled to immediate possession of the property replevied, where the right to immediate possession was in issue, and the issues were found for plaintiff.

2. A defendant in replevin may be found to have wrongfully detained the property, though no demand was made, where he filed a general denial without a disclaimer, in view of Gen. St. § 1330, requiring him to file such disclaimer if he intends to deny that he detained the property.

Appeal from court of common pleas, New London county; Walter C. Noyes, Judge.

Replevin by John R. McNamara against Erastus D. Lyon. From judgment for plaintiff, defendant appeals. Affirmed.

Charles F. Thayer, for appellant. J. J. Desmond, for appellee.

TORRANCE, J. This is an action of replevin in the statutory form for a horse. The answer was a general denial, without disclaimer. The issues were found for the plaintiff, and judgment was rendered in his favor. The court also found the following facts: Before and at the time the action was commenced, the plaintiff was the owner of the horse. He never disposed of it, nor gave any one authority to dispose of it, and the possession of the defendant was without the plaintiff's consent, and without his knowledge, until within a few days before the action was commenced. The defendant purchased the horse in good faith and for value from one Lathrop, about two weeks before the action was commenced. From the time of such purchase till it was replevied in this suit, the horse was in the exclusive possession of the defendant, and worked in his team. It did not appear in any way how Lathrop obtained possession of the horse, nor how the plaintiff lost possession of it. No demand was made upon the defendant by the plaintiff for the delivery of the horse, before the service of the writ. Upon the trial the defendant asked the court to rule "that a demand upon the defendant by the plaintiff was necessary as a foundation for the writ, under the circumstances of this case, and that, it being proved that no demand was made, the defendant did not, as matter of law, detain the horse." "The court upon the foregoing facts, and for the additional reason that the defendant upon the general issue did not file therewith a notice of disclaimer, found that the defendant wrongfully detained said horse, without proof of demand and refusal."

This ruling presents the only question arising upon this appeal, but, inasmuch as the de-

fendant also claims that the court erred in holding that the plaintiff was entitled to the immediate possession of the horse, it may be well to dispose of that claim first. The statute (Gen. St. § 1323) provides that the action of replevin may be maintained to recover any goods or chattels "in which the plaintiff has a general or special property, with a right to their immediate possession, and which are wrongfully detained from him in any manner." The court found that the plaintiff was the owner of the horse, but in the finding of facts has not expressly found that he was entitled to its immediate possession; and one of the errors assigned is this: that the court erred, upon the facts found, in deciding, as matter of law, that the plaintiff was entitled to the immediate possession of the horse. There is no foundation for this claim. No such claim was made in the court below. The only claim there made was the one before stated relative to the wrongful detention. Moreover, the question whether the plaintiff was entitled to the immediate possession of the horse was one of the matters in issue, and is expressly found for the plaintiff. This is equivalent to an express finding that he was so entitled (*Kavanagh v. Phelps*, 36 Conn. 111, 115; *Brown v. Poland*, 54 Conn. 313, 316, 7 Atl. 719); and the record does not show, nor suggest, even, that in reaching that conclusion the court committed any error whatever.

The only question in the case, then, is the one arising upon the ruling complained of. The ruling was based upon two grounds: (1) Because, upon the facts found, no prior demand was necessary; and (2) because the defendant had not filed a disclaimer under the statute; and, if the ruling is sustainable on either ground, the judgment must stand.

We are of opinion that it is sustainable on the second ground. Prior to the Revision of 1874, the statute (Gen. St. 1866, p. 79, § 344) relating to replevin provided as follows: "The defendant may make a general denial of the allegations of the plaintiff's declaration, or plead any special matter of defense; but if, under such general denial, he shall rely for his defense upon the claim that he has not in fact detained the property he shall, under such plea, disclaim all right to the property, in which case a judgment of return shall not be rendered, although judgment shall in other respects be rendered for the defendant." In the Revision of 1875 the phraseology of this provision was changed to read as follows: "The defendant may plead the general issue with or without notice, as may be necessary, or any special plea, or make an avowry of a taking for lawful cause of the goods and chattels replevied; but if, under a plea of the general issue, he intends to deny that he detained the same, he shall file with his plea a notice that he disclaims all right to the property; in which case, if final judgment shall be rendered in his favor, he shall not be entitled to any judgment of return." This is the precise form in which

this provision now appears as section 1330 of the present General Statutes, and we do not think the change in phraseology was intended to or did work any change in the law upon this point. *Association v. Danielson*, 62 Conn. 319, 26 Atl. 345.

The question presented upon the record relates to the construction of this part of the statute regulating the action of replevin, and we are of opinion that it expressly limits the scope and effect of a general denial in this form of action, when filed without a disclaimer. The declaration in an action of replevin sets forth three facts: (1) That the plaintiff has a general or special property in the chattels therein described; (2) that he is entitled to their immediate possession; (3) their wrongful detention by the defendant. To such a declaration the defendant is permitted to file a general denial. Under such a denial, but for the other provisions of the statute, the fact of wrongful detention would be put in issue; but the statute says, in effect, to the defendant: "If you intend, under the general denial, to deny that you detained the chattels at all, you must file a disclaimer; and unless you file such disclaimer, you will not be permitted to contest the fact of wrongful detention, nor will the plaintiff be obliged to prove it." In other words, the statute makes the filing of a disclaimer a condition precedent to the right of the defendant, under a general denial, to claim, or offer evidence to prove, that he did not wrongfully detain the chattels described in the declaration. The statute thus expressly limits the scope and effect of such a denial, when filed without a disclaimer, by excluding from the issues formed by it, and to be tried under it, the fact of wrongful detention.

We are not aware that this precise question has ever been heretofore considered or decided by this court, but in *Kavanagh v. Phelps*, 36 Conn. 111, this view of the law seems to have been taken for granted. In that case the plea was a general denial without disclaimer, and the court said: "The plaintiff under that plea, unless there was a disclaimer of all right to the property by the defendant, was bound to prove his title to the property, or a right of possession. The defendant did not so disclaim or deny the detention, but, on the contrary, admitted it, and claimed, and offered evidence to prove, a title in Phelps derived from Hart and Townsend. The only question then involved in the issue was a question either of title or of right of possession in the plaintiff." In that case, as here, the court found that no demand prior to the suit had been made upon the defendant, but this court said: "The question of demand was not necessarily within the issue presented by the record." In *Sander v. Goldsmith*, 41 Conn. 578, the defendant, having filed a general denial without disclaimer, offered evidence upon the question of wrongful detention. This was objected to, on the ground

that it was not admissible under the general issue without a disclaimer. The trial court admitted the evidence, and, after the trial and argument, the defendant, by permission of the court, filed a disclaimer. This court said: "Whether or not the evidence offered by the defendant was admissible before the disclaimer was filed it is not important to decide, for if it was not admissible before, it certainly would be after."

On the whole, we think the ruling of the court below, complained of in the case at bar, was correct, upon the ground that, as the defendant had not filed a disclaimer, the question of demand was not in issue; and this renders it unnecessary to consider or decide whether it is also sustainable on the other ground mentioned by the trial court. There is no error.

FISK et al. v. CITY OF HARTFORD.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

RIPIARIAN RIGHTS—DIVERSION OF WATER.

A city for many years appropriated about one-half of the volume of a river, the use of the waters of which belonged to plaintiffs, who were riparian owners and mill proprietors. The greater part of the water was returned to the river in the form of sewage, so that plaintiffs sustained no substantial damages. The city thereafter, for the purpose of abating the nuisance caused by such sewage, built a sewer, diverting it from such stream. Held that, as the city, under its charter, had the right to dispose of its sewage as it saw fit, a bill by plaintiffs to enjoin it from so diverting "the sewage" would not lie whether the city had or had not the right, as against plaintiffs, to take and use the water.

Case reserved from superior court, Hartford county; William T. Elmer, Judge.

Suit by Leonard D. Fisk and others to restrain the defendant, the city of Hartford, from diverting the water of Park river into an intercepting sewer, until compensation therefor should be made to the plaintiffs, as riparian and mill proprietors. Reserved by the court, upon demurrer of the defendant, for the consideration and advice of this court. Judgment sustaining demurrer advised.

Henry C. Robinson, William F. Henney, and John T. Robinson, for plaintiffs. Lewis E. Stanton and William J. McConville, for defendant.

TORRANCE, J. To the original complaint in this case (which sought to enjoin the defendant from diverting, in the manner therein alleged, the flow of water into Park river) a demurrer was filed, and sustained, with leave to amend. The complaint was then amended; a demurrer thereto was filed; and thereupon the questions arising upon both demurrers were reserved for the advice of this court. As the determination of the questions arising upon the demurrer to the amended complaint disposes of the case reserved, it will be unnecessary to consider those arising upon the

demurrer to the original complaint. The amended complaint consists of two counts.

The substance of the material parts of the first count, by paragraphs, may be stated as follows: (1) The plaintiffs are the owners of a valuable mill property on Park river, in the city of Hartford, with mills upon both sides of the river, one upon Elm street, and the other immediately opposite, upon Wells street. They are the owners, at that point and for a considerable space upon each side of it, of the banks of the river, and of its bed, and the exclusive owners of the water privileges at that point. (2) The water power available at this point to the plaintiffs, by means of their dam, is equivalent to about 200 horse power upon the average. (3) The water privilege is an ancient one, having been established, used, and occupied as such for more than 250 years. (4) The value of the mill property in connection with the water privilege is \$250,000, and the plaintiffs have established a large and profitable business thereon as millers, and the water power is sufficient, without the assistance of steam, to carry on the entire business of the plaintiffs as such millers. (5) The defendant is the owner of a large and important system of reservoirs, for the use of the citizens of Hartford, for domestic and other purposes. The water of all these reservoirs is communicated to a certain distributing reservoir, whence, by leading pipes, it is carried to the streets, houses, stores, and lands in the city, and is thence nearly in whole returned to Park river, above the plaintiffs' dam, by the present drains, pipes, and sewers of the city, and is thereby made available to the plaintiffs in the use of their said water privilege. (6) All the water collected and carried by the city in all of said reservoirs is from brooks, streams, and springs which are tributary to Park river, to the entire current and flow of which river the plaintiffs are entitled, by their mill and riparian ownership aforesaid. (7) Since the introduction of the system of water supply by said city, referred to in paragraph 5, down to the present time, the water collected in such reservoirs, as they were severally completed and put in operation, has been largely, if not entirely, returned to said river, and made available for the uses of plaintiffs in the enjoyment of the said mill privilege, as set forth in paragraph 5. (8) The said city has recently, to wit, within about a year from the date of this complaint, built and completed a reservoir in the town of Bloomfield, known as the "Tumbledown Brook Reservoir," of very extensive area, in which the said city has accumulated, and still continues to accumulate and hold, vast quantities of water from the watershed, streams, brooks, and springs tributary to said Park river, and to whose usufruct the plaintiffs are entitled as aforesaid, and has connected the same by canals with said distributing reservoir, whence the said water is returned to said river, and made available for the uses of the plaintiffs in their mill work, as set out in paragraph fifth. (9) The surface

water flowing from all points this side of the distributing reservoir now finds its way, either by direct surface flowage, or by the existing drains, pipes, and sewers of the city, into Park river. Some small portion of said surface water, however, and also a small portion of the water brought from the reservoirs, is carried into Park river, below the complainants' dam, and into the Connecticut." (10) The city is now constructing an immense intercepting sewer, designed to divert, and which will divert, all the water now conveyed by pipes, drains, and sewers, and by surface flow into Park river, above plaintiffs' dam, away from Park river, into the Connecticut river; and it intends to and will wholly divert said water, as aforesaid, unless restrained by injunction. "(11) The proposed intercepting sewer is particularly described in an exhibit which, by reference, is made part of this complaint, and will be filed in court as 'Exhibit B.'" (12) This diversion will deprive the plaintiffs of the use of from one-third to one-half the volume of water whose usufruct belongs to them, and will be a great and irreparable injury and damage to them. (13) By an act of the general assembly passed at its session in 1882, authority was given to the city to take, occupy, and appropriate any stream, or part of a stream, running in or through said city, and to remove dams, walls, and other obstructions to the free and healthful flow of such stream, or part of a stream, and to raise said dams and build other dams where the public health or convenience may require, and to cause it to flow through a sewer or other aqueduct built in or upon the bed of said stream, or laid in the earth in or near the bank thereof; and by said act it was required that the city should agree, if possible, with parties interested, upon the damage on account of such improvement; and, if unable to so agree, that the city should have the damages appraised, and paid in the manner prescribed in said act. (14) In March, 1894, the plaintiffs presented their claim for damages in the manner prescribed by said act to the proper authority; but neither the city, nor any one in its behalf, has "ever made any offer to compensate to any extent the plaintiffs for the damages which will arise from said so-called 'improvement,' nor have they agreed or attempted to agree with the plaintiffs upon such damages, although frequently requested by the plaintiffs." (15) Neither the city, nor any one in its behalf, has taken any of the steps in said act prescribed, or otherwise, to have the plaintiffs' damages aforesaid ascertained or appraised; but it "threatens to continue the building and completion of said intercepting sewer, and to divert from said stream of water, and from plaintiffs' use, nearly one-half of its flow and current, without any compensation whatsoever to the plaintiffs for their damages resulting from said so-called 'improvement.'" (16) Such diversion will injure the plaintiffs to the amount of, at least, \$100,000. (17) If the city does what it threatens to do, without

agreeing with the plaintiffs as to their damages, or having the damages appraised and paid, the injuries inflicted upon the plaintiffs will be irreparable and incapable of estimate, and plaintiffs will be without adequate remedy. (18) On the 24th of July, 1893, the common council of the city were of opinion, and expressed that opinion by action at the time, "that the proper sewage of the city required the diversion of the water from Park river," and then passed certain votes, "whose effect will be to cause a large part of such stream which now flows into the natural channel of said river to flow through a sewer to be built in part in and upon the bed of said such stream, and in part on either bank thereof." (19) On the same day, the court of common council "passed a vote proposing said so-called 'improvement,' and referred the same to the board of street commissioners; and the said court of common council and the said board of street commissioners prepared a descriptive survey of the improvement proposed, with a careful estimate of the cost of completing the same." (20) In February, 1894, the board of street commissioners gave proper notice of a time and place for hearing all parties interested in said improvement, and the plaintiffs appeared at the proper time and place, and made their claims to said board for the damages which would be caused to them by said improvement, and the consequent diversion of water as aforesaid. (21) At said meeting no agreement was made with the plaintiffs with reference to said damages. The relief prayed for was as follows: "The plaintiffs claim: An injunction restraining the defendant city from diverting into said intercepting sewer, or any part of the same, or elsewhere, the present current and flow of water into said Park river, at and above the said dam of plaintiffs, whether such present current and flow be through drains, pipes, sewers, surface flowage, or otherwise, until an assessment of the damages resulting to plaintiffs from such diversion shall have been assessed or agreed upon, and the payment thereof made or secured, in accordance with the provisions of an act of the general assembly entitled 'An act granting control of Park river to the city of Hartford,' approved March 22, 1882."

The first 16 paragraphs of the first count were made part of the second count, and the remainder of said second count, with the relief prayed for, was as follows: "(2) The defendant threatens to divert from said stream of water, and from the plaintiffs' use thereof, nearly one-half of its flow and current, without any compensation whatsoever to the plaintiffs for their damages directly resulting from said so-called 'improvement.' (3) The diversion of said water, as aforesaid, by the defendant, will cause an irreparable damage to the plaintiffs, and damages incapable of estimate. (4) The defendant has never compensated nor paid in any way the plaintiffs for the accumulation of the water of Tumbledown Brook Reservoir, as described in the

eighth paragraph of the first count, nor have they attempted to agree with the plaintiffs as to the amount of said damages. (5) Until the plaintiffs are deprived of the use of said water, which is now returned to them, as hereinbefore set out, they suffer no substantial damage; but when said water is carried past the plaintiffs' dam, as proposed by the construction and use of said intercepting sewer, as aforesaid, the same will be of great and irreparable damage to them. (6) For the accumulation of the waters of the stream and its tributary springs and brooks, described in paragraphs 6 and 7 of the first count, no compensation has ever been made to the plaintiffs or their predecessors in the ownership of the mill privilege aforesaid. (7) The storage capacity of said reservoirs is as follows: No. 1, 146,000,000 gallons; No. 2, 284,000,000 gallons; No. 3, 146,000,000 gallons; No. 4, 601,000,000 gallons; No. 5, 94,000,000 gallons; No. 6, 800,000,000 gallons. No. 6 is Tumbledown Brook Reservoir. The average daily consumption of said water by the defendant's water department is about 7,000,000 gallons. The plaintiffs amend the prayer for relief by making the same as it now stands paragraph 1 of plaintiffs' claims, and adding thereafter the following: (2) An injunction restraining the defendant city from diverting into said intercepting sewer, or any part of the same, or elsewhere, the present current and flow of water of the said Park river at and above said dam of the plaintiffs, whether such present current and flow be through drains, pipes, sewers, surface flowage, or otherwise, until the injury aforesaid done and to be done to the plaintiffs is compensated and paid for. (3) Such other and further relief as may to equity pertain."

After the complaint as thus amended was filed, it was further amended, by way of more specific statement, as follows: "The plaintiffs herewith amend the complaint by making more specific statement, as follows: (1) At the end of paragraph 19 add the following: The action and opinion of said court of common council referred to in paragraphs 18 and 19 were expressed by certain votes, copies of which, with the subject-matter and the correct dates thereof, appear in the annexed journals of the board of common council and the board of aldermen of said court, which are marked Exhibits 'C' and 'D,' respectively, at pages 185-217, inclusive, and 251 of Exhibit C, and pages 222, 386, 387, 446, and 461 of Exhibit D. The plans, maps, and surveys referred to at page 217 of Exhibit C are made a part hereof by reference, the same being in the possession of the defendant, and of such a character that the plaintiffs are unable to file the same. The report of the committee, with the resolution therein submitted, a copy of which appears at pages 336 and 337 in said Exhibit D, is still pending in said court of common council. (2) At the end of paragraph 20 add the fol-

lowing: The action of said street board referred to in this paragraph was pursuant to a vote of said court of common council, a copy of which, with the subject-matter and the correct date thereof, appears in said Exhibit C, at pages 479-481, inclusive. A copy of the publication of the resolution therein mentioned, so far as there was any publication thereof, is the plaintiffs' Exhibit B. A copy of the publication of the notice given by said street board, and referred to in this paragraph, with the correct date of such publication, is hereto annexed, and marked 'Exhibit E.'"

Exhibit C shows, in substance, that the city, in July, 1893, resolved to construct the intercepting sewer complained of, in order to remove what is called in said Exhibit C the "Park river sewage nuisance," and also as "an improvement to the city's sewerage system in general." Exhibit D shows, in substance, that in July, 1893, the common council appointed a committee to ascertain and report the probable cost of extinguishing the flowage rights of the plaintiffs, and of acquiring their entire mill property; that in November of that year said committee made a report, and asked for further power in the premises. This report was eventually tabled by the board of aldermen, in March, 1894, and so remains. Exhibit E is as follows: "Board of Street Commissioners, Hartford, Conn., March 19, 1896. This board will meet Monday evening, March 19, 1896, at 7:30 o'clock, to hear all parties interested in the matter of damages for the right of way for the proposed system of intercepting sewers and branches thereof. Parties interested are invited to be present. Charles H. Northam, President."

So far as it is deemed necessary to set out the demurrers, they are as follows: To the first count: "The defendants demur to the first count of the plaintiffs' complaint, for the following reasons: None of the votes or resolutions passed by the court of common council of the city of Hartford, referred to in paragraphs 18 and 19, or any paragraph of the first count, as amended or in plaintiffs' specific statement, have the effect, or, as matter of law, contain any vote or determination of the common council, to divert any part of the Park river, or to take the waters of said river out from its stream, or any part thereof, or cause it to flow through a sewer or other aqueduct built in or upon the bed of such stream, or laid in the earth in or near the banks thereof. It does not appear from the first count, or any amendments thereof, that, by virtue of any of said votes or resolutions, the city of Hartford took any action under the act of March 22, 1882, referred to in said count." "Because it appears from the first count, as amended, that the notice or notices referred to in paragraphs 19 and 20 of same, as amended, by specific statement, or any paragraph of said count, and the action of any of the board of

street commissioners and of the common council of the city of Hartford, were each and all of them notices or action in relation to the construction of sewers under the ordinary regulations prescribed by law relating to the construction of sewers in accordance with the charter of the city, and were not either notices or action for any proceeding under the act of March 22, 1882, and were not part of any proceedings to divert the waters of Park river from the stream, or to carry said waters in any sewer laid in its bed near either of its banks." "Because it does not appear from any averments in the first count contained that the special act of March 22, 1882, has any application to the building of the intercepting sewer described in the first count." To the second count: "The defendant also demurs to second count of amended complaint, for the following reasons: It appears from the second count, and from various paragraphs thereof, and especially from paragraph 10, that the defendants are not proposing to divert Park river, nor any streams of water which flow into the same, but are proposing merely to keep sewage out of Park river, to turn sewage or sewage water from certain sewers into an intercepting sewer, and take said sewage into the Connecticut river." "It appears from the second count, and especially from paragraph 10 of original complaint, now made part of second count, that the acts of the defendants complained of are done in the course of the construction of a certain intercepting sewer by the city of Hartford, and the proposed use of the same in order to turn sewage into the Connecticut river; and there are no averments in second count which tend to show that such construction of a sewer or diversion of sewage on the part of the defendant is unlawful." "The defendant demurs to the relief demanded in second count of complaint, because, upon the allegations of the second count, the plaintiffs are not entitled to the relief by way of injunction, as therein sought." To the entire complaint: "The defendant demurs to the entire complaint as amended, for the following reasons: Because the special act of March 22, 1882, and found in Special Acts of 1882 (page 419), is merely a permissive act, authorizing the city of Hartford to do certain things named therein, but not imposing upon the city of Hartford any obligation to take action under the same, and because said act has no application to the building of said intercepting sewer, or to any damages arising therefrom." "Because the city of Hartford has full right, under the laws of the state, to abandon all action under the act of March 22, 1882, and also to resort to another method of drainage, and an injunction ought not to issue in order to restrain it from performing its duty in the premises." "Because, under the charter of the city, its court of common council is vested with full powers to pass ordinances for

laying out and constructing and altering public sewers, through the highways, streets, including turnpike roads, alleys, and public grounds within the city, and also through the private inclosures within the same. And, further, by said charter, it is made the duty of the board of street commissioners of the city of Hartford to cause the prompt completion of all necessary repairs of streets, highways, sewers, and public works, within the limits of the streets, highways, and thoroughfares of the city, other than public buildings." "Because it appears from the complaint that the defendant city is constructing said intercepting sewer under its police powers, in the discharge of a governmental duty, in order to promote and preserve the public health." "Because it appears from the complaint that the object of the same is to compel the defendant city to take action under the act of March 22, 1882, when no obligation rests upon the city to take such action, and, if injunction should issue, the city would be restrained from making use of a sewer which is constructed in order to promote and preserve the public health." "Because the construction and use of said intercepting sewer is a public work of great importance, and of great necessity to the inhabitants of the city, and that the same appears from the complaint, and especially from the 10th, 11th, and 13th paragraphs thereof; and the city will not be restrained by an injunction from using a public work, in order to force the city to pay damages for diversion of sewage water." "Because it appears from the complaint that all the acts on the part of the defendant complained of are being done by the city of Hartford, in the construction and management of its own system of sewers, and because polluted sewage water, referred to in the complaint, is a public nuisance, and, by law, the city has full right to abate a public nuisance without the payment of damages." "Because the plaintiffs have adequate remedy at law, by proper action against the city, if any of their rights to water, or to the flow of water into the Park river, shall be taken or injured by the city in consequence of the construction of said intercepting sewer."

Although the record in this case is somewhat voluminous, the facts decisive of it lie in narrow compass, and may be briefly stated as follows: The plaintiffs are the owners of a valuable water privilege and mill property on Park river. Prior to the acts complained of, the city of Hartford had constructed a system of reservoirs, at great expense, to supply itself and its inhabitants with water for domestic and other purposes. This water supply is all taken above the plaintiffs' dam, from brooks, streams, and springs which are tributary to Park river, to the entire current and flow of which river, including the water so taken by the city, the plaintiffs are exclusively entitled at their mills. The water so taken by the city is

from one-third to one-half the volume of said river. This water is carried to a distributing reservoir, and thence, by leading pipes, to the city, where it is sold and distributed to the citizens through service pipes for use, and, after such use, is returned in great part to Park river, through the sewerage system of the city. This has been done ever since the city began to use such water supply, and, by reason of such return, the plaintiffs thus far have suffered no substantial damage from the use of said water by the city. The city now proposes to divert all the water thus flowing through its sewerage system, as aforesaid, into Park river, above the plaintiffs' mills, into a great intercepting sewer, which it is engaged in constructing, and, by means of such sewer, to carry such water directly into the Connecticut river. This, if done, will divert and take away from the plaintiffs' water privilege from one-third to one-half of the volume of Park river, as it has been accustomed to flow there, and will very greatly damage the plaintiffs. It further appears that under the act of 1882, referred to in the complaint, authority was given to the city to do the things set forth in said act with reference to "any stream, or part of a stream, natural or artificial, running in or through said city"; and also that the city took such action with reference to purchasing or condemning the property of the plaintiffs, and appropriating Park river, under the act of 1882, as is set forth in the complaint and the exhibits which are made a part of it. It further appears that, in the opinion of the city authorities, the sewage and waste water thus returned to Park river created a nuisance, which ought to be abated in some way; and that said authorities finally determined to abate such nuisance by building the intercepting sewer, and, through it, diverting said waste water and sewage into the Connecticut river.

These are the main controlling facts in the case, and the question is whether, upon them, the plaintiffs are entitled to the precise relief which they now seek. If the complaint could be regarded as one brought simply to enjoin the city from taking its water supply, or any part of it, from the tributaries of Park river, the case thus presented would be a very different one from the present case; but it cannot be so regarded. The complaint is not brought to have the city enjoined from diverting the water of Park river or its tributaries into the reservoirs and distributing pipes of the city, or from using the water so diverted, but it is brought to restrain the city from diverting its sewage into the intercepting sewer; and this is the very gist of the complaint. The allegations of the complaint are, in effect, that this sewage has heretofore been permitted to flow into Park river; that it is available for use at the plaintiffs' mills; that the city now intends to divert it into the intercepting sewer, past the plaintiffs' mills; that this will greatly

lessen the flow of the river, to the plaintiffs' damage; that the city has no right to thus divert its sewage from Park river, and should be enjoined from doing so until it has paid or satisfied the plaintiffs' damages. It is true the complaint may be fairly said to allege, in effect, that the city gets its water supply from waters which belong to the plaintiffs, and that it has no right, as against the plaintiffs, to take and use such water as it does. But the complaint does not ask to have such taking and use enjoined against. It only asks to have the city enjoined from disposing of that water after it has become sewage.

Now, it is quite clear that the city either has, or it has not, the right, as against the plaintiffs, to take and use the water which constitutes its supply, as set forth in the complaint; and in either case we think it is equally clear that the city has the right, as against the plaintiffs, to dispose of that water after it enters the sewerage system as sewage, under its charter, as it sees fit. In other words, the plaintiffs may or may not have the right to have the whole or a part of the water supply of the city returned as water to Park river; but in either case they have no right to have it so returned after it has become sewage, or to have it returned through the sewerage system of the city, which are in effect the rights claimed in the present case. If the city has the right, as against the plaintiffs, to take and use the water in its reservoirs, then, clearly, it has the further right, as against them, either before or after it is used, to dispose of it under its charter as it sees fit. If, on the other hand, it has no right, as against the plaintiffs, to take or use the waters in its reservoirs, which is, we think, the case stated in the complaint, this fact of itself does not give the plaintiffs a right to control the disposition of such water after it has entered the sewerage system, and become sewage. That control still remains with the city, and ought to remain with it.

As the court is bound to take judicial notice of the city charter (Gen. St. § 1087), we know that full control over its sewerage system, and over the disposal of sewage, is conferred upon the city; and there is nothing in the entire record which shows any loss of such control, or which shows that the plaintiffs have any rights which the city is bound to consider in dealing with its sewer system, or in dealing with the disposal of sewage. In this view of the case, it makes no difference whether the sewage is or is not injurious to health, or whether its open flow has or has not otherwise become a nuisance. In either case the city still has, and ought to have, full control over it, and the pipes, drains, and sewers through which it flows, or can be made to flow. If the city wrongfully takes and uses the plaintiffs' water, the remedy for such a wrong is ample, either by an action at law for damages, or, in a proper case in equity, by injunction; but where, as in this case, the plain-

tiffs apparently condone the wrongful taking and using of the water, on condition that it shall be allowed to come back to them in the form of sewage through the city sewers, and assert a right to sewage as such, and to have it flow through the sewers as it has been accustomed to flow, they cannot have the remedy which they now seek, simply because they have not shown that they possess any such right. The complaint clearly shows that it is the sewage of the city, and not the waters of Park river or its tributaries in any proper sense, which the city is about to turn into the intercepting sewer; and it is this precise diversion, and nothing else, which the plaintiffs seek to have enjoined. For the reasons given, we are of opinion that they are not entitled to the injunction.

In this view of the case, the question whether the city, in what it has done or intends to do, as alleged in the complaint, is or is not acting under the act of 1882,—a question much discussed upon the argument,—becomes of secondary importance. We think, however, that the record clearly shows that the city is not acting in this matter under the authority conferred by the act of 1882, but under the provisions of its charter, without regard to that act. Furthermore, we think that what the city has done, and what it intends to do, as alleged upon the record, do not constitute a taking or appropriation of Park river, or any part of its bed or banks, or of any part of its waters, within the meaning of the act of 1882; and that its charter gives it full power to do what it has done and intends to do, as these matters are alleged in the complaint. The superior court is advised that the complaint is insufficient. The other judges concurred.

WOLF v. HOSTETTER et al.

(Supreme Court of Pennsylvania. July 15, 1897.)

NEGOTIABLE NOTES—INDORSERS—JOINT LIABILITY—ACTIONS.

1. A joint action cannot be maintained by the holder against separate indorsers of a negotiable note.

2. Where several persons in succession indorse a note payable to the order of one person, the act of each imports a several and successive, and not a joint, obligation, whether done for accommodation or for value, unless there be an agreement to the contrary.

Appeal from court of common pleas, Lancaster county.

Assumpsit by J. P. Wolf against A. B. Hostetter and W. M. Jacobs, doing business as W. M. Jacobs & Co. There was a judgment of nonsuit, and plaintiff appeals. Affirmed.

J. W. Johnson, for appellant. John E. Malone, for appellees.

STERRETT, C. J. This suit was brought on a note made by "Banner Leaf Tobacco Co.," for \$1,225.75, at four months, from December 29, 1894, to the order of A. B. Hostetter, one of the defendants, and by him indorsed, and

then indorsed by the other defendant, W. M. Jacobs & Co. Judgment was taken against the payee and first indorser for want of an appearance. As to Jacobs, the other defendant, issue was joined, and on the trial judgment of nonsuit was entered. This appeal is from the refusal of the court to take off the nonsuit.

While the record does not distinctly show, as it should, the grounds on which the motion for nonsuit was based, it is alleged by defendants, and not denied, that the reasons were (1) that the liability of the defendants, if liable at all, was not joint, but several, and (2) that no sufficient notice of demand and nonpayment was given to the defendant Jacobs.

As to the first, it clearly appears in the plaintiff's statement that the suit is against the payee and first indorser and the second indorser jointly, and is predicated of a joint liability of the defendants, of which there was no evidence whatever. This of itself was quite sufficient to justify the action of the court below. In the absence of statutory authority, such as exists in several of our sister states (2 Pars. Notes & B. 457, note), permitting the holder of negotiable paper to join in one action all parties thereon prior to himself, etc., it is very clear that in this state a joint action against two or more separate indorsers cannot be maintained. As was well said in *Fawcett v. Fell*, 77 Pa. St. 308: "It is elementary law that there can be no recovery in an action *ex contractu* against several defendants, unless they are jointly liable, and there can be no joint liability if the contract is not joint, but several." Where several persons in succession indorse a negotiable note, the act of each, respectively, imports a several and successive, and not a joint, obligation, whether done for accommodation or for value, unless there be an agreement allunde different from that evidenced by the indorsements. 2 Daniell, Neg. Inst. (4th Ed.) § 703. An apparent exception to this principle is the case of a note payable to the order of two or more persons, and by them, respectively, indorsed; but, upon due consideration, it will be found to be in harmony therewith. *Foster v. Collner*, 107 Pa. St. 305.

It is unnecessary to consider the second alleged ground for nonsuit, viz. failure to notify the defendant Jacobs of demand and nonpayment of the note. Enough has been said to show that there was no error in refusing to take off the judgment of nonsuit. Judgment affirmed.

MULLEN v. UNION CENT. LIFE INS. CO.
(Supreme Court of Pennsylvania. July 15, 1897.)

INSURANCE—APPLICATION—ANSWERS—WITNESSES
—CROSS-EXAMINATION—INCOMPATIBLE CONDUCT
—TRIAL—AFFIDAVIT OF DEFENSE—READING TO JURY.

1. Where assured correctly described the policies held upon her life at the time of the appli-

cation, and the agent who prepared the application neglected to mention one of them therein, and neither assured nor the beneficiary read the application, both relying on the agent to correctly prepare it, the company could not avoid liability because of the omission.

2. On an issue whether a beneficiary in a life policy was a creditor of deceased, he testified that he commenced to work for deceased 20 years before the policy issued, and did everything that was needed to be done for her comfort, specifying the different kinds of labor, and testified that his services were worth a certain amount per month, and that he expected deceased would pay him for them, but admitted that he kept no account of the work. Held error not to permit him to be cross-examined as to whether he had tried to collect his claim out of deceased's estate.

3. Where the affidavit of defense was not offered in evidence, and plaintiff had the closing argument, it was error to permit him to read the affidavit to the jury in such argument.

Appeal from court of common pleas, Luzerne county.

Assumpsit by Anthony Mullen against the Union Central Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

The assignments of error are as follows, viz.:

"First. The court erred in refusing to allow the following question on cross-examination of appellee: 'Q. After she died, did you endeavor to collect this money which you say she owed you out of her estate? (Objected to.) The Court: I do not see what that has to do with it, Mr. Palmer. (Objection sustained. Exception noted for defendant. Bill sealed.)'

"Second. In allowing appellee's counsel, in his closing address to the jury, to read to them a paper which had not been offered in evidence, viz. the affidavit of defense, as follows: 'Counsel for plaintiff, in his closing address to the jury, proposes to read the defendant's affidavit of defense in this case, and counsel for the defendant objects, because the affidavit of defense and the files in the case have not been formally offered in evidence. The Court: I think the affidavit is evidence, and counsel may read from it in his address to the jury. (Exception noted for the defendant. Bill sealed.)'

"Third. The court erred in charging as follows: 'The plaintiff has testified as to the services rendered by him for his sister for twenty-two years, and what they were. You will remember that he said that his services consisted in looking after her garden, hoeing it, raising garden truck for her, and some other services, and in shingling her house, and that his services were worth during that time at the rate of six dollars a month. If you believe what the plaintiff has testified to on that subject, that he labored for this woman in the neighborhood of twenty-two years, and that his services were worth at the rate of six dollars per month, then he was such a creditor as would give him an interest in the life of the sister at the time the insurance was effected. If, however, you believe these services were gratuitous, that he never intended

to charge her for the same, that he did not look upon her as his debtor, but it was a free gift of the services, then he would not be such a creditor. He testified on that subject that he did charge her for the services, or kept an account of that charge,—I have forgotten the exact words,—but it was not in a book; that he did intend she should pay, but he did not know how. It makes no difference whether he knew how or not, if he intended that she should pay him for the services; and I take it, no matter whether he could enforce the claim against her in law or not, he would have such an interest in her life as would entitle him to maintain this action in this case; and therefore we do not think the court would be warranted in holding, as a matter of law, that this was a mere gambling policy upon the life, of which the plaintiff had no interest.'

"Fourth. The court erred in charging as follows: 'As to the second point of defense, the plaintiff and Andrew Weir, the agent, testified that the answers to the printed interrogatories were written by the agent of the company; that, when he asked what other insurance there was on the life of Mary Howley, she mentioned the policy for a thousand dollars, and the Metropolitan policies for four hundred and thirty-five dollars; and that the agent had learned from other sources of this insurance; and that, in writing the answers, he, by mistake or otherwise, omitted to mention the Metropolitan policies; and that Mr. Weir did not read to them the answers which he had written in the application. You will inquire, did Mrs. Howley give truthful answers as to the other insurance on her life, and did the agent, by mistake, omit to insert the correct answer? Did she and the plaintiff sign the application through ignorance of the fact that the answers were incorrectly written, and was or was not the application read after the answers had been written by the agent? You will see the importance of this. If Mrs. Howley gave an untruthful answer; if she said she had one thousand dollars in the Prudential, when she had in fact one thousand in the Prudential, and four hundred and thirty-five in the Metropolitan,—then it is such an untruthful answer as would prevent a recovery in this case. But if she gave a truthful answer to the agent of the company, she being an ignorant woman, unable to write at least, and the agent, through mistake, put down a thousand dollars, instead of fourteen hundred and thirty-five dollars, and she, without having the policy read to her, or without having the application and the answers read to her, signed the answers so incorrectly written down by the agent, it would not bar or prevent a recovery in this case. In other words, if it was the agent's mistake or fraud in writing down the answers, and not that of Mrs. Howley or the plaintiff here, and she and the plaintiff here signed the application, believing that her truthful answers were correctly written down, it would not bar a recovery; but if it was her untruthful answer,

or even her mistake in giving an untruthful answer, the plaintiff could not recover.'

"Fifth. The court erred in charging as follows: 'If you believe the evidence adduced upon the part of the plaintiff, and there is no other evidence in the case, you should find a verdict for the plaintiff for the amount of \$1,500, and interest from the 9th of October, 1892. Whether you believe the evidence or not is for you to decide. The credibility of the witness is for you to pass upon, and not for the court.'

"Sixth. The court erred in affirming the plaintiff's first point, as follows: 'The plaintiff asks the court to charge as follows: "(1) Under the evidence in this case, the relationship of debtor and creditor is shown, and therefore the plaintiff has an insurable interest." I decline to say as matter of law. I leave it for the jury to say, and I repeat what I said before: If you believe the evidence submitted upon the part of the plaintiff, the relationship of debtor and creditor has been shown.'

"Seventh. The court erred in refusing the defendant's second point, as follows: '(2) The plaintiff has failed to prove that he had such a claim or demand upon Mary Howley as a creditor as to give him an insurable interest in her life.' I decline so to charge.'

"Eighth. In refusing to charge as requested in defendant's third point, as follows: '(3) An insurance by a creditor on the life of a debtor may be sustained if the amount of the debt, taken in connection with the expectation of life of the debtor and the amount of the premiums to be paid, bears some reasonable relation to the amount of the insurance; but in this case the evidence fails to furnish the amount of the debt or the expectation of life of the debtor, and therefore there is no evidence from which these essential facts can be ascertained.' I decline so to charge.'

"Ninth. In refusing defendant's fourth point, as follows: '(4) Under all the evidence, the verdict must be for the defendant.' I decline to charge as requested in that point.'"

H. W. Palmer, for appellant. John T. Lenahan and Edward A. Lynch, for appellee.

McCOLLUM, J. The plaintiff was the beneficiary named in the policy, and the assured was his sister. On the trial, the court, on the defendant's request, instructed the jury that the plaintiff had no insurable interest in the life of his sister by reason of their relationship. This instruction left the question of insurable interest to be determined on his evidence, in support of his claim that he was a creditor of the assured. The learned court below thought, and so instructed the jury, that the evidence, if believed, was sufficient to sustain this branch of his contention. As the case is now presented to us, it is not clear that the court erred in holding that it was for the jury to decide whether the plaintiff was a creditor of the assured when the policy was issued on her life for his benefit.

The court would not have been justified in taking the case from the jury on the ground of misrepresentation or concealment respecting the amount of insurance on the life of the plaintiff's sister when the application for the policy in question was made. The testimony of the plaintiff and of the agent of the defendant company was clear on this point, and to the effect that the assured, in answer to the agent's interrogatories, correctly stated the number and amount of the policies then held upon her life, and the names of the companies by which such policies were issued. The blank space in the printed application was filled by the agent, and it was his duty to insert in them the answers of the applicant to the questions formulated by the company he represented. It appears that he failed to mention in the application her policies in the Metropolitan Company, and that, after he had completed the same, it was not read by or to the assured or her beneficiary, both of whom relied on him to correctly insert in the proper places the answers to the questions addressed to her. Upon this omission or neglect of its agent, the defendant company sought to escape liability on the policy, and it now complains of the rulings by which this branch of its contention was defeated. In these rulings we discover no error. A clear warrant for them will be found in *Dowling v. Insurance Co.*, 168 Pa. St. 234, 31 Atl. 1087, where the rule on this subject is clearly stated, and the authorities for it are cited, by our Brother Fell.

The question whether the plaintiff had an insurable interest in the life of his sister, "on the ground of kinship alone," is not on this record. No specification of error raises it, although the learned counsel for the appellee have devoted considerable space in their paper book to the discussion of it. We do not regard it as properly before us, and we therefore decline to consider it on this appeal.

As the case was tried in the court below, the controlling question in it was whether the plaintiff was a creditor of the assured. He claimed that he was, and he relied on his own testimony to support the claim. According to this testimony, he commenced to work for his sister about 20 years before the policy in suit was issued on her life. He built fences and shanties for her, and an addition to her house. He chopped wood for her. He planted, hoed, and dug potatoes, and put them in her cellar for her use, and he did "everything that was needed to be done" for her comfort. He testified that these services were worth at least six dollars a month for each and every month of the twenty or more years in which they were rendered, and that he expected she would pay him for them, although he admitted that he kept no account of the work. In this state of the testimony, it was clearly competent for the counsel of the defendant company to ask him on cross-examination if he had made an effort to collect his claim out of her estate. Any act or omission of the plain-

tiff inconsistent with his claim, or with the testimony submitted to sustain it, was pertinent to the issue, and therefore admissible; and so was a cross-examination of him directed to the development of a course of conduct incompatible with either.

The affidavit of defense was not offered in evidence, but the plaintiff, against the protest of the defendant, was allowed to read it to the jury in his argument upon the issues of fact. This, we think, was an unauthorized and improper use of it. The plaintiff had the affirmative of the issue and the closing argument. He was thus permitted to discuss to the jury, as an item of evidence, a paper which had not been received or offered as such, and which the defendant had no opportunity to explain. If it contained an omission or statement inconsistent with the defense made on the trial, and the plaintiff desired the benefit of the inconsistency, he should have offered the paper in evidence. It was not an item of evidence in the case, and therefore the plaintiff had no right to read it or comment upon it to the jury. We sustain the first and second specifications of error, and overrule the other specifications. Judgment reversed, and venire facias de novo awarded.

BEAVER v. SLEAR.

(Supreme Court of Pennsylvania. July 15, 1897.)

NOTES—VARIANCE BY PAROL—INTEREST—PROVINCE OF JURY.

1. Where a note given by husband to wife, and payable one day after date, did not bear interest on its face, parol evidence was admissible to show whether the parties intended it to bear interest during the wife's life.

2. Where a husband gave a wife a noninterest-bearing note, payable one day after date, for money borrowed to purchase a farm, on which they lived until her death, using the proceeds for their living, and the wife had declared that she was not to get interest during her life, and none was ever paid her, it was for the jury to say whether the note was intended to bear interest during said period.

Appeal from court of common pleas, Union county.

A judgment by confession in favor of William H. Beaver, trustee for Sarah J. Slear, was entered against George M. Slear, and afterwards opened, and defendant permitted to plead. There was a judgment in his favor, and plaintiff appeals. Affirmed.

The note is as follows, viz.:

"\$1,200.00. April 2nd, 1876. One day after date I promise to pay to the order of Wm. H. Beaver, trustee for Sarah J. Slear, twelve hundred dollars, without defalcation, for value received; and I do hereby empower any attorney of any court of record within the United States or elsewhere to appear for me and confess judgment against me as of any term for above sum, with costs of suit and costs of attorney's commission, and release of all errors; hereby waiving inquisition, and agreeing to

condemnation of any property that may be levied upon by any execution, which may issue forthwith on failure to comply with the conditions hereof; also, hereby waiving the benefit of exemption laws, or any act of assembly relative to execution now in force or hereafter to be passed. Witness hand and seal. George M. Slear. [Seal.]"

Following are the assignments of error:

"First. The court erred in admitting the testimony of James Slear, defendant's witness, against plaintiff's objection, as follows: 'Mr. Lelser. We offer to show by this witness and others that George M. Slear took certain real estate in Buffalo township in the partition in the estate of his father, George Slear, deceased; that at the time he was married to Sarah J. Slear, his wife, whose trustee, William H. Beaver, is the present plaintiff; that at the time he was living upon this farm with his said wife, Sarah J. Slear; that the money for which the note in suit was given was loaned by Sarah J. Slear to her husband, George M. Slear, for the purpose of paying part of the purchase money of his farm, and that it was invested in the farm, being used to pay off other heirs of George M. Slear; that Sarah J. Slear, his wife, lived continuously with George M. Slear, the defendant, as his wife, upon this farm, from the time this money was given, in 1876, until the day of her death, in 1893; and that she enjoyed the income and profits of that farm jointly and unitedly with her husband, George M. Slear. This is offered for the purpose of showing that, under the law, interest cannot be computed against the defendant for the note in suit of the time covered by the life of Sarah J. Slear. Mr. Linn. To which the defendant objects that it is not evidence for the purpose offered; that, under the evidence of the plaintiff, it is shown that George M. Slear entered into a written contract with the trustee of his wife to pay interest upon the money loaned from one day after date (that is, April, 3, 1876); that under this contract she takes the position of a creditor, with all a creditor's rights; that parol evidence cannot be offered for the purpose of altering, adding to, or taking away from a contract which is in writing; that there is no subsequent contract; that there is no contract between George Slear and his wife subsequent to the execution of the written agreement shown or offered to be shown; that the testimony offered does not show that there was such a contract made between him and his wife subsequent to the execution of the written agreement; that under this contract she, notwithstanding her marriage, and notwithstanding the fact that she lived with him upon these premises during her married life, is not deprived, under the law of Pennsylvania, nor is her husband, George M. Slear, exempted, under the law of Pennsylvania, from the payment of interest, but she stands as any other creditor, with any other creditor's rights. By the Court. We will hear the testimony, and note an exception for the plaintiff. (Plaintiff

excepts, and bill sealed.)' The witness then testified, *inter alia*, as follows: 'By Mr. Leiser. Q. You have said that Sarah Jane Slear was the wife of George M.? A. Yes, sir. Q. And that they were living together upon the farm in Buffalo township? A. Yes, sir. How did you say George M. Slear got that? A. Through the courts. Q. In partition proceedings? A. Yes, sir; partition of the court. Q. Those proceedings were in the estate of his father? A. Yes, sir. Q. Whose money paid for it? A. His and his wife's money. Q. How much money did she put in? A. Well, the note I seen was \$1,200. * * * Q. From whom did he get the money? A. From Sarah J. Slear. * * * Q. How long did Sarah Jane Slear live with her husband, George Slear, on the farm? A. Well, she lived from '06 until '92-'93. * * * Q. She lived, then— Well, when did she die? A. November 1, 1893. * * * Q. Did they live anywhere else, except upon that farm? A. No, sir; they did not. * * * Q. Off of what did they live? A. Off the proceeds of the farm. * * *

'Second. The court erred in admitting the testimony of Mrs. Hanna Heckman, defendant's witness, against plaintiff's objection, as follows: 'Mr. Leiser. We propose to prove by this witness that she is a half-sister of George M. Slear, the defendant in this case; that she lived in Clinton county, and has been living there for a number of years; that prior to the death of Sarah Jane Slear, whose trustee is the plaintiff in this case, she was accustomed to visit George M. Slear and Sarah Jane Slear yearly; that at such periodical times she collected the interest that was coming to her upon her share of her father's estate remaining invested in farm owned by George M. Slear, and upon which George M. Slear—and upon which George M. Slear and his wife, Sarah J. Slear, lived; that at such visits she had frequent conversations with Sarah J. Slear; that at different times Sarah Jane Slear mentioned the fact that she was not getting any interest upon her money, and notably at one time, just a year before Sarah Jane Slear's death, Sarah Jane Slear told her that she had her money in the farm, and was not getting any interest thereon, and was not entitled to any, because they (that is to say, the said George M. Slear and Sarah Jane Slear) were living off the interest of their farm, in which her money was invested; and that the substance of this conversation had been repeated time and again at the time of these visits. Mr. Linn. The plaintiff objects to the testimony offered, as being irrelevant and immaterial to the issue; second, it is parol testimony offered to raise the presumption of an alteration of the written agreement, and is inadmissible for the purpose; third, we object to it as an offer to alter a written agreement and the legal effect of the written agreement by parol. By the Court. The objections are overruled, and an objection for the plaintiff. (The plaintiff excepts, and bill sealed.)' 'The witness then testified, *inter alia*, as follows:

Q. Did you know Sarah Jane Slear? A. Yes, sir. Q. Who was she? A. Beaver,—Sarah Jane Beaver. Q. Where did she live in her lifetime? A. On the farm. Q. What farm? A. * * * My father's farm. Q. Where is it situated? A. Buffalo township, Union county. Q. How long did they live there? A. From the time of their marriage (November, 1866) until the time of their death. * * * Q. Do you know how much he got from his wife? A. Some \$1,200 was the note that was given. That is what she told me. Q. What was that money for? A. To pay off the heirs. Q. Did you ever have any conversation with Sarah J. Slear, in her lifetime, relative to the money? A. Yes, sir. Q. When was it? A. In 1892, the 4th of October, we had a conversation. She continually kept saying she could not pay the interest, and so I kind of got nettled at her always complaining, and I said— She said, "You are getting interest, and I am getting none;" and then I said— She said, "I have not anything to show either. that I am getting any." And I told her that the money I had received of my father's estate, that was in my husband's hands, I didn't receive any interest either, the same as her. nor did I think we were entitled to any interest, because we were living together as man and wife, and we were living off the proceeds of the farm; and she said, "Certainly, that was in, too. I am just telling you this—" Q. What was mentioned when you spoke about it? What did she say? A. She didn't say anything, but she just said she wasn't getting any interest, and she said, she knew we weren't entitled; and that ended her conversation, and there was no more said. Q. I ask whether she had, previous to this time, spoken about it at other times when you visited there? A. Well, she always said before that she was not getting any. * * *

'Third. The court erred in refusing to strike out the testimony given by Mrs. Hanna Heckman as follows: 'Mr. Linn. We ask to have the testimony stricken out as immaterial and irrelevant to the issue. By the Court. We overrule the motion, and an exception for the plaintiff. (Plaintiff excepts and bill sealed.)'

'Fourth. The court erred in admitting the testimony of George Calvin Slear (taken at a former trial of this case), defendant's witness, against plaintiff's objection, as follows: 'Mr. Leiser. We offer the examination of George Calvin Slear as taken at the other trial. Mr. Linn. * * * We simply object to the competency of the testimony. Judge Bucher. For the same reasons as the other? Mr. Linn. Yes, and further. We object to the admission of this testimony for the reasons that were given to the testimony of James Slear and Mrs. Heckman, with the additional objection that conversation which took place between Mrs. Slear and the witness does not identify the note in suit, nor refer to it, and it is therefore inadmissible. The witness states: "Q. She said she was not getting any interest? A. Yes, sir. Q. Didn't say anything whether the

note drew interest or not? A. Never said she had a note. Q. Never said anything about a note at all? A. No, sir." We therefore object to the testimony because it does not identify nor refer to this note at all; the witness himself stating that she never said anything about the note at all, nor whether the note drew interest. By the Court. We will receive this deposition. (The plaintiff excepts, and bill sealed.) Under this ruling the testimony was admitted, *inter alia*, as follows: 'Q. Acquainted with George M. Slear? A. Yes, sir. Q. Who was his wife? A. Sarah J. Slear. Q. Did you live with them? A. Yes, sir. Q. Where? A. On the farm. Q. Where is the farm located? A. Buffalo Valley, near Vicksburg. * * * Q. How long did they live on that farm,—George Slear and his wife, Sarah Jane? A. To my knowledge, all the time they were married. Q. Do you know when she died? A. No. * * * Q. How long did you live there? A. Three years,—from '85 to '88. Q. Did you ever hear her say anything about the money of hers that her husband had? A. Yes, sir. Q. What did she say? A. She told me she had her money in the farm there, and that they were living off of it; and she said she thought that, when people was living together, they ought to have their money in the farm, and a man ought not to pay interest to his wife when they was both living off the farm. Q. Did she say where her money was? A. Yes, sir; she said, in the farm. Q. Whose farm? A. Their farm that they had there. Q. To whom did that belong? A. George Slear and his wife. Q. Her husband's farm? A. Yes, sir. * * * Q. Did she say whether she was getting interest? A. She said she was not. Q. Was it in that connection she said she didn't think it right a wife should have interest? A. Yes, sir; she said it wasn't right for a man to pay a woman interest when they both lived off the proceeds of the farm.'

"Fifth. The court erred in rejecting the following offer of evidence made by plaintiff: 'Mr. Potter. We offer in evidence the last will and testament of Sarah J. Slear, dated May 25, 1881, admitted to probate the 24th of November, 1893, whereon letters of administration cum testamento annexo were issued to George M. Slear, the defendant. This offered for the purpose of fixing the period to which the plaintiff claims interest upon the note in dispute, and also to show the disposition which the decedent made of her estate, and who are the beneficiaries under the will. Judge Bucher. The defendant objects that it is not evidence for the purpose offered, that there is nothing in the will that fixes when the interest on this note accrued or is payable, and that it is utterly irrelevant to the issue trying. Mr. Potter. Also offered for the purpose of showing who the real parties in this case are. Judge Bucher. I object that it is not evidence for that purpose; that the parties in interest are disclosed by the record, Beaver, trustees, and Slear, defendant, and it is immaterial who the beneficiaries are. By the Court. The sole com-

tention in this case, the purpose for which the judgment was opened, was to determine whether or not interest was to be paid on this obligation during the lifetime of Sarah J. Slear. Who the beneficiaries are under the will, and who are ultimately entitled to the money, we do not consider of any relevancy to this issue. The objections are sustained, and the evidence rejected. (The plaintiff excepts, and bill sealed.) Mr. Potter. We renew the offer of the will above named for the single purpose of fixing the period to which interest was to be computed according to the contention of the plaintiff in this issue; the issue having been directed by the court to ascertain what amount, if anything, is due on the judgment, and not what amount of interest is due upon the judgment. The will offered in evidence, providing that George M. Slear shall have the use of all the property of the testatrix during his natural life; interest on the judgment in dispute therefore having ceased, according to the terms of her will, at the time of her death. Judge Bucher. I object to the offer, and, as a ground of objection, I desire to offer, and ask the reporter to enter on the record, from the orphans' court docket of Union county, filed May 15, 1894, "I, George M. Slear, surviving husband—" Mr. Potter. Do not read it until we know what it is. By the Court. We overrule the offer, and sustain the objection, for the reason that this will does not tend to show, or does not show, when Sarah J. Slear died. Mr. Potter. We renew the same offer, to be followed with proof when she died. Judge Bucher. The defendant objects that it is irrelevant to the issue trying, and utterly immaterial; that, as the issue is framed, it is to determine what amount of money Beaver, trustee (plaintiff), is entitled to recover on the obligation in suit, as against George Slear, and the will is utterly irrelevant in order to determine that amount, because nothing is said in the will in reference to the matter. It simply gives George Slear a life estate in all her property, real, personal, and mixed, and at her death it goes to her heirs (naming them). It being a feigned issue, and under the control of the court sitting as a chancellor, the jury can be directed to find for the plaintiff generally. And, if that be done, then interest would be counted on the claim from the date of the note down until the defendant comes to pay it; or if the jury are to ascertain the amount that they are to find by their verdict, in the event that they find that it bears interest, they are to find the principal sum with interest down to this day, and they are not at liberty to liquidate it as the date of her death, and thus, from the day of her death down, constitute the whole interest and principal as an interest-bearing security, when it is not provided in the obligation. And that the admission of the will throws no light on the transaction whatever, because the defendant has already shown the court that he exercises the rights given to him by the act of assembly, and refuses to accept under the will. Mr. Potter. I

want to amend that offer. That we offer the will of Sarah J. Slear, giving the date and time of probate as above, in which is contained, among other things, "I give, devise, and bequeath all my estate, real and personal, to my beloved husband, George M. Slear, during his life, and after his death to be divided to my brothers and sisters, share and share alike." This for the purpose mentioned in the foregoing offers. Judge Bucher. Defendant objects for the same reason as before. By the Court. The only question in this case, as we understand it, is whether or not interest is to be computed on the note from the day after its date until the death of Sarah Jane Slear. Plaintiff's counsel admit that they do not claim interest after the death. We sustain the objection, and note an exception for the plaintiff. (Plaintiff excepts, and bill sealed.)

"Sixth. The court erred in answering the plaintiff's third point, which point and answer are as follows: 'That the whole evidence on the part of the defendant is insufficient to set aside the judgment for the sum of \$1,200, with interest from April 3, 1876, and the verdict should be for the plaintiff. By the Court. Reversed.'

"Seventh. The court erred in answering the plaintiff's fourth point, which point and answer are as follows: 'That if the jury believe the evidence of Wm. H. Beaver, Schoch, and Gutelius, that this note itself was drawn by the direction of George M. Slear and his wife that it should bear interest, that Mrs. Slear said in the presence of George M. Slear that she did not wish George to pay interest annually, on account of paying other creditors, but after her death her heirs should have her money with interest, and that all her notes bore interest, the verdict should be for the plaintiff for the amount of \$1,200, with interest from April 3, 1876, to November 11, 1893, \$1,235.52.

—In all, the sum of \$2,465.52. By the Court. We do not affirm this point, as put; but if you believe, from the testimony of the witness as set forth in this point, and from all the testimony in the case, that the contract between the parties was that the interest should be paid, after maturity of the note, your verdict should be for the plaintiff.'

"Eighth. The court erred in answering the defendant's second point, which point and answer are as follows: 'The undisputed evidence showing that George M. Slear and Sarah J. Slear, the owner of the note in suit, were husband and wife, living together as such, at the time the note was given, and they so continued until her death, and that the money for which the note in suit was given went into the farm of said George M. Slear, the defendant, on which they had their home, and upon the income of which they lived continuously from the date of the note to the date of her death, the presumption is that the income or interest of said money was used, with her consent, for the support of himself and family; and, in order to recover interest for the time prior to her death, plaintiff must prove an

agreement on the part of George M. Slear to pay such interest. By the Court. This point is affirmed, and it is for you to say whether an agreement, taking the note and all other evidence in the cause into consideration, has been shown by the plaintiff to pay for the time prior to her death.'

"Ninth. The court erred in answering the defendant's third point, which point and answer are as follows: 'The undisputed evidence showing that the money for which the note in suit was given was the money of Sarah Jane Slear, the wife of George M. Slear, the defendant, and that this money was borrowed and used by her husband for the purpose of paying part of the purchase money on the farm on which both husband and wife had their home, and upon the income of which they lived, the note in suit does not, standing alone and by itself, establish an agreement on the part of George M. Slear to pay interest on the money of his wife for which the said note was given. By the Court. This is affirmed, but the note should be taken into consideration by you, with all the other evidence in the cause, in determining whether or not Mr. Slear was to pay interest.'

"Tenth. The court erred in charging the jury as follows: 'There is no dispute whatever as to the principal, and there is no dispute whatever as to the interest after the death of Mrs. Slear.'

"Eleventh. The court erred in charging the jury as follows: 'The plaintiff, I think (where the defendant has proven that the money has been used by the husband in the purchase of a property on which both husband and wife lived), should show by the contract between the parties that interest was to be paid.' Now, this contract might not be by merely the note itself, but by that in connection with the other testimony in the case; and if you believe that this note was to draw interest during the life of Mrs. Slear, notwithstanding the fact that they lived together as husband and wife on the farm, you will find a verdict in favor of the plaintiff.'

"Twelfth. The court erred in charging the jury as follows: 'I have concluded to simply allow you to find a verdict in favor of the plaintiff or defendant. So, if you find from evidence in the case that this interest was to be allowed,—the agreement between the parties was that interest was to be paid after the maturity of the note,—you will then find a verdict in favor of the plaintiff. If you find that interest was not to be paid, you will find a verdict simply in favor of the defendant. If interest was to be paid during Mrs. Slear's life, find a verdict for the plaintiff; if not, find a verdict for the defendant.'

A. W. Potter, for appellant. Joseph C. Bucher and Andrew A. Leiser, for appellee.

PER CURIAM. While it is true that the note in suit would bear interest from the time of its maturity, and the court so charged the jury, yet it is also true that it did not bear

interest on its face. It follows that a question might well arise, without contradicting the terms of the note, whether it was the agreement or intent of the parties that it should not bear interest during the life of the wife. On that question considerable testimony was taken, and the learned court below fairly left it to the jury to decide, upon all the testimony, including the note itself and the legal intentment arising from it, whether the agreement of the parties was that interest should be paid, or should not be paid, during the life of the wife. The jury has found that it was not to be paid. There was adequate testimony to justify such a finding, and there was no error in submitting the question in that way. It was entirely undisputed that the defendant borrowed the money from his wife to pay on the purchase or valuation of a farm which he accepted upon partition proceedings in the orphans' court, and that he and his wife lived together on the farm until her death, using the proceeds of the farm for that purpose. This fact, together with the direct testimony as to the declarations of the wife that she was not to get any interest during her life, was quite sufficient to raise the question submitted to the jury. The assignments of error are not sustained. Judgment affirmed.

PALMORE v. MORRIS et al.

(Supreme Court of Pennsylvania. July 15, 1897.)

DEFECTIVE STRUCTURE—CONVEYANCE—LIABILITY OF GRANTOR.

A grantor who delivers to the grantee a deed of land on which there is a defective structure, and surrenders possession thereof to him, is not liable to one of the public thereafter injured because of the defect, since the duty to repair the structure is assumed by the grantee from the time of such delivery and surrender.

Appeal from court of common pleas, Philadelphia county.

Action by Edwin L. Palmore, by his next friend, against Morris, Tasker & Co. From a judgment for plaintiff, defendants appeal. Reversed.

Following are the assignments of error, viz.:

"First assignment: The learned court erred in charging the jury as follows: 'It seems that on the Wednesday before, if we may accept the undisputed testimony, some wagons, in going out, pulled this door off, and the evidence is that at the time this accident occurred there was no crossbar on it, and the transom was out, and there is evidence to show that at the lower part where the door was fastened the woodwork was rotten. The question is whether the door was in such a condition as to be dangerous to the public, whether it had remained in that condition long enough to charge those who were responsible for keeping it in repair with notice, so that in the exercise of ordinary prudence that repair would have been made. It seems that on the 10th of May—the day before this ac-

cident occurred—the defendants, Morris, Tasker & Co., had consummated, by the execution of a deed, a sale of these premises to a man named Lodge. They were at the place where the accident occurred on these premises in a sort of transition state. It appears that some twenty-five or twenty-seven men of the defendant were still there at work, and it also appears that Mr. Lodge had done some acts which have the look of taking possession on the 10th of May; that is, some acts were done under his direction which were the exercise of control. His men directed the workmen of the defendants to stop their work. After that the order was recalled, and the letters would indicate that for the removal of the scrap iron and the machinery the defendants were to have until the following Monday. Now, the astuteness of counsel in the presentation of the case to you has made this take the appearance of being the turning point in the case. The question, however, is not one of the exact time of the transfer, nor one of the delivery of possession. The real question is as to whether or not there was a failure of duty upon the part of the defendants, and whether that failure of duty was the cause of this accident. No doubt, as soon as Mr. Lodge took possession of this property, then a duty would begin with him. He ought within a reasonable time to see that the property which he had purchased, if it was in a dangerous condition to the public, was put in repair, but with that question we have nothing to do in this case. The real question in the case is not as to when there was a transfer of the possession, nor when there was a transfer of the title, but was there any act of commission or of omission upon the part of the defendants which amounted to that want of reasonable care which the law makes negligence, and whether you find that to be the fact. To illustrate, if I take a package of dynamite and put it into a hammer, and sell the hammer, I have there parted with the title, and when I hand the hammer over I have parted with the possession. If, a week later, somebody, in striking with that hammer, should explode the dynamite, and thus cause injury to himself or others, the question would be whether it was my negligence which led to that result. Or, if I have an old knife, and it is worn out in my judgment, and I conclude to throw it away, and I throw it out of the window, I have parted with the ownership and parted with the possession. But suppose, in falling to the street, it should strike some one in the eye, and do them an injury, or suppose it lies upon the pavement until dark, and some one using the street in the ordinary way should tread upon it, and thus be injured. The question would be, not when I parted with the ownership in the knife, but whether or not the facts were such as to show that I, in doing what I did, exercised reasonable care. Take the case before us, and suppose the accident had occurred, say, not a day later, but

a half hour after this deed had been put upon record and possession had been taken. Now, that would not have been long enough, in the very nature of things, to have enabled Mr. Lodge to have made the repairs which were necessary, and if the contention which has been presented to you were correct, somebody might be very seriously injured, and nobody be liable for the consequences. So, as I say to you, the real question in the case is not as to what the exact time when the transfer occurred was, but whether or not the circumstances of this case are such as to show that the defendant here was negligent in the failure to perform the duty, or any duty, in the repair of these premises, and that negligence was the cause of the accident.'

"Second assignment: The learned court erred in affirming the first point presented by plaintiff, to wit: 'First. If the jury find that the door or gate which fell upon and injured the plaintiff opened out upon the public sidewalk, and that the post which supported said door or gate had rotted off at the bottom, and had been in that condition for some time prior to the accident, and that said door or gate was not properly supported, and that this condition of things was actually known to the defendant sufficiently long before the accident to enable the defendant to put them in a secure and safe condition, or that time enough had elapsed in which knowledge of the condition of the door or gate and door post would have been obtained by the defendant by the exercise of reasonable diligence, it was negligence to permit the door or gate and post to remain in that unsafe and insecure condition; and if they also find that the defendant was in possession and occupation of the premises for a long time prior to the date of the accident, and until May 13, 1895, their verdict should be for the plaintiff, if they also find that there was no contributory negligence on the part of the plaintiff. Answer of the Court: That is a pretty long point, and one which will perhaps be difficult for you to carry, but I think it is correct upon the whole, and I affirm it.'

"Third assignment: The learned court erred in refusing to charge as requested in defendant's first point, to wit: 'First. Before the plaintiff in this suit can recover, he must prove that at the time of the accident the premises where the accident occurred were in the actual possession of and under the control of Morris, Tasker & Co. If he does not do so, your verdict must be for the defendant. Answer of the Court: I decline that point.'

"Fourth assignment: The learned court erred in refusing to charge as requested in defendant's second point, to wit: 'Second. If Morris, Tasker & Co.'s title had been divested, and possession surrendered, before the accident, the plaintiff cannot recover against them. Answer of the Court: I decline that point.'

"Fifth assignment: The learned court er-

red in refusing to charge as requested in defendant's third point, to wit: 'Third. The party in possession alone is responsible for this accident, and if the possession had actually changed before the accident occurred it is immaterial in this case what agreement had been entered into between the seller and the purchaser as to the time of giving possession. Answer of the Court: I decline that point.'

"Sixth assignment: The learned court erred in refusing to charge as requested in defendant's fourth point, to wit: 'Fourth. The record shows that George Lodge was the owner of the premises in question prior to the day of the accident, and possession under the title might lawfully be taken either by him personally, or by any one authorized by him for that purpose; and if the jury believe that the possession was changed in either of these ways before the accident occurred, the plaintiff cannot recover. Answer of the Court: I decline that point.'

"Seventh assignment: The learned court erred in refusing to charge as requested in defendant's fifth point, to wit: 'Fifth. As the record shows that the title had gone out of Morris, Tasker & Co. prior to the day of the accident, unless it appears clearly from the evidence in this case that possession had not followed the title, the plaintiff cannot recover. Answer of the Court: I decline that point.'

"Eighth assignment: The learned court erred in refusing to charge as requested in defendant's fifteenth point, to wit: 'Fifteenth. If Lodge or his authorized agents took possession of these premises before the time fixed for the delivery of possession, that relieves the seller of all duty to maintain and keep in good order the said premises thereafter. Answer of the Court: I decline that point as not applicable to the circumstances of this case.'

"Ninth assignment: The learned court erred in refusing to charge as requested in defendant's tenth point, to wit: 'Tenth. If the jury believe that the so-called superintendent was sent to the premises in question to superintend the work in and about the store house, and that during the time he was upon the premises he did anything to the gate in question, in so doing he would be a mere volunteer, and the defendant would not be liable for the consequences of that act. Answer of the Court: I decline that point.'

"Tenth assignment: The learned court erred in permitting plaintiff's witness Cochran to testify from whom he received orders, to wit: 'Q. Where were you employed on May 11, 1895? A. Morris and Tasker's building. Fifth and Tasker. Q. How long had you been employed there? A. At this present time? Q. Yes; how long had you been employed by Morris, Tasker & Co.? A. I worked for Morris, Tasker & Co. about three years, altogether. Q. How long had you been employed the last time you were there under their employment? A. From the time that they started to take the machinery out. Q. How long was that

before the accident? A. I should judge about a month. Q. From whom did you receive your orders and instructions as to your employment while you were there? (Objected to.) Mr. Harrington: I simply want to show by this witness additionally that Mr. Johnson was there in charge of the men, gave instructions, and gave directions as to what should be done. Mr. Hart: For what, as to the date? Now, Mr. Johnson has said that he was there superintending such work as Morris and Tasker had, and he has sworn that that work was to remove some scrap and machinery. Now, of course, he had rights over these men, but Mr. Harrington must go further than that, and prove that the power of this man was a power over that place as a place; not a particular locality of that place, but as a place; that he was in charge of the entire structure. The Court: You may go on. Q. Was there any other superintendent there besides Mr. Johnson? Mr. Hart: That is objected to. They have fixed an act on Mr. Johnson. Now, his power is to be proven. Whether there was any other superintendent there or not is wholly immaterial. The Court: I understood you a while ago to offer to show who it was that gave directions and orders to this witness. That was your proposition, was it not? Mr. Harrington: Yes. The Court: Do you withdraw that? Mr. Harrington: No. The Court: I think you may ask that question which was presented a few moments ago. If you want to withdraw it, that is another matter. Q. From whom did you receive your orders and instructions as to your employment while you were there? (Objected to. Objection overruled. Exception noted for Mr. Hart.) A. I received orders from Mr. Johnson. Q. Mr. William Johnson? A. The man that was up here and testified.'

"Eleventh assignment: The learned court erred in permitting plaintiff's witness Hemple to testify as to what happened to him at the gate on the night before the accident, to wit: 'Q. What happened to you, in connection with that door, the night before the accident? (Objected to.) The Court: It is proposed to follow it up by showing that that condition of the door remained? Mr. Harrington: Yes; I propose to show the door was in such an unsafe condition— The Court: Of course, if it was in an unsafe condition a week or two before, and then something else had intervened, if it had been repaired, and put in order, that would be incompetent testimony, because it shows a condition of things which did not exist at the time of the accident. Mr. Harrington: I propose to follow it up, and to show that nothing was done to the door. The Court: I think you may show that. The objection is overruled. (Exception noted for Mr. Hart.) Q. What was the condition of this door the night before the accident? (Objected to. Objection overruled. Exception noted for Mr. Hart.) A. That door was simply hanging by the props that were put under it at night-time.'

"Twelfth assignment: The learned court erred in overruling the question put by counsel of defendant to Johnson, the witness of plaintiff, as follows: 'Q. After the gate did fall on this boy, who put it up? A. Mr. Cronin put it up. Q. That is Mr. Lodge's watchman? Were you requested by Lodge to put it up? A. Yes, by Mr. Cronin. Q. What did you do? A. I refused to put it up. Q. Why? (Objected to.) Q. You did refuse, and then he did it? A. He came to me then to put it up, and I told him I would not do it. (Objected to.) Q. He came to you to put it up, and you refused, and then he did put it up? A. Yes, sir. Q. Why did you refuse to put the gate up? (Objected to. Objection sustained. Exception noted for Mr. Hart.)'

"Thirteenth assignment: The learned court erred in not charging 'peremptorily for the defendant' as requested by the defendant, to wit: 'Mr. Hart: I request the court now to charge peremptorily for the defendant,' which said request the court did not grant, but charged as hereinbefore set out."

F. H. Bohlen and Gavin W. Hart, for appellants. Avery D. Harrington, for appellee.

DEAN, J. On May 11, 1895, the plaintiff, a boy about 10 years old, was standing on the pavement on the north side of Morris street, Philadelphia, looking through a partially opened gate into the large foundry works, before that time carried on at that place by Morris, Tasker & Co., defendants. While so standing, the gate fell, and seriously injured him. On that day the works no longer belonged to Morris, Tasker & Co. The accident occurred on Saturday. On Friday, the day previous, they had conveyed the property by deed to George Lodge, and the deed had been put on record the same day. When defendants delivered the deed, they also gave to Lodge a letter, of which this is a copy: "Philadelphia, May 10th, 1895. Mr. George Lodge—Dear Sir: We write to state that we can allow you to take possession 5/13/95 of all the buildings on the square of ground for which settlement has been made to-day, with the exception of the storehouse on the corner of Fifth and Tasker streets, you to allow us two weeks to vacate and remove the material therein belonging to us. The power plant, consisting of boilers, engines, and so forth, which belong to us, we will remove after you notify us that the parties who leased the same are through, and that the contents are ready for us to haul away. Please notify us when we can remove all material belonging to us; that is, power plant now leased by the Southern Electric Company. There are two planers, one punch, a part of tramway belonging to Mr. Smith, and he asks that we have until Wednesday, May 15th, to haul away. Yours, very respectfully, Morris, Tasker & Co." It will be noticed that while in the heading the letter is dated 10th May, in the body of it

the date is 13th May, which was the following Monday. But Lodge acted on the assumption that his possession commenced on the 10th, and his brother and Cronin, an employé, went upon the premises, and took formal possession, so announced to those in the building, and gave orders, stopping a man named Smith from removing scrap iron and machinery which he had purchased from defendants before the conveyance to Lodge, and which Lodge did not allege had passed to him by the deed. The man hauling away the machinery, then, the same day, May 10th, called on Morris, Tasker & Co., and obtained from them a letter to Johnson, their head workman at the foundry, of which this is a copy: "May 10th, 1895. Mr. William C. Johnson, Paschall Iron Works, Philadelphia—Dear Sir: This is to notify you that Mr. Lodge is not to interfere in any way with the hauling of the scrap iron from the works until Monday; also that Mr. Smith is to have until Wednesday to haul out his machinery, all as per letter of acceptance by Mr. Lodge to-day. Very respectfully yours, Morris, Tasker & Co." On being shown this letter, Cronin, who had acted for Lodge, permitted the purchasers of the personal property to go on removing it, but excluded them from any occupation of the premises not necessary to the removal. Cronin and another watchman of Lodge maintained for him formal possession all Friday afternoon and night, and Saturday morning until 8 o'clock, when the gate fell. Lodge himself testifies that when the settlement had been made between him and defendants on Friday in pursuance of which the deed was delivered to him, he telephoned to his brother, and the brother and Cronin took possession. He says that afterwards, on the evening of the same day, he told them he had not the right of possession until Monday, but the uncontradicted evidence is that Cronin and another employé of Lodge remained on the premises until after the accident. The plaintiff, treating Morris, Tasker & Co. as in possession, brought suit against them for damages, averring his injury was the result of their negligence in maintaining a dangerous and badly secured gate on a building adjoining a public sidewalk. There was evidence sufficient to warrant the jury in finding the gate was out of repair, and that there was negligence on part of him whose duty it was to repair; but the question on which the case must turn is, were defendants answerable for this neglect, after delivery of the deed, and possession under it, taken by Lodge? At the trial, among many written points, defendant's counsel asked the court to instruct the jury as follows: "(2) If Morris, Tasker & Co.'s title had been divested, and possession surrendered, before the accident, the plaintiff cannot recover against them. Answer: I decline that point." The view the learned judge of the court below took of the law applicable to the facts is best shown by the

following excerpt from the general charge: "The question, however, is not one of the exact time of the transfer, nor one of the delivery of possession. The real question is as to whether or not there was a failure of duty upon the part of the defendants, and whether that failure of duty was the cause of this accident. No doubt, as soon as Mr. Lodge took possession of this property, then a duty would begin with him. He ought, within a reasonable time, to see that the property which he had purchased, if it was in a dangerous condition to the public, was put in repair; but with that question we have nothing to do in this case. The real question in the case is not as to when there was a transfer of the title, but was there any act of commission or of omission upon the part of the defendants which amounted to that want of reasonable care which the law makes negligence, and whether you find that to be the fact." Under fuller instructions in accord with this view, the jury found for plaintiff, and we have this appeal by defendants, assigning for error, among others, the refusal of the court to affirm their second point.

It is clear, from plaintiff's own testimony, that the title and constructive possession of the real estate vested in Lodge absolutely on the 10th of May, the day before the accident. It is also clear that in pursuance of the grant by deed he attempted to take formal possession within an hour after delivery, and, while the oral stipulation between him and the grantors was that actual possession was not to be taken until the following Monday, nevertheless there is evidence that he took possession on Friday, and did not restore it to defendants, who assented to his action, stipulating only for the right of entry and exit for removal of the property which did not pass by the deed. Under the facts, then, unquestionably Lodge acquired title and in fact took possession of the real estate, on which was a defective structure, the day before an accident resulted from neglect to repair it. Defendants are not answerable.

The authorities on the exact question are very meager. As between a landlord and tenant at will or for a term, the weight of authority is that the landlord continues answerable, though out of possession, for injuries resulting to third parties from negligently constructed buildings and structures on the land where they were erected by the landlord. The very letting by him of to him known defective property, without stipulation for repair, is significant of continuous negligence on his part. *Godley v. Haggerty*, 20 Pa. St. 387, and the cases following it down to *McKenna v. Paper Co.*, 176 Pa. St. 306, 35 Atl. 131. But this is not a letting of the land by a landlord to a tenant; it is an absolute sale, whereby the owner divests himself of title, and all right to possession, or of re-entry for repairs, or for any other purpose. Any future possession in face of his deed, unless there be an independent stipulation to the contrary, would be a

palpable trespass; and with his surrender of possession all the duties incident to ownership, as to him, were at an end. From the moment Lodge took possession under his deed the duties theretofore incumbent on Morris, Tasker & Co. were transferred to him, and he became answerable to the public for neglect in their performance. The learned judge of the court below adopts a different event for the commencement of liability on the part of the grantee than possession taken under the deed. He says, "He ought, within a reasonable time, to see that the property which he had purchased, if it was in dangerous condition to the public, was put in repair." That is, he imports into the deed an implied covenant on part of the grantors that they will be answerable to third parties for defects in the building for a reasonable time after the grantee takes possession. Public policy does not demand that such clogs on the transfer of real estate should be imposed by construction, nor does the law warrant such an implication. Before he purchased the real estate, the law presumes the grantee examined the property, and was cognizant of its situation, surroundings, the character of the structures upon it, and their condition of repair. Without an express covenant by the grantors, as between them and the grantee, there was no duty on the grantors to repair. The purchaser thereafter assumed that duty because he then became the owner and occupant. If the grantors, after possession by Lodge, the grantee, owed no duty to him, why should there be neglect in performance on their part as to the public? It is not even the case of no actual occupancy, where the law casts the duty on the owner, but one where the owner and actual occupant were the same. If the accident did not happen during the ownership and occupancy of Morris, Tasker & Co.,—and the evidence showed that it happened after Lodge took possession,—the question for the jury was not whether there was negligence on part of defendants in maintaining a defective gate. The real question on the evidence was, did Lodge take possession of the property described in his deed on Friday, the 10th of May? If he did, then the accident which occurred on the 11th must be imputed to the negligence of the owner and occupant of the premises, and not to Morris, Tasker & Co., who, before that time, were owners and occupants. And this is the principle announced in *Grier v. Sampson*, 27 Pa. St. 183; *Cheetham v. Hampson*, 4 Term R. 318; *Blunt v. Aikin*, 15 Wend. 522,—although the facts in all these cases are different from those before us. And, while laying down this rule in this case, we do not intend to be understood as declaring there can be no exception to it. There may be a case where the grantor conceals from the grantee a defect in a structure, known to him alone, and not discoverable by careful inspection, that the owner would be held liable, though out of possession; but that is not this case. The rotten gate, the testimony shows, was as obvious before the

accident as afterwards, and the reasonable time for the purchaser to discover it was not limited to the 20 hours after he took possession, but to the weeks and months pending the negotiations, before the delivery of the deed. On the undisputed evidence, the jury should have been instructed to find for defendants. The judgment is reversed.

In re STRICKLER'S ESTATE.

Appeal of BALMER.

(Supreme Court of Pennsylvania. July 15, 1897.)

GIFT—WHAT CONSTITUTES—SUFFICIENCY OF EVIDENCE.

B. loaned S., his son-in-law, \$7,800, and received a common money bond, in the ordinary form, in the penal sum of \$15,600, "to be paid to the said B.," etc., and conditioned that if S. paid B. \$7,800, "without interest, to be accounted for when a final settlement is made of his estate," the bond should be void. S. wanted the money to buy a farm. His wife died before her father, and S. became insolvent. *Held*, that the facts did not warrant a conclusion that the money was a gift by way of advancement, and that after B.'s death it was to be settled for by charging it against his daughter's share of his estate.

Appeal from court of common pleas, Lancaster county.

Distribution of the assigned estate of Reuben R. Strickler. From a judgment sustaining exceptions of Strickler, and dismissing the exceptions of John Balmer to the report of the auditor, Balmer appeals. Reversed.

N. Franklin Hall and Brown & Hensel, for appellant. A. H. Fritschey, for appellee.

GREEN, J. By the decision of the learned court below a bond for the payment of \$7,800, regularly sealed and delivered, has been declared to represent, not a debt due from the obligor to the obligee, but a gift of the entire sum of money by the obligee to the obligor. We are quite unable to see the transaction in any such light, and for reasons which are entirely convincing to us. There is no doubt as to the actual facts of the case. John Balmer certainly did lend \$7,800 to Reuben R. Strickler in April, 1882, when he received from Strickler the bond in question. It is the ordinary form of a common money bond, in the penal sum of \$15,600, concluding with the words: "To be paid to the said John Balmer, or to his certain attorney, executors, administrators, or assigns. To which payment, well and truly to be made and done, I bind myself, my heirs, executors, and administrators, and every of them, firmly, by these presents." The condition of the bond is in the usual form of a money bond, conditioned that if "Reuben R. Strickler, his heirs, executors, administrators, or any of them, shall and do well and truly pay or cause to be paid unto the above-named John Balmer, his certain attorney, executors, administrators, or assigns, the just and full sum of seven

thousand and eight hundred dollars, like money aforesaid, without interest, to be accounted for when a final settlement is made of his estate," then the obligation is to be void. On its face, and by the plain and necessary meaning of the words, this paper is a bond for the payment of money, and it contains no word or phrase in any degree indicative that the obligor may be relieved of the payment of the money by any theory that the transaction was a mere gift of the money by Balmer to Strickler. That the debt was not to bear interest does not signify that the principal sum was not to be paid. Those words of the condition mean just what they say, to wit, that no interest is to be paid. When it is considered that Strickler was the husband of Balmer's daughter, and that the money was wanted to buy a farm with, it is not a source of wonder that, to ease his daughter's husband, Balmer should forego the interest, and let his son-in-law have the money without paying interest for it. But that is all that the words of the instrument require, and that is the full scope of their meaning. The learned judge of the court below, however, thought that, because the principal sum of the debt was to be accounted for at the final settlement of Balmer's estate, it was not to be treated as a debt, but as a gift by way of advancement, and that after his death it was to be settled for by charging it against his daughter's share of his estate. In view of the fact that his daughter died before her father, and therefore could not be the recipient of a share of his estate, there was nothing against which the money could be charged, and it could only be justly said of this situation that the parties were disappointed in their expectation of an event which never happened. But that consideration cannot possibly be made use of to convert the debt into a gift. There are no words in the bond which could possibly justify such an interpretation. And when it is further considered that Strickler became insolvent, and could not hold the farm until Balmer's death, every vestige of a reason for treating the debt as discharged disappears. What Balmer might have been willing to do, or to have done, with this debt, if his daughter survived him, and her husband still held the farm, it is unnecessary to consider, since neither of those contingencies exists. But, looking at the plain meaning of the words of the bond, they clearly cannot justify the construction claimed. The words are, "to be accounted for" when a final settlement of Balmer's estate is made. How is the debt "to be accounted for," if it is treated as a gift? In that method of treatment there never was or could be anything to be accounted for. If the money was a gift, it belonged to Strickler, and he had nothing to account for. But Strickler never could account for it, in any event, because he was not a child of Balmer. He had no share of his estate. He had no conceivable interest against which the money could be

charged, and therefore no accounting could be had. The basis of the reasoning disappears, and upon that ground alone any inference that the debt must or might be treated as a gift is simply impossible. We are clearly of opinion that as in its origin the money was due as a debt, and there is an entire absence of the only facts which could in any circumstances be used to change its character, its original aspect remains, and it must still be regarded as a debt only. For the same reasons we cannot sustain the view of the auditor. As Strickler is not the owner of the money, he cannot be entitled to any interest on it. John Balmer, being a creditor to the amount of the real debt, \$7,800, is entitled to a share of the fund in court proportioned to the amount of his debt. The assignments of error are sustained. The decree of the court below is reversed at the cost of the appellee, and the record is remitted, with instructions to distribute the fund in accordance with this opinion.

In re MILLER'S ESTATE.

Appeal of DORRIS.

(Supreme Court of Pennsylvania. July 15, 1897.)

COLLATERAL INHERITANCE TAX—WHEN PAYABLE—PENALTY.

1. The existence of a single outstanding uncollected claim in favor of an estate does not prevent collection of collateral inheritance tax on the balance, after deduction for probable expenses.

2. Penalty for not paying collateral inheritance tax on the part of the testator's estate in another state, invested in the name of another, and so standing at testator's death, should not be imposed; the question of liability therefor not having been settled till the court below settled it.

Appeal from orphans' court, Huntingdon county.

Estate of John F. Miller, deceased. Willis Dorris, executor, was cited to show cause why he should not pay certain collateral inheritance tax. Decree was rendered against him, and he appeals. Modified.

A. O. Furst and John D. Dorris, for appellant. J. F. Schock, for appellee.

DEAN, J. John F. Miller, of Huntingdon, on 24th August, 1893, died, unmarried, without issue. He left an estate of about \$70,000, nearly all of it personalty. He left a will, in which he made specific bequests to a number of collateral relatives, amounting in the aggregate to \$42,000. The residue of the estate he bequeathed to his niece Margaret A. Taylor, subject to the payment of the collateral inheritance tax. He appointed appellant executor of this will, and letters testamentary were issued to him in Huntingdon county on 9th September, 1893. The executor filed an inventory, showing about \$24,000 in his hands. At the date of testator's death, the situs of a considerable part of the estate was in Iowa. A nephew of his and a legatee, one W. W.

Miller, who resided in Iowa, and who, during the lifetime of his uncle, actively managed that part of the estate, procured letters of administration thereon in Iowa. He filed an inventory of that part, in Black Hawk county, Iowa, showing about \$36,000 in his hands. Dorris, the executor of the domicile, had the will also proven in Iowa, and instituted proceedings in the proper court of that state to have the appointment of W. W. Miller vacated, and letters ancillary issued to him. W. W. Miller also made large claims on the estate of his uncle as a creditor. There resulted long and doubtful litigation. The final event was a decree by the supreme court of Iowa, in favor of the Pennsylvania executor, on March 16, 1895. Letters testamentary in Iowa were directed to issue to him, and the nephew was directed to pay over to him about \$33,000, in his hands. In addition, Mr. Dorris collected from him a note of \$5,000, given to his uncle. He also filed a bill in equity against the nephew to enforce the collection of an additional amount of \$10,000, alleged to be due from the nephew to the uncle. This last proceeding is still pending in the supreme court of Iowa, on appeals by both parties. Within one year after testator's death, the executor paid to the register of Huntingdon county \$670, collateral inheritance tax, computing it on the amount in his hands, less \$4,000, which he reserved for expenses and possible contingencies. On May 23, 1896, the register of Huntingdon county petitioned the court for a citation to the executor to appear and show cause why decree should not be made against him to pay the collateral inheritance tax on the whole appraised estate, the amount of said tax being computed at \$2,434.45, with interest thereon at 12 per cent. from August 25, 1894. To this, the executor made answer, setting out fully the facts of prolonged litigation, the amounts he had received, and the dates; also, that a large sum as taxes had been collected in Iowa, and he is advised that part of the estate located there is not subject to collateral inheritance tax in Pennsylvania.

On full hearing, the court below decided that the portion of the estate in Iowa was subject to the Pennsylvania tax, and all the estate except a small portion of real estate outside of this state. The learned judge of the court below thus states a computation of the tax, and his reasons therefor:

"This tax was payable on the 24th of August, 1894. The executor paid \$670 of it on the 23d of August, and he is entitled to credit for that amount. The balance of the tax remains unpaid, and the act of assembly fixes the rate of interest on it at 12 per cent. per annum, except where, from litigation or other unavoidable cause of delay, a portion of the estate cannot be settled, in which case only 6 per cent. per annum is chargeable on such unsettled portion until default. On account of litigation in the state of Iowa, the sum of \$27,997.57 did not come into the hands of the executor until March 16, 1895. He would not

be in default in the payment of the tax on that part of the estate until after that time, and would be liable for interest on it only at the rate of 6 per cent. from the end of the year until he received it. Applying the foregoing method of computation, we find that there is due and unpaid collateral inheritance tax the sum of \$1,788.92, ascertained as follows:

5 per cent. on \$178.50, value of furniture, &c.....	\$ 8 92
5 per cent. on \$42,000, legacies paid..	2,100 00
5 per cent. on \$2,000, note of John H. Miller	100 00
5 per cent. on \$5,000, paid to residuary legatee.....	250 00
	<hr/>
	\$2,458 92
Deduct amount paid August 23, 1894.	670 00
	<hr/>
	\$1,788 92
Interest from August 24, 1894, to March 16, 1895, at 6 per cent.....	\$ 35 65
Interest on same from March 16, 1895, to this date, November 16, 1896, at 12 per cent.	207 46
Interest on balance, \$730, from August 24, 1894, to this date, November 16, 1896, at 12 per cent.....	195 15
	<hr/>
	438 26
	<hr/>
	\$2,227 18

We think this computation is not warranted by the law and the undisputed facts. Section 4 of act of May 6, 1887, enacts that, "where from claims made upon the estate, litigation, or other unavoidable cause of delay, the estate of any decedent, or part thereof, cannot be settled up at the end of the year from his or her decease, six per cent. per annum shall be charged upon the collateral inheritance tax arising from the unsettled part thereof, from the end of such year until there be default." Obviously, from this act, it was not the intention of a great commonwealth, where a faithful representative of an estate has striven, both in her interests and those of the estate, to perform his official duty, to harass him with vexatious litigation, and the imposition of punitive penalties, because of delay that was unavoidable. It will be noticed, under the will, the whole of the collateral inheritance tax is to be paid out of the residuary estate devised and bequeathed to Mrs. Taylor. There is to be no abatement of specific legacies to the amount of the tax. The executor, however, voluntarily, at his own risk, paid the tax within one year on the amount received by him in Huntingdon county, less \$4,000, reserved for expenses and contingencies. The law just quoted, then, had no further demands on him while the Iowa litigation was pending, for it is not disputed that the commencement and prosecution of that litigation was an unavoidable, though probably a very irksome, duty. He prosecuted it, not only in the interest of the estate, but in the interest of the commonwealth, for had he not done so, and permitted one-half the estate to go into the hands of a foreign administrator, the commonwealth would probably have lost, at least, one-

half the tax now claimed. That part of the estate was not settled by reason of unavoidable litigation. On March 16, 1895, the executor received from that source \$33,888.62, and on April 20th, following, \$5,000. But when was the estate settled, so as to determine approximately the amount subject to the tax? Litigation as to \$10,000 is still pending. That claim, however, is not against the estate, but is made in its favor. There can be no more unfavorable result to the estate than a failure to recover the amount, and consequent payment of costs. The residuary estate will be to that extent depleted, but that does not warrant a decision that there is no settlement, because of a single outstanding uncollected claim in favor of the estate. Another question is raised by the answer, viz. that is doubtful whether a large part of the estate in Iowa is subject to the collateral inheritance tax, having been invested in the name of W. W. Miller, the nephew, and so standing at the death of the testator. But, as the learned judge of the court below clearly shows, under the authorities (*Miller v. Com.*, 111 Pa. St. 321, 2 Atl. 492; *In re Coleman's Estate*, 159 Pa. St. 231, 28 Atl. 137; and *Williamson's Estate*, 153 Pa. St. 508, 26 Atl. 246), this money is taxable under the law of the domicile. However, that question was not settled at the end of the year, nor was it settled until the court below settled it. That decree protects the executor now in payment to the commonwealth, but, until that decree, the estate, as to that question, was not settled, and the imposition of any penalty is unwarranted. Therefore we are of opinion that the penalty of 12 per cent. should not be computed on any portion of the tax.

The executor avers, in his answer, that it is doubtful if \$7,000 will cover the expenses of final settlement. In view of the protracted and expensive litigation carried on in a distant state, we think this not an unreasonable sum to reserve for such contingency. We therefore affirm the decree of the court below, with this modification: That from the whole amount received by the executor, both in Pennsylvania and Iowa, there be deducted the sum of \$7,000, to be retained by him for contingent expenses which may be incurred in the final settlement of the estate, and that interest at 6 per cent. be computed on 5 per cent. of balance from one year after the death of testator until the date of this decree. Thus:

Furniture	\$ 178 50
Legacies paid	42,000 00
Note of John H. Miller	2,000 00
Residuary legatee	5,000 00
	<hr/>
	\$49,178 50
Deduct	7,000 00
	<hr/>
	\$42,178 50
Five per cent.	\$ 2,108 92
Deduct tax paid	670 00
	<hr/>
	\$ 1,438 92
Interest on same, at 6 per cent., from 24th August, 1894, to 15th July, 1897	249 65
	<hr/>
	\$ 1,688 57

This amount the executor is directed to pay over to the register of wills of the county of Huntingdon, and, as thus modified, the decree is affirmed.

POTTS v. BRENEMAN.

(Supreme Court of Pennsylvania. July 15, 1897.)

WILLS — POWER OF SALE — ADMINISTRATOR DE BONIS NON.

A will gave certain property to testator's wife absolutely, gave to her for life the use and income of the "rest, residue, and remainder of my estate, real, personal, and mixed," and after her death gave "the said residue and remainder" to relatives and their descendants, and to F., with provision in a codicil that the devise and bequest to F. should not go to her absolutely, but that the principal should be put out and kept at interest after the death of testator's wife, and the interest paid to F. for life, the principal, on the death of F., to be divided among testator's relatives, as specified in his will concerning "the residue" of his estate. The wife was also made executrix, with power to sell all testator's real estate as she should deem most advantageous to her and the estate; and direction was given that she should not be required to give security to persons "entitled in remainder" to any of the estate. *Held*, that the power of sale, being absolute and unconditional, the word "remainder" not being used technically, but in the sense of "balance of," "what is left," or "what may remain," could be exercised after death of the executrix by the administrator d. b. n. c. t. a.

Appeal from court of common pleas, Lancaster county.

Case stated, in the nature of an amicable action of assumpsit by Joseph M. Potts, administrator d. b. n. c. t. a., against Joseph P. Breneman. Judgment for plaintiff, and defendant appeals. Affirmed.

The opinion of the court below is as follows:

"From the case stated, it appears: (1) That Samuel Miller, late of the city of Philadelphia, Pa., died on or about March thirtieth, A. D. 1874, having first made his last will and testament, which, after his decease, was duly proved in the register's office at Philadelphia, and in and by which he directs, *inter alia*, as follows: 'I direct that all my just debts, funeral and other expenses be paid as soon as can be. My house furniture and household goods I give to my beloved wife, Eliza, her heirs and assigns.' 'I give and bequeath the use, rents, income, and interest of all the rest, residue, and remainder of my estate, real, personal, and mixed, whatsoever and wheresoever, to my said wife, for and during her natural life, subject to the payment of three hundred dollars out of said rents, incomes, and interest to Mary McCullough, who has been a long time with me, annually and regularly during her life.' 'After the decease of my said wife, I give, devise, and bequeath the said residue and remainder of my estate, real, personal, and mixed, unto all my brothers and sisters then living, and the issue and descendants of any of them then dead, and Edith Fodell, now

the wife of John A. Shulze, if then living, and her issue and descendants if she be then dead, their heirs and assigns, per stirpes, in equal shares and parts, subject, however, to the payment of the aforesaid annuity of three hundred dollars thereafter to the said Mary McCullouch annually and regularly during her life, and which annuity I hereby give and bequeath to her.' 'I constitute and appoint my said wife, Eliza Miller, sole executrix of this, my last will and testament, with power and authority to sell, dispose of, and convey in fee simple any or all of my real estate, and change any investments of my personal property, as she shall deem most advantageous to her and to my estate. And I direct that my said wife shall not be required by any court to give security, to secure the interest of the person or persons entitled in remainder to any part or portion of my estate of which she shall, under this, my will, be entitled to the use, rents, income, and interest during life, as hereinbefore provided, whenever the same shall accrue or vest in possession.' To this will be added a codicil, in which he directed that the devise and bequest to Edith Fodell should not go to her absolutely, nor to her issue and descendants, heirs and assigns, 'but that the principal (subject to its proportion of a certain annuity in said last will mentioned) shall be put out and kept at interest after the decease of my said wife, and such interest shall be paid to said Edith Fodell annually or oftener, as it accrues, during her life; and, at or immediately after her decease, the principal shall be paid and distributed to and among all my brothers and sisters then living, and the issue and descendants of any of them then dead, in the manner as specified in my said will concerning the residue of my estate.' A copy of said entire will, together with a list of the heirs and legatees of Samuel Miller, deceased, are appended to the case stated, and made part thereof. We shall not insert them here. (2) Eliza Miller, the sole executrix of said last will and testament, died on or about December 30, 1896, and on the 2d day of January, A. D. 1897, letters of administration de bonis non cum testamento annexo were granted by the register of wills of Philadelphia to Joseph M. Potts, he having first given security to truly administer and account in said estate. And Mary McCullouch, named in said will, and an annuitant, died in the year 1896. (3) At the time of the making of said will, and at the time of the death of said testator, he was the owner in fee simple of real estate, inter alia, as follows: A certain lot or piece of ground, marked 'No. 203' on the plan of lands of the Logan Land Association, located and situated in Philadelphia, on the west side of Twenty-Seventh street, at the distance of two hundred and fifty-two feet and six inches (252 ft. 6 in.) southward from the south side of Cumberland street, in the Twenty-First ward of the city of Philadelphia, containing in front or breadth, on the said Twenty-Seventh street, twenty feet (20 ft.), and extending that

breadth in length or depth, westward, between parallel lines, at right angles with the said Twenty-Seventh street, on the north line thereof, one hundred and thirty feet and four and five-eighths inches (130 ft. 4 $\frac{5}{8}$ in.), and on the south line thereof one hundred and thirty-one feet and eleven and three-fourths inches (131 ft. 11 $\frac{3}{4}$ in.), to lands of Henry Duhring. (3 $\frac{1}{2}$) The testator owned other lands in Forest and Venango counties, Pa., and left personal property of the value of about \$30,000. (4) That, on the first day of March, 1897, articles of agreement were entered into between Joseph M. Potts, administrator d. b. n. c. t. a., plaintiff, of the one part, and Joseph P. Breneman, defendant, of the city of Lancaster, of the other part, for a sale of the above-described premises, for eleven hundred dollars (\$1,100), payable on March 3, 1897, on the delivery of the deeds; the sale being made for the purpose of distributing the proceeds, under the will of Samuel Miller, deceased. On March 3, 1897, the said Joseph M. Potts, administrator, plaintiff, tendered to the said Joseph P. Breneman, defendant, a deed, sufficient and correct in form, for the above-described premises, and demanded the purchase money, eleven hundred dollars (\$1,100), according to the agreement, which the said Joseph P. Breneman declined and refused to pay, admitting that the deed was sufficient in form, that the title of Samuel Miller in said premises was complete, that there were no liens or incumbrances on said property, that all the debts of said Samuel Miller had been paid, but averring that, under the will of said Samuel Miller, the administrator d. b. n. c. t. a. had no power to sell, that said power in the executrix terminated with and at the death of Eliza Miller, and that the said Joseph M. Potts, administrator d. b. n. c. t. a., could not make a legal conveyance of and title to said premises. (5) That all the debts of Samuel Miller, deceased, were paid by his executrix named in the will within a year after his death. And, by the case stated, the court is asked if it shall be of opinion that, under the said will of Samuel Miller, deceased, and the grant of letters of administration d. b. n. c. t. a. to Joseph M. Potts, the said administrator had power, under said will, to sell said real estate, and to make a good and legal title to Joseph P. Breneman, the said defendant, to enter judgment for the plaintiff in the sum of eleven hundred dollars (\$1,100), but if the court shall be of opinion that the said power to sell cannot be exercised by the said administrator d. b. n. c. t. a., and that said plaintiff had not power to make a good and legal title to said real estate, then to enter judgment for the defendant, with costs.

"The question presented for our consideration and determination in the case thus presented is whether or not Mr. Joseph M. Potts, administrator d. b. n. c. t. a. of Samuel Miller, late of the city of Philadelphia, deceased, has power and authority, under the will of Samuel Miller, deceased, to sell the real estate of the testator. That, by his will, the testator

gave to his wife, and subsequently widow, Eliza Miller, a life estate in all his real estate and personal property, subject to the annuity of Mary McCullough, and after the decease of his wife he bequeathed and devised the remainder of his estate, real, personal, and mixed, unto all his brothers and sisters then living, and the issue and descendants of any of them then dead, and Edith Fodell (then), the wife of John A. Shulze, if then living, and her issue and descendants if she be then dead, their heirs and assigns, per stirpes, in equal shares and parts, subject to the payment of the annuity of \$300 to Mary McCullough, annually, during her life, cannot be questioned, is not denied. He made his wife, Eliza Miller, sole executrix of his will, and gave her 'power and authority to sell, dispose of, and convey, in fee simple, any or all of his real estate,' and to change any investments of his personal property, as she should deem most advantageous to her and to his estate. Eliza Miller, the executrix, died in December, 1896, and in January, 1897, letters of administration d. b. n. c. t. a. were duly granted to Joseph M. Potts. As appears by Exhibit B, attached to and filed with the case stated, there are about sixty persons who are now entitled to participate in the distribution of this estate, who, so far as known, are scattered through the states of Pennsylvania, New Jersey, Maryland, New York, Virginia, West Virginia, District of Columbia, Oregon, Ohio, Iowa, Illinois, and Kansas.

"By the act of assembly of March 12, 1800 (section 3), it is provided that 'if, where such devises as aforesaid have been or shall be made, or authorities and directions given, such executor or executors are deceased, or shall hereafter die, or have refused, or shall hereafter refuse, or have renounced, or shall renounce, and letters of administration with the will annexed have been or shall be granted, it shall and may be lawful for such administrators with the will annexed to sell and convey such real estates, and otherwise act respecting the same as fully and completely as if such deceased, refusing or renouncing executor or executors, might or could have done, were he, she or they still living, or had he, she or they accepted the execution of the last wills and testaments of such testators, or had not renounced.' And by the act of February 24, 1834 (section 13), it is provided that 'the executors of the last will of any decedent, to whom is given thereby, a naked authority only to sell any real estate, shall take and hold the same interests therein, and have the same powers and authorities over such estate for all purposes of sale and conveyance, and also of remedy by entry, by action or otherwise, as if the same had been thereby devised to them, to be sold, saving always to every testator his right to direct otherwise.' Section 14: "The survivor or survivors of several executors of any last will containing a devise of real estate to such executors for the purpose of sale or otherwise, or a power or naked

authority only to them to sell the same as aforesaid; also, the acting executor or executors of any such will, where one or more of them resign, refuse or renounce the trust, or are discharged or dismissed therefrom, shall have the same interest in and power over such estate for all purposes of sale, conveyance and remedy as aforesaid, as all the executors might have or exercise for the like purposes, saving always to every testator his right to direct otherwise.' And section 67 provides that 'all and singular the provisions of this act relative to the powers, duties and liabilities of executors are hereby extended to administrators with a will annexed.'

"Let it be conceded, as has heretofore been decided, that administrators cum testamento annexo have no power as such, independently of these several acts of assembly, to execute a power given to executors to make sale of the lands of the testator. The powers of executors c. t. a. under these acts have been the subject of numerous decisions, which have clearly and definitely established the principles and rules of law; and it only remains to determine whether or not the facts as presented in any particular cases fit them. Some of those rules of law may be stated thus: (1) A power to sell for the purpose of distributing the proceeds amongst persons who are named or described in the will is a power which belongs to the executor, *virtute officii*. (2) Where there is no limitation as to the time of exercising the power of sale given to executors in a will, the same may be controlled within a certain period, ascertainable from the general scheme and purpose of the will. (3) The duration of an executor's power to sell real estate depends upon the intent of the testator, and, where the will shows that the testator gave this power for a particular purpose, the power ceases to exist after that purpose has been accomplished or has become impossible or unattainable. (4) Where power is given by will to executors to sell real estate, with a view to the distribution of the proceeds among legatees, such power belongs to the executors *virtute officii*.

"Was not the intention of Samuel Miller, the testator, to give his executrix or her successor power to sell his real estate, with a view to distribute the proceeds thereof, with his personal estate, among the legatees named and specified in his will? From the terms of the case stated, we learn that Samuel Miller, the testator, left a considerable estate, real and personal. His widow survived him more than twenty years. At the time of her decease, and we may say, presumably, at the time of the testator's decease, his relatives, heirs, and legatees, as we have seen, were scattered over [many of] the United States. While he gave his wife the use, income, and profits of his estate, she was given no power to use or consume any part of the corpus or principal. She had full power and authority to sell the lands and to change the invest-

ments and securities. Under the will, she was undoubtedly authorized to convert the whole estate into money at any time she chose, and to have it in this form, for distribution at the time of her death. There need have been no real estate to be sold after her death if she had seen proper to sell it during her life. It will be observed that the power to sell is not given to her nominatim merely, nor to her as his wife or widow, as life tenant, or as the beneficiary of the trust. In the first item of his will he gives to his wife his house furniture and household goods. In the second item he gives to his wife the use, rents, and income of his estate. In the next clause he gives his residue to his brothers and sisters or their descendants, living at the time of his death, and to Edith Fodell. And finally he appoints his wife, Eliza Miller, 'sole executrix of this, my last will and testament,' and, as such, 'with power and authority to sell, dispose of, and convey in fee simple any or all of my real estate, and change any investments of my personal property as she shall deem most advantageous to my estate.'

"It is argued on the part of defendant that 'the wording of the will shows that the power was to end with the life of the widow, for the words of the will are, "I direct that my said wife shall not be required by any court to give security, to secure the interest of the person or persons entitled in remainder to any part or portion of my estate" ' ; that 'this clearly shows that it was the intention of the testator to give only his executrix power to sell, and, if not so sold, the power was to die with her death; that "remainder" refers only to real estate, and the testator intended the persons entitled to portions of his estate after the death of his widow to take the real estate remaining unsold'; that 'a remainder is a remnant of an estate in lands or tenements, expectant upon a particular estate, created together with the same at one time.' And this is correct, in cases like those cited, where a power of sale is given with the express purpose of raising money to pay devisees, special legacies, etc. The power to sell was exhausted when there was enough sold and converted to accomplish such purpose. In the case under consideration there is no such limitation. The testator says: 'After the decease of my said wife, I give, devise, and bequeath the said residue and remainder of my estate, real, personal, and mixed, unto all my brothers and sisters then living, and the issue and descendants of any of them then dead,' etc. And in *Com. v. Hackett*, 102 Pa. St. 505, the supreme court says: 'A testamentary clause, disposing of "all the rest, residue, and remainder of my estate," will, in the absence of a contrary intention, apparent in the will, pass the realty, as well as personality, and by virtue of the act of April 8, 1833, after-acquired real estate will pass under such clause in a will.' And in *Darlington's Case*, 160 Pa. St. 70, 28 Atl. 504,

cited by defendant, it is said that a conversion of real estate into personalty is worked when there is 'such a blending of realty and personalty by the testator in his will as to show that he intended to create a fund out of both real and personal estate, and to bequeath the same as money.' Just such is the case here. The testator makes no devise of any portion of his real estate as such to any person named in his will, but blends his whole estate—the whole of the rest, residue, and remainder of my estate, real, personal, and mixed,—into one mass, one fund for distribution, and distributes it, or rather orders it to be distributed, as money; thus rendering it necessary that his real estate should be sold for the purposes of distribution, for the purpose of carrying out the testator's disposition of his estate. In *Ross v. Barclay*, 18 Pa. St. 183, the supreme court (Gibson, C. J.) held that by virtue and force of the act of 24th February, 1834 (before cited), relating to executors and administrators, an 'administrator with the will annexed' may execute a power to sell in order to bring the land into a course of administration, but not to execute a trust for a collateral purpose; that the sixty-seventh section of the act puts an administrator with the will annexed on a footing with a surviving executor, but not on a footing with a testamentary trustee; and the rule, thus stated, has been in the main adhered to in subsequent decisions. In *Gray v. Henderson*, 71 Pa. St. 368, it is said that, by the act of February 24, 1834 (section 12), it is enough if, in any part of the will, the intention be expressed to confer a power of sale on executors, and the power is implied when the distribution and management of the fund arising from a sale is expressly confided to the executor, or when it is confounded by the testator in one common fund with the personalty (as here), although there be no express direction to the executor to distribute it; while in *Waters v. Margerum*, 60 Pa. St. 44, *Sharswood, J.*, held that the deed by the administrator d. b. n. conveyed no title, because the power to sell given by the will to the executors was not for the payment of debts, but for distribution among legatees and for investment.

"In *Evans v. Ohew*, 71 Pa. St. 49, *Sharswood, J.*, delivering the opinion of the court nisi prius, modified this decision somewhat by expressly deciding that administrators c. t. a. had all the power given to executors *virtute officii*; that the general power to sell will be presumed to be for the payment of debts; and that a power to sell for the purpose of distributing the proceeds among persons named in the will is a power belonging to the executor '*virtute officii*,' as well where the power is discretionary as where the direction is absolute. In view of the former dicta of Chief Justice Gibson, and of what Justice Sharswood admits to have been a slip on his part, and inasmuch as the opinion of Justice Sharswood at nisi prius is adopt-

ed by the court, *per curiam*, in *Evans v. Chew*, it is interesting, as well as highly important to this case, to note the opinion of the court: 'A general power to sell will, of course, be conclusively presumed to be for the payment of debts; for a purchaser is never required to call for or look into an account, or to demand an inventory of personalty or list of debts. Such was the power in *Re Meredith's Estate*, 1 Pars. 433. Mr. Binney's opinion, *Hood, Ex'rs*, 241, and note. About the authority of an administrator with the will annexed in such a case there could be no question. A power also to sell for the purpose of distributing the proceeds amongst persons named or described in the will is a power which, it seems equally clear, belongs to the executor *virtute officii*. This would seem to be the case without question where there is an absolute direction to sell, and not a mere discretionary power, for in that case the estate would be converted into money from the death of the testator. But does not the same rule apply where there is only a power? In *Keefer v. Schwartz*, 47 Pa. St. 503, there was an absolute direction, but it is not rested upon that ground in the opinion. Justice Strong said: "The executors were not made testamentary trustees of the property. They were directed to sell for distribution. Their powers and duties were official by virtue of their office." Some difficulty appears to have arisen in the minds of counsel from what was evidently merely a dictum of Gibson, C. J., in *Ross v. Barclay*, that "no statute of Pennsylvania empowers an administrator with the will annexed to execute a trust of land confided to an executor by title or name for any other purpose than to sell for payment of debts," and his declaration in the same case that a power could not be exercised by such administrator "to turn the land into money for the convenience of partition." This last phrase is repeated in *Waters v. Margerum*. In both these cases the trust extended beyond the sale and distribution, *virtute officii*, to an investment; in short, a trust for a collateral purpose. The executors were, in both of these cases, testamentary trustees, and they were invested with power as such. These dicta were therefore entirely aside from the case. "For myself [says Sharswood, J.] I may say that I copied the phrase from *Ross v. Barclay*, as is often done, in the hurry of composition, and it passed without notice in consultation. I may have, and probably had, in my mind, not a sale for the purpose of distribution, but what is not uncommon in the country, a power to executors to make partition, with an ancillary power of sale and conveyance for that purpose." It might therefore well be assumed that this case established in Pennsylvania the rule of law that a power to sell for the purpose of distributing the proceeds amongst persons named or described in a will is a power belonging to an executor *virtute officii*, and is trans-

mitted to the administrator d. b. n. c. t. a. In *Lantz v. Boyer*, 81 Pa. St. 325, the real estate was devised to the wife for life, and in case the wife should so desire, and the executors deem it for the best interests of wife and children, they were authorized to sell the same. The executors were discharged, and letters of administration d. b. n. c. t. a. granted to Boyer. [Sharswood, J., again delivering the opinion], the court held that "it may now be considered as definitely settled that whenever a power is given by will to executors to sell real estate, with a view to the distribution of the proceeds among legatees, such power belongs to them *virtute officii*, and may be exercised by administrators *de bonis non* with the will annexed." It seems equally clear that it makes no difference whether the distribution is to be immediate, or upon the expiration of a certain period of time, or upon the uncertain contingency of a life or lives. In the case before us the life estate was given to the widow, and absolute direction to the executors to sell if she should desire it, and the proceeds of the sale to be invested in good real estate security, the interest to be paid to the widow for her life, and a part of the principle, if she should desire it, to be invested in a house for her use for life.' In that case the residue was to be distributed under the intestate laws, and the wife's share, when her life estate should expire, would be a part of the residue. The court says: 'He makes a common fund of his estate, real, personal, and mixed, and by whom is the distribution to be made? By his executors, certainly, and that *virtute officii*. This duty of distribution then devolved, of necessity, upon the administrator d. b. n. c. t. a. If so, he must be entitled to receive and invest the fund, and hold it so invested until that period of final distribution shall arrive.' Upon this reasoning, it was held that the administrator with the will annexed had power to vest in the purchaser a title to the real estate.

"We might refer to other cases in further illustration, but this seems to fit the case under consideration in all material points with such great precision that we forbear. In this case Samuel Miller most unquestionably gave his executrix power to sell all his real estate, with a view to and for the purpose of distribution. He had no children. His wife was not to have, receive, or take any portion of the corpus of his estate for her use or benefit during life. He gave to his executrix full power and authority to sell, dispose of, and convey in fee simple any and all of his real estate, and change any investments of his personal property, as she shall deem most advantageous to her and to his estate; and, for the purposes of distribution, he blends his whole estate, the rest residue, and remainder, real, personal, and mixed, into one fund, and directed distribution to be made at the decease of his wife, as directed by and to the persons named or

described in his will. When his wife died, and the estate came to be distributed, his executrix was dead, and an administrator d. b. n. c. t. a. was, as we have seen, duly appointed. The power of sale was absolute, and belonged to the executrix *virtute officii*, and therefore may be properly and legally exercised, the real estate sold, the estate settled, and distribution made as directed by the will, by the administrator d. b. n. c. t. a., under and by virtue of the provisions of the act of February 24, 1834. The court, being of opinion that under the said will of said Samuel Miller, deceased, and the grant of letters of administration d. b. n. c. t. a. to Joseph M. Potts, the said administrator had power, under said will, to sell said real estate, and to make a good and legal title to said defendant, Joseph P. Breneman, do now, in accordance with the provisions of the case stated, enter judgment in favor of plaintiff, in the sum of eleven hundred dollars (\$1,100)."

J. W. Brown, for appellant. Brown & Hensel, for appellee.

DEAN, J. We have nothing to add to the able opinion of the learned court below, vindicating his judgment on the case stated, except to do what probably he had no opportunity to do,—distinguish the cases cited by appellant in the argument before this court from the one in hand. In *Wilkinson v. Bulst*, 124 Pa. St. 253, 16 Atl. 856, this court held, under the terms of that will, the power to sell ended with the life estate, because the testator plainly so intended. In *Fidler v. Lash*, 125 Pa. St. 87, 17 Atl. 240, the sole purpose in creating the power to sell was to provide for the widow during her lifetime. Necessarily, the intention was that it should end with her death. In *Swift's Appeal*, 87 Pa. St. 502, the fact, as found by the court, was that enough realty had been sold to pay the devise; that, for this purpose alone, the power had been conferred, and, when the purpose was accomplished, the power was exhausted. There is really no conflict in these cases with those cited by the court. The direction that his wife should not be required to give security, to secure the interests of the persons "entitled in remainder," and the words "beneath the said residue and remainder of my estate," are not significant of a limitation of the power, in view of the whole will, and especially of the codicil. True, technically, a remainder is an estate in land, limited to take effect and be enjoyed after another estate is determined; and such estate vests immediately on the death of the grantor, to be enjoyed in possession after the determination of the particular estate. But the testator manifestly here used these technical words, in the sense of "balance of," "what is left," or "what may remain." The judgment is affirmed, on the opinion of the court below.

HIMMELREICH et al. v. SHAFFER et al.
(Supreme Court of Pennsylvania. July 15, 1897.)

CREDITORS OF INDIVIDUAL AND OF NOMINAL PARTNERSHIP—PRIORITY OF CLAIMS—SEIZURE ON EXECUTION.

Priority of seizure on execution of property by the individual creditors of the owner thereof gives them a right in the distribution of the proceeds, superior to that of one whose claim arose from contracting with such owner and another as partners whose firm owned the property; there having in fact been no partnership, and the other person having no interest in the property.

Appeal from court of common pleas, Elk county.

Contest between the individual creditors of T. J. Shaffer, and W. D. Himmelreich & Co. as partnership creditors of Jacob Shaffer & Son, over a fund produced by a sale on execution. Decree in favor of the individual creditors, and Himmelreich & Co. appeal. Affirmed.

McCauley, Ames & Whitmore, J. M. & P. B. Linn, and Andrew A. Lelsner, for appellants. Harry Alvan Hall, for appellees.

GREEN, J. This is a contest between the individual execution creditors of T. J. Shaffer, and the appellants as partnership creditors of Jacob Shaffer & Son, over a fund produced by a sale upon execution of certain timber seized upon several executions. There were four writs of *fi. fa.* issued against T. J. Shaffer individually, and one (that of the appellants) issued against the firm of Jacob Shaffer & Son. The writs in the individual cases had priority, being issued one day prior to the writ in favor of the appellants. The timber was undoubtedly cut under a written contract which purported to be made between the appellants and the firm of Jacob Shaffer & Son, and it is beyond all question that, as between the parties to the contract, both Jacob Shaffer and T. J. Shaffer would be estopped from denying their partnership. But here there are individual creditors of T. J. Shaffer, who have a lien on the same property by virtue of their executions, and thus a contest arises as to which set of creditors is entitled to the proceeds. The auditor found that in point of fact there never was a partnership between Jacob Shaffer and T. J. Shaffer, and therefore awarded the fund to the individual creditors. Upon exceptions filed, the report of the auditor was confirmed, and thereupon the present appeal was taken by the partnership creditor. An examination of the testimony is very convincing that the finding of the master was correct. T. J. Shaffer was examined as a witness, and testified that his father never was his partner, and that in all the rest of his dealings, except those with Himmelreich & Co., he never held himself out as having a partner, and that all his other operations were conducted by himself alone. He was asked: "Q. Did you not put your father's name in the Himmelreich contract

simply to give them your father as additional security for the fulfillment of the contract? A. Yes, sir. Q. As a matter of fact, there was no co-partnership between your father and yourself? A. No more than his name is on that agreement. There was no partnership between ourselves. My father's name is signed to the agreement with Himmelreich, and I signed it, but he put nothing in and got nothing out." As has been already said, there is no kind of doubt that, as between Jacob Shaffer & Son and Himmelreich & Co., there was a partnership which could not be denied by Shaffer & Son. But the determination of that question does not settle the present contention. Here the rights of the individual creditors of T. J. Shaffer are concerned. Their executions were prior in date of levy, and, if they can lawfully set up their individual rights as against the partnership rights of the appellants, they are perfectly at liberty to do so, and under the thoroughly well-settled law of the commonwealth they must prevail. Of course, they are not subject to any disqualification to establish by proof the actual state of the facts. They have done so in this case. The facts are found in their favor, and, no matter what the hardship is to the appellants, they must prevail, if the law so declares. The subject has been before this court in a number of well-considered cases, notably *Doner v. Stauffer*, 1 Pen. & W. 198; *Baker's Appeal*, 21 Pa. St. 76; *York Co. Bank's Appeal*, 32 Pa. St. 446; and *Scully's Appeal*, 115 Pa. St. 141, 7 Atl. 588. It is not necessary to review them in detail. The leading principle prevails in them all. Perhaps the best enunciation of the doctrine, in circumstances most apposite to those of the present case, was made in *York Co. Bank's Appeal*. There an actual agreement of partnership had been executed, and business was carried on under it for several months; but because one of the partners had not complied with his agreement, in paying into the firm the moneys he had agreed to pay, the agreement was held to be nugatory as to the individual creditors of the other partners, who had a prior levy, and the fund was awarded to the individual creditor to the exclusion of the partnership creditors. The entire stock of alleged partnership effects was sold, and the proceeds brought into court for distribution. Said Thompson, J., delivering the opinion: "The appellant claims to have his execution, although subsequent in time, first satisfied out of the proceeds of sale, on the ground that his was a partnership debt, and the property sold was partnership property. The appellee claims priority of satisfaction on the ground that as between the partners there was no joint property, that it all belonged to Keys, and that, as his separate creditor, he is entitled to be paid out of it his individual debt, in its order of priority. * * * When a creditor levies on the property of a firm, his execution fixes and attaches to this right to the same extent that it existed in the partners, and

hence the preference over a separate execution creditor in the distribution. All this is predicable of a case of joint property only. But where there was no joint property the rule has nothing to operate on. The mere name is not enough in such case. There must be an equity. If that equity never existed, a creditor's execution could not attach to any right amounting to a lien to have the assets appropriated to a partnership debt. That Moore has no interest in the firm property is found by the auditor. * * * This being so, the property levied on was individual property in fact, although seized in the firm's name. The appellant cannot work out his equity through the partners, for they, as such, did not exist, *inter se*; and the individual owner could not give him this right over a prior execution against him individually. The property was all individual property, and priority of seizure gave priority of right in the distribution." It is true, as contended for the appellants, that in their contract for the timber the name of Jacob Shaffer & Son appears as the other contracting party, and it was testified for the appellants that checks were given by the appellants on account for the timber sold, in the name of Jacob Shaffer & Son; but it is also true, under the testimony, that Jacob Shaffer had put no money or other property in the firm, and was entitled to nothing out of it, and it was testified also, and the auditor has so found, that there never was a partnership, nor an agreement for a partnership, between the father and son. Between the appellants and the Shaffers there was undoubtedly a partnership, but not as between the appellants and the appellees who are individual creditors of T. J. Shaffer, and have their own rights, of which they cannot be deprived by the mere circumstance that others have rights as between themselves and the alleged partners, but which cannot be set up against the appellees. In *Scully's Appeal*, also, there was a nominal partnership, and it was general in all the business in question. There was a public notice of the partnership, by advertisement in the papers, and the alleged partners were to have an interest in the profits, and they participated in the business, giving checks and signing receipts in the firm name. But the auditor found that there was no actual partnership, and therefore gave preference to the individual over the partnership creditors. The present chief justice in delivering the opinion referred the case to the ruling in *York Co. Bank's Appeal*, and based the decision upon the same principle, to wit, that the partnership creditor could only work out his equity through the equity of the partners, and, if there was no partnership as a matter of fact, there was nothing upon which the partnership creditor could found a claim for preference. We also applied the same doctrine in *Bixler v. Kresge*, 169 Pa. St. 405, 32 Atl. 414. In that case, also, the contest was between partnership and individual creditors of an alleged firm. The business of the firm was

carried on in the name of the firm, notice to that effect was publicly given out, their goods were bought in the name of the firm, the store books were kept in the same name, as was also the bank account, and checks were drawn in the firm name. But the auditor held, for sufficient reasons, that in point of fact there was no actual partnership, and on that ground held that the partnership creditors could not succeed with their claims. The court below affirmed the auditor's report, and we sustained the decree. It would be a work of supererogation to discuss the subject at length. It is only necessary to know whether the facts of a given case are brought within the controlling principle. They are so found in this case upon sufficient testimony. That finding is sustained by the learned court below, and we see no reason for reversing that action. The assignments of error are not sustained. Decree affirmed, and appeal dismissed, at the cost of the appellants.

NATIONAL BLDG. & SAV. ASS'N v. FINK
et al.

(Supreme Court of Pennsylvania. June 15, 1897.)

SURETIES—WAIVER OF DEFENSE.

Where a building contract was settled with the knowledge and active co-operation of the sureties on the contractor's bond, and a loan obtained from the owner with which to settle the liabilities of the builder, the sureties on the bond given to secure the loan, who were the same persons as the sureties on the contractor's bond, cannot, as defense to action on the bond to secure the loan, assert failure of the owner to retain from the contractor, pending the building contract, 10 per cent. of the sums due him as the work progressed in accordance with the terms of the contract; the time to have raised this question being at the settlement of the building contract.

Appeal from court of common pleas, Berks county.

Judgment was entered by the National Building & Savings Association against Cornelius Fink and others on warrant of attorney accompanying a bond. From order opening the judgment, plaintiff appeals. Reversed.

Felix P. Kremp, Edward S. Kremp, and Ermentrout & Ruhl, for appellant. William J. Rourke, Philip S. Zieber, and Baer & Snyder, for appellees.

WILLIAMS, J. This appeal is from an order of the court below opening a judgment entered upon a warrant of attorney accompanying a bond. Fink, one of the defendants, was a builder, who had entered into a contract with the plaintiff for the erection of several dwelling houses in the city of Reading. Born and Yetzer, the other defendants, had been his sureties for the performance of the building contract. When the houses were completed, it was found that Fink had not applied all the money he had received upon the contract to the cost of building, and that he was indebted to workmen and material men

in sums amounting together to about \$5,000. His sureties, as the evidence shows, were disturbed about the situation. They found that mechanics' liens were about to be entered against the houses for the sums due from Fink, and they knew that they would thereupon become liable upon their undertaking as sureties for the default of their principal. The obvious way to relief was to secure a loan for Fink that would enable him to comply with his building contract, and that would give time in which to recover his losses, and repay the loan. Negotiations were therefore entered upon with the plaintiff, and an arrangement made by the terms of which the association agreed to loan Fink \$5,000 with which to free the building from lien or liability, upon his giving security for its repayment at the end of two years, and to provide him with further employment meantime. Born and Yetzer became his sureties upon the bond given for this money, and his building contract, upon which they had also been sureties, was complied with by the payment of the money upon the claims outstanding against the houses. This was, in a certain sense, an extension of their original suretyship, but it was not literally such. The original contract having been fully complied with by means of the money borrowed, the bond given for the money was a novation. This judgment was entered upon the bond. When it fell due according to its terms, Fink had paid nothing upon it, and proceedings were instituted for its collection. The application to open judgment, now before us, was then made by the sureties in July, 1895. It was based upon three several allegations of fact: First, fraudulent representations made by Fink and plaintiff's officers to induce the execution of the bond; second, the failure of the plaintiff to retain from Fink, pending the building contract, 10 per cent. of the sums due to him as the work progressed in accordance with the terms of the contract; third, the allegation by Born that the plaintiff had released the real estate of Yetzer from the lien of the judgment, whereby his right to contribution from Yetzer was defeated. After a full hearing upon the rule to show cause, the learned judge of the court below decided against the sureties upon the first of these questions, holding that neither by Fink nor by the plaintiff had they been misled in any particular. The second point turned out to be equally unfounded. The building contract had been finally settled with the knowledge and active co-operation of the sureties, and the new bond given without objection on their part as to its amount, or the application of the money obtained upon it. The time to have raised this question was at the settlement of the building contract. It could not be properly raised when the bond given to secure the borrowed money was payable. The relation of owner and contractor closed when the building contract was finally settled. The relation created by the bond was that of lender and borrower, and no reason is disclosed

by the evidence for relieving the borrower from the payment of the entire sum borrowed. The third reason is stated in an indefinite manner. The facts upon which injury to Born is alleged are not given. What real estate was released, and when, how such release affected the right of contribution of the other surety, or the ability of Yetzer to respond to the plaintiff's judgment, does not appear. The order of the court below seems to us, therefore, to have been wisely made upon the showing then before it; but because of the uncertainty relating to the alleged releases we are of the opinion that further opportunity might well be given to Born to show the exact facts in regard to the releases alleged to have been given to Yetzer. The order of the court below is reversed except as to the complaint made by Born about the release of Yetzer from the lien of this judgment. The record will be remitted, to afford opportunity to investigate this single question, and ascertain whether the value of the right of contribution against Yetzer has been destroyed or seriously impaired, and, if so, the court will make such order for the relief of Born as the circumstances may require.

STELLER et ux. v. SELL.

(Court of Errors and Appeals of New Jersey.
July 15, 1897.)

TRUST—VALIDITY—CONSIDERATION—ENFORCEMENT.

An agreement made between a creditor and his debtor that if the debtor would procure his life to be insured in order to secure the payment of the indebtedness, in an insurance association, naming the sister of the debtor, who was the wife of the creditor, and who had knowledge at the time of the purpose of the insurance, as beneficiary, in order to comply with the laws of the insurance association, which required that insurance could only be had for the benefit of a blood relative of the insured, and that the creditor would pay the assessments on such insurance, and that after the death of the debtor the creditor, upon receiving the proceeds of insurance, would pay over to the wife of the debtor whatever balance remained after deducting the indebtedness and interest, and the assessments paid and interest thereon, is an agreement founded upon a good consideration, and created a trust in favor of the wife of the debtor enforceable in equity against the creditor, and the beneficiary named in the certificates of insurance, who received the proceeds of such insurance.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill by S. Elizabeth Sell against John Steller, Jr., and Ida Steller, his wife. From an order overruling a demurrer (32 Atl. 211), defendants appeal. Modified.

Cortlandt Parker and George F. Tuttle, for appellants. Thomas Anderson and Amzi D. Taylor, for respondent.

LIPPINCOTT, J. Originally the bill of complaint in this matter was filed in the court of chancery by the respondent, S. Elizabeth Sell, against John Steller, Jr., who is one of the appellants. To this bill of complaint a de-

murrer was filed by John Steller, Jr., which, upon hearing, was overruled by the chancellor. His opinion is reported in 32 Atl. 211. After the demurrer was overruled, an answer by John Steller, Jr., was filed. After this answer an amended bill was filed, in which Ida Steller, the wife of John Steller, was made a party defendant to the bill of complaint. To this amended bill Ida Steller filed a separate answer. Some portion of this answer was expunged, after which the cause came to final hearing upon the bill, amended bill, answers, and proofs, and a decree advised by Vice Chancellor Reed in favor of the respondent against the appellants, from which decree this appeal was taken.¹

The contest in this case arises over the question, who is entitled to certain excess insurance, upon three policies which were taken out on the life of George W. Sell, the husband of the respondent? The facts, briefly stated, appear to be that in March, 1894, George W. Sell, the husband of the respondent, obtained on his life three certificates of insurance in the Northwestern Masonic Aid Association. These certificates of insurance were for \$2,500, \$5,000, and \$1,000, each certificate naming Ida Steller, his sister, as beneficiary. These certificates were taken out under the following circumstances: Sell became indebted to John Steller, Jr., the husband of Ida Steller, and she is the beneficiary named in each of the certificates of insurance. Steller proposed to Sell this insurance to secure his indebtedness. Steller, to obtain this insurance, proposed to keep the premiums or assessments thereon paid. After some negotiations between Sell and Steller, Sell assented to this method of insurance, and the certificates were taken out in the sums named, which aggregated a much larger sum than the indebtedness. It further appears that it was agreed between Sell and Steller that on the death of Sell, and upon the payment of the insurance money to Ida Steller, his sister, she should pay the money to Steller, and Steller then should retain the indebtedness and interest thereon, and all assessments and premiums paid on the insurance and interest thereon, and then pay the balance to the respondent, the widow of Sell. It also further appears that Sell promised that within the space of two years he would pay the indebtedness to Steller, and also such assessments as had been advanced by Steller on the insurance, and interest thereon, and take the life insurance to himself. Under the articles of incorporation of the aid society only a blood relative of the insured could be made a beneficiary. The insurance was received by Ida Steller, paid over to John Steller, Jr., and now Mrs. Sell seeks to have a trust declared in her favor for the excess of insurance after the payment of the indebtedness and the assessments and interest, and asks for an accounting and pay-

¹ Opinion not published, by direction of Vice Chancellor Reed.

ment over to her. Steller paid the assessments on the insurance for 10 years, when Sell, in 1894, died, and the amount of the certificates were paid by check of the aid society to the order of Mrs. Steller, which check was by her indorsed, and delivered to her husband on June 21, 1894, who collected the money thereon, and has since controlled the proceeds of the certificates of insurance. The indebtedness of Sell at the time the insurances were taken out, according to the statement of Steller, was \$1,300. The respondent understood that it was only \$800. The facts are very fully stated in the opinion of the learned vice chancellor, and need not be repeated. Only such facts are here stated as reveal the questions raised and argued in this court. The respondent insisted in the court of chancery that after the payment of the debt due Steller by her husband, and the amount of the premiums or assessments, and all interest thereon, she was entitled to the balance of the policies. The appellants claimed that the balance belonged to Mrs. Steller. The decree in the court of chancery as advised by the vice chancellor was that the appellant Ida Steller had no equitable interest in the proceeds of the insurance, and that a trust was impressed upon the certificates in favor of the respondent, and that after the receipt by John Steller, Jr., of the proceeds of the insurance on June 21, 1894, he was bound to pay the same less the assessments paid by him, and interest, and less also the indebtedness of Sell to Steller and interest, to the respondent. The conclusion reached by the court is that so far this decree of the court of chancery should be affirmed for the reasons given by the vice chancellor in his opinion in that court. By the decree, upon the accounting, as stated by the learned vice chancellor, between the respondent and Steller, he was allowed the amount of the assessments paid by him, with an average interest thereon to the 21st day of June, 1894, and so far again the decree is affirmed for the reasons given in the opinion below. By the decree there was also allowed to Steller an indebtedness of \$800, loaned to Sell prior to September 1, 1883, and interest thereon from the latter date to June 21, 1894, and that there was due from Steller to the respondent as the excess proceeds of the certificates the sum of \$5,916.66. Upon a consideration of the facts of the case, I have reached the conclusion that the part of the decree allowing to Steller only an indebtedness of \$800 and interest thereon, and fixing the amount as due from Steller to the respondent at the sum of \$5,916.66, is erroneous. Steller swears distinctly and emphatically that at the time the policies were taken out Sell was indebted to him in the sum of \$1,300. The indebtedness of \$800 was admitted by the respondent. Steller declares, circumstantially, that in November, 1883,—he thinks it was the 20th or 30th of the month, the day after Thanksgiving,—a further loan of \$500 was made by him to Sell.

It was to be but a temporary loan, for a week or two, but, Sell being unable to repay it, the indebtedness continued and existed at the time of the issuance of the certificates of insurances, and has never been repaid. It is true that Steller admitted in his evidence that he had told others of the loan of \$800, but had omitted to mention the fact of the loan of \$500. His explanation of this admission is that he did not wish his wife to know of it at the time. It is true that he at other times stated that the indebtedness of Sell to him amounted to about \$2,500, which would be about the amount of the assessments and interests and \$800 and interest. While these are circumstances of suspicion as to the correctness of his claim for the additional sum of \$500, yet it is not sufficient to overcome his positive evidence as to the loan of this amount, and the detail of facts and circumstances under which it was made. The conclusion reached upon the proof is that this additional loan of \$500 was made, and that in the accounting Steller should have been allowed that additional sum and interest thereon from November 30, 1893, the date of its advancement to Sell, to June 21, 1894, and that the decree, in so far as it omitted this allowance, should be reversed, and the cause remanded to the court below, to the end that such additional allowance of \$500 and interest be made, and the decree of that court, so modified and corrected, carried into execution. I shall therefore vote for such modified reversal of this decree.

HEWITT v. HEWITT.

(Court of Chancery of New Jersey. June 25, 1897.)

DIVORCE—EXTREME CRUELTY.

1. The use of profane and foul language does not of itself, and irrespective of its effect upon the person addressed, constitute extreme cruelty.

2. Proof of three or four separate acts of violence, occurring at different times during a period of 20 months, each occasioned by a new incident, unaccompanied by any evidence of malice, and which did not cause a condition of terror or apprehension for the future, and did not prevent the continuance of the connubial relation, will not sustain a decree for divorce from bed and board, on the ground of extreme cruelty.

(Syllabus by the Court.)

Bill by Edward S. Hewitt against Annie Hewitt for divorce. Decree for defendant.

Samuel W. Beldon, for complainant. Jonas S. Miller, for defendant.

GREY, V. C. (orally). I will pass upon this question now. The bill is filed by the husband seeking limited divorce from the wife, under the statute, upon the ground of extreme cruelty. The marriage took place in December, 1893, and there is no evidence on either side of any serious dispute between the parties for a period of six or seven months after the marriage. Indeed, the first one of which

evidence is given with any accuracy of date is in October, 1894. On that occasion the difficulty came, not because of any difference between the husband and the wife arising from anything in their own relations, but because of the differences caused by the story related by the stepdaughter to the husband, of a quarrel which had resulted in the exchange of blows between the daughter and the wife, which came about because of some rude play with a spice bag. The next difference between the parties was occasioned by an attempt on the part of the wife to assert her authority over the son, because he had taken some sausages. Another was occasioned by whispering, or a charge of whispering, between the husband and the daughter, about the wife. So, without going into a detailed examination of each of these causes of difference, it is to be observed that they each arose because of some extraneous or foreign influence, which brought about a difference between the husband and the wife. It is perfectly apparent that this woman is a woman of violent temper, and that she does not attempt to restrain herself to the language of modesty and good taste in times of excitement; and I think there were also occasions when she freely permitted her tongue to use foul language. But this alone does not establish extreme cruelty. It may show that it was bad taste in the husband in selecting such a woman as a wife. Violent language, when uttered by a person of that character, is of the least possible weight, because one who habitually accustoms herself to the utterance of violent or foul words when not actuated by violent feelings is simply a pitiable object, and such expressions are looked upon by sensible people as the howlings of a spoiled child. I think this woman has some of these characteristics, and that violence is used by her in language when it does not truly represent any real violence of feeling. At the same time, she has not always restrained herself from violent action, but, on each of the occasions shown, the dispute was brought about by the intrusion of some foreign element. When a woman marries a man, she does not marry his children. That is a thing he must look out for. When he marries, he agrees that he will prefer her before he will consider them. This he undertakes by the mere act of his marriage, and even if they may be right, and the wife wrong, the husband undertakes that he will stand by the wife, to be her helpmeet and adviser, to maintain her in her position. As her husband, he should not take sides with his children, and condemn her for hasty or ill-advised speech or action. He should support her against the children, as the mistress of his household, even if she may err, and be unduly energetic or even violent at times.

This husband seemed to feel that he was called upon to justify and support the side of his children. I do not say the children were wrong. It is not necessary to be passed upon, but he did, on the occasions named, I think,

give the wife the sense that he was taking the side of the children, and was disapproving of her assumption to be mistress of the household. That, not extraordinarily, provoked her. Her ebullitions of feelings were each of them, as stated in the evidence, individual instances. They have no relation to each other. There is no evidence here of any malice or ill feeling existing on the part of the wife. Each of the incidents of violent conduct arose separately. No one brought on the other. There is no proof of continuous purpose to treat this man with cruelty. The evidence is that, after each of these quarrels, the husband resumed his relations with his wife. After one of the most violent, after they had come to a personal struggle, which I believe from the testimony resulted in an exchange of blows, they came together, and there is no denial of the fact. They said they were sorry, and they resumed their connubial relations in a sensible way, and sought to forget all about their differences. This was a characteristic of each quarrel, showing that the husband at the time had no feeling that the wife was actuated by any malicious purpose towards him. Indeed, there is no evidence of malice, except casual statements, which were made one or twice, that she wished he was dead, or that she would kill him. These statements she denies, but, if I accept them as true, they are too disconnected and infrequent to give sufficient evidence of a serious purpose. The manners and personal appearance of the defendant, and her statements while under oath, and all the indications of the whole case, relieve me from considering the case as imputing to her a maliciousness of purpose which is continuous or serious in character. I think all these ebullitions of feeling are traceable to a violent and untrained temper, exhibited on occasions which she felt justified her, and which were each individual, arising from the immediate provocation of the moment, and ceasing when the occasion had gone by. I think the husband was of that mind. He undoubtedly was of that mind as to all of these events until the incident of the 23d of August, 1895. What happened after that is in dispute; I mean immediately after that event; that is in dispute. I am not going into the details of these quarrels. They are a sort or kind that a court may possibly have to take cognizance of. I do not think they are of a kind that requires consideration just now. I think they are wholly unjustifiable, and largely due to the violence of the wife. After this occasion, August 23, 1895, there seems to be some doubt as to whether their intercourse was resumed. She says it was, and he denies it. She now says that it was continued for a year or more, until the filing of this bill. He says it was not. But there is no denial that on the particular occasion itself, when this difficulty originated the husband came to his own room, in response to her demands, and spent the night there, with her; and I cannot believe that the circumstances were such that the man was

made to come out of his room because he was afraid of the use of a cleaver, as was intimated in the evidence. The cleaver, as I recall the testimony, was certainly not exhibited or used as a means of compulsion. If it be true that the husband knew when he was in the other room, and had the door locked, that she had the cleaver in the entry, and was afraid, it is very much more likely that he would have stayed in that room than that he would have come out. The sense of the evidence which I received as to the cleaver was that it was discovered in the entry the next morning, and that it was not effectual in any way in inducing the exit of Mr. Hewitt from this room to which he had retired. In response to her demand, which she had a right to make (not by threats, indeed, but by ever so vigorous a demand), that he come, after their quarrel, and occupy his own room, and that he should not put upon her the shame of separating himself from her in the presence of his family, he did that like a sensible man, when he was invited to come out of the room, not induced by the threats, but because he felt that he ought to do what he could to make up the difficulty in his family; and he admits that he came and occupied the same room with his wife. This is the only quarrel proven which endured over the going down of the sun. The next morning the remains of it broke out again at breakfast, and Mrs. Hewitt threw a cup of coffee at Mr. Hewitt. There is some doubt as to where it landed, but there seems to be no doubt as to the spirit which actuated the attack. She was sore because of the feeling that her husband was whispering about her with his daughter, and on this occasion threw the cup in response to his challenge. She says in her testimony that, up to the filing of this bill, he continued to occupy the same room with her, and also continued the connubial relations. He denies it. It is not necessary to consider the testimony on this question, because, where it is asserted on one side by the wife, and denied on the other side by the husband, it is almost impossible to say whether the connubial relations were continued; but there is no denial that during the whole of the period, not only up to the filing of the bill, but to the present time, Mr. Hewitt has continued to live in the same house with his wife, and to accept from her all her duties, excepting only the occupation of the same room. The services of a wife in the management of his household, and waiting upon him, she even yet performs; and there is nothing in the case anywhere to indicate any apprehension or terror on his part arising from any threats which she has made; nor is there shown any sense or feeling that he is in the slightest danger; nor was there any evidence given in terms or words of any suffering on the part of the husband, existing or apprehended, because of the wife's conduct. On the other hand, one witness testifies that she was there two weeks last summer before she got any idea of any family differences what-

ever. The wife testifies that she has no ill feeling towards her husband. A permanent boarder swears there is less disturbance during the past year.

The events which last preceded the filing of the bill were the quarrel near the refrigerator and the coffee-throwing incident. These happened August 23, 1895. The bill was not filed until September 23, 1896. Counsel has made a statement here, which I am willing to accept so far as it is necessary, of the fact that the engagements of counsel prevented for some time the filing of this bill; but, if the condition of that family was as wretched and miserable as counsel so eloquently depicted, it is impossible for me to believe that the husband would have endured it for a period of a year and month next succeeding the happening of the provoking cause, which was characterized as inflicting such a terrible sense of deprivation of peace and quiet upon this family. Since that time there has been no collision. Violent language has been used, but violent or profane language is not of itself sufficient to justify the holding that it is extreme cruelty. It it were accompanied by other incidents which would go to show that it had an effect upon the person to whom it was used, and had resulted in causing a condition of despair and depression, as in the case of a sick or weak woman, who is bedridden, and not able to get away, it would be forceful. But there is no evidence which indicates that this gentleman has been reduced to a condition of either terror or fear. On the contrary, all the evidence goes to show that the exercise of that mutual concession which each undertook to extend when entering into the marriage state would probably result in the whole of these quarrels being forgotten, as they ought to be. In my view, nothing has been shown to me which will justify a divorce on the ground of extreme cruelty, and I think, therefore, the bill must be dismissed. I will make the order that the dismissal of this bill shall be without prejudice. I cannot but feel that I should give something in the nature of a warning that such conduct of the wife as has been shown here is of the kind to invite this sort of attack, and I will leave this case in such a shape that, if circumstances shall justify it, the facts here presented may be part of the basis of further proceedings, although I cannot retain the bill.

YOUNG v. CAMDEN, G. & W. RY. CO.

(Court of Errors and Appeals of New Jersey.)

June 28, 1897.)

PASSENGER ON STREET CAR—CARRYING PAST DESTINATION — RETURN ON RIGHT OF WAY—NEGLIGENCE.

The conductor of a trolley car, who had undertaken to let off at a given destination the plaintiff, who was a stranger, carried him past it. He then let the plaintiff off on the company's right of way, and directed him to walk back on the track. While obeying this instruction, in the nighttime, the plaintiff followed the track onto a trestle, where he was struck by a car of the

defendant coming from the opposite direction. *Held*: (1) That in giving this instruction the conductor was acting as the agent of the company; that (2) whether he gave it, and (3) whether it was an act of negligence, was properly submitted to the jury, as also (4) was the question of the contributory negligence of the plaintiff in going on the trestle if so directed. *Held*, also, that if the plaintiff was warned by the conductor not to go on the trestle, he was guilty of contributory negligence; also that the motorman whose car struck the plaintiff was under no duty to be on the lookout for pedestrians on the trestle. (Syllabus by the Court.)

Error to supreme court.

Action by Young against the Camden, Gloucester & Woodbury Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

P. J. Pancoast, for plaintiff in error. John J. Crandall, for defendant in error.

GARRISON, J. The facts not disputed at the trial were that the plaintiff was a passenger upon a trolley car of the defendant; that he desired to leave the car at Newbold, a small village between Gloucester City and Woodbury; that the car passed Newbold, and had gone a short distance, when a conversation took place between the plaintiff and the conductor of the car, as the result of which the former left the car, and walked back upon the defendant's right of way, which was not a public road; that he came to a trestle that carried the rails of the car tracks over a place of low land; that he was walking the ties laid on this trestle, when a car coming from the direction in which he was walking struck him, and knocked him from the trestle to the ground.

The gravamen of the plaintiff's action was that the conductor carried him past Newbold, although notified that he wished to be let off at that place, and then directed him to walk back upon the track to Newbold, and that in so doing he was caught upon the trestle, and injured in the manner above described.

In this state of the proofs the defendant, at the close of the plaintiff's case, moved for a nonsuit upon the ground that no cause of action against the company had been shown. The contention of the defendant was that it had been guilty of no negligence at the time the plaintiff left its car, and voluntarily ceased to be a passenger, and that the conductor's direction to the plaintiff to walk back on the track was gratuitous advice given to a pedestrian, and not an act done as the representative of the carrying company.

On the other hand, it was argued by the plaintiff that it was negligence in the conductor to carry him past Newbold after the notification that he wished to be let off at that point, and that the direction given to the plaintiff was an attempt to remedy this default, and hence part of the original act of negligence. Having thus identified the conductor with the defendant's business, the further contention was that the direction it-

self was a negligent act, the probable consequence of which was to endanger the plaintiff. It is not necessary to pass upon the broad proposition that the failure of the conductor to let the plaintiff off at the designated point was per se an act of negligence that rendered the company liable for whatever might flow from it. There is little or no analogy in this respect between the operation of street railways and that of ordinary railroads. Upon the one the passenger rides by virtue of the cash payment of a fare, and without any specific contract as to his place of destination; upon the other he is carried upon a written contract that passes into the possession of the conductor, who is thereby apprised of the terms of the contract, and of the necessity of stopping the train in fulfillment of those terms. It might be a grievous, if not an impracticable, rule to require a street-car conductor to bear in mind the special designation of each passenger upon a mere notification. The passenger has some duties cast upon him, and the reasonable doctrine would seem to require that upon the announcement by the conductor of each street or point of stoppage the passenger must indicate his purpose to alight. There is, however, no reason why a conductor may not undertake to inform a passenger when his destination is reached. Indeed, in the case of the very young or of the very old, or of passengers who are infirm, or even of strangers to the locality, such an undertaking would be in the line of the company's business, for which it could not disavow reasonable responsibility. In the present instance the plaintiff relied upon such an undertaking, and thereby raised a question that necessarily called for the opinion of the jury. Whether the plaintiff was, upon his own showing, guilty of contributory negligence, was likewise a jury question. There was, therefore, no error in the refusal of the trial court to direct a nonsuit. The applicability to the plaintiff's case of the provisions of "An act to prevent accidents on railroads" (P. L. 1869, p. 806; 2 Gen. St. p. 2680) was not raised or discussed by counsel, and hence has not been judicially considered.

The testimony for the defendant raised an issue of fact with respect to the instruction given by the conductor to the plaintiff. The language of the conductor upon the witness stand was as follows:

"Q. Had he [the plaintiff] spoken to you or the subject before that?

"A. Not to my knowledge. I said to him 'My dear friend, we are by Newbold. You should have told me before.' But I say, 'However, as we have carried you by, you stay on the car, and when we meet the up-bound car I will put you on it, and send you back to Newbold, which won't cost you anything.' No; he insisted upon getting off the car. I stopped the car, and he stepped off. 'Now,' I said, 'there is a trestle road that we have just crossed, and there is a road

around the bank. Now, don't dare to cross the trestlework, because it is dangerous. A car going in either direction might hit you. There is a road going around the bank. Be sure and take that."

With reference to this version of the affair the jury was instructed by the trial court in this language:

"If you believe that, notwithstanding what the conductor told him, notwithstanding the instructions he had from the conductor to go back on that track, if you believe the conductor said so, and you think, as a prudent, sensible man, he had no right to take those instructions, and go on that track, that is a question for you to say; and if you say so, then he can't recover. It is a question for you to decide, notwithstanding all that happened, was he protected—clearly protected—by the statement or direction of the conductor to go? If you say that as a sensible man, in spite of everything, instructions or not, he was careless to go there at all, you will say it, and he ought not to recover."

In another part of the charge this language is used:

"But if the conductor told him, as the conductor says he did, not to go on or cross that trestle, he could not take the risks of being killed or injured, and treat his instructions lightly, and recover for injuries resulting therefrom. But if, notwithstanding his instructions, he went there, seeking for a way out of his then serious predicament, and found, after going some distance, that it was really a dangerous place, and, as he saw the light of an approaching car, then undertook to return, trying to save himself as best he could, finding, perhaps, that he had been misled and trapped at that instant, and, while making efforts to escape and save himself, was overtaken by the car on the track, and hit, it is then a question for you whether or not he had done what a reasonably prudent man could do, situated as he was, and had taken the precautions that a reasonable and prudent man could be expected to take in his predicament. That is a question for you."

These instructions left to the jury the question whether the plaintiff was guilty of contributory negligence if he failed to take the road the conductor directed him to travel, and went upon the trestle in the face of a specific warning of the danger of so doing.

In this there was an error.

If the direction given to the plaintiff was that testified to by the conductor, he disobeyed it at his peril, and there was neither liability on the part of the company nor right of recovery to the plaintiff.

Upon another point, also, there was error. The defendant requested the court to charge:

"That it was not carelessness on the part of the motorman not to anticipate the presence of the plaintiff on the trestle where he was at the time the car approached him."

In response to this request the court, in

effect, left it to the jury to say whether reasonable care on the part of the motorman would not have enabled him to avoid striking the plaintiff on this trestle, and that, if it would, he was negligent in not exercising such a degree of vigilance. Inasmuch as the trestle was constructed upon private property, and was in no respect a public highway, the motorman, in crossing it, had no other duty than to avoid running down the plaintiff if he became aware of his presence. He was not required to exercise a vigilance predicated upon the possibility—still less the probability—of meeting a pedestrian at that time of the night in so unusual and perilous a place. The defendant was entitled to have the jury charged in substantial compliance with his request.

The judgment of the supreme court is reversed, in order that there may be a venire de novo.

POLHEMUS v. BATEMAN et al.

(Court of Errors and Appeals of New Jersey.

June 28, 1897.)

FISHERIES — GRANT TO RIPARIAN OWNER — CONSTRUCTION — TRESPASS.

1. The state may grant the exclusive use of its lands under water, but until such grant is made the right to enter and fish upon it may be exercised by all the citizens of the state.

2. A deed by the riparian commissioners under the act of March 21, 1871, can be made to the owner of the ripa only; and where the deed expressly declares that the grantee is owner of the ripa, and that it shall be void if he is not such owner, a citizen who is exercising the right of fishery upon the land granted may, in a suit for trespass, challenge the fact that the grantee is owner of the ripa.

3. The deed in this case gave the grantee the right to fill in and otherwise improve the land under water, and to appropriate it to his own exclusive uses. *Held*, that until the grantee reclaimed the land he acquired no exclusive right to it, except so far as might be necessary to enable him to make reclamation.

(Syllabus by the Court.)

Error to supreme court.

Suit by Rebecca R. Bateman, executrix, and Luther Bateman, Jr., against Zebulon Polhemus. Judgment for plaintiffs, and defendant brings error. Reversed.

C. H. Sinnickson, for plaintiff in error. Walter H. Bacon and David J. Pancoast, for defendants in error.

VAN SYCKEL, J. This suit was brought against Zebulon Polhemus, the defendant below, to recover damages for the breaking and entering of the close of the defendants in error, covered by the waters of Delaware Bay, in the county of Cumberland. The defendants in error claim title to the close under a deed made by the riparian commissioners of New Jersey to Luther Bateman on the 28th day of June, 1886. This deed recites that Luther Bateman is the owner of lands fronting on the Delaware Bay where the tide ebbs and flows, and so is riparian owner on tide waters in this

state, and is desirous of obtaining, pursuant to the act of March 21, 1871, entitled "A supplement to the riparian act," a grant from the state of the lands under water which lie in front of his said lands, and conveys by metes and bounds to said Luther Bateman about seventy acres of land flowed by tide water, "with the right, liberty, privilege, and franchise to exclude the tide water from so much of the lands above described as lies under tide water, by filling in or otherwise improving the same, and to appropriate the lands above described to his exclusive private uses." The deed further expressly provides that if the said Luther Bateman is not the owner of the ripa, the deed and all the covenants therein on the part of the state shall be void. On the trial below the defendant offered to show that Luther Bateman was not the owner of the ripa. The rejection of that evidence constitutes the first error relied upon for reversal.

It is well settled that officers intrusted with power of sale exercise a naked power, and no title passes unless the conditions exist upon which the exercise of the power depends. *Woodbridge v. Allen*, 43 N. J. Law, 270. In this case there was not only an entire absence of the conditions upon which the riparian commissioners were authorized to make the grant, but there was also an express provision in the conveyance that it should be void if such conditions were nonexistent. In this case the defendant below, in taking oysters upon the locus in quo, was in the exercise of a legal right, which he had in common with all other citizens of the state, unless the plaintiffs had obtained a grant from the state which excluded the defendant from the premises. *Brown v. De Groff*, 50 N. J. Law, 409, 14 Atl. 219. The defendant could stand upon that common right until the plaintiffs below established a superior title. The plaintiffs had no possession of the premises, and could, therefore, maintain their action only by showing a paper title. In *Fitzgerald v. Faunce*, 46 N. J. Law, 591, Mr. Justice Depue said: "A preliminary question is presented whether the plaintiff Fitzgerald has such a grant from the state as will give him a standing to enable him to set up the rights of the state against the right of Christian Faunce under the Whitall deed. He could acquire such a standing only in virtue of a grant by the riparian commissioners, which the commissioners were empowered to make under the statutes authorizing them to grant and convey lands of the state under water." Applying that rule, he held that under the act of March 21, 1871, no one but a riparian owner can apply, and a grant by the commissioners to any one else would be ultra vires. The case before us therefore involves the question whether the Batemans had such a grant from the state as would enable them to set up the rights of the state against Polhemus. A grant which, by the terms of the riparian act, the riparian commissioners were disabled to make, and which, by the express language of the convey-

ance executed by them, they declared they did not intend to make, passed no title to the grantee, and could not have the effect to make the act of Polhemus a trespass. The trial court erred in rejecting this evidence offered by the defendant.

In *City of Elizabeth v. Central R. Co.*, 53 N. J. Law, 491, 22 Atl. 47, the grant was absolute in its terms, independent of any riparian title, and without any reference to any particular statute, and consequently it was held that the grant must be deemed as comprehensive as the law permitted. In that case, because the United States Supreme Court in *City of Hoboken v. Hamburg-American Steam-Packet Co.*, 124 U. S. 656, 8 Sup. Ct. 643, had held that the state could not defeat its absolute grants because of the public right to a highway on the ripa, it was considered that the grant could not be attacked collaterally. It was conceded, however, that where the false suggestion appears on the face of the grant, the grant may be challenged and declared void in collateral proceedings. That is the situation which the defendant on the trial below alleged to exist, and he offered to show that the grantee had falsely held himself out as the owner of the ripa, and that the statement in the deed that he was such owner was not true.

The question remains to be considered whether this action can be maintained if the plaintiffs below establish the ownership of the ripa in Luther Bateman. The grant by the state must be strictly construed. The state may grant the exclusive right to take oysters, and to its lands under water. *Wooley v. Campbell*, 37 N. J. Law, 163. But until such grant is made the public right of fishery exists. *Brown v. De Groff*, supra; *Grace v. Willets*, 50 N. J. Law, 415, 14 Atl. 559. Conceding that the grant may vest in the grantee of lands under water all the rights of the state in the lands granted, and thereby exclude the public rights which previously existed, it seems equally clear that the conveyance need not necessarily be so comprehensive. The state, as well as the individual, may limit the extent of its grant. The language of the conveyance must measure what passes by it, and the grantee can acquire nothing in excess of that because of the existence of a power to enlarge the grant. This observation is made because it is insisted that under the first section of the act of March 21, 1871 (3 Gen. St. p. 2790, pl. 21), "all the rights of the state in said lands may be vested in the grantee." The question in this case is not what might have been granted to Bateman, but what is the extent of the grant to him, applying the rule of strict construction in favor of the state. The act of 1871 provides that the conveyance shall be executed as directed in the act to which it is a supplement. Section 8 of the act of 1869 (3 Gen. St. p. 2788, pl. 15) prescribes the manner of execution. The deed was executed in the prescribed form, but it does not, in terms, grant all the rights of the

state in said lands to the grantee. On the contrary, it contains the provision hereinbefore recited, setting forth the purposes for which said conveyance was made. That provision was manifestly intended to give to the grantee such rights as he would have been entitled to under a grant made exclusively under the eighth section of the act of 1869. That section provides that upon delivery of the deed "the grantee may reclaim, improve, and appropriate to his and their own use the lands conveyed." The statute does not require that this provision shall be inserted in the deed; it does not enter into the form of the conveyance, but simply provides what its effect shall be when delivered. That effect must be accorded to it unless it contains some provision narrowing its scope. So it may be admitted that the deed to Bateman under the act of 1871, in the absence of any language limiting its operation and effect, would have passed to him all the rights of the state in the lands under water; but the deed contains the provision that he is to have the right, liberty, privilege, and franchise to exclude the tide water from so much of the lands as lies under tide water by filling in or otherwise improving the same, and to appropriate the lands to his exclusive private uses. This language restricts the grant, and nothing in excess of it passes to the grantee. His rights under it must be interpreted by the words of the conveyance. He may fill in or otherwise improve the same, and appropriate the lands so improved to his exclusive private uses. If he is permitted to appropriate the lands to his exclusive private uses without filling in or improving, no effect is given to the previous language, and the deed will be given the same effect as if it contained only the provision that he could appropriate the lands to his own exclusive private uses. Such a construction of the deed under the well-settled rules of interpretation is inadmissible. The state made the grant, and Bateman accepted it in this form, and it cannot be enlarged beyond the clear meaning of the words used. Bateman acquired no title to the exclusive use of any portion of the land under water until he filled in and reclaimed or improved it. The grant was only for the purposes of reclamation. In this respect the charge of the court was erroneous, and the judgment below should be reversed.

TROTH v. BOARD OF CHOSEN FREEHOLDERS OF COUNTY OF CAMDEN.

(Court of Errors and Appeals of New Jersey.
June 28, 1897.)

CLERK OF COURT—FEE—COUNTY CLERK.

1. Under the act of March 17, 1874 (P. L. 1874, p. 280), all fees chargeable by the clerk of Camden county for services rendered by him as clerk of the criminal and civil courts of the county belong to the county.

2. There is no law allowing any fee to the clerk of Camden county for services performed

by him in reviewing, correcting, and certifying bills, under sections 109 and 153 of the criminal procedure act (1 Gen. St. pp. 1142, 1150).

3. In certifying bills under the sections just mentioned, the county clerk added to each bill a fee of 50 cents for himself for his service, and collected this fee from the person producing the bill for certification, who, in turn, collected it from the county collector. *Held*, that the county could recover the same from the clerk.

(Syllabus by the Court.)

Error to supreme court.

Action by the board of chosen freeholders of the county of Camden against Henry Troth, executor of Edward Burrough. Judgment for plaintiff. Defendant brings error. Affirmed.

John F. Harned, for plaintiff in error.
Thomas E. French, for defendant in error.

DIXON, J. The questions raised in this cause relate to the right of the defendant's testator, Edward Burrough, to receive and retain certain moneys which came to his hands while he was clerk of Camden county, during the years 1886 to 1891. The statute applicable generally to the issues involved is "An act to regulate the salary of the clerk of the county of Camden," approved March 17, 1874 (P. L. 1874, p. 280), which enacts that he shall receive a salary of \$4,000 per annum "for his services as clerk of the criminal and civil courts of said county, which sum is to be paid to him in quarterly payments by the collector of said county, and is to be in lieu of all fees, costs, and compensation now allowed him in said courts; and all fees, costs and compensation that said clerk is now entitled by law to receive, shall be taxed in all bills of costs the same as are now taxed, and shall be collected by the sheriff of said county, and be by him paid over to the collector of said county, for the use of said county." Under our constitution and statutes, the clerk of each county is also the clerk of the court of common pleas and of the circuit court, which are civil courts in the county, and of the court of quarter sessions, the court of oyer and terminer, and the court of special sessions, which are criminal courts in the county. His duties, therefore, are divisible into those devolved upon him as clerk of these courts, and those pertaining to his primary office as clerk of the county. This division is that contemplated by the act of 1874, and, according to that act, the salary specified is made his sole compensation for the duties first mentioned. The defendant insists that the services covered by the salary are only those for which the clerk's fees are "taxed in bills of costs," and "collected by the sheriff," so as "to be by him paid over to the collector of the county." But we think this construction is too narrow. The closing sentences of the statute may be confined to fees of this character, but the prior clauses plainly include all services as clerk of the courts; and as the fees for those services are not abolished, and the county is to pay the salary in lieu of them, the clear intend-

ment of the law is that all such fees shall go towards reimbursing the county treasury.

According to the assignments of error, the county has recovered judgment below for \$30.50, received by the clerk for swearing in sheriffs, justices of the peace, coroners, and judges of the common pleas, and \$200, received by him for issuing licenses to sell intoxicating liquors. These services were rendered by him as clerk of the court of common pleas (2 Gen. St. p. 2331, § 11; *Id.* pp. 1788, 1797), and therefore they belonged to the county. The county also has judgment for \$1,136.80, received by the clerk "for taxing criminal bills of costs of justices and others, and taxing bills of justices in cases of petty larceny, maintenance, and support, and \$4,872.58, received by him for taxing bills of costs in disorderly cases." We understand that the services for which these fees were received were performed under sections 109 and 153 of the criminal procedure act (1 Gen. St. pp. 1142, 1150), which require the county clerk to review and correct the bills of justices and others against the county, and to certify the correct amount thereof to the county collector for payment. In performing this function, the practice of the clerk seems to have been to add to each bill a fee of 50 cents for himself, and certify it as a part of the correct amount; and this fee, being paid to the clerk by the person presenting the bill for certification, was by the latter collected from the county. The defendant contends that this service is embraced within the third section of the fee bill (2 Gen. St. p. 1450), which allows "clerks, for taxing every bill of costs, fifty cents," and that as the service was, according to the statutes enjoining it, to be rendered by the "county clerk," the charge was legitimate. But an examination of the statutes allowing clerks a fee "for taxing every bill of costs" shows clearly that the taxation there intended was the taxation of costs in causes instituted in the court of which the person entitled to the fee was clerk. See *Elmer's Dig.* p. 185, §§ 49, 50; *Nixon's Dig.* (Ed. 1855) p. 273, §§ 4, 6; *Nixon's Dig.* (Ed. 1868) p. 322, §§ 4, 6. They have no reference to the services now under consideration, in the discharge of which the county clerk acts as an auditing officer for the protection of the county. *Shumar v. Applegate*, 51 N. J. Law, 117, 16 Atl. 59. We have found no law allowing any fee for the service of the county clerk under these sections of the criminal procedure act, and therefore we must adjudge the charge to have been illegal. *State v. Kelsey*, 44 N. J. Law, 1, 32. By certifying this fee for himself, as one proper to be paid by the county collector to the person presenting the certified bill, the county clerk made that person his agent to collect the fee for him, and therefore the case is the same as if the county clerk had received it directly from the county treasury. Under the rule laid down in *Demarest v. Inhabitants of New Barbadoes*, 40 N. J. Law, 604, it is now recoverable from him by the county.

The exact nature of the transaction by which the defendant's testator received \$880 from the county collector, as mentioned in the fourth assignment, cannot be learned from the case before us. But as it is incumbent on the plaintiff to show error in the record, and none appears as to this item, we cannot interfere with it. The judgment should be affirmed.

ELLISON et al. v. GRAY.

(Court of Errors and Appeals of New Jersey
June 30, 1897.)

APPEAL—FINAL ORDER—PAROL EVIDENCE.

1. An order of the chancellor on appeal from the determination of the receiver of an insolvent corporation, under the eighty-second section of "An act concerning corporations," is final, and not interlocutory.

2. Written contracts, in the absence of fraud or mistake, cannot be varied by parol testimony. (Syllabus by the Court.)

Appeal from court of chancery.

Rodman Ellison and others appeal from an order of the chancellor affirming the disallowance of their claims by George R. Gray, receiver of the United States Credit-System Company. Affirmed.

E. A. & W. T. Day, for appellants. Howard W. Hayes, for respondent.

DAYTON, J. The receiver of the United States Credit-System Company having disallowed the claim of John B. Ellison & Sons, an appeal was taken to the chancellor, whose order sustaining the determination of the receiver was made January 14, 1896. From this order the appellants filed their petition of appeal, February 1, 1897. The respondent moves to dismiss this appeal, upon the ground that the chancellor's order was in its nature interlocutory, and the appeal was not taken within the 40 days limited by law.

The motion cannot prevail. The order of the chancellor on appeal from the decision of the receiver, as provided for in the eighty-second section of the "Act concerning corporations," is in the nature of a final decree. It has all its attributes and characteristics. The statute conferring the right of appeal from the decision of the receiver primarily clothed it with power to decide manifestly contemplated that the result should be conclusive. It is final in its nature, disposing of the whole merits of the case, leaving nothing for further examination or judgment.

An order which determines the whole controversy between the parties, without reserving anything for further consideration, is a final order. In this case the claim of the appellants was definitely disallowed, and the party thereby dismissed from the case. *Plank-Road Co. v. Elmer*, 9 N. J. Eq. 754, 787; *Central Trust Co. v. Grant Locomotive Works*, 133 U. S. 207, 10 Sup. Ct. 736.

The motion to dismiss the appeal being re-

fused, it remains to consider the case appealed to this court upon its merits.

It seems to be undisputed that Mr. Tissot, of the firm of J. B. Ellison & Sons, the appellants, on November 2, 1893, inquired of Mr. Whittick, the agent of the United States Credit-System Company, whether the failure to pay the premium on that policy before the expiration of the preceding policy, October 30, 1893, would have the effect of depriving the insured of the benefit of the renewal as to losses for goods shipped during the life of the preceding policy, notwithstanding the provision in the renewal certificate that, in order to secure such benefit, the premium must be paid before the expiration of the term of the prior policy. To this inquiry, Mr. Marx, the special agent of the credit company, in the presence of Mr. Whittick, the general agent of the company, said: "It was all right; it would not lessen their protection in the slightest; that the contract would hold just the same as though it had been paid for prior to the expiration of the contract." The contract was then entered into, and a certificate accepted, containing the clause referred to. John B. Ellison & Sons knew of the existence of this limitation clause in their new contract, and nevertheless, relying solely upon the parol assurance of the credit company's agents that it was nugatory or would not be enforced, "that it was all right," accepted the certificate of insurance. It is upon this policy their claim is founded. They are bound by its terms. If they have any means of relief from the hardship imposed upon them, it could only be by a reformation of the contract, and there is no prayer for such action if any could be introduced in these proceedings. The rule of law is well settled in this state that a written contract, in the absence of fraud or mistake, cannot be varied by mere parol testimony. So long as the contract, unmistakable in its meaning, stands unaltered by decree of the court, its effect cannot be changed by parol evidence of a different agreement. *Dewees v. Insurance Co.*, 35 N. J. Law, 366; *Insurance Co. v. Martin*, 40 N. J. Law, 568.

All concur in affirming decree below. On motion to dismiss, vote is as follows: MARGIE, C. J., and COLLINS, DIXON, GARRISON, and BOGERT, JJ., voted "Aye." DEPUE, LIPPINCOTT, LUDLOW, VAN SYCKEL, DAYTON, HENDRICKSON, and NIXON, JJ., voted "No."

HALL v. HOME BLDG. CO. et al.

(Court of Chancery of New Jersey. July 10, 1897.)

MORTGAGE—CONSTRUCTION—PARTIAL PAYMENTS—RELEASES.

1. A clause in a mortgage that a mortgagee shall, "from time to time, and as often as request was made to her or them for that purpose, release from the lien and operation of the said

accompanying indenture of mortgage, for each ninety dollars of principal paid, a lot of land to be selected by the said party obligor, its successors and assigns, containing two thousand square feet of land," does not oblige the mortgagee to accept a payment of less than \$90, or to release a fractional part of 2,000 square feet, or to release lots of an area less or more than 2,000 square feet each, at the rate of \$90 each.

2. The fact that 33 lots out of more than 1,500 were released to the mortgagor for moneys paid, which varied from \$69.74 to \$99.12 per 2,000 square feet of area, does not create an obligation upon the part of the mortgagee to release other lots at the rate of \$90 per 2,000 square feet.

(Syllabus by the Court.)

Bill by Sarah Mickie Hall against the Home Building Company and others. Decree for complainant.

Martin V. Bergen and Geo. J. Bergen, for complainant. John F. Harned, for defendants Elizabeth Heck and Abraham Anderson.

GREY, V. C. This cause came on to be heard on final hearing on bill and the answers of the defendants Elizabeth Heck and Abraham Anderson. The bill is filed to foreclose the bond and mortgage, dated December 8, 1891, made by the Home Building Company, a corporation of New Jersey, one of the defendants, to the complainant, Sarah Mickie Hall, conditioned to secure the payment of \$63,800, "at any time within five years from the date thereof," with interest at $5\frac{1}{2}$ per cent. per annum, payable semiannually, and taxes immediately upon their assessment. The bond and mortgage contains the following proviso: "Provided, however, that during said term of five years the said company obligor, its successors or assigns, might at any time pay, on account of the said principal sum, such sum or sums of money as it or they might desire, provided that the sum of eight thousand dollars, at least, each year, should be paid on account of said principal: And provided, further, that the said obligee, her heirs, executors, administrators, and assigns, should, and they did thereby, agree, from time to time, and as often as request was made to her or them for that purpose, to release from the lien and operation of the said accompanying indenture of mortgage, for each ninety dollars of principal paid, a lot of land to be selected by the said party obligor, its successors and assigns, containing two thousand square feet of land." They also contain a provision that in case default should be made for the space of 30 days in the payment of any installment of interest, or 60 days in the payment of any annual sums of principal, or 90 days in the payment of any taxes after they become due, then the whole principal debt should, at the option of the mortgagee, become due and payable. An answer was filed by the defendant Isaac W. Budd, on which issue was joined; but, on the hearing, no one appeared for this defendant, nor was any evidence offered in his behalf.

The mortgage is a purchase-money mortgage. The mortgaged premises are situate in

the Eighth ward of the city of Camden, and are described from a survey made on October 23, 1891, not quite two months before the execution of the mortgage. In the description in the mortgage the lands are described by their out bounds, with two excepted portions, specifically described, and are stated to contain, without the exceptions, 55.27 acres of land. Nothing in the description of the land in the mortgage indicates that the parties, at the time of making the negotiations, had before them any description or map of a subdivision of the tract into smaller portions. The defendant Abraham Anderson is the present holder of the title to two lots, part of the mortgaged premises, which are designated in his answer as lots Nos. 22 and 23 in section 5 "of said mortgaged premises," and "on said plan," and also of lot No. 36 in section 11 "on said plan." The defendant, in his answer, states that Nos. 22 and 23 on section 5 contain 3,000 square feet, and that, under the terms of the mortgage, he is entitled to a release of those lots on paying to the mortgagee complainant \$138, with interest thereon from December 8, 1893. He also states that lot No. 36 in section 11 contains 1,275 square feet, and he claims that he is entitled to a release of this lot upon paying to the mortgagee complainant \$57.38, with interest thereon up to the time it was paid; that on October 31, 1894, he tendered to the complainant \$145.59, which he asserts is the amount which the complainant was entitled to receive for the release of lots Nos. 22 and 23 in section 5, together with interest to the time of the tender, and that the complainant refused to receive it; and that on the same day he tendered to the complainant the sum of \$60.82, the amount which the complainant was entitled to receive for the release of lot No. 36 in section 11, together with interest to the time of the tender, and the complainant refused to accept it; and that at the same time he presented a release to the complainant discharging these lots from the lien of the mortgage, and requested her to execute it, which she refused to do. He states that he has at all times been ready to pay this money upon the execution of a release, and is still ready to do so, and brings the money into court for that purpose, and upon this ground claims that the above-mentioned lots should be released from the operation of the mortgage. The defendant Elizabeth Heck, who is represented by the same solicitor, states that she has become the owner of lots described in her answer as lots Nos. 51, 52, 53, and 54 in section 5, as laid out on the plan of lots mentioned in the bill of complaint; that lots Nos. 52 and 53 have been released, and that lot No. 51 contains 1,184 square feet; that the defendant Elizabeth Heck is entitled, on paying \$53.50, with interest thereon up to the time the same was tendered, to have a release of lot No. 51 from the lien of the complainant's mortgage, and that on October 31, 1894, she tendered \$56.71, which was the amount com-

plaintant was entitled to receive for the release

of lot No. 51, with interest then due, and that the complainant refused to receive the same; that she had also at that time tendered a release of this lot No. 51, which the complainant refused to execute; and that she has always since been ready to pay the release money, and has brought the same into court for that purpose.

The testimony in the case shows that the Home Building Company consisted of three persons, Moore, Campbell, and Taylor. Campbell was president. Moore was secretary. Taylor was manager. The company was formed for the purpose of improving the property purchased from Mrs. Hall. The manager, Mr. Taylor, was examined as a witness, and produced a "plan of lots, property of the Home Building Company," which is a map of the mortgaged premises, showing subdivisions into town lots, streets, etc. Mr. Frederick Hall, the son of the complainant, was her agent in the conduct of the business, and was a witness on the stand in the trial of this cause. The manager, Mr. Taylor, testifies that the plan was made after the purchase had been completed; that the first draft of it had been submitted to Mr. Hall, and the outline of it was shown to him before it was lithographed. He expressed satisfaction with it, and thought it was all right. The method by which the releases referred to in the bill of complaint were executed was as follows: The building company would build a house on a lot, and, if they mortgaged it or sold it, they would secure it to be released from the blanket mortgage by going to Mr. Hall (who represented his mother, the complainant), and designating, by the lot and number and section on the plan, what portion it was they wanted released. A release would then be presented, corresponding with the number of the lot on the map, and Mr. Hall would be paid, for his mother, the amount of the release money. All of the releases in the description of the lots, parts of the mortgaged premises, which were released from its lien, are designated by number and location, and in description by metes and bounds, as they are described on the map or plan which was made by the Home Building Company; and there seems to be no dispute that this map, made subsequent to the execution and delivery of the mortgage, was the plan used by the parties in the definition of the territorial bounds of the lot released from the lien of the mortgage, so far as any releases were given. The defendants Anderson and Heck are grantees of the mortgagor. The complainant's mortgage was made on December 8, 1891, and received for record on January 5, 1892. The defendant Anderson's grantor received his deed from the mortgagor, February 23, 1893, and the defendant Heck received his on March 30, 1894. Both defendants took their title long after the complainant's mortgage had been received for record.

The defendants claim that, by the interpre-

tation of the release clause in the mortgage itself, they have a right to releases of their several tracts from the lien of the mortgage upon payments to the mortgagor at the rate of \$90 for each 2,000 feet released, whether they contained exactly 2,000 square feet or fractional parts thereof. They also claim that the map produced is a plan of the lots of the mortgaged premises, which has been accepted by the mortgagee as the basis on which the lots were to be released, and that any of the lots there indicated must be released by the mortgagee when payment is made to her at the rate of \$90 per 2,000 feet, whether the lot contains 2,000 feet, or a multiple, or any fractional part thereof. The clause in the mortgage providing for the release of lots declares that the mortgagee shall release, "for each \$90 of principal paid, a lot of land to be selected by the said party obligor, its successors and assigns, containing two thousand square feet of land." The mortgagee by this clause does not agree to release any less quantity than 2,000 square feet, nor any greater quantity than may be contained in additional lots of 2,000 square feet each; nor to accept less than \$90 as a payment. There is no declaration that the land should be released at the rate of \$90 for 2,000 feet, nor that fractional parts less than 2,000 feet shall be released at any price. The clause in the mortgage distinctly declares that there shall be "a lot of land" to be selected, etc., containing 2,000 feet. Each piece to be released must therefore have been a lot containing 2,000 feet, and not a fractional portion of the tract greater or less than 2,000 square feet, to be discharged at the rate of \$90 for 2,000 feet. I cannot interpret the clause as expressed in the mortgage to give a right to the mortgagor and its grantees to secure the release of a smaller portion than 2,000 feet, or any fractional part of 2,000 feet, without violence to the expressed words and manifest meaning of the contract, by thrusting into the agreement (which is perfectly clear in itself) a term not assented to by the mortgagee.

The further claim by the defendants is that the map produced is a plan of the mortgaged premises, which the mortgagee has accepted as a basis for the release of the lots. It does not appear that the map was one prepared with the mortgage for this purpose. Nothing in the mortgage makes any reference to any plan or map, either in existence when the mortgage was made, or then in preparation or contemplation. The parol evidence shows that the map was prepared after the purchase, and, as the mortgage is a purchase-money mortgage, it must have been after the mortgage had been made; and it does not appear that, in making the map, the provision for the release of lots in the mortgage was considered. The lots are not laid out in subdivisions of 2,000 square feet. The mortgage provides only for releases of lots of 2,000 square feet each. An effort was made to show that there was a uniform

proportion in the amounts paid for releases of lots under the map, according with the sum named in the mortgage as necessary to be paid to release 2,000 square feet. This attempt to support the map had no such uniformity as would be required to give it sufficient weight to impose an obligation on the mortgagee. The rate per 2,000 square feet released varies from \$69.74, for the lowest, to \$99.12, for the highest. An attempt was made to obtain an average nearer to \$90, by taking in the superficial area of the alleys; but this rule, while helping in some cases, would hinder in others, and I can see no reason for putting in the area of alleys as a factor, and omitting that of streets. If the latter be done, all possibility of harmony between the sum named in the mortgage and that actually agreed upon in the releases granted is destroyed. More than 1,500 lots are shown on the map. There were only 12 releases given, releasing 33 lots before the scheme was abandoned. None of these were given to the defendants Anderson or Heck. All were given to the mortgagor company. The amounts paid for releases were none of them, when computed, shown to be exactly at the rate of \$90 for 2,000 square feet; and some of them varied so greatly that it was, I think, demonstrated that this rate was not in fact one recognized by the parties as a basis at the time of the giving of the release, and that, where there was an approach to this rate in fixing the sum to be paid for releases of fractional parts, it was a mere coincidence. The testimony of the witness Taylor (one of the officers of the mortgagor company), for the defendants, was that he thought there was, "to the best of his knowledge," an understanding with Mr. Hall (the agent of the mortgagee) that the agreements in the mortgage should be interpreted to apply to the map. No other witness aided this proof. Mr. Taylor testified that the settlements for the releases and payments therefor, by check, were conducted by Mr. Moore (another officer of the mortgagor company), and not by him (Taylor). So it is indicated that, in speaking of his "thought," and "to the best of his knowledge," this witness was drawing an inference, rather than swearing to a fact. On the other hand, Mr. Hall, who actually conducted the release settlements, swears positively that he never saw either the map or an outline of it until after the deed for the property, and the mortgage of it, had been exchanged; that there was no agreement to release by a map to be drawn, and that there was no agreement as to releases outside of that contained in the mortgage; that the releases were arranged with Mr. Moore, as applied for, and there was, on talking it over, an arbitrary amount fixed, not always the same; that they had no way of calculating to find it. In this condition of the proofs, I cannot see any ground upon which to sustain the defendants' claim to a right to a release of their lots from the lien of the complainant's mortgage. The superficial area of lots 22 and 23 in section 5, belonging to the defendant An-

derson, is 3,060 square feet. That of lot 36, section 11, belonging to the same defendant, is 1,275 square feet. The lot No. 51, section 5, belonging to the defendant Heck, contains 1,184 square feet. It is these areas which the defendants insist the complainant is bound to release. None of these areas are within the operation of the release clause in the mortgage, nor has any other obligation to release them been shown to be incumbent upon the complainant.

The defendants also insist that the complainant, by the giving of the releases to the mortgagor company, is estopped to deny the defendants' right to releases. The complainant had the right to release any lot she chose without any agreement. That she released lots for the mortgagor company did not of itself obligate her to release other lots for its grantees. To impose this duty upon her, there must have been some contract. That the provision in the mortgage did not require the complainant to release the defendants' lot has already been shown. No proof has been given showing that the complainant's conduct induced the defendants to buy, in the expectation of a release. There is no evidence that the defendants Anderson and Heck, or either of them, even knew of the releases to the mortgagor company, and purchased their own lots relying on this action of the mortgagee, as an interpretation of the clause of release in the mortgage. Nothing done by the complainant appears to have induced the defendants to change their position. They simply bought their lots subject to the complainant's mortgage. There is no room for the application of the doctrine of estoppel.

The complainant claims that the nonpayment of interest and taxes had caused the principal to become due, before any tender was made in part payment of the principal, under the release clause in the mortgage, and that, while interest remained due and taxes unpaid, the defendants had no right to insist upon a payment on account of the principal. The efficiency of the defendants' tender of the release money claimed to be sufficient, and its amount, and proper payment into court, are also denied by the complainant. I do not think it necessary to determine these questions, as, in my opinion, the defendants have failed to show their right upon any ground to the releases demanded. I will advise a decree in accordance with the prayer of the complainant's bill, without releasing the defendants' lots. The order of sale of the different lots must preserve the equitable rights of the purchasers from the mortgagor company and their grantees.

SNYDER v. DWELLING HOUSE INS. CO.

(Court of Errors and Appeals of New Jersey.
July 5, 1897.)

INSURANCE—PROOF OF LOSS—WAIVER BY AGENT
—EVIDENCE—CONDITIONS.

1. A stipulation that no agent of the insurer shall have power to waive "any provision or con-

dition" of the policy does not apply to a requirement that proofs of loss must be furnished within a specified time.

2. Such requirement may be waived by a local agent, authorized to fill up blank policies, deliver them to applicants, collect premiums, and forward same to the company, less his commissions.

3. The participation of the agent in the adjustment, and his statement to the insured that the latter need do nothing further till he hears from the company, is evidence of such waiver.

4. A provision that a policy shall be void if there be kept on the premises "petroleum or any of its products of equal or greater inflammability than kerosene oil of legal standard (which last may be used for lights only, provided the oil be drawn, and the lamps be trimmed and filled, solely by daylight)" does not prohibit the use of kerosene in an oil cook stove.

Gummere and Dayton, JJ., dissent.

Error to supreme court.

Action by Frank R. Snyder against the Dwelling House Insurance Company. A judgment for plaintiff was reversed by the supreme court (34 Atl. 931), and plaintiff brings error. Reversed.

Frank P. McDermott, for plaintiff in error.
C. & R. W. Parker, for defendant in error.

DEPUE, J. This was an action on a policy of insurance against loss by fire, dated August 27, 1892. The suit was tried in the court of common pleas of Monmouth county, and resulted in a verdict for the plaintiff. The property insured was a dwelling house situate at Freehold. The fire occurred August 9, 1894. Notice of the loss was promptly given, and was received by the company August 11th. The policy requires proof of loss, containing a statement setting out several particulars, and sworn to, to be rendered to the company within 30 days after the fire. Near the end of the policy is a clause that no suit or action on the policy shall be sustainable unless the insured shall have fully complied with all the requirements of the policy. The policy concludes as follows: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions, if any, as properly are or shall be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy." Proof of loss such as required by the policy was not furnished until the latter part of October, which was after the expiration of the 30 days after the fire. To justify the failure to furnish proofs of loss in season, the plaintiff relied upon a waiver by agents of the company. The facts relied on for that purpose are these: Lockwood, the local agent of the company at Freehold, gave the company notice of the loss by a letter dated August 9th, saying also that the Phoenix Company had a policy of \$1,000 on the household furniture. On the 13th or 14th of August, Nichols, a special agent of the company, came to Freehold. Nichols testified that he came there as the company's special agent, solely for the purpose of ascertaining the amount of the loss

or damage. When Nichols arrived at Freehold, Mr. Walsh, an adjuster representing the Phoenix Company, was there. Lockwood testified that Mr. Nichols said to him, in the presence of the plaintiff, "Lockwood, I have arranged with Mr. Walsh to adjust the loss, and I can go on to Philadelphia and save time;" that he, Walsh, and the plaintiff then adjusted the loss at \$1,100, and the plaintiff signed a paper agreeing to accept that sum from the defendant company. Lockwood further testified that he at that time asked the plaintiff if he had the specifications of the loss; that plaintiff said he did not have them then, but the company could have them at almost any time they desired; that he (Lockwood) then said to the plaintiff he would wait to see what the company required further. The plaintiff testified that Lockwood, after the paper was signed, told him that he had nothing further to do until he heard from the company in regard to the insurance. The force of this testimony arises from the fact that Lockwood participated in the adjustment of the loss, and advised the plaintiff that he had nothing further to do until he heard from the company. The plaintiff received no information from the company on the subject until, by a letter dated October 11th, signed by the assistant secretary, he was notified that the company disavowed liability upon the policy, for the reason, among other reasons, that proofs of loss had not been given to the company within 30 days. Lockwood testified that he was the resident representative of the company at Freehold, and had charge of issuing policies; that the way policies were issued by him was that the policies were sent to him signed, and in blank; that he was to fill up the policies, to issue insurance, either fire, lightning, or tornado, sign them, and deliver them to the insured, collect the premiums, and forward the premiums, less his commissions, to the company. If the presentation of proofs of loss was capable of being waived otherwise than by agreement indorsed upon the policy, in compliance with its terms, Lockwood's agency was such that the waiver might be made by him, and his acts and assurances were such as were competent evidence of a waiver. The trial judge gave the instruction to the jury that proofs of loss might be waived by the company by acts and declarations which led the insured to believe that it would not insist upon such a requirement, and that an agent "intrusted with policies of insurance in blank, and authorized to issue them upon the application of parties seeking insurance, is thereby clothed with apparent authority to bind the company in reference to any condition of the contract, whether precedent or subsequent, and may waive notice of proofs of loss, and may bind the company by his admissions in respect thereto." With these instructions, the questions of fact arising from the evidence were left to the jury. These instructions were in conformity with the principle adjudged in *Carson v. Insurance Co.*, 43

N. J. Law, 300. Upon these instructions, the supreme court reversed the judgment. In the *Carson Case* the language of the policy was that "no agent of this company is authorized in any respect to change the terms and conditions of this policy, and they shall be neither changed nor waived except in writing, signed by the president or secretary of the company." The principle adjudged in that case was that such a stipulation applies only to those conditions and provisions in the policy which relate to the formation and continuance of the contract of insurance, and are essential to the binding force of the contract while it is running, and does not apply to those conditions which are to be performed after the loss has occurred, in order to enable the assured to sue upon his contract; and hence that, after the loss has happened, conditions in the policy with respect to notice of loss and preliminary proofs may be waived by parol, though the policy contain such a stipulation as is above referred to. In the supreme court the learned judge who prepared the opinion distinguishes this case from the *Carson Case* in the fact that in this policy the phrase is, "any provision or condition of the policy," whereas in the other case the language was, "terms and conditions of insurance." We think this distinction without substance. The word "provision" is a word in common use to express the terms, stipulations, and conditions in deeds, contracts, statutes, and constitutions. "In law," the word provision "is a stipulation; a rule provided; a distinct clause in an instrument or statute; a rule or principle to be referred to for guidance, as the provisions of law, the provisions of the constitution," etc. Cent. Dict. "Provisions." Substantially the same definition is given in Webster's Dictionary and in the Encyclopædic Dictionary. "Proviso," when used, always implies a condition, unless subsequent words change it to a covenant. 2 Bouv. Law Dict. 399, "Proviso." The word "provision," in this paragraph, is meaningless if not synonymous with terms and conditions contained in the body of the policy, unless it be limited to provisions indorsed upon the policy set out in the preceding member of the sentence. We think the instruction of the trial court on this head was correct, and that the reversing judgment of the supreme court should be reversed.

Another assignment of error appears in the record which was not considered in the supreme court. There was a kerosene oil stove in the shed which was on the premises. The oil stove was used for cooking. The fire broke out in close proximity to the stove. The lamp in the stove was then burning, but the fire was not caused by an explosion. The policy contains a provision that it should be void if "there be kept, used, or allowed on the above-described premises naphtha or petroleum or any of its products of equal or greater inflammability than kerosene oil of legal standard [which last may be used for lights only, provided the oil be drawn, and

the lamps be trimmed and filled, solely by daylight.]” The only legal standard for petroleum or any of its products is that specified by the act of 1883. That act provides that “only such products of petroleum as will not flash at a less temperature or flash test than one hundred degrees Fahrenheit may be sold for lighting or illuminating purposes, except when the same is to be used in street lamps or open air receptacles or in gas machines, in which case (as to petroleum or kerosene) there shall be plainly marked on the barrel, can or vessel in which the same is sold, etc., the words ‘Not for inside lights.’” 2 Gen. St. p. 2454. No standard is prescribed by this statute except for lighting or illuminating purposes,—“inside lights.” In fact, the kerosene oil used in the kerosene stove was of the standard of 150 degrees Fahrenheit, flash test, which is above the standard mentioned in the statute. The contention is that the policy, by force of the above provision, was avoided by the use of kerosene otherwise than in lamps for illuminating purposes. The result of this contention depends upon the construction and effect of the clause of the policy above set out. It is a settled rule, in the construction of contracts of insurance, that policies of insurance will be liberally construed to uphold the contract, and conditions contained in them which create forfeitures will be construed most strongly against the insurer, and will never be extended beyond the strict words of the policy. *Carson v. Insurance Co.*, supra. In *Stone’s Adm’rs v. Casualty Co.*, 34 N. J. Law, 371-375, Chief Justice Beasley said: “A qualification of the agreement so restrictive of the rights of the party insured ought not to be admitted unless the terms of the indorsement will bear no other rational interpretation. If the terms used are imperfect, it is the fault of the defendants. It is their contract, and the construction of it must be most strongly against them.” The principal member of this clause, “if there be kept, used, or allowed on the above-described premises * * * petroleum or any of its products of equal or greater inflammability than kerosene oil of legal standard,” is not broken by the use made of kerosene in this instance. The defense rests upon the other member of the sentence, which is inclosed in brackets, viz. “which last”—i. e., kerosene oil of legal standard—“may be used for lights only, provided the oil be drawn, and the lamps be trimmed and filled, solely by daylight.” This member of the sentence imports a regulation of the use of kerosene oil when used for lighting purposes, and the words used are capable of a construction which would give to it no other effect. If the insurer intended to prohibit the use of kerosene for any other purpose than for lights, it would have been easy to so express the prohibition in its policies. Policies of insurance against fire are taken out by all classes of persons, educated and uneducated, and no rule of law is more

salutary than that conditions in these instruments, expressed in terms ambiguous and capable of misleading, shall not be allowed to avoid the contract. The member of the sentence within the brackets, to say the least, is confusing and ambiguous when taken in connection with the words which precede it, and should not be allowed to make void this policy under the circumstances of this case. The judgment of the supreme court should be reversed, and the judgment of the common pleas restored.

GUMMERE and DAYTON, JJ., dissent.

STATE (SHARP, Prosecutrix) v. FROELICH, Collector.

(Supreme Court of New Jersey. June 3, 1897.)

SCHOOL DISTRICTS—CONSOLIDATION—BONDS—TAXATION—DISTRICT CLERK.

1. Where two school districts, one of which had issued bonds, were consolidated under Gen. St. p. 3055, property in what was formerly the district that did not issue the bonds was not subject to a tax for their payment.

2. There is no statute authorizing an order signed alone by a district clerk for levying a tax to meet original bonds issued by a school district not having a special charter.

Certiorari by the state, on the prosecution of Sarah F. Sharp, against Herman Froehlich, collector of Union township, to review an assessment of taxes. Such assessment was set aside in part.

Argued February term, 1897, before GARRISON and GUMMERE, JJ.

Adison Ely, for prosecutrix.

PER CURIAM. By the school law of May 25, 1894 (3 Gen. St. p. 3055), the school districts No. 38 and No. 39, into which the township of Union, Bergen county, had been divided, became one school district. In 1895 the voters of this district ordered \$3,000 to be raised for school purposes, but the assessor of the township levied a school tax amounting to \$4,550. The prosecutrix, by this writ of certiorari, seeks to set aside so much of the tax assessed against her as was levied to raise the excess, \$1,550. The excess was levied to meet school bonds issued by the former district No. 39 in the year 1893, and the first ground on which the collector defends the tax is that in 1893 the voters of that district ordered such a sum to be raised. But the property of the prosecutrix is in what was formerly district No. 38, and manifestly the voters of district No. 39 in the year 1893 could not legalize a tax on the property in district No. 38, to be levied in the year 1895. The next support for the tax is sought in an order signed by the clerk of the district in 1895, directing the assessor to levy this sum to meet the bonds mentioned, which, it is insisted, had become debts of the consolidated district under said law of May 25, 1894. But we cannot find any legislation to sustain such an or-

der. The statutes most nearly applicable seem to be section 20, p. 3060, section 4, p. 3066, section 2, p. 3080, and section 3, p. 3088, of the General Statutes. None of these laws, however, purports to sanction an order or warrant, signed by a district clerk alone, for levying a tax to meet original (not renewal) bonds issued by a school district not having a special charter. And the bonds in question were of this character. So much of the school tax, being $\frac{1550}{4650}$ thereof, must therefore be set aside. According to the acts of March 26, 1852 (3 Gen. St. p. 3390), and March 23, 1881 (3 Gen. St. p. 3404), the residue of the tax must stand. The prosecutrix should not recover costs against the defendant.

COLES et al. v. COLES et al.

(Court of Chancery of New Jersey. June 28, 1897.)

WILLS — CONSTRUCTION — NATURE OF ESTATE DEVISED.

1. A devise of the "real estate" derived by testatrix from her deceased son does not include land purchased by her at foreclosure of mortgages bequeathed to her by the son.

2. A devise of testatrix's "unimproved" real estate passes land leased by her to tenants who built thereon under such circumstances that the buildings remained their personal property.

Bill by George Coles and others, executors of Elizabeth V. Coles, deceased, against Charles F. Coles and others, to quiet title.

Edwin B. Williamson, for complainants.
William C. Cudlipp and Oscar Keen, for defendants.

STEVENS, V. C. This is a bill to quiet title to land in Jersey City. The title depends upon the proper construction to be given to that clause of the will of Mrs. Elizabeth V. Coles by which she specifically devises "so much of my real estate situate in Jersey City, derived by me from my son William F. Coles, lately deceased, as, at my decease, shall remain unsold, and shall not then be improved by dwelling houses or other buildings." Two questions have arisen under this clause. The first is this: Mrs. Coles became entitled under her son's will (she having survived him) to certain mortgages upon real estate. These she foreclosed, and at the foreclosure sale she bought in the land mortgaged. The defendants' contention is that this is a part of the real estate which she derived from her son, the argument being that, as owner of the mortgage, she took a conditional fee derived from her son, which continued to be vested in her until the foreclosure sale, when it became, by her act of purchasing, an absolute, unconditional one. This contention appears to me to be untenable. What Mrs. Coles derived from her son was a real security for money. This security would, in case of intestacy, pass to the personal representative as personal estate, and not to the heir at law as real estate. But

the devise is specifically limited to real estate. To cite cases at this day going to show that the status of Mrs. Coles as mortgagee does not, according to the course of decision in this state, constitute her the owner of the land mortgaged, except in the very limited sense pointed out by the late chief justice in *Wade v. Miller*, 32 N. J. Law, 296, would seem to be unnecessary.

The second question is one which, at least at first blush, would appear more doubtful. It arises in this wise: The husband of testatrix was the owner of a large amount of real estate in Jersey City. By his will, proved in 1865, he gave testatrix (speaking generally) the income of one-half of his estate for her life. He gave the residue of his estate to his son William. William died in 1881, having devised and bequeathed all his property to his mother. The devised property may be classified as follows: (1) Real estate which had been improved by William or his predecessors in the title; (2) real estate altogether unimproved; and (3) real estate peculiarly situated, in that, having been leased while unimproved, it had been built upon by the lessees, under such circumstances of agreement or consent that it was conceded by both sides on the argument that as between landlord and tenant these improvements were personal property. It is only in relation to this last class that any controversy has arisen. It is contended by complainants' counsel that these lands were, in fact, "improved by dwelling houses or other buildings," and consequently did not pass under the clause of the will now under consideration; while, on the other hand, it is contended by defendants' counsel that, as to the testatrix, these lands were unimproved, and therefore did pass. It appears to me that this latter contention is the more reasonable. It is conceded that, so far as the legal right of the testatrix extended, the lands were unimproved. She had no more title to the houses of her tenants, merely because they stood upon her land, than she would have had to their horses and carriages. *Pope v. Skinkle*, 45 N. J. Law, 41. And not only was there no annexation in law, but the two things thus temporarily united were, in legal contemplation, different species of property; the one being real property, and the other personal. The testatrix was receiving a ground rent for the land. For the buildings on the land she was getting nothing, and had no interest in them. In her will she gives her improved land to one class of persons, her unimproved to another. Is it not reasonable to suppose that in so giving her unimproved real estate she was giving it from the standpoint of her own legal right, rather than from that of a stranger? As to her, it was unimproved. It is true that a stranger knowing nothing of the facts would, on looking at the property, assert that it was improved real estate; but this assertion would be based upon want of knowledge, or, to speak more accurately, upon a contemplation of the property as one undivided whole,

—as being nothing but land. With knowledge of all the facts, he would admit that, in so far as it was real property, it was unimproved. Counsel contended that in making her classification she meant to distinguish, not between property which, as to her, was improved, and property which, as to her, was unimproved, but between property which was productive and property which was nonproductive. But testatrix has failed to suggest any such distinguishing test by the words she has used. It appears from the testimony of George Coles that testatrix did, in fact, in her lifetime, derive rent from a vacant lot. Any argument which would go to exclude such a lot, if rented at her decease, and then unimproved, from the scope of the devise, would necessarily be fallacious. I think, therefore, the lots in controversy on this branch of the case belong to the devisees named in the first clause of Mrs. Coles' will.

MAYOR, ETC., OF JERSEY CITY v. TALLMAN.

(Court of Errors and Appeals of New Jersey.
July 1, 1897.)

APPEAL—REVIEW OF FACTS.

Findings of fact by the court trying a case without a jury are not reviewable on error to the court of errors and appeals.

Dixon, J., dissenting.

Error to supreme court.

Action by William D. Tallman against the mayor and aldermen of Jersey City. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Spencer Weart, John A. Blair, and William D. Edwards, for plaintiffs in error. Allan L. McDermott, for defendant in error.

PER CURIAM. The record shows that the issue in this cause was tried before a judge without a jury, and the bills of exception show that upon the trial the judge found the following facts, viz.: That the city, by its lawfully authorized agents, employed Tallman as supervising inspector of a city hall then to be erected, at a salary of five dollars per day, to commence when the work upon the building should have been started; that T. accepted the employment; that the city's agents afterwards directed him to report for duty, which he did; that, during the period covered by the declaration, he performed services for the city, and such services as were required of him as such inspector. Upon these facts, the conclusion of the judge was that T. was entitled to recover five dollars per day for every day during the period covered by the claim (except Sundays and holidays), and, upon a postea expressing that conclusion, judgment was entered, to remove which this writ of error was brought.

The bills of exception on which error is assigned all challenge the correctness of the

judge's findings of fact, except one, which objects to the conclusion upon the facts found. On a trial by a judge, without jury, it is his province to settle the facts according to his views of the evidence. *Kalbfleisch v. Oil Co.*, 43 N. J. Law, 259. His findings of fact are not reviewable on error. It is only where the facts found do not support the conclusion that the judgment can be disturbed on error. *Bridge Co. v. Geisse*, 38 N. J. Law, 39, 580; *City of Elizabeth v. Hill*, 39 N. J. Law, 555; *Blackford v. Gaslight Co.*, 43 N. J. Law, 439. Upon the facts found, the conclusion reached is supported, and no reviewable error appears. Let the judgment be affirmed.

DIXON, J., dissenting.

WEINBURGH et al. v. UNION STREET-RAILWAY ADVERTISING CO. et al.

(Court of Chancery of New Jersey. July 1, 1897.)

CORPORATIONS—STOCKHOLDERS' MEETING—MAJORITY VOTE.

1. Where stockholders at a special meeting did not object to it as irregularly called, but in a protest filed assumed its regularity, and the restraining order which they sought to procure was against a regularly called meeting, any objections to the regularity were waived.

2. The by-laws of a corporation provided that at special meetings of the stockholders the corporation act of 1896 should apply as to the casting of all votes. The only provision of the corporation act relating to the casting of votes is the thirty-sixth section, authorizing votes by shares at elections of the directors. *Held*, that the voting at a special meeting must be by shares, and a provision in the by-laws relating to amendments thereof, requiring the affirmative vote of a majority of the stockholders at a special meeting, means the majority in interest.

3. Under such by-laws as to special meetings, and a by-law providing that at annual meetings the right to vote should be determined as provided by statute, the rule of voting by shares should be the rule as to casting of votes for all purposes.

Bill by Henry Weinburgh and others against the Union Street-Railway Advertising Company and others. On application for preliminary injunction. Heard on bill and affidavits and answers and affidavits. Application for injunction denied.

William R. Barricklo and Mr. Horwitz, for complainants. C. D. Thompson and Mr. Marshall, for defendants.

EMERY, V. C. The bill in this case is filed by three of the six stockholders of the Union Street-Railway Advertising Company against the company and the other three stockholders, who are also three of the four directors of the company; the fourth director being Henry Weinburgh, one of the complainants. The main object of the bill is to enjoin the defendant directors and the company from acting under certain amendments to the by-laws of the company, which were adopted solely by the vote of the three defendant stockholders. One

of the by-laws so adopted confers, or purports to confer, upon the directors of the company increased power of removal of officers of the company, and the other confers upon the president alone powers which are now exercised by him under the supervision or control of the directors. I think there can be no question but that the by-laws in question do regulate the internal affairs and management of the company in such important particulars that, unless they have been legally adopted, the complainants, as stockholders, are entitled to the aid of this court in preventing action under cover of their authority. The jurisdiction of the court for this purpose was not questioned at the argument, the contention of the defendants being that the amendments to the by-laws were lawfully adopted. The disputed amendments to the by-laws were adopted on May 24th, at a meeting of the stockholders, at which the three individual defendants were present and voting for them, being holders of shares as follows: Michael Weinburgh, 666 shares; Robert M. Burnett, 665 shares; Asa W. Dickinson, 1 share,—being 1,332 shares out of a total of 2,000 shares. This is the statement of the vote as given in the answers, although it would seem by other statements in the pleadings that Michael Weinburgh is the owner on record of 732 shares. The complainants are each owners of record of 200 shares (600 in all), and there are no other stockholders than the complainants and individual defendants. The meeting of the stockholders to consider the proposed amendments to the by-laws was a special meeting originally called for May 15, 1897, and at this meeting the complainants were all present in person, and were attended also by their counsel. At this meeting no objection was made by either of the complainants or by their counsel that the special meeting had not been properly called. They presented a protest in writing against the consideration of the proposed amendments, on the ground that they were contrary to law, and interfered with the vested rights of the complainant Henry Weinburgh, who was and is treasurer of the company. A bill had been filed by the present complainants against the present individual defendants (the company not being a party) to restrain the removal of Henry Weinburgh from his office as treasurer, and from passing on the proposed by-laws, to accomplish that purpose; and pending the hearing of an application for preliminary injunction, action on the proposed by-laws was restrained except to adjourn the meeting, which was duly adjourned to May 24th. The restraining order was discharged on the hearing, and the proposed amendments to the by-laws were adopted at the adjourned meeting of May 24, 1897, by the vote above mentioned, none of the complainants being present at the adjourned meeting. The validity of these amendments to the by-laws was attacked at the hearing on three grounds: First, because the special meeting was illegally called; second, because the quo-

rum required by the by-laws for special meetings was not present at the meeting of May 24th, when the amendments were adopted; third, because under the existing by-laws of the company, as is claimed by complainants, an amendment to the by-laws can be made only by the affirmative vote of a majority in number of the stockholders, and cannot be made by a majority in interest. The second ground of objection was not set up in the bill, but was relied on at the hearing.

As to the first objection,—that the special meeting was not regularly or legally called,—the affidavits in reply to the bill show that the requirements of the by-laws in this particular were followed, and in view of the failure of the complainants at the special meeting of May 15th to object to the meeting as irregularly called, and in view also of their protest, which assumed a regularly called meeting, and of the restraining order which they procured as against a regularly called meeting, the objection cannot be considered as affording a ground for preliminary injunction in the present case, even if the irregularity of the meeting was conceded. Under these circumstances, objection to the regularity of the call for the meeting should, for the purposes of the present application, be considered as a matter of form which has been waived by the complainants, and the only objections urged by the bill which I shall consider are the other objections which go to the merits of the case. The claim of the complainants is that under the by-laws in force at the time of the special meeting of May 24th a majority in number of the stockholders of record was necessary to constitute a quorum at the special meeting, and also that by the by-laws an amendment thereto can only be adopted by the affirmative vote of a majority in number of these stockholders. If either of these claims be well founded, the by-laws in question have not been legally adopted, and action under them should be enjoined. The company was incorporated under the general law in 1894, and the provisions relating to amendments and quorums in its by-laws as originally adopted provided (article 13): "These by-laws may be altered or amended at any regular meeting of the stockholders upon the affirmative vote of three-fourths in interest of the stockholders, and at any special meeting of the stockholders, upon the same vote," etc. By these original by-laws, also, it was provided (article 1, § 2) that "seventy-five per cent. in interest of the stockholders present, either in person or by proxy, shall constitute a quorum for the transaction of business at all meetings of stockholders." Article 8 of these original by-laws also provides that "at all meetings of this company each share of stock shall be entitled to one vote either by proxy or in person." By the Revised Corporation Act of 1875, § 21 (Revision, p. 181), it was provided that every company might determine by its by-laws "what number of shares shall en-

title the stockholders to one or more votes, what number of stockholders shall attend, either in person or by proxy, or what number of shares or amount of interest shall be represented at any meeting in order to constitute a quorum, and if the quorum shall not be so determined by the company, a majority of the stockholders in interest represented, either in person or by proxy, shall constitute a quorum." By an act of March 9, 1891 (P. L. 115), the section was amended and re-enacted with the insertion of a proviso "that in no case shall more than a majority of shares or amount of interest be required to be represented at any meeting in order to constitute a quorum." The by-laws of the company, as originally adopted, violated this proviso, which was then in force, by requiring seventy-five per cent. in interest of the stockholders to constitute a quorum. The by-laws were afterwards amended in March, 1897, and the original by-laws as to a quorum were changed so as to provide (article 1, § 2) that "at all meetings of stockholders there shall be present either in person or by proxy, stockholders owning a majority of the capital stock of the corporation, in order to constitute a quorum"; and also (article 1, § 3), as to special meetings, "and a majority of all the stockholders of record shall alone constitute a quorum at each special meeting." As to the manner of voting, the by-laws of 1897 provided as follows (article 1, § 2): "Voting by proxy shall be allowed at all meetings of the stockholders of this company." Section 8: "At all meetings of stockholders, all questions, except the question of an amendment to the by-laws and the election of directors, and all such other questions, the manner of deciding which is specially regulated by statute shall be determined by a majority vote of the stockholders present in person or by proxy, provided a quorum, as hereinbefore provided for, be present and voting. At such meetings any qualified voter may demand a stock vote, and in that case, such stock vote shall be immediately taken and each stockholder of record, present in person or by proxy shall be entitled to one vote for each share of stock owned by him. All voting shall be *viva voce*, except that the stock vote shall be by ballot, each ballot stating the name of the stockholder voting, and the number of shares owned by him, and in addition, if such ballot be cast by proxy, it shall also state the name of such proxy." Section 9: "At special meetings of stockholders, the provisions of the act of the legislature entitled 'The Corporation Act of the State of New Jersey,' passed in 1896, shall apply to the casting of all votes." The provision as to the amendment of the by-laws, adopted in March, 1897, and in force when the amendments now in question were adopted, was as follows (article 7): "These by-laws may be altered or amended at any regular meeting of the stockholders upon the affirmative vote of a majority of the stockhold-

ers, and at a special meeting of the stockholders upon the same vote (provided notice be given)," etc.

The whole dispute between the parties on this branch of the case relates to the construction of the words "majority of the stockholders," as used in this by-law, relating to amendments, and whether this means, as claimed by complainants, the majority in number of the stockholders or the majority in interest. It is insisted by complainants that the words "majority of stockholders," in their plain, clear, ordinary meaning, refer only to a majority of stockholders as persons, and that the question has been settled by the adjudication in reference to these words, as used in a statute regulating voting, by the case of *Taylor v. Griswold* (1834) 14 N. J. Law, 232. The charter considered in *Taylor v. Griswold* was that of a company organized to build bridges across the Passaic and Hackensack rivers, and to exercise franchises considered by the court to be of a public character, requiring the discharge of a personal duty imposed on the members of the corporation, which could not, under the act, be discharged by proxy. There were no provisions in the act either for voting by proxy or for the casting of more votes than one by any stockholder. The court held that at common law, and independent of statute, the members of a corporation were each entitled to one vote, and no more, and that the provisions of the charter not only failed to allow one vote for each share, but its various provisions, which were cited (pages 238, 239), indicated clearly that the election of directors "by a majority of the stockholders" meant a majority in number of the stockholders, and not the majority in interest, or the holders of a majority of the stock. Taken in connection with the general object of the charter and its other provisions, the court held that in this statute election by a majority of stockholders could not mean election by the holders of a majority of the stock. But this construction of words, as used in this charter, cannot be considered as conclusive upon the question of the construction of the same words used by these stockholders in this by-law. The ruling of the court in that case is not, I think, to be considered an adjudication that the words "majority of stockholders" cannot, under any circumstances, be construed to mean a majority in interest of the stockholders; and the real question here is whether in the present by-law the words now in question, read in connection with the statutes relating to corporations, and with the other portions of the by-laws, meant a majority in number or a majority in interest of the stockholders. And in the construction of the whole by-laws I think weight should also be given to the common, if not universal, practice of allowing voting by shares in private business corporations, which has obtained in this state since the statute of March 11, 1841 (P. L. 116), and also obtains generally throughout the United States. This common knowledge and practice is the basis, I think, from which the or-

ordinary stockholder of a private business corporation adopting by-laws referring to a majority of stockholders would to some extent be inclined to consider the meaning of the words as used in a by-law presented for adoption, and it cannot justly be laid out of view, in considering the construction of a particular by-law, viewed in the scope of the entire by-laws adopted. Late cases in the courts of other states seem to hold that the natural and ordinary meaning of the words "majority of stockholders," without other qualifications, even in a statute, indicates a majority in interest, and not in number. *Fredericks v. Canal Co.* (1865) 109 Pa. St. 50, 2 Atl. 48.

But, whatever might be held to be the proper construction of the words standing alone, my view is that if, upon the construction of the whole by-laws, it appears that the words were intended to be used as meaning a majority in interest of the stockholders, and not a majority in number, this construction of the words should be enforced. And upon the whole by-laws my opinion is that the words were used as meaning a majority in interest of the stockholders, and that this construction of the words not only in this provision as to amendment of by-laws, but also in the provision as to quorum, is the only construction which will allow all of the provisions of the by-laws to become effective. Article 1, § 9, provides that at all meetings of stockholders the provisions of the corporation act of 1896 shall apply to the casting of all votes. The only provision of the corporation act relating to the casting of votes is the thirty-sixth section, authorizing the votes by shares at the election for the directors, "unless otherwise provided in the charter certificate or by-laws of the corporation." I think that the sole object of this by-law (article 1, § 9) was to refer to that portion of this section 36 which regulated the casting of votes by shares, and that this reference was made for the purpose of applying this same rule, expressly declared in the statute, to the casting of votes at special meetings. As to the annual meetings the by-laws had already provided (article 1, § 4) that the right of any stockholder to vote shall be governed and determined as prescribed in an act concerning corporations of the state of New Jersey. If this construction of the object and effect of article 1, § 9, is correct, then the voting at special meetings must be by shares, and the provision in the by-laws relating to amendments, requiring the affirmative vote of a majority of the stockholders at a special meeting, must mean the majority in interest. The by-law relating to amendments allowed the amendment by the same vote at regular and special meetings, and I think it appears from the fair and reasonable interpretation of these by-laws relating to the casting of the votes that at both the annual meeting (which was the only regular meeting of the stockholders) and at the special meetings the rule of voting by shares which was adopted in the statute as to the election of directors should be the rule as to the casting of

votes for all purposes, with the provision that, except in the cases of amendment to by-laws and election of directors, the first vote should be a show of hands, or majority in number, which should be final, unless a stock vote was demanded. As to the amendment to by-laws and election of directors, it seems to have been assumed in article 1, § 8, of the by-laws, that both of these matters were expressly regulated by statute, as governed by the same rule of voting by shares only, and therefore a preliminary vote by show of hands was not lawful. I can see no indication in any portion of these by-laws of any intention to control the powers given in the by-laws to the majority in interest by giving to the simple majority in number the control of the amendment of the by-laws, and I therefore hold that the words were used here as meaning the majority in interest of the stockholders. It is my view, also, that in the provision that "majority of all the stockholders of record shall alone constitute a quorum at a special meeting" the "majority" referred to is also a majority in interest; otherwise the provision is repugnant to the provision of article 1, § 2, that "at all meetings of the company there shall be present stockholders owning a majority of the stock in order to constitute a quorum." And it is also in violation of the act of 1891 (Corporation Act, § 21) providing that "in no case shall more than a majority of the shares or amount of interest be required at any meeting to constitute a quorum." This proviso as enacted repeals or qualifies to that extent the section as it previously stood, authorizing the company to determine what number of stockholders shall attend either in person or by proxy to constitute a quorum. I cannot adopt the construction of this act of 1891 insisted on by complainants,—that after the passage of this amendment it was within the power of the company to provide that a quorum at any meeting must consist only of the majority in number of the stockholders. No more stockholders, in my view, could be required to be present in order to constitute a quorum than the owners of a majority of the stock. Adopting the above construction of these words "majority of stockholders," the by-laws are consistent and effective throughout, and they also harmonize with the provisions of the statute. And, taking into consideration also the general and recognized understanding as to the control of private business corporations by the majority in interest rather than the majority in number of the stockholders, and the injurious results of committing to the control of a minority of stockholders the regulation of its affairs in matters usually controlled by a majority unless the by-laws clearly give such control, the construction I have adopted seems to me to be the reasonable construction, in the absence of anything indicating that in adopting these words the stockholders clearly had in view the majority in number as distinct from the majority in interest of the stockholders. I hold, therefore, that these by-laws have been legally

adopted, and, this question being the only question presented on the hearing, the application for injunction is refused, and the rule discharged. The bill prayed an injunction against the removal of the complainant Henry Weinburgh as treasurer, but, in view of the decision in the previous suit, which was handed down after the present bill was drawn, this application was not urged. Costs on this application will abide the final decree.

WOOD v. WATSON.

(Supreme Court of Rhode Island. July 27, 1897.)

ATTACHMENT—CONTINGENT INTEREST—DISSOLUTION—NEW TRIAL.

1. Plaintiff having recovered judgment for the full amount of his claims and costs, it is not necessary to grant a new trial because of the erroneous dissolution of his attachment; but the case will be remitted to the district court to reverse its order of dissolution, as of the time of the making thereof.

2. A contingent interest in real estate is within Gen. Laws, c. 253, § 10, allowing attachment of "real estate, or the right, title, and interest of any defendant therein."

3. The only authority for dissolving an attachment on real estate is under Gen. Laws, c. 253, § 10, allowing the court to which the writ is returnable, in case the damages laid therein are excessive, or the property attached greatly exceeds in value such damages, to release a portion of the property.

Action by Delos C. Wood, administrator, against Irving Watson. Plaintiff petitions for new trial, because of dissolution of an attachment. Case remitted to district court.

Fred. C. Olney, for plaintiff. C. J. Arms, for defendant.

TILLINGHAST, J. The record in this case shows that on February 15, 1897, the plaintiff recovered a judgment by default, in the district court of the Second judicial district, for the sum of \$201.34, debt, and costs of suit, taxed at \$13. He now petitions for a new trial, on the ground that the said court erred in granting the defendant's motion to dissolve the attachment, which the plaintiff caused to be made of defendant's contingent interest in certain real estate.

As the plaintiff has already obtained a judgment for the full amount of his claim and costs, there is no occasion for granting a new trial. We think, however, that the district court erred in ordering the attachment dissolved. If a contingent, executory, or future interest in real estate may be disposed of by legal conveyance or will, as provided in Gen. Laws R. I. c. 201, § 23 (see, also, 2 Washb. Real Prop. [5th Ed.] 611, and cases in note), we see no reason why such an interest may not be legally attached, the general rule being that the attaching creditor acquires the same rights over the thing at-

tached as his debtor had, so far, at any rate, as to enable him to satisfy therefrom the judgment that he shall obtain. Moreover, Gen. Laws R. I. c. 253, § 10, expressly recognizes the right of a plaintiff to attach "real estate, or the right, title, and interest of any defendant therein"; and this language is clearly broad enough to include a contingent interest in real estate. We think, therefore, that the action of the district court in ordering the attachment dissolved was without jurisdiction, and void; and that the plaintiff's rights under the attachment remain precisely as they were before said order was entered. In order, however, that the error of said court may be properly corrected, so that the execution which may issue may authorize a levy on and sale of the defendant's interest in the real estate attached, we will remit the case to said district court, with direction to reverse its order dissolving said attachment, as of the time of the making thereof. See Gen. Laws R. I. c. 251, § 11.

To what we have said relating to the want of jurisdiction in the district court to dissolve the attachment aforesaid, we may add that we are not aware of the existence of any jurisdiction, either in a district court or any other court in this state, to dissolve an attachment of real estate, when regularly and properly made, except that under the provisions of Gen. Laws R. I. c. 253, § 10, the court to which the writ is returnable, in case the damages laid therein are excessive, or if the property attached greatly exceeds in value the amount of damages laid in the writ, may release a portion of the property attached. In many, and perhaps most, of the states, an attachment cannot be made except upon an order of a judge, based upon affidavit alleging certain facts; and in those states, if it is subsequently made to appear that the attachment was improvidently issued, because the allegations on which it was issued were untrue, the court, on proper pleading, may dissolve it. *Lovler v. Gilpin*, 6 Dana, 321; *Drake, Attachm.* (3d Ed.) § 397 et seq. But where, as in this state, under the statutory process, an attachment may be made if the plaintiff so directs, the defendant cannot be allowed to impeach the attachment for improvidence, as the plaintiff is given the absolute right to attach and hold the property of the defendant to satisfy the judgment that he may obtain, subject only to the power of the court to reduce the amount attached, as aforesaid. If the property attached be personal estate, the defendant may obtain a release thereof by giving the bond provided for by statute. Gen. Laws R. I. c. 253, § 14 et seq. The case is remitted to the district court of the Second judicial district, with direction to proceed in accordance with this opinion.

TIEPKE v. TIMES PUB. CO.

(Supreme Court of Rhode Island. July 14, 1897.)

**LIBEL—QUESTION FOR JURY—INNUENDO—DEMUR-
RES.**

1. Where certain words, in a newspaper article, making no accusation in direct terms, are capable of being construed as insinuating that plaintiff, who was a public officer, and a candidate for re-election, was guilty of malfeasance in office, in accepting money from pool-room men, roulette keepers, and liquor dealers, in return for his protection of them against violations of law, in which case they are libelous, the question whether they were so used is for the jury.

2. An innuendo, in connection with a statement in the declaration that plaintiff had been closeted with a certain person, stating the purpose to have been to give such person protection in return for his political support and influence in a certain election, is bad on demurrer, as going beyond the meaning of the language complained of, or any suggestion to be legitimately drawn from it.

3. Where a publication is libelous, and the declaration avers it to be false and malicious, the defense that it was proper criticism of a candidate for public office, and consequently privileged, cannot be made on demurrer.

Trespass on the case by Henry E. Tiepke against the Times Publishing Company. On demurrer to the declaration. Overruled.

Frank W. Tillinghast and Benj. M. Bosworth, for plaintiff. Arnold Green, Theodore F. Green, and Joseph Osfield, Jr., for defendant.

MATTESON, C. J. This is an action of trespass on the case for libel. The defendant demurs to the declaration on two grounds: (1) Because the article complained of contains no libelous matter; and (2) because, at the time of the publication of the article claimed to be libelous, the plaintiff was a public officer, and a candidate for re-election to the office held by him, and that the words alleged to be libelous were proper criticism, and privileged. While the article does not, in direct terms, make the accusation that the plaintiff was guilty of malfeasance in office in accepting money from horse pool-room men, roulette keepers, and liquor dealers, in return for his protection of them against violations of law, it is possible to construe it as insinuating such charge. Whether the language complained of was so used is a question for the jury. If so used, it was clearly libelous. *State v. Spear*, 13 R. I. 324; *Weed v. Foster*, 11 Barb. 203; *Powers v. Dubois*, 17 Wend. 63. In so far as the innuendo, in connection with the statement that the plaintiff had been closeted with Briggs, states the purpose to have been to give Briggs protection in return for his political support and influence in the election, it goes beyond the meaning of the language complained of, or any suggestion to be legitimately drawn from it, and to that extent is bad. *Hackett v. Publishing Co.*, 18 R. I. 589, 29 Atl. 143. The declaration avers that the publication was false and malicious, and the demurrer admits it to be so. If libelous, therefore, the defense that it was proper criticism of a candidate for public office, and consequently privileged, cannot be made

on demurrer. *Filtration Co. v. Lingane*, Index RR, 144, 146, 147, 33 Atl. 452. Officers and candidates may be canvassed, but not calumniated. *Seely v. Blair*, Wright, N. P. 358; *Powers v. Dubois*, 17 Wend. 63; *Weed v. Foster*, 11 Barb. 203; *Root v. King*, 7 Cow. 613; *Brewer v. Weakley*, 2 Overt. 99; *Bailey v. Publishing Co.*, 40 Mich. 251, 253, 257; *Harwood v. Astley*, 1 Bos. & P. (N. R.) 47. Demurrer overruled, and case remitted to the common pleas division for further proceedings.

COONEY et ux. v. LINCOLN.

(Supreme Court of Rhode Island. July 12, 1897.)

MARRIED WOMAN—RELEASE—VALIDITY.

Under Pub. St. c. 166, §§ 1, 2, as amended by Pub. Laws, c. 399, p. 131 (Id. c. 1087, p. 211; Id. c. 1204, p. 352), giving to married women the exclusive management of their property, the sole release of a married woman was sufficient to discharge a cause of action for personal injuries sustained by her, since her marriage, through the negligence of defendant's servant, though her husband may have been required to join in bringing an action therefor.

Trespass on the case by Patrick Cooney and wife against I. Marshall Lincoln. On plaintiffs' demurrer to certain special pleas. Overruled.

Gorman & Egan, for plaintiffs. Dexter B. Potter, for defendant.

ROGERS, J. Patrick Cooney and Ann, his wife, on April 18, 1896, brought an action of trespass on the case against the defendant to recover damages for personal injuries alleged to have been sustained by the wife on November 7, 1894, by reason of the negligent driving of the defendant's servant. The defendant, in addition to the general issue, has filed two special pleas in bar, in which he says *actio non*, because, in substance, he says: (1) That subsequently to the grievances complained of, and before the bringing of this action, on, to wit, February 13, 1895, the said plaintiff Ann Cooney, by her certain writing of release, sealed with her seal, etc., did remise, release, and forever quitclaim unto the said defendant and one George Sherman, their heirs, executors, and administrators, the said several grievances in the said declaration mentioned, and each and every of them, and all actions, causes of action, debts, dues, claims, and demands, both at law and in equity, which the said Ann Cooney ever had, then had, or which she ought to have, for or by reason or means of any matter or thing from the beginning of the world to the day of the date of the said deed or writing of release; and (2) that after the happening of the several alleged grievances, and before the bringing of this action, on, to wit, February 13, 1895, the said defendant (without George Sherman), to buy their peace, and to satisfy said plaintiff Ann Cooney, paid to her the sum of \$160, in full satisfaction and discharge of the

said alleged grievances and injuries, and which said sum the said Ann Cooney then and there received from the said defendant (and said Sherman) in full satisfaction and discharge of the said alleged grievances and injuries. To these special pleas in bar the plaintiffs demurred, and for cause of demurrer say that the said Ann Cooney, at the time of receiving the injuries complained of, and upon the date of the said release mentioned in said pleas, was the wife of the said plaintiff Patrick Cooney; and the giving of the said release by her, executed by herself and not by her said husband, was not in law a legal and full release of the present cause of action, and is no bar whatever to the plaintiffs' maintaining this action. The sole question for determination, then, is, was Ann Cooney, a married woman, competent in law on February 13, 1895, to release, without the joinder of her husband, the causes of action in tort for injuries sustained by her personally that occurred subsequent to her marriage?

The law of Rhode Island, both at the date of the alleged injury to Mrs. Cooney and of her release, provided that the real estate, chattels real, and personal estate which are the property of any woman before marriage, or which may become the property of any woman after marriage, or which may be acquired by her own industry, shall be absolutely secured to her sole and separate use. Neither the same, nor the rents, profits, or income of the same, nor any part thereof, shall be liable to be attached or in any way taken for the debts of the husband, either before or after his death; and, upon the death of the husband in the lifetime of the wife, shall be and remain her sole and separate property, and said provisions were likewise applicable to the proceeds of any such property sold. Pub. St. R. I. c. 106, §§ 1, 2. In March, 1884, the law was amended so that in all cases the sole and separate receipt, order, or discharge of the wife for the payment and delivery to her, or to any person upon her order, of her own property, including moneys on deposit or due or owing to her, in or from any savings bank or institution for savings, or other person whomsoever, whether secured by mortgage or otherwise, shall be a sufficient discharge therefor, and she might in her own name, or by her own separate deed, discharge any such mortgage or security therefor. Pub. Laws R. I. c. 399, p. 131. In May, 1892, the law was still further amended so that any married woman might sell and convey any of her personal estate in the same manner as if she were single and unmarried, and might make contracts respecting the sale and conveyance thereof with the same effect, and with the same rights, remedies, and liabilities, as if she were single and unmarried, but nothing in said amendment was to be construed to authorize any married woman to transact business as a trader. Pub. Laws R. I. c. 1087, p. 211. In May, 1893, the general assembly enacted that any married

woman might make any contract whatsoever, the same as if she were single and unmarried, and with the same rights and liabilities. The husband did not have to join in his wife's deed of real estate, even, excepting to convey his interest as tenant by the curtesy; and it was provided that the property secured to the married woman should be liable to attachment or levy for her debts and liabilities under the same circumstances and with the same effect as if she had continued sole and unmarried. Pub. Laws R. I. c. 1204, p. 352. It would seem that the language of the statutes of the state was sufficiently clear and explicit to exclude all doubt as to the intention of the legislature in regard to giving the wife the exclusive and untrammelled management of her property. Though the statute required husband and wife to sue and be sued jointly as to her property in certain cases, until a later amendment, yet this in no way excluded her power to make contracts and conveyances without her husband, and this legislative solecism was doubtless due to legislative oversight. In some states, it is true, as narrow a definition as possible has been given to the words "property" or "estate," when dealing with married women; and a distinction has been sought to be drawn between things in possession and things (or choses) in action,—between property and a claim to property. Our statute law, in our opinion, uses the words "estate" and "property" in an extremely broad sense, and includes choses in action as well as property in possession. Bouvier, in his Law Dictionary, in defining the word "estate," says: "In its most extensive sense, it is applied to signify everything of which riches or fortune may consist." And Austin, in his Jurisprudence (volume 2, 754), in criticising Blackstone, says: "The word 'property' is a term of exceedingly complex meaning, comprising a vast variety of rights, and he [Blackstone] includes under it all the rights over real and personal property which are described in his second volume." In statutes very similar to ours, in Michigan and Illinois, it has been held that damages in tort actions for injuries to the wife after marriage, when recovered, will become her individual property, which she can release before judgment, or appropriate afterwards. *Berger v. Jacobs*, 21 Mich. 215; *Railroad Co. v. Dunn*, 52 Ill. 200. See, also, *Leonard v. Pope*, 27 Mich. 145. Though, at the time of the release made by Mrs. Cooney, her husband may have had to join in bringing an action, for sake of conformity to the statute, yet in our opinion her sole release would have discharged the cause of action in which the wife was interested. For injury sustained by the husband for loss of service, etc., he can, of course, maintain an action in his own name, unaffected by the course pursued by the wife. The demurrer is overruled, and case remitted to the common pleas division for further proceedings.

BRISTOW v. NICHOLS.

(Supreme Court of Rhode Island. Feb. 18, 1897.)

NEW TRIAL—GROUNDS — IMPARTIAL TRIAL.

1. Under Gen. Laws, c. 251, § 2, providing that if a party has not had "full, fair and impartial trial," or, "in case a trial has been had in such case," if it appear that "a new trial therein should be had," a new trial may be granted, error in the rulings does not present a case for new trial for want of a full, fair, and impartial trial; the remedy being by exception, under section 6.

2. Nor does it appear that a new trial "should be had" in such case, where petitioner has already had two trials, both of which resulted adversely to him.

Action by John Bristow against John C. Nichols, in which there was a judgment for plaintiff. Defendant petitions for a new trial. Denied.

Frederick C. Olney, for plaintiff. Samuel W. K. Allen, for defendant.

MATTESON, C. J. The defendant in this suit took the steps necessary to entitle him to a new trial provided in the first and second paragraphs of Gen. Laws, c. 251, § 6, but omitted to file his petition for such trial as required by the third paragraph of the section. The section provides that, in case all of the steps required in the second and third paragraphs have been taken, judgment shall be stayed, but, in case of any default in any step, judgment shall be entered as if said claim for a new trial had never been made. The defendant now petitions for a new trial, under Gen. Laws, c. 251, § 2, which provides: "Whenever it shall be made to appear to the satisfaction of the appellate division of the supreme court, by any party or garnishee in a suit which shall have been tried or decided in the common pleas division of the supreme court or in any district court, within one year previous to such application, that by reason of accident, mistake, or any unforeseen cause, or for lack of newly discovered evidence, judgment has been rendered in such suit on discontinuance, nonsuit, default or report of referees, or that such party or garnishee had not a full, fair and impartial trial in such suit, or, in case a trial has been had in such case, that a new trial therein should be had, such division may grant such trial or new trial upon such terms and conditions as it shall prescribe." The defendant claims that the common pleas division erred in its rulings, and hence that his petition is within the words of the section relating to the granting of a new trial, on the ground that he did not have a full, fair, and impartial trial, or within the words providing for the granting of a new trial in case a trial has been had. We do not think that the petitioner makes a case within these provisions of section 2. For aught that appears, the trial which the petitioner had in the common pleas division

was a full, fair, and impartial trial, within the meaning of that language in the section. If the court erred in its rulings, his remedy was by exception, to be allowed and prosecuted as provided in section 6. To render a trial not a full, fair, or impartial trial, within the meaning of section 2, there must, we think, be something more than mere error on the part of the court which would form the subject of an exception. Unless there be something more than this, to grant a new trial under section 2 would be to do away practically with the procedure provided in section 6. It appears that the defendant has had two trials of his case already,—one in the district court and another in the common pleas division,—both of which resulted adversely to him. We see no reason for granting a third trial under the language of the section relating to the granting of a new trial in case a trial has been had. Petition denied and dismissed.

JONES v. NEW YORK, N. H. & H. R. CO.
(Supreme Court of Rhode Island. June 23, 1897.)

MASTER AND SERVANT — RAILROADS — DEFECTIVE CARS—INSPECTION—EVIDENCE—NEW TRIAL.

1. In an action against a railroad company for personal injuries, a verdict in favor of plaintiff will not be disturbed on the ground that it is against the evidence, where plaintiff's testimony that, as he was climbing a certain car, the grab iron, as he laid hold of it, being loose at one end, swung around, and he was in consequence precipitated to the ground, was corroborated by that of another witness, to the extent that the grab iron on the car in question was loose at one end, all of which testimony was uncontradicted, though defendant sought to discredit it by attempting to show that plaintiff had stated to one witness that he did not know how the accident occurred, and to others that he was injured by the giving way of a brake wheel, and also by attempting to show that the testimony of plaintiff's witness was inconsistent with his conduct after the accident.

2. Testimony to the effect that when such car arrived at certain shops for repairs, six days after such accident, the grab iron was not out of repair, was properly refused, where not accompanied by an offer to show that the car was at the time of such arrival in the same condition as at the time of the accident.

3. Evidence on the question as to whether such train had its full complement of trainmen on the date of the accident was admissible, over defendant's objection that the declaration did not allege that such accident was due to a lack of the requisite number in the crew in charge of the train, where introduced for the purpose of showing that plaintiff was properly in the position in which he was on the train at the time of the accident.

4. Where a trainman was injured in consequence of a grab iron on a car in the train being loose at one end, defendant was liable therefor, as such defect could have been discovered by reasonable inspection, and it was defendant's duty to have ascertained and remedied the same, though such car belonged to another company.

5. Evidence alleged to be newly discovered will not entitle defendant to a new trial where it does not appear but that such evidence might have been produced at the trial, or it tends merely to impeach or discredit the testimony of plaintiff.

Action by John R. Jones against the New York, New Haven & Hartford Railroad Company. There was a verdict for plaintiff, and defendant, alleging exceptions, applies for a new trial. Denied.

Walter B. Vincent and Herbert A. Rice, for plaintiff. Frank S. Arnold, for defendant.

MATTESON, C. J. The only testimony as to how the accident happened is that of the plaintiff. His statement is that, as he was climbing the car, the grab iron on top of the car, as he laid hold of it, being loose at one end, swung around, and he was, in consequence, precipitated to the ground. The plaintiff is corroborated in his statement by the testimony of the witness Rollins to the extent that the grab iron on the car from which the plaintiff testifies that he fell was loose at one end. There is no direct testimony in contradiction of that of the plaintiff and of Rollins, but the defendant sought to discredit it by attempting to show that the plaintiff had made statements shortly after the accident to one witness that he did not know how it occurred, and to other witnesses that he was injured by the giving way of a brake wheel in setting the brake, and by attempting to show that the testimony of Rollins was inconsistent with his conduct after the accident. The credit to be given to the plaintiff's testimony and to that of Rollins was for the determination of the jury. Their verdict being in favor of the plaintiff, it is not for us to disturb it on the ground that it is against the evidence in this respect.

We find no error in the refusal of the common pleas division to permit the defendant to put in testimony to the effect that when the car arrived at Altoona, Pa., on December 31, 1895, six days subsequently to the accident, certain repairs were made upon it, but that the grab iron was not out of repair, and no repairs were made on that. The travel of the car after the accident had not been shown by the testimony beyond New Haven, and the offer was not accompanied by any offer to show that the car was in the same condition at the time it arrived in Altoona that it was when it left New Haven; or, in other words, that no repair of the grab iron had been made between New Haven and Altoona. If the grab iron was defective, as testified by the plaintiff and Rollins, and consequently dangerous to the employes of the defendant or other railroad corporations over which the car might be transported, it is not improbable that it may have been repaired subsequently to the accident during its transit.

We do not think that the common pleas division erred in admitting the evidence of the plaintiff on the question as to whether the train had its full complement of train-

men on the date of the accident. The ground of objection was that the declaration did not allege that the accident was due to a lack of the requisite number in the crew in charge of the train, but merely the defective condition of the grab iron. The purpose of the testimony was not to show that the accident was occasioned by the lack of a sufficient number of men to properly handle the train, but to show that the plaintiff was properly in the position on the train in which he was at the time of the accident to rebut any claim which might be made by the defendant to the contrary, as the basis of a contention that the plaintiff was guilty of contributory negligence. We think the testimony was admissible for the purpose.

The defendant contends that, if the plaintiff's injuries were occasioned in the manner alleged, they were occasioned by the act of a fellow servant, and therefore that the plaintiff is not entitled to recover. It is argued that, as the car belonged to another corporation, the defendant's car inspectors employed by it were as to the plaintiff, in so far as the inspection of this car was concerned, fellow servants; and hence, in the absence of any claim that such inspectors were not competent, that the plaintiff cannot maintain an action for an injury resulting from a failure of the former to perform their duty. There is a wide diversity of opinion in relation to the obligation of a railroad company to inspect the cars of other companies received by it for transportation. The cases relating to the subject are collected in 3 Elliot, R. R. § 1270, notes. It seems to us that the better view, as well as that sustained by the weight of authority, is that laid down in *Gottlieb v. Railroad Co.*, 100 N. Y. 462, 3 N. E. 344. This view is that a railroad company "is bound to inspect foreign cars just as it would inspect its own cars"; that "it owes the duty of inspection as master, and is at least responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. When cars come to it which have defects visible or discoverable by ordinary inspection, it must either remedy such defects, or refuse to take such cars. So much, at least, is due from it to its employes. The employes can no more be said to assume the risks of such defects on foreign cars than on cars belonging to the company. As to such defects, the duty of the company is the same as to all cars drawn over its road." The court adds that this rule is neither onerous, inconvenient, nor impracticable. It requires, before the train starts, and while upon its passage, the same inspection and care as to all the cars on the train. The defect complained of in the present suit was one which could have been discovered by reasonable inspection, and one, therefore, which it was the duty of the defendant, under the rule stated, to have ascertained and remedied.

Having failed in its duty in this respect, it is liable to the plaintiff for the injuries to him which have ensued.

We do not think that the evidence alleged to be newly discovered, as set forth in the affidavits filed and accompanying photographs, is such as to entitle the defendant to a new trial.

No reason appears why the fact that the box car 16,500, T. H. & I., was constructed with side ladders instead of end ladders could not have been proved at the trial. At least one of the witnesses (Kipple) called for the defendant had seen and inspected this car prior to the trial, and, for aught that appears, his testimony on the point might have been taken, if inquiry concerning it had been made. Moreover, the effect of the testimony is merely to impeach or discredit that of the plaintiff that the car from which he fell had end ladders, and it has been repeatedly held that a new trial will not be granted for newly-discovered evidence which goes merely to discredit or impeach the testimony of a witness. *Francis v. Baker*, 11 R. I. 103; *Dexter v. Handy*, 13 R. I. 474; *Roberts v. Roberts*, Index RR, 169, 33 Atl. 872. But, aside from these technical suggestions, the evidence is not sufficiently conclusive in itself to warrant a new trial. It is designed to establish that car 16,500, T. H. & I., had side ladders, and not end ladders; the purpose being to argue from this that the plaintiff's testimony was false or mistaken, because he said in his testimony that the car from which he fell had end ladders, and that he thought it was car 16,500, T. H. & I. The plaintiff did not pretend to state positively that the car from which he fell was that designated as "16,500, T. H. & I.," and it is evident that his knowledge as to the marks upon the car was derived from some one subsequently to the accident. His affidavit filed at the hearing states that this information was obtained from the conductor of the train in September, 1896, long subsequently to the accident. But it is not pretended that the conductor had any knowledge of the position in the train of the car in question save that afforded by his train book, which contained a record of the cars composing the train. It does not appear that any reason existed for a record in the train book of the precise order in which the cars were arranged in the train, and, in the absence of such reason, it is not to be presumed that especial care was taken to have the cars entered in the train book in the exact order of their position in the train; and, if not, the evidence of the train book, while it may be accurate as to the cars in the train, is not conclusive as to the position of any particular car; and hence car 16,500, T. H. & I., may not have been in the position in the train of the car from which the plaintiff testifies that he fell, and, if not, it may not have been that car. New trial denied, and case

remitted to the common pleas division with direction to enter judgment for the plaintiff on the verdict.

LEWIS v. CLARK et al.

(Court of Appeals of Maryland. June 23, 1897.)

ACTION FOR RENT—DEFENSES.

Defendant, after leasing certain premises for a term, removed therefrom, and refused to pay rent for the balance of the term, for the alleged reason that the water gave out, and had been unfit for use, and that he had executed the lease relying on representations of plaintiffs that the water was excellent and plentiful. It appeared that defendant had gone over the property with one of the plaintiffs before signing the lease, and knew that it was supplied with water by a cistern only, the quantity depending on the rainfall; that plaintiffs had recently acquired the property; and that the statement by one of them as to the quality and quantity of the water was a repetition of what the former owner had said to him, as defendant knew. *Held* no defense to the action, in the entire absence of proof of false or fraudulent representations made by plaintiffs, or attempt of defendant to examine as to the condition of the water supply.

Appeal from superior court of Baltimore city.

Action by Richard B. Clark and another against Frank S. Lewis. There were verdict and judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, ROBERTS, PAGE, and BOYD, JJ.

O. Parker Baker, A. C. F. Boehme, Jr., and Harry K. Stevens, for appellant. John Prentiss Poe, Edgar H. Gans, and B. Howard Haman, for appellees.

ROBERTS, J. This suit is brought to recover a balance of rent claimed to be due from the appellant to the appellees, under a lease signed and sealed by the said parties. On the 6th of June, 1894, the appellees let to the appellant their property, known as "Arnvair," in Baltimore county, for a period beginning June 6, 1894, and ending April 30, 1895, for \$400, payable, \$100 in advance, and the balance in monthly or three equal installments, of which rent \$300 is claimed to be still due and unpaid. The lease provides that whatever alterations or repairs the tenant shall be permitted to make shall be done at his own expense. The declaration contains but one count, which is a special count on the lease. The pleas are: (1) Fraud in the procuring of the lease; (2) eviction; (3) release; (4) that the defendant was compelled to remove from the premises by reason of their unhealthy and untenable condition at the time of the execution of the lease, known to the appellees, and unknown to the appellant.

At the hearing in this court, but little attention, if any, was paid to the defenses set up of an eviction and a release, and, from a careful examination of the testimony contained in the record, we have failed to discover any evidence in support of either of said pleas.

The only questions which the controversy presents relate—First, to the manner in which the lease was procured; and, second, to the condition of the premises at the time the lease was made, whether untenable and unhealthy, and known to the appellees, but unknown to the appellant. The appellant, after having rented said premises from the appellees, in June, 1894, voluntarily removed therefrom in August of the same year, before the expiration of his term, without the consent of the appellees, and refused to pay rent for the balance of the term. The reasons assigned for such refusal were that the water gave out, and for some time prior thereto was unfit to drink or wash with, and that he had executed the lease relying on the representations of the appellees that the water was excellent in quality and plentiful in quantity. Before signing the lease, the appellant had gone over the property with one of the appellees, and was fully aware of the fact that it was supplied with water by means of a cistern only, and that the quantity of water in the cistern at any time was solely dependent upon the amount of rain falling. The appellees had never occupied the property, having obtained it in the fall of 1893 under an exchange with the former owner. The statement made by one of the appellees to the appellant as to the quality and quantity of the water was a mere repetition of what the former owner had said to the appellee, and, in making such statement, the appellee had made known to the appellant the source of his information.

There is but one exception in the record relating to the admissibility of the evidence. The appellees, having proved by Mr. Clark the execution of the lease, and the amount of rent paid, rested their case; whereupon the appellant proceeded to cross-examine the witness, by asking him to state the conversation which had taken place between the appellant and witness prior to the execution of the lease, with reference to the property therein mentioned, but the appellees objected to the admissibility of the same, and the court sustained the objection, and refused to allow the question to be answered. It is very clear that it was not a proper cross-examination of the witness, and we agree with the appellant's statement in his brief that "the exception is not very material."

The second exception relates to the granting of all of the prayers of the appellees, and the rejection of all of the appellant's prayers. The appellees' prayers presented the law of the case very fully as applicable to each of the issues joined, and we think the whole case was amply embraced in the instructions given, and that the appellant obtained the benefit of all the law which he was entitled to have applied to his case. The verdict and judgment being against him, he has appealed. The principles of law regulating actions of this character have so often been considered and

passed upon by this court that it is only necessary to apply them to the facts in this case. We refer to the cases of *McAleer v. Horsey*, 35 Md. 439; *Buschman v. Codd*, 52 Md. 207; *Robertson v. Parks*, 76 Md. 123, 24 Atl. 411; *Weaver v. Shriver*, 79 Md. 540, 39 Atl. 189. The record of this case is burdened with a great deal of testimony which has no proper bearing upon or relation to the issues joined, which are but few and simple. While it is well-settled law that where one makes a false representation, knowing it to be false, with intent to induce another to enter into a contract which but for such representation he would not have entered into, and he is thereby damaged, a case of fraud is made out, and an action will lie. As stated by Judge Robinson in *Buschman v. Codd*, supra: "The representation, to be material, must be in respect of an ascertainable fact, as distinguishable from a mere matter of opinion. A representation which merely amounts to a statement of opinion, judgment, or expectation, or is vague and indefinite in its nature and terms, or is merely a loose conjectural or exaggerated statement, is not sufficient to support an action; and for the reason that such indefinite representations ought to put the person to whom they are made upon the inquiry, and if he chooses to put faith in such statements, and abstained from inquiry, he has no reason to complain." In this case the alleged misrepresentations were made concerning the quality and quantity of the water in the cistern. The appellee, with entire frankness, stated that they had never resided on the property, but that the former owner had commended the water as excellent. The appellant could have verified the correctness of the representations concerning the quality of the water without serious inconvenience to himself, if he had thought proper to do so; and, having failed to exercise this reasonable precaution, he has now no just cause of complaint. He was informed and saw that the property was supplied with water by means of a cistern, which caught the water, and acted as a reservoir to retain the rain falling upon the roof. The water appears from the testimony to have been reasonably good when first used by the appellant, but is claimed to have become worse later on in the season. This was only a natural result, and one which the appellant should have reasonably anticipated. The accumulation of dust upon the roof of the house naturally was washed by the falling rain into the cistern, and the water in time became affected thereby. What we have said concerning the water is equally applicable to the condition of the barn: and the failure of the appellant to ascertain the actual condition of both, when they were both so easily accessible to him, cannot support the defenses set up in this action. *Ranstead v. Allen* (not yet officially reported) 37 Atl. 17.

In conclusion, we think there is an entire absence of proof to sustain the alleged falsity

of the representations made by the appellees, or that they knew them to be false, or that they were made with fraudulent intent, for the purpose of inducing the appellant to lease said premises. Being of opinion that the appellees' prayers, all of which were granted by the court, covered the whole law of the case, for that reason we deem it unnecessary to consider in detail the several prayers offered by the appellant, and refused by the court. It follows from what we have said that the judgment of the court below must be affirmed. Judgment affirmed, with costs.

DIGGS et al. v. DENNY.

(Court of Appeals of Maryland. June 23, 1897.)

SALES—FRAUD OF PURCHASER—WHAT CONSTITUTES—INSOLVENCY.

1. If a purchaser on credit, at the time of the sale, is insolvent, and knows himself to be so, he is under no obligation to disclose such fact to the seller; and, if he has a reasonable expectation of paying the price, the purchase is not fraudulent.

2. Purchasers of goods on credit who have merely good reason to know that they are insolvent are not to be visited with the consequences of actual knowledge of such fact.

Appeal from superior court of Baltimore city.

Replevin by C. F. Diggs and others, trading as C. F. Diggs & Co., against Harry L. Denny, trustee for the benefit of creditors of Julius Hellweg and August Hellweg, Jr., trading as August Hellweg, to recover possession of coal sold by plaintiffs to defendant's grantors. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, PAGE, ROBERTS, and BOYD, JJ.

William A. Fisher, W. Cabell Bruce, and D. K. E. Fisher, for appellants. James W. Denny and H. L. Denny, for appellee.

BRYAN, J. This was an action of replevin, brought by the appellants against the appellee. The judgment being for the defendant, the plaintiffs appealed. It appeared in evidence that Julius and August Hellweg, partners under the firm name of August Hellweg, had been dealing with Diggs & Co. about 12 years, and had during that time purchased from them large quantities of coal; that in August, 1896, they were indebted to Diggs & Co. more than \$9,000; that more than \$2,000 of this sum had accrued between the 1st and 13th days of August, 1896; that, on the 15th day of August, the Hellwegs made a deed of trust to Harry L. Denny, the defendant, which conveyed to him all their property for the benefit of their creditors, without preference or priority. There was evidence on both sides bearing on the question whether the Hellwegs, at the time of purchasing the coal, were insolvent, and knew themselves to be so, and had no reasonable expectation of paying for it. The case was tried before the court with-

out a jury. The court found a verdict for the defendant, and at the same time made a special finding of facts as follows: "I find from the evidence in this case as facts: (1) That, at the time of the purchase of the coal for which the replevin in this case was issued, the purchasers, August and Julius Hellweg, did not know themselves to be insolvent. (2) That said August and Julius Hellweg had an expectation of paying for said coal in accordance with their contracts of purchase, based upon their assets and their experience of their business in former years, and that such expectation was in their estimation reasonable; but a disinterested person, capable of comprehending the real situation of their affairs, could not have founded a reasonable expectation of meeting their engagements with the plaintiffs from all the resources shown to have been within the reach of said firm at the time said purchases were made, and this without regard to the question of their ability to meet all their obligations to other parties."

The questions in this case have no connection with proceedings under our insolvency system. If the purchase of the coal was fraudulent, the plaintiffs had a right to disaffirm the sale, and to take it under the writ of replevin. The court in substance ruled on the prayers of the plaintiff that if, at the time of the purchase, the buyers were insolvent, and knew themselves to be so, and had no reasonable expectation of paying for the coal, then the purchase was fraudulent. But the court refused to rule that the transaction was fraudulent if the purchasers had good reason to know themselves to be insolvent. The court, on the prayer of the defendant, ruled that if the purchasers at the time of the sales were insolvent, and knew themselves to be so, they were under no obligation to disclose such facts to the plaintiffs, and such failure to disclose did not make the purchases fraudulent; and that, if the purchasers had a reasonable expectation of paying for the coal at the maturity of the debt, the purchase was not fraudulent; and that the court was not to consider the question of their ability to pay all their debts to other persons; and that the court might consider their indebtedness to other persons as affecting the reasonableness of their expectation to pay for the coal. This instruction is modeled on the second prayer of the appellant in *Peters v. Hines*, 48 Md. 506. The leading case on this subject is *Powell v. Bradlee*, 9 Gill & J. 222. In that case the court approved the sixth instruction to the jury, given by the trial court, to the effect that the purchase of goods vested a good title in the buyer, provided that at the time of the sale and delivery he intended to pay for them, although he was then insolvent, and knew the fact. But, in considering the fourth and fifth instructions given to the jury, the court decided that if the purchaser was insolvent, and was aware of his insolvency, and had no reasonable expectation of paying for the goods, then the purchase was fraudulent. And, in considering the fourth

prayer of the defendant, the court decided that the purchase was not made fraudulent by the facts that the purchaser knew himself to be insolvent at the time of the purchase, and did not so inform the seller, although he knew at the time that the seller was ignorant of the fact, and had not the means of ascertaining it. It was said: "The prayer seems to have been founded on the idea that the sale was fraudulent if the vendees knew themselves to be insolvent at the time of the purchase, and did not communicate that circumstance to the vendors; knowing at the time that they were ignorant of the fact, and had not the means of becoming acquainted with it. The law, it seems, does not sanction such an elevated tone of morality in mercantile dealings as would have warranted the granting of the prayer, to the extent asked for by the defendants in this case. Such a strict and rigid doctrine, considering the vicissitudes and changes incident to mercantile life, would go far to cramp the operations of trade and commerce, and has not received the countenance of the courts of justice, either in this state or elsewhere, as far as we have been able to ascertain. Moreover, the proceeds of sales of the property purchased might have enabled them to fulfill their contract, and, from anything which appears, might have been intended to be applied to that purpose." *Powell v. Bradlee* has always been considered as settling the law in this state in regard to sales made under the circumstances mentioned.

The granted prayers in this case ruled what the verdict should be on a hypothetical state of facts, but the special finding by the court determined positively what the facts were. This finding is a part of the verdict; and, when the court rendered judgment, it was a decision that these facts defeated the plaintiffs. The question is properly presented by the plaintiffs' motion for a judgment non obstante veredicto. The Hellwegs were not guilty of fraud unless they intended to get the coal without paying for it. And if they did not know themselves to be insolvent at the time of the purchase, and if, founding their opinion on their assets and their experience in business during former years, they had a reasonable expectation of making payment, it could not be inferred that they intended to get the coal without paying for it. They had a right to conduct their business according to their own judgment, provided it was not exercised mala fide or recklessly; and they could not be required to conform their conduct to the opinions which other persons might form who had no interest in the matter. The reasonableness of the expectation of payment would, of course, be decided by the facts known to exist at the time of the purchase, and not by occurrences which took place afterwards. If the Hellwegs did not know that they were insolvent at the time of the purchase of the coal, and they had a reasonable expectation of paying, they are not to be convicted of a fraudulent intent. The counsel

for the appellants contended that, if they had good reason to know that they were insolvent, they ought to be visited with the consequences of a knowledge of that fact. We do not find this rule established by the authorities, and there are many difficulties in the way of its practical application. A man of cool, calm, and steady judgment, who was not liable to be swayed by his hopes and wishes, might make an accurate estimate of the value of his assets, and see clearly the improbability of paying his debts, and therefore come to the conclusion that he was insolvent. Another man, equally honest, but less intelligent, and who was more ready to hope for the best, and to believe what he earnestly desired, might in perfect sincerity think that he would be able to make an advantageous disposition of his property, and pay all his debts. The future is usually uncertain, and it appears very differently to men of different temperaments and characteristics. How is a jury to determine which of these two men had good reason for his opinion? Is it to arrive at a conclusion by hearing evidence of dispositions and relative mental powers? In marked contrast to this proposed rule, there is another one, of easy application, and sufficiently definite for the purposes of practical justice. If a debtor intends to pay his debts, and, in the honest exercise of such judgment as belongs to ordinary men, he believes that he will be able to do so, then, even if he has made a mistake in his ability to pay, he is not to be put on the footing of one who knows himself to be insolvent. This latter rule fully meets the requirements of justice, and is in harmony with our leading authority. Of course, we cannot review the special finding of facts. Upon it, considered as an essential part of the general verdict, the judgment was properly rendered for the defendant. Judgment affirmed.

YORK et al. v. YORK MARKET CO.

(Supreme Court of New Hampshire. Hillsborough. March 13, 1896.)

DEPOSITARIES — APPROPRIATION OF MONEY — RECOVERY ON INSOLVENCY.

Y. was the treasurer of the C. Co., and a stockholder of the M. Co. While Y. was at home sick, a clerk of the M. Co. carried to him a check belonging to the C. Co., for his indorsement as treasurer. Being unable to attend to business, he directed the clerk to turn the check in with the funds of the M. Co. During his illness, without further authority from him, other checks belonging to the C. Co. went into possession of the M. Co., which used the money in buying goods in the regular course of business. The M. Co. went into the hands of a receiver, and the funds of the C. Co. were among the assets, there being nothing to indicate the ownership of the C. Co. *Held*, that the amount of the checks would be repaid to the C. Co. from the assets in the receiver's hands.

Exceptions from Hillsborough county court.

Petition by Carlos E. York and others, stockholders of the Universal Collar Company, against the York Market Company, praying that the receivers of defendant be required to

pay into court \$1,490.72, for the use of the collar company. The court dismissed the petition, and plaintiffs except. Sustained.

Carlos E. York is the treasurer of the collar company and a stockholder of the York Market Company. In January, 1895, while he was confined to the house by sickness, a clerk of the market company carried to him a check belonging to the collar company for his indorsement as treasurer. He was not in condition to do any business, and directed the clerk to turn the check in with the funds of the market company, and the clerk did so. During York's illness, and without further authority from him, other checks belonging to the collar company went into the possession of the market company in the same way, amounting in all, including the first check, to \$1,490.72. The market company used the money in buying goods in the regular course of their business. When the receivers took possession, April 8, 1895, of the property, consisting of goods, horses, and carriages, and about \$12 in money, they had no knowledge that any funds of the collar company were mingled with it, and there was no earmark or anything indicating that any part of the property belonged to the collar company. The court dismissed the petition, and the plaintiffs excepted.

O. E. Branch, I. L. Heath, and W. A. J. Giles, for plaintiffs. G. W. Prescott, for defendants. Drury & Peaslee and D. A. Taggart, for creditors of York Market Co.

CARPENTER, J. In the absence of objection, it is assumed that the petition is brought by individual stockholders of the collar company for sufficient reasons. *Mor. Priv. Corp.* § 240. It is not claimed that York had authority to transfer the property of the collar company to the market company. The market company must be taken to know, as their agent, the clerk, knew, that the checks belonged to the collar company. It is not necessary to consider what might be the rights of the parties if the market company were trustees, or, as factors or agents of the collar company, had received the money for a specified purpose. The doctrine that while a cestui que trust may follow the trust fund as long as it can be traced, and maintain a charge for it upon any specific property in which he shows it to be invested, he cannot maintain a charge for it upon the general estate of the trustee, of which it is shown to be an undistinguishable part (*Story, Eq. Jur.* § 1259; *Perry, Trusts*, §§ 345, 837, 841; *Little v. Chadwick*, 151 Mass. 109, 111, 23 N. E. 1005), if sound (*Knatchbull v. Hallett*, 13 Ch. Div. 696, 709, 711, 716, 717, 719, 722, 723, 727; *Frith v. Cartland*, 2 Hem. & M. 417, 420, 421; *National Bank v. Insurance Co.*, 104 U. S. 54; *Englar v. Offutt*, 70 Md. 78, 16 Atl. 497; *Cavin v. Gleason*, 105 N. Y. 256, 262, 263, 11 N. E. 504; *Plow Co. v. Lamp*, 80 Iowa, 722, 45 N. W. 1049; *Harrison v. Smith*, 83 Mo. 210; *McLeod v. Evans*, 60

Wis. 401, 409, 28 N. W. 173, 214; *Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383; *Ferchen v. Arndt*, 26 Or. 121, 37 Pac. 161; *Slater v. Oriental Mills*, 18 R. I. 352, 27 Atl. 443), has no application. In that class of cases the cestui que trust or the creator of the trust gives credit to the trustee,—intrusts him with the legal possession and power to dispose of the property. This may afford some reason for the holding that, when the trust funds are indistinguishably commingled with the general estate of a bankrupt trustee, the trust creditor must take his dividend like other creditors.

The collar company gave no credit to the market company. The relation of debtor and creditor did not exist. Between the two corporations there was no fiduciary relation of any kind. The property of which the money received on the checks forms a part is in the custody of the court. The receivers are officers of the court, and the only question is whether they shall be directed to pay the sum of \$1,490.72 to the collar company, to whom it belongs, or the creditors of the market company, to whom it does not belong. The fact that the market company has so disposed of the money that neither it nor the particular property into which it has been converted can be distinguished from their general estate affords no reason for depriving the collar company of their property, and giving it to the market company or their creditors. It is just that those who have had sufficient confidence in the integrity and business capacity of the market company to give them credit should bear the loss resulting from misfortune, want of integrity, or of capacity. They suffer the consequences of their own imprudence or lack of judgment. It is not just that he who has not trusted them should, by reason of their unlawful appropriation of his property, be subjected to loss, for the benefit of those who have. Exceptions sustained.

CLARK, J., did not sit. The others concurred.

HENRY et al. v. TOWN OF HAVERHILL.
(Supreme Court of New Hampshire. Grafton.
March 11, 1892.)

COMMISSIONERS OF FIRE DISTRICT—AUTHORITY TO LAY OUT NEW HIGHWAY.

Act July 21, 1887 (*Laws* 1887, c. 204), authorized a fire district to adopt *Gen. Laws*, c. 78 (relating to sidewalks and sewers), and to choose commissioners who "shall have the powers of mayor and aldermen of cities respecting all matters within the legal authority of the district." *Gen. Laws*, c. 46, § 14, gives to the mayor and aldermen of cities the powers of selectmen, and the authority to establish new highways is given to selectmen of towns by chapter 67, § 1. Act July 21, 1887, provides that "nothing in this act shall be construed to impose any distinct or special liability upon the district respecting highways within its limits." *Held* that, the town being left liable for defects in highways, Act July 21, 1887, did not transfer from the se-

lectmen of the town to the commissioners of the district the power to lay out highways.

Exceptions from Grafton county court.

Petition by J. E. Henry and others against the town of Haverhill for a new highway which defendants' selectmen had refused to lay out. Defendants moved that the petition be dismissed on the ground that the original petition should have been addressed to the commissioners of the Woodsville fire district, within the limits of which the proposed highway is located. The motion was denied, and defendants except. Overruled.

Smith & Sloane, for plaintiffs. S. B. Page, for defendants.

ALLEN, J. By the act of July 21, 1887 (Laws 1887, c. 204), the Woodsville fire district was authorized to adopt chapter 78 of the General Laws, relating to sidewalks and sewers, and to choose annually five commissioners, who "shall have all the powers of mayor and aldermen of cities respecting all matters within the legal authority of the district." The act was adopted, and commissioners were chosen by the district. Section 4 of chapter 78 of the General Laws gives to the mayor and aldermen of cities the power, upon an application for a new highway, to direct, as a condition of establishing the highway, that a portion of the expense of laying out and constructing it shall be paid by persons particularly interested in obtaining it. The defendants claim that the district of Woodsville, by virtue of its adoption of the provisions of the chapter, and as a consequence of the power thereby conferred, has authority to lay out and construct all highways within its limits. The general authority of the mayor and aldermen of cities to establish new highways is the same as that of the selectmen of towns (Id. c. 46, § 14), and "selectmen upon petition may lay out any new highway, or widen and straighten any existing highway within their town for which there shall be occasion, either for the accommodation of the public or of the person applying." Id. c. 67, § 1. The act of 1887, under which the defendants claim to oust the selectmen of their jurisdiction, does not, in terms or by implication, provide for the establishment of new highways. It gives the district commissioners "all the powers of mayor and aldermen of cities respecting all matters within the legal authority of the district," and the establishment of new highways is not one of those matters. It gives them "the sole power of appointing a surveyor of highways for said district," but provides that he shall give bond to the town, and be deemed an officer of the town, and that "nothing in this act shall be construed to impose any distinct or special liability upon the district respecting highways within its limits." The district is subjected to no liability respecting its highways "distinct" from its liability as a part of the town. It is not liable to indictment for neglecting to make new highways lawfully established, for

neglecting to keep its highways "in good repair, suitable for the travel thereon" (Gen. Laws, c. 74, § 1), or to travelers for damages happening to them by reason of defects therein (Id. c. 75, § 1). To these burdens the town alone is subjected. Legislation imposing upon one body the sole duty of constructing and keeping in repair highways, and subjecting another body to both criminal and civil liability for defects therein, which it has no power to prevent, would be novel as well as inequitable. There are no words in the statutes directly indicating, or from which it can be inferred, that the legislature intended such a result. Exceptions overruled.

BLODGETT, J., did not sit. The others concurred.

TOWN OF NEWCASTLE v. HAYWOOD et al.

(Supreme Court of New Hampshire. Rockingham. July 29, 1892.)

INJUNCTION—REMEDY AT LAW.

Injunction will not lie to restrain defendants from maintaining a fence in a highway, where it does not appear that the public will suffer irreparable damage by reason of it, or that constant travel is totally or dangerously obstructed, and where the question of right has not been determined at law.

Bill in equity, by the town of Newcastle against Dolly F. Haywood and another, alleging that there is a public highway in the plaintiff town leading to a public landing on the Piscataqua river; that the defendants built a bridge across the highway so as to interrupt the public travel to and from the landing; and that the proper officers of the town removed the fence, whereupon the defendants immediately replaced it. The prayer of the bill is that the defendants may be restrained from maintaining and keeping a fence across the highway. The defendants demur. The case was referred to a referee, who, without ruling on the demurrer, found the following facts: The highway and landing exist as set forth in the bill. The defendant Dolly F. Haywood is the owner of a lot of land on the southerly side of the highway, and, in order to use it, it is necessary to fence against the highway. The defendant Thomas Haywood, acting for the other defendant, built a fence across the northerly line of said land against the highway, and in so doing obstructed a portion of the highway in such a manner as to prevent travelers on the same from having access to the landing. It was more convenient and less expensive to the defendants to so locate the fence than it would have been to have put it nearer the landing, or at some other point upon Dolly F. Haywood's land. Soon after the erection of the fence, the officers of the town notified the defendants to remove it, and upon their refusal to do so the selectmen of the town removed it. Upon the following day the defendants replaced it, and

stated that they were going to keep it there. The selectmen again removed it, and the defendants again replaced it. Bill dismissed.

Frink & Batchelder, for plaintiff. Calvin Page, for defendants.

PER CURIAM.¹ The facts found by the referee do not show that the plaintiff or the public suffer irreparable damage by reason of the existence of the fence in the highway, or that there is such danger of mischief on that account as to bring the case within any rule of equity jurisdiction before the establishment of the plaintiff's right in a suit at law. It not appearing that the remedy at law is inadequate, equitable relief must be denied. *Bassett v. Manufacturing Co.*, 47 N. H. 426, 438; *Dana v. Craddock*, 66 N. H. 593, 32 Atl. 757. If the defendants had placed a boom across the mouth of the Piscataqua river, or had totally or dangerously obstructed constant travel through the main street of the town, there would have been occasion for a temporary injunction, and any procedure necessary for the correction of such a grievous infringement of public right and the ensuing irreparable injury. There is adequate remedy for the violation of legal rights. *Boody v. Watson*, 64 N. H. 162, 171, 9 Atl. 794. The only ground on which an injunction could be decreed in this case would be the inadequacy of the remedy at law. That ground failing, the bill must be dismissed. If *Town of Burlington v. Schwarzman*, 52 Conn. 181, sustains the plaintiff's contention, it merely shows that a more extensive equity jurisdiction exists there than has been understood to obtain in this state. Bill dismissed.

CHASE, J., did not sit. The others concurred.

LADD v. GRANITE STATE BRICK CO.
(Supreme Court of New Hampshire. Rockingham. March 15, 1895.)

INJUNCTION—NUISANCE—ANNOTANCE FROM BUSINESS.

1. Defendant manufactured bricks near plaintiff's house, causing smoke to trouble plaintiff, who was aged and of enfeebled health. It also discolored some of her trees, but had not killed any. Persons of ordinary health would not have been perceptibly injured. The damage to defendant to be forced to cease business would be large. *Held*, that defendant should not be restrained from continuing to manufacture bricks, as its use of its property is not unreasonable to plaintiff.

2. A consent to a trial by the court of the merits waives the objection that the continuance of a nuisance ordinarily will not be enjoined until its existence is established by a suit at law.

Bill by Lydia W. Ladd against the Granite State Brick Company, praying for an injunction against the manufacture of bricks near the plaintiff's dwelling. Facts found by the court: In 1890 the defendants began the manufacture of bricks on their land,

about 70 rods from the plaintiff's house. On a few acres of the plaintiff's land, between her house and the brickkiln, there is a natural growth of hard pine, and a small percentage of white pine. At times during the burning of brick, smoke or vapor from the kilns is carried by the wind to the plaintiff's house, causing a perceptible odor, that is offensive and temporarily annoying to the plaintiff. She is 66 years old, and has been for many years in delicate health, with a predisposition to bronchial troubles and erysipelas. She is susceptible to irritation from atmospheric changes, and sensitive to any supposed invasion of her rights. The smoke or vapor carried to her house is not such in quantity or quality as to cause serious inconvenience or perceptible injury to persons of ordinary health and temperament, but the plaintiff, in her enfeebled state and nervous condition, is troubled by it. It oppresses her breathing, causes her to cough more than usual, and has a tendency to bring out erysipelas. The foliage or needles on some of the white pines nearest to the kilns, and on the side of them next to the kilns, have turned to a reddish-brown color, indicating decay. This discoloration was caused by the smoke or gas from the kilns. No trees have been killed. The value of the grove as a protection of the plaintiff's dwelling from winds and storms is not affected, nor is its ornamental value seriously impaired. During the first two years the defendants used coal dust in their kilns, which, in the process of burning, generated a gas that is destructive to certain kinds of trees. In August, 1892, they discarded coal, and since that time have used nothing but wood. The defendants' use of their property is not unreasonable to the plaintiff. The damage to them from an injunction restraining the continuance of their business would be large. The damage to the plaintiff, if any, from a continuance of the business, will be small, and not irreparable.

Frink & Batchelder, W. L. Foster, and Streeter, Walker & Chase, for plaintiff. Drury & Peaslee, C. Page, and Blackmer & Vaughan, for defendants.

CARPENTER, J. "The maxim, 'Sic utere tuo ut alienum non lædas,' " says Erie, J., in *Bonomi v. Backhouse*, 81, Bl. & El. 622, 643, "is mere verbiage. A party may damage the property of another where the law permits, and he may not where the law prohibits; so that the maxim can never be applied till the law is ascertained, and when it is the maxim is superfluous." The same may be said of the correlative maxim, "Qui jure suo utitur neminem lædit." To the proper application of either a prior determination of the legal rights of the parties in their relation to each other is essential. Equal rights are often in conflict. One's lawful use of a public highway may seriously interfere with, or for a time wholly prevent, its use by another who has an equal right to its free and unobstructed use. While

¹ See footnote, 36 Atl. 607.

one may in general put his property to any use he pleases not in itself unlawful, his neighbor has the same right to the undisturbed enjoyment of his adjoining property. The right of each is qualified by that of the other. Livery stables, limekilns, brickkilns, butchers' shops, pigsties, tallow factories, smelting works, tanneries, noisy workshops, and various other establishments, useful and necessary, but productive of more or less annoyance and injury to neighboring proprietors, may be maintained in some places, and not in others, although their injurious effect upon adjacent property and upon the personal comfort of those dwelling in the vicinity is in each case the same. What standard does the law provide by which the business conducted in one place is declared lawful, and in another unlawful? Whatever may be the law in other jurisdictions, it must be regarded as settled in this state that the test is the reasonableness or unreasonableness of the business in question, under all the circumstances. The owner may put his land or other property to any use not unlawful, which, in view of his own interest and that of all persons affected by it, is a reasonable use. For the consequence to others of such a use he is not responsible. The question of reasonableness is a question of fact. *Bassett v. Manufacturing Co.*, 43 N. H. 569; *Hayes v. Waldron*, 44 N. H. 580; *Swett v. Cutts*, 50 N. H. 439; *Eaton v. Railroad*, 51 N. H. 504, 530-533; *Brown v. Collins*, 53 N. H. 442, 446-448; *Holden v. Lake Co.*, Id. 552; *Thompson v. Improvement Co.*, 54 N. H. 545, 556, 559; *Garland v. Towne*, 55 N. H. 55, 59; *Green v. Gilbert*, 60 N. H. 144; *Jones v. Aqueduct Co.*, 62 N. H. 488; *Rindge v. Sargent*, 64 N. H. 235, 9 Atl. 723; *Davis v. Whitney*,¹ — N. H. —, — Atl. —; *Graves v. Shattuck*, 35 N. H. 257, 265-268; *McIntire v. Plaisted*, 57 N. H. 606; *Connecticut River Lumber Co. v. Olcott Falls Co.*, 65 N. H. 290, 390-392, 21 Atl. 1090. It is found that the use made by the defendants of their land is not unreasonable to the plaintiff; that is to say, it is not unreasonable so far as by it she is affected. It does not unreasonably interfere with or prejudice her rights. The evidence was competent and sufficient to support the finding, and it cannot be revised. By consenting to a trial by the court of the merits, the objection that equity does not ordinarily intervene in such cases until the existence of the alleged nuisance is established at law was waived. The case stands as if, in a trial at law, the jury found against the plaintiff. Bill dismissed.

BLODGETT, J., did not sit. The others concurred.

In re THAYER.

(Supreme Court of Vermont. Bennington. Jan. Term, 1897.)

HABEAS CORPUS—SUFFICIENCY OF MITTIMUS.

1. A mittimus reciting that defendant has been convicted of keeping intoxicating liquors with in-

tent to sell the same sufficiently describes the offense, though the sentence is excessive for a first conviction, and it is not therein shown that it is a second conviction.

2. It is not ground for discharge that the mittimus on which one was committed was defective; the judgment and sentence showing that the imprisonment is legal.

Petition by William Thayer to the supreme court sitting for the county of Bennington for discharge on habeas corpus for insufficient mittimus. Denied.

The mittimus recited that the relator had been duly convicted of the crime of owning, keeping, and possessing intoxicating liquor with intent to sell the same contrary to law.

Clarence P. Niles, for relator. Edward A. Bates, State's Atty., for the State.

TYLER, J. The writ is granted upon the allegation in the petition therefor that the relator is imprisoned without authority of law as appears by the mittimus upon which he was committed. It is apparent that the sentence was excessive upon a first conviction for keeping intoxicating liquor with intent to sell the same in violation of law, and it does not appear from the description of the offense in the mittimus that it was a second conviction. Form 55, Vt. St., provides for a description of the offense in the mittimus when the sentence is imprisonment in the house of correction, and fine, but it does not prescribe with what particularity the offense shall be described. As the mittimus is only the warrant of authority to the officer to make the commitment, and to the superintendent of the house of correction to confine the prisoner, it would seem that a general description of the crime is all the statute contemplates. In the form of mittimus for commitment to the industrial school the direction is to "set forth the nature of the crime." It was held in *Re Durant*, 60 Vt. 176, 12 Atl. 650, that a warrant issued upon an indictment need not describe the crime with particularity. In this cause the crime is the same in essence whether it be upon a first or a subsequent conviction, but upon subsequent convictions the penalty is more severe than upon the first. Therefore we hold that the mittimus contains a sufficient description of the offense to answer the purpose for which it was issued. But it would not avail the relator if the description were insufficient or incorrect. A good mittimus may be substituted at any time in place of a defective one, even after the issue of a writ of habeas corpus, and the relator would not be entitled to discharge. This is held in *Kelley v. Thomas*, 15 Gray. 192, and in *People v. Baker*, 89 N. Y. 461. In the latter case it is said that if the prisoner has been properly and legally sentenced to prison he cannot be released because of a defective mittimus; that when he is safely in the proper custody there is no further office for the mittimus to perform; that he is not detained by virtue of the mittimus, but by virtue of the judgment, a certified copy of the

¹ Opinion not ready for publication Aug. 7, 1897.

records of which can always be shown in justification of the detention. It has also been held that a certified copy of the record of a sentence to imprisonment is sufficient to authorize the detention of the prisoner without any warrant or mittimus. *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935; *People v. Nevins*, 1 Hill, 154; *People v. McEwen*, 67 How. Prac. 105. See *Church, Hab. Corp.* § 375, where this subject is discussed, and the authorities collected. 9 Am. & Eng. Enc. Law, 161. Church further says that if the certified copy of the minutes of the court or certified copy of the judgment furnished to the keeper is erroneous, or imperfectly describes the crime of which the prisoner was convicted, the keeper can, upon the return to a writ of habeas corpus, show by the records of the court what the precise crime was, and thereby that the sentence was valid, and the imprisonment authorized. But it is not necessary to go to that extent in disposing of the case before us, for here the crime is sufficiently described in the mittimus, and, if it were not, the certified copy of the judgment and sentence shows that the imprisonment is legal. Judgment that the relator is not unlawfully restrained, that he be remanded to the former custody, and that the petition be dismissed.

NEW ENGLAND GRANITE WORKS v. BAILEY.

(Supreme Court of Vermont. Washington. Oct. Term, 1896.)

CONTRACT — PERFORMANCE — PAROL EVIDENCE — ACTION FOR PRICE.

1. In an action for price of a monument to be, according to contract in writing, of "white Westerly granite," but which was in fact of a reddish tinge, plaintiff having shown that it was of a variety known to the trade as "white Westerly," defendant could show that "white Westerly" was also applied by the trade to a variety which took a grayish cast, and that at the time of the contract it was understood and agreed by the parties that the monument should be of this variety.

2. One who contracts to erect a monument to be of a certain colored granite cannot recover therefor, he having used therein a different colored granite, and there being no waiver or acceptance by the other party.

Exceptions from Washington county court; Ross, Chief Judge.

Assumpsit in the common counts by the New England Granite Works against Harriet Bailey. Pleas, nonassumpsit and several special defenses. Judgment for defendant. Plaintiff excepts. Affirmed.

F. L. Laird, for plaintiff. T. J. Deavitt and S. C. Shurtleff, for defendant.

THOMPSON, J. The plaintiff seeks to recover for a balance alleged to be due it for a monument erected on the defendant's lot in Montpelier cemetery. By the terms of the contract, which was in writing, the monument was to be of "white Westerly granite." The monument erected was of a reddish or choco-

late tinge in color. The defendant refused to accept the monument, on account of its color, claiming that it must be of a whiter shade to fulfill the contract in respect to color. The county court found that there were different varieties of Westerly granite, known among dealers as "white Westerly granite," none of which are pure white. The coloring material is intermixed in some, is of a reddish cast, which will give to the polished surface a chocolate tinge or color, and a slighter tinge or color of the same kind to the hammered surface. These tinges or colors are not all of the same intensity. In another variety of white Westerly granite the coloring matter is of a bluish color of different intensities. This gives to the polished and hammered surface a grayish white color. A monument from this variety has more of the appearance of clear white than one constructed of the reddish variety. The plaintiff contends that there was no evidence to support the finding that there was more than one kind of Westerly granite known to the trade as "white Westerly."

We have carefully examined the transcript of the evidence, and find that this contention cannot be sustained, there being evidence tending to prove the facts found. For instance, Henry Bertoll, a witness improved by the plaintiff to show that the monument in question was made of white Westerly granite, on cross-examination testified: "Q. Are there different kinds of white Westerly? A. Yes, sir. Q. There is pinkish, white, and bluish? A. There is pink, red, and white and blue." Other evidence also had the same tendency.

The plaintiff also insists that it was error to permit the defendant to show by parol evidence that at the time the contract was made it was understood and agreed by the parties that the monument should be made from the whitest variety of white Westerly granite, — the one which took a grayish, rather than a reddish, cast. It is urged that this phase of the case falls within the general rule that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." 1 Greenl. Ev. (12th Ed.) § 275. It was incumbent upon the plaintiff to establish that the monument was made of white Westerly granite. The granite of which it was made was not white, but of reddish or chocolate color, and did not literally meet the terms of the contract. He was therefore properly permitted to show that it was of a variety known to the trade as "white Westerly." It was then permissible for the defendant to show that the phrase "white Westerly granite" was also applied by the trade to the variety of granite from which she claimed the monument was to be built. The rule of law applicable to these facts was well stated in *Hart v. Hammett*, 18 Vt. 127, in which the contract involved called for "winter strained lamp oil." On the trial the evidence of the plaintiff tended to show that dealers in oil sometimes understood that kind of oil to mean "winter strained sperm lamp

oil," and that sometimes the term "winter strained lamp oil" meant either whale or sperm oil. In this state of the case, on the part of the defendant, evidence was admitted to show how the parties understood the term "winter strained lamp oil" as used in the contract. To its admission the plaintiff excepted. In disposing of this exception, the court said: "It may well be conceded that parol evidence should not be admitted to support a construction different from what the words themselves imply. To permit this would be to permit a written contract to be controlled by parol testimony. Parol evidence is, however, admissible to give an application of a written contract to its subject-matter in cases in which the thing, as expressed, is applicable, indifferently, to more than one subject. In such case, the question being what was intended to have been expressed through the written instrument, any evidence which would be pertinent to the inquiry should be received. Wig. Ev. 118. In many cases an inference of intention is drawn from circumstances. If the intention of the parties is expressly declared, this should be regarded as far more satisfactory than to have the intention inferred; and evidence to this point cannot but be material and relevant to the inquiry. The evidence in this case shows that this contract, in its terms, is equally applicable to sperm or whale oil, and no rule of law is violated in giving it an application to the one or the other, by evidence allude the contract." In the case at bar the phrase "white Westerly granite" being applicable to the granite of which the monument was built, and to that from which the defendant claimed it was to be built, it was competent to show how the parties understood the contract in this respect when it was made. 2 Phil. Ev. (Cow. & H. and Edw. Notes) *p. 718, and note 510; Steph. Dig. Ev. art. 91, subd. 8. The finding on this question being in favor of the defendant, and against the plaintiff, it cannot recover, by reason of the nonperformance of the contract on its part, there being no waiver nor acceptance by the defendant.

This view of the case renders it unnecessary to decide whether or not the plaintiff's claim is barred by the statute of limitations. Judgment affirmed.

KENNY et al. v. HOWARD.

(Supreme Court of Vermont. Windsor. Oct. Term, 1896.)

DECEDENTS' ESTATES — PROBATE AND COUNTY COURTS—JURISDICTION.

1. Where, before commissioners of the probate court have acted on a claim against the estate, the executor sues in the county court to recover a debt in favor of the estate against claimant, the jurisdiction of the probate court in respect to the demand of either party is thereby ousted.

2. Executors are not estopped from prosecuting an action in the county court on notes held by decedent at his death, by reason of their having contested defendant's claim against the estate

before the commissioners of the probate court, who acted without jurisdiction.

Exceptions from Windsor county court; Tyler, Judge.

Assumpsit by A. W. Kenny and another, as executors of the will of Chester Downer, deceased, against Austin Howard. There was a judgment in favor of plaintiffs, and defendant excepts. Reversed pro forma.

The commissioners made their report to the probate court August 15, 1892, finding a balance due to the defendant, for which judgment was there rendered in his favor. The other facts appear in the opinion.

J. J. Wilson, for plaintiffs. D. C. Denison & Son, for defendant.

START, J. It appears from the agreed statement of facts that Chester Downer and the defendant, Austin Howard, were formerly partners; that Chester Downer deceased February 19, 1890; that commissioners on his estate were appointed, and held their first meeting June 25, 1890; that the defendant presented a claim to the commissioners, but no hearing was had before them until July, 1891; that the only matter investigated by the commissioners was the standing of the book accounts between the parties, and the notes in question were not presented to the commissioners. Chester Downer, at the time of his decease, held three notes against the defendant; and on the 8th day of October, 1890, the plaintiffs brought this suit, declaring on these notes, and secured the same by attachment. The defendant insists that the plaintiffs are estopped from prosecuting this suit, by reason of their appearing before the commissioner and adjusting the accounts of the parties. When this case was before us on demurrer to the defendant's pleas, it was held that, when an executor or administrator commences an action to recover a debt or claim in favor of the estate, against a person having a claim or demand against it, either before or after such person has presented his claim to the commissioners for allowance, and before they have acted thereon, the jurisdiction of the probate court in respect to the claims or demands of either party is ousted by the commencement and pendency of such action; and that all proceedings thereafter in the probate court, during the pendency of such action, in respect to the claims or demands of either party, are absolutely void. *Kenny v. Howard*, 67 Vt. 375, 31 Atl. 850. It appears from the agreed statement of facts that this suit was commenced before the commissioners acted upon the defendant's claim, and was pending in the county court when a hearing was had before them. Therefore the county court had exclusive jurisdiction of the respective claims of the parties, and the claim sought to be recovered is not barred by reason of anything that transpired before the commissioners or the probate court. Nor are the plaintiffs estopped from prosecuting this

action by reason of their appearing before the commissioners, who acted without jurisdiction, and contesting the defendant's claim. The judgment of the court below was correct. As the parties have, by their stipulation, reserved the right to litigate other questions raised by the pleadings, the judgment will be reversed pro forma, to enable them to do so. Judgment reversed pro forma, and cause remanded, with costs to the plaintiff.

LAZELLE v. TOWN OF NEWFANE.

(Supreme Court of Vermont. Windham. Jan. Term, 1897.)

DEFECTIVE BRIDGE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Plaintiff, who could remember nothing of the accident, was last seen 25 rods from a town bridge, driving a gentle horse at a walk. The wheel tracks indicated that he had driven upon the bridge without trouble, when his horse stopped, cramped the wagon, and backed off the side of the bridge, over a log used as a railing, falling into the bed of the stream. *Held*, that the question of the town's negligence was properly submitted to the jury.

Exceptions from Windham county court; Start, Judge.

Action by Stillman Lazelle against the town of Newfane to recover for personal injuries. Judgment for plaintiff, and defendant brings exceptions. Affirmed.

At the close of the testimony, the defendant moved for a verdict, on the ground that there was no evidence tending to show that the plaintiff was in the exercise of due care. The motion was overruled, and the defendant excepted. The evidence on the part of the plaintiff tended to show that he started from his home, about one mile from the place of the accident, with a team, consisting of a horse, harness, and single buggy, and his mother riding with him; that he stopped at a blacksmith shop about 50 rods from the bridge, and had some work done; that everything about the team then appeared to be sound and right; that he drove from a shop to a neighbor's, in an opposite direction from the bridge, and then back by the shop towards the bridge, the team still appearing to be all right, and was immediately afterwards seen about half-way from the shop to the bridge, driving the horse, which was then walking; that the plaintiff was then 53 years old, accustomed to driving horses, and particularly the one then in use; and that the horse was gentle, manageable, and safe. There was no evidence tending to show what happened after the plaintiff was last seen, as before stated, until he was found unconscious under the bridge, except the circumstances stated in the opinion. The mother was instantly killed.

Clarke C. Fitts and L. M. Read, for plaintiff. Waterman, Martin & Hitt and K. Haskins, for defendant.

TAFT, J. The plaintiff was under the burden of proving that the proximate cause of his injury was the result of the negligence of the defendant, and that he was not guilty of contributory negligence in any degree. The defendant concedes that, if there was any evidence relating to the conduct of the plaintiff at the time of the accident, the cause was properly submitted to the jury. Whether there was or not is the only question before us. The last seen of the plaintiff prior to the accident, he was 25 rods from the bridge upon which the accident occurred, driving towards it with a gentle, manageable, and safe horse. He drove on the bridge, when his horse stopped, and backed, cramping around and over a log used as a railing on the side of the bridge, went over the log, and down on the rocks, in the bed of the stream below the bridge. The plaintiff could remember nothing of what transpired at the time of the accident, and no one else now living saw it. To entitle the plaintiff to recover, it was not necessary that there should have been an eye-witness to the transaction, who can be called to testify to the circumstances attending the accident. The direct testimony of a person witnessing the accident is not required. The manner of the accident, the cause of it, and the fault, if any, of either party, may be inferred from the facts shown and detailed by the witnesses. The plaintiff was last seen 25 rods from the bridge. The wheel tracks upon the bridge indicated that he had driven upon it without meeting any trouble, when his horse backed, and, cramping the wagon, backed over the log lying on the side of the bridge. The jury could well find from the testimony that the bridge was insufficient, and out of repair, in not having a sufficient railing, and that the want of it was the proximate cause of the accident, and the town in fault in not having it. From the fact that, as he approached the bridge, the horse was being properly driven, and was then walking, and that he passed onto the bridge without trouble, as indicated by the wagon tracks, and that, from some unknown cause, the horse backed, cramping the wagon around, and backing it over the log, and down on the rocks in the bed of the stream, the jury might well infer that the plaintiff, presumably possessing the instincts of self-preservation, did not contribute in any degree to the accident. From facts stated in the record, it is probable the horse was suddenly frightened; that, as soon as he began to back, the wagon cramped, and immediately went over the log lying on the side of the bridge, and on the rocks under the bridge, and that the accident occurred so suddenly that the plaintiff had no time to escape from the wagon, nor prevent being dashed upon the rocks below. They could infer, from the circumstances shown by the testimony, the neglect of the town the proximate cause of the accident, and that the plaintiff was without fault. Judgment affirmed.

In re ENRIGHT.

(Supreme Court of Vermont. Chittenden. Jan. Term, 1897.)

DISBARMENT OF ATTORNEY—REINSTATEMENT.

An attorney, disbarred on proof of conduct as an attorney seriously impeaching his moral character, will not be reinstated on petition of attorneys merely stating belief that he has been sufficiently punished for the offense.

Petition to the supreme court to set aside its judgment of disbarment against John J. Enright. Dismissed.

Roberts & Roberts, for petitioner. R. E. Brown, State's Atty.

ROSS, C. J. This is a petition of John J. Enright, praying this court to set aside its judgment of disbarment rendered against him at its January term, 1895. In it he sets forth the judgment of disbarment, and refers to it, as found in 67 Vt. 351, 31 Atl. 786, and says "that he has realized and appreciated, to the fullest extent, and with the most intense feeling, all the grave consequences of his removal; that he has suffered greatly from loss of business and the consequent taking from him of his means of livelihood that has been the result of it; * * * that to continue his punishment would be unnecessary to his discipline, or for public example, and would be unnecessarily severe for the offense charged." This is the only ground for relief set forth in his petition. In support of his petition he has filed petitions signed by a majority of the bar in every county of the state, and in many instances by nearly the entire bar of the county. These petitions are identical in form and language, and state as the reason for supporting his petition that they believe that he "has been sufficiently punished for the cause for which he was removed, and that the ends of justice will be met if he is reinstated in said office." These petitions of the bar, so numerous signed, demand, and have received, the careful consideration of this court. It is to be observed that the petition of Mr. Enright, and the petitions of the bar in support of it, all proceed upon the ground that the judgment of disbarment had for its sole object the punishment of Mr. Enright for the offense found against him as an attorney, and that the punishment has been sufficiently severe for that single offense. The argument in the petitioner's behalf by the oldest practicing member of the bar has proceeded upon that ground alone. We do not doubt but that this court has the power, on a proper cause shown, to set aside the judgment of disbarment. To determine whether a proper cause is shown to set that judgment aside, we must consider the object and purpose of admission to the bar, and the scope and end to be accomplished by a judgment of disbarment. By admission to the bar the applicant becomes an officer of the court endowed with certain peculiar privileges, which amount to a sacred trust. The oath of

office places him under the highest obligation known to the law,—among other things, to do no falsehood, nor to consent that any be done in court; that he will act in the office of attorney within the court according to his best learning and discretion, with all good fidelity, as well to the court as his client. The ultimate end sought to be accomplished by courts is to ascertain the truth in regard to the matter in controversy, and thereon adjudge and award to the parties their respective rights. By becoming an officer of the court, as well as by his oath of attorney, he binds himself to put forth his best endeavors to accomplish these ends. Hence the wide scope and clear, searching provisions of his oath. The courts are empowered, by rules, to make provisions for admission to the bar only of such persons, in character and in knowledge, as will help the courts in accomplishing the ends for which they are established. Among these rules—and they would not accomplish the desired ends unless there was such a rule—is one requiring that all applicants for admission shall establish that they are of good moral character. By his admission the courts indorse the applicant, and hold him out as possessing the knowledge and character requisite to render him a worthy member of the bar. The ends to be accomplished through courts and its officers, the attorneys, being the establishment of the truth in regard to the matter in hand, and the rights of the parties according to such truth, absolutely forbid the use of falsehood and deception in any of the proceedings connected therewith. When an attorney, one of its officers, is charged with unprofessional conduct, and the court institutes inquiry in regard to the truth of the charge or charges, it is not mainly for the purpose of punishing him, but to ascertain whether he has violated the trust reposed in him. If the charges are found established, and show such misconduct in his office as amounts to a violation of his trust, it then becomes the duty of the court to remove him from the office of attorney, not primarily as a punishment to him, but as a protection to the court and community. Such is the scope of the judgment rendered in Enright's Case, as found in 67 Vt. 351, 31 Atl. 786. It is not claimed that the misconduct there found established against him is untrue, nor that it did not go to the essence of his right to be an attorney, nor that he was unjustly removed from the office of attorney. The cause set forth in all these petitions does not touch the real grounds of the judgment of disbarment there rendered, nor furnish an adequate reason for disturbing it. That judgment establishes a serious impeachment of Mr. Enright's moral character, shown in his conduct as an attorney. To restore him to the office of attorney for the reasons set forth in the petitions would, in effect, abrogate the rule requiring the applicant for admission as an attorney to establish that he is of good moral character and furnish Mr. Enright an opportunity to repeat the commission of the same offense for

which he was disbarred, and of other offenses of like character. If the present was his original application for admission to the bar, he could not be admitted, without more being shown than what is contained in these petitions. In these views all the members of the court concur. The petition is dismissed.

LYMAN v. MORSE et al.

(Supreme Court of Vermont. Lamolille. Jan. Term, 1897.)

WILLS—CONSTRUCTION—EFFECT OF CODICIL.

Testator devised one-half of the interest and the income of his estate to his son during his natural life, and on his death such interest to be paid to his sons for 10 years, they then to receive the principal. The other half of the interest and income of his property was devised to a grandson, to be paid to him for 10 years; then the principal to become his. By a codicil he provided that the will should be changed so as to give said T. (his son) two-thirds of said interest and income, and one-third to the said grandson. *Held*, that it was the intent of the testator that the principal should be divided in the same proportion.

Exceptions from Lamolille county court; Rowell, Judge.

Action by Arthur Lyman against Harmon W. Morse, executor of J. W. Turner, and others. Judgment pro forma that plaintiff take one-third only of the estate, and plaintiff excepts. Judgment affirmed.

P. K. Gleed, for plaintiff. Hogan & Royce and Frank Plumley, for defendants.

TYLER, J. It appears by the agreed statement of facts that the testator, J. W. Turner, had two children, Charles W. Turner and Mrs. Lyman, and that when he made his will and codicil the son was living, and the daughter had deceased. Charles died October 16, 1887, leaving two sons, Henry W. and Roy W. They and Arthur Lyman, son of the testator's daughter, were all living November 26, 1896, and are still living. The will was made September 30, 1878, and the codicil January 19, 1882. The testator died October 26, 1886. The second paragraph of the will is: "I give, devise, and bequeath all interest and income on all of my property, personal and real estate, not hereinbefore disposed of, to Charles W. Turner and Arthur Lyman, son of Seymour Lyman, as follows: I give, devise, and bequeath one-half of said interest and income to said Charles W. Turner during his natural life, and in case of his death I give, devise, and bequeath said C. W.'s interest and income to Henry W. Turner and Roy W. Turner, said C. W. Turner's sons, each one-half, and to be paid them for ten years; then principal to become theirs. The other half of said interest and income from all my property not hereinbefore disposed of I give, devise, and bequeath to Arthur Lyman, and to be paid to the said Arthur for ten years; then the principal to become his. In case of his death before the expiration of ten years, then, in that event, said

Arthur leaving no heir or heirs, I give, bequeath, and devise the said principal to the American Board for Foreign Missions." The codicil is as follows: "I hereby change the foregoing will so as to give the said C. W. Turner two-thirds of said interest and income, and one-third to the said Arthur Lyman." The testator's intention is clearly expressed in the original will to give one-half of the income of his estate to his son Charles for life, and, after Charles' death, to his sons, Henry and Roy, for 10 years, when one-half of the principal should be theirs. The intention is equally clear and unequivocal that Arthur Lyman should have the other half of the income for 10 years after the testator's death, when one-half of the principal should be his, if he was then living. He was to have as much of the income and principal as both his cousins. The sons of Charles are not mentioned in the codicil, but no claim is made that they are not entitled to their father's share of the income upon his decease. This was so held in *Lyman v. Turner's Ex'r*, 82 Vt. 465, 20 Atl. 596.

The defendants contend that the gift in the codicil of two-thirds of the income to Charles carries with it a gift to him of two-thirds of the principal, while the plaintiff contends that the codicil does not affect the principal. It is a settled rule that the intention of the testator must, if possible, be discovered, and, when discovered, must govern, because, as was said by Chief Justice Shaw in *Quincy v. Rogers*, 9 Cush. 291, "It is his intention, manifested in his words, which makes his last will and testament." The same learned judge gives some of the modes by which the meaning and intent of the testator may be ascertained; as, where there is a codicil, the will and codicil are to be construed with reference to each other, to determine from change of circumstances or otherwise what it is intended to alter, and what to retain and confirm; and that the codicil shall change the will so far only as the intent is manifest, especially where in all other respects the will is in terms ratified and confirmed. The rule is concisely stated in *Barnes v. Hanks*, 55 Vt. 317: "A codicil is regarded as a part of the will, and the will and codicil are to be construed as one instrument, and a codicil should be so construed, if it can fairly be done, so as to make it harmonize with the purposes declared in the body of the will." 1 Redf. Wills, 288; *Thompson's Adm'r v. Churchill's Estate*, 60 Vt. 376, 14 Atl. 600. In *Jarman on Wills* (page 351), it is said that: "In determining the extent to which a codicil affects the disposition of a will, it is an established rule not to disturb the disposition of the will further than is absolutely necessary to give effect to the codicil." Nothing is clearer in the whole instrument than that it was the testator's intention by the codicil to increase Charles' share of the income from one-half to two-thirds during Charles' life; but whether he supposed that changing the fractional parts of the income would change the disposition of the principal in the same ratio,

or whether he supposed that the change would leave the principal unaffected, must be determined from the entire instrument. It is argued on one side that the testator's omission to mention the principal in the codicil is controlling evidence that he intended to leave it as provided in the original will, under the rule that a purpose in the codicil to alter the will in one particular carries with it the presumption that the testator did not intend to alter it in any other. On the other side it is argued that there is no disposition of the principal in the original will, independent of the income, but that it follows the course of the income, and that the silence of the testator in respect to the principal has no significance. Either one of two events, which the testator might reasonably have anticipated, would defeat the leading purpose of the codicil under the plaintiff's construction of it: If Arthur should die within 10 years after the testator's decease, his half of the principal would at once vest in the American Board, and only one-half of the estate would remain from which Charles could derive an income. If Arthur lived 10 years after the testator's death, he would then be entitled to one-half of the estate; and, if Charles continued in life, he could thereafter receive only the income of the remaining half. The testator, in the original will, did anticipate and provide for the possibility of Arthur's death within 10 years after his own, and may be presumed to have considered that possibility when he made the codicil. Again, if Charles and Arthur lived 10 years after the testator's death, and Charles then died, under the plaintiff's construction Arthur would then take his half of the principal, and defeat Charles' sons from having two-thirds of the income, or the entire principal would be held in trust for 10 years, that the income might be divided according to the codicil, and according to the decision in 62 Vt., 20 Atl. Under one construction, the will and codicil would be, in certain events, inconsistent with each other, and a trust which the testator did not contemplate would arise of necessity, while under the construction here adopted the two parts of the instrument would always harmonize. Therefore, in view of the testator's clearly expressed desire to provide more amply for his son, we think the more reasonable construction of the codicil is that he supposed and intended that the principal would follow the income by the codicil as it would have done by the will. This view is strengthened by the fact that the possibility of Arthur's death within the 10 years was contemplated by the testator, and yet he made no provision that the estate should be held until the end of the 10 years for the payment of the income pursuant to the codicil. This construction is not in conflict, but in consonance, with the well-established rule cited by the plaintiff's counsel that, where the devise in the will is clear, it is incumbent upon those who contend it is not to take effect by reason of a revocation in the codicil to

show that the intention to revoke is equally clear and free from doubt as the original intention to devise; that, if there is a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought to stand. The entire will must be construed as if the fractional division provided by the codicil were read into the body of the will in place of the division there made, in which case there could be no reasonable doubt but that Charles Turner's sons would take two-thirds of the principal and Arthur Lyman one-third thereof. Judgment affirmed.

LORD et al. v. BUCHANAN.

(Supreme Court of Vermont. Washington. Jan. Term, 1897.)

TRESPASS—RIGHT TO MAINTAIN.

Plaintiff sold a stove to defendant on conditional contract, title to remain in him until payments were made. Defendant, on foreclosure of a chattel mortgage against the vendee's husband, took the stove, and sold it. The vendee recovered of defendant a judgment for the value of the stove and special damages. *Held* that, though plaintiffs might at the time of the seizure have had the right to repossess themselves of the stove by reason of the vendee's failure to make the payments, no recovery could be had, no special damage being shown, for the reason that the vendee had full recovery for the unlawful taking.

Exceptions from Washington county court; Ross, Chief Judge.

Action by Lord, Stone & Co. against William H. Buchanan. Trial by the court. Judgment for defendant, and plaintiffs except. Affirmed.

T. R. Gordon and G. W. Wing, for plaintiffs. Frank J. Martin, for defendant.

TYLER, J. The plaintiffs sold a stove to a Mrs. Harroun by the following contract: "Berlin, Vt., Sept. 27th, 1894. For value received, I promise to pay Lord, Stone & Co., or bearer, the first day of November, February, May, and August next, thirty-two dollars, with interest. The consideration of this note is one Model Crown portable cooking range, which I have received of said Lord, Stone & Co. Nevertheless, it is understood and agreed between the undersigned and said Lord, Stone & Co. that the title of the above-mentioned property does not pass to me, and, until this note is paid, the title to the aforesaid property shall remain with the said Lord, Stone & Co., who shall have the right in case of nonpayment at maturity of said note, without process of law, to enter and retake, and may enter and retake, immediate possession of said property, whenever it may be, and remove the same. Mrs. J. Harroun." The defendant, as a public officer, in the foreclosure of a chattel mortgage against the vendee's husband, entered her dwelling house, took the stove, and duly advertised and sold it; the plaintiffs and the vendee making known to the defendant their respective claims, and forbidding the sale.

The vendee sued the defendant in trespass for breaking and entering her dwelling house, converting the stove to his use, and depriving her thereof. Judgment was rendered for her to recover the value of the property and special damages, and no exception was taken. This suit was brought a few days later, is in trespass and trover, and special damages are alleged, for that "the plaintiffs were for a long time prevented from transacting their necessary business, and were put to great trouble and expense in being deprived of the stove." During the trial the defendant conceded that the stove in controversy was not the one included in the mortgage, and did not seek to justify the taking. The plaintiffs claim that they held the title to the stove, and, as there was an overdue payment, that they were entitled to the possession; that the taking was an invasion of their right, for which they should have at least nominal damages.

The vendee had possession of the property, and an interest in it, and was entitled to recover the full value thereof and her damages, *Harker v. Dement*, 52 Am. Dec. 670, and notes. *White v. Bascom*, 23 Vt. 268. It is said in the latter case that naked possession is sufficient against all the world, except him who has a superior title, and that, where the suit is brought by the special owner, the law presumes it to be by consent of the general owner, who alone can interfere, and that what is recovered by the special owner above his interest is held by him in trust for the general owner. The question is whether the plaintiffs can recover the damages which they suffered in consequence of the defendant's wrongful act. The rule is that, to entitle a plaintiff to maintain trespass or trover, he must, at the time of the taking, have either the actual possession, or the title, with the right of present possession. *Hurd v. Fleming*, 34 Vt. 169. This rule is stated, in substance, in 1 Chit. Pl. 48, and it is there said that, though the action may be brought by the general or special owner against a stranger, yet both actions cannot be supported at the same time, and that "when the general owner has not the right of immediate possession, as where he has demised goods for a term, he cannot maintain trespass or trover even against a stranger, though, if the injury were sufficient to affect his reversionary interest, he may support a special action on the case; and a recovery in an action by the party having a possessory interest would be no bar to an action for an injury to the reversionary interest." In this case the plaintiffs cannot recover the special damages found by the trial court, for the reason that they are not declared for. They, in fact, only claim nominal damages, which would be for the unlawful taking of the property. For this they can have no recovery, for the reason that the plaintiff in the other suit has had a full recovery upon this ground, and there cannot be two recoveries for the same taking. If the plaintiffs had the right to repossess themselves of the property by rea-

son of the vendee's failure to make payment, they waived that right, and assented to the vendee's possession and suit, and cannot recover in this action. Judgment affirmed.

BOURNE v. BOURNE et al.

(Supreme Court of Vermont. Rutland. Jan. Term, 1897.)

APPEAL — WAIVER OF OBJECTION — REVIVOR OF MORTGAGE—FINDINGS AND DECREE.

1. Objection to admission of evidence before a master cannot be availed of on appeal, exception to master's report, for that reason, not having been filed in the court of chancery.

2. Parents conveyed their residence to a son, and he gave back a lease for the term of their natural lives and the survivor of them. The deed was merely to secure him for what he had and would do for them, it being understood that they should continue to live on the place, and be supported by him. After the death of the father, the place was sold, and part of the proceeds used in paying a mortgage on the son's property; he thereafter contributing nothing to the mother's support, though stating that he considered the money subject to the agreement on which the conveyance was made to him, and that he had arranged so she should be protected. He died insolvent, devising to her certain land. *Held* that, as against creditors of his who did not become such on the strength of the mortgage being paid and discharged, it should be revived in her favor for the amount of the proceeds used to pay it, with interest thereon; and that she should have the use of this amount, with right to resort to the principal if necessary, anything left of the principal at her death to belong to his estate, there being first deducted whatever amount he should have paid for her support, but did not, which should go to her estate.

3. A finding that most of a certain fund went to pay a mortgage is not sufficiently definite to authorize a decree reviving a mortgage for the benefit of the owner of the fund.

Appeal from chancery court, Rutland county; Taft, Chancellor.

Bill in chancery by Electa Bourne against Montraville A. Bourne, executor of Charles E. Bourne, deceased, and others. The case was heard on the report of a master, and decree rendered that defendants convey the Engrem premises to the oratrix, unless they elect to pay her the amount withdrawn from the savings bank by Charles E. Bourne, and that, in the event of such election, the Engrem mortgage should be revived and foreclosed for the enforcement of such payment. Defendant Ellen Bourne appeals. Reversed.

Butler & Maloney, for appellant. Joel C. Baker, for appellees.

ROWELL, J. Before and on June 26, 1879, Edmund Bourne, the oratrix's husband, who died in July, 1879, owned a place in Danby, whereon they lived. On that day, by a warranty deed of that date in common form, they conveyed the same to the testator, Charles E. Bourne, their son, for the expressed consideration of \$1,000, and Charles gave them back a lease thereof "for and during the term of their natural lives, and the survivor of them." It is found from oral testimony, seasonably ob-

jected to by the defendant Ellen, who is the widow of Charles, that Charles paid nothing for said deed at the time, and that it was not intended to evidence an absolute sale to him, but was only to secure him for what he had already done or might thereafter do for his father and mother; that it was expected she would continue to live on the place, and be supported principally by Charles, and that her support would, at least, equal the value of the place, which would belong to Charles when she was dead. This arrangement was known to the other members of the family, and acquiesced in by them. The objection to the admission of this oral testimony cannot be availed of here, as it does not appear that an exception to the report for that reason was filed in the court of chancery. V. S. § 942. The arrangement found therefrom must stand for what it is legally worth.

The oratrix continued to live on the place till some time in 1885, and was supported by her children, including Charles, who severally contributed what they saw fit. Whether Charles' contributions were regarded as a legal claim against her, any more than the contributions of her other children, does not appear unless it is shown by the conveyances and arrangement aforesaid. On January 6, 1886, the place was sold for \$1,100, the oratrix joining in the deed. Charles had the money, and deposited it in a savings bank in his name. In 1887 he drew it from the bank, and paid most of it on a purchase-money mortgage that he had given on two lots in the village of Rutland, which he had previously bought of Engrem. On January 26, 1891, Charles borrowed \$600 of his brother, the defendant Montraville, who is executor of Charles' will, and, with that and other money, paid the balance due on the Engrem mortgage, which was then discharged of record, and thereupon he gave Montraville a mortgage on said lots for \$600, which is still a lien thereon. After the place in Danby was sold, the oratrix lived a while with one of her daughters, and later with her son Montraville, who has supported her for several years. It does not appear that Charles, who died July 2, 1892, contributed anything to her support after she left Danby, nor that he paid her any interest on the money in his hands; but he frequently said that he considered the money subject to said arrangement, and intended that his mother should have the benefit of it to the same extent as though it was the family homestead in Danby, and that he had arranged his affairs so that she would be protected if he should be taken away. The only arrangement he made in this regard was to will her the Engrem lots. The defendant Ellen is a creditor of Charles' estate. There are other creditors, and the estate is insolvent.

As the oratrix cannot take under the will as against creditors nor Montraville's mortgage, she seeks to revive the Engrem mortgage, and to set it up for her benefit to the extent that the money derived from the Danby

place went into it. The defendant Montraville does not object to this, although both he and the other creditors would be unfavorably affected thereby; but the defendant Ellen does object, and claims that a case is not made that warrants its being done as against her. But, as she did not become a creditor on the strength of the Engrem mortgage being paid and discharged, she cannot object as a creditor to granting the relief prayed for, if the case otherwise warrants it. It is clear that this money did not belong to Charles. The place from the sale of which it was derived was devoted to the support of the oratrix and her husband, not merely the use, but the corpus as well, for it was expected that the full value of it, at least, would be required for such support. The money therefore was, in equity, devoted to the same purpose as the land, and it was so intended and declared by Charles, who undertook to effectuate it by his will. Failing in that, there is no reason why equity will not follow the money into the Engrem mortgage, and make it available to the oratrix, according to the original intent, by reviving the mortgage, and setting it up for her benefit to the extent that the money impressed with the trust went into it, augmented by the interest thereon since. We think the effect of the deed, the life lease, and the oral agreement found by the master is that Charles was to support his father and mother during life, and therefor, and for what he had already done for them, was to have the place at their death. The lease devoted the entire use of the place to their support first of all and at all events. What that lacked of being enough, if anything, Charles was bound to make up, as the rights of the old folks under the lease necessitated the keeping of the corpus intact. If Charles was living, this duty could be enforced against him. But he is dead, his estate is insolvent, and the place has been converted into money, and now the oratrix's only remedy is to follow the money, in which her rights are the same as they were in the place, in which she had an equity aside from the lease, except as those rights may have been altered, if at all, by the changed condition of things. She is entitled—First, to the entire use of the money in any event, as she was to the entire use of the place; and as she cannot now obtain from Charles what more she may need, if anything, she is entitled, second, to resort to the fund itself therefor, as she would have been to the land itself had it not been sold. If there is anything left of the principal of the fund at her death, it will belong to Charles' estate; but first there must be deducted therefrom the amount of whatever Charles ought to have paid for her support, but did not, which will go to her estate.

The master reports that most of the money that came from the place went into the Engrem mortgage, but that he cannot tell just how much. This is not definite enough to found a decree upon. There will have to be

further inquiry concerning it. When that amount is ascertained, a proper decree should be entered, reviving and setting up said mortgage to that extent, augmented by the interest thereon since the money went into said mortgage, for the benefit of the oratrix, as herein indicated. And, inasmuch as said mortgage may be redeemed, a trustee should be seasonably appointed to receive, hold, and disburse the money under the order of the court; and for this purpose the case should be retained. Decree reversed, and cause remanded, with mandate.

HOYT v. CITY OF DANBURY.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS — GOVERNMENTAL DUTIES — OWNER OF FEE — NEGLIGENCE — PROXIMATE CAUSE — DAMAGES — FINDINGS.

1. Plaintiff slipped on a sidewalk, which he alleged was defective. The walk was covered with snow, but plaintiff gave no notice that the defect was caused by snow, as required by Gen. St. § 2673, when damages are claimed for an injury resulting from a defect so caused. Defendant set up want of such notice as a reason why only nominal damages should be assessed. *Held* that, in order to present the question of law as to damages, and also that as to the proximate cause of the accident, defendant was entitled to an explicit finding, if one were possible, as to whether it was the snow that caused plaintiff to slip.

2. Where there is found by the prior to be a probability so strong as to induce a reasonable belief in an impartial mind as to the existence of a fact material to the issue, the parties are entitled to a finding of the existence of such fact.

3. A finding that plaintiff slipped on a sidewalk, and was unable to save himself from falling, "probably because of snow upon said stone," imports that the snow was the probable cause of the accident.

4. A remark of the court, in the findings, that it does not find that plaintiff's fall was caused by the presence of snow on the sidewalk, is not equivalent to a finding that the fall was not caused by the snow.

5. Where two portions of a sidewalk on a street descending a hill were built on two different planes, divided by a perpendicular wall several feet in height, the building of steps with a suitable railing might be a proper method of connecting the two portions.

6. The adoption by municipal officers of plans for the construction of a sidewalk is the exercise of a governmental duty, quasi judicial in character; and where the plan adopted is permissible in itself, and is not so defective as soon to require repairs to make the way safe for travel, there can be no recovery because of defects therein, under Gen. St. § 2673, providing that any person injured in person or property by means of a defective road may recover damages from the party bound to keep it in repair.

7. A sidewalk made necessary by the action of a borough in changing a grade, and constructed under the superintendence of its chief officer, and accepted, paid for, and maintained for years by it and its successor, must be treated as a construction of the highway authorized by the proper municipal authorities, though a technical defect existed in the authority of the borough officer who superintended the construction; and hence no defect in the plan of construction could be a neglect of repair, within Gen. St. § 2673, providing that any person injured in person or property by means of a defective road may recover

damages from the party bound to keep it in repair.

8. Where a public sidewalk was built on property owned in fee by a borough, which had approved the construction of the walk, a city which succeeded the borough as a corporation, and in its property rights, was not negligent in permitting the walk to remain there.

9. Two portions of a sidewalk were built on different planes, divided by a perpendicular wall several feet in height, and were connected by steps. The walk and steps were covered with snow three or four inches deep. Plaintiff placed one foot on the coping of the wall, and was in the act of stepping down when the foot on the coping slipped, and he fell. *Held*, plaintiff having had but one arm, under which at the time of the accident he was carrying a parcel, that it was a question of fact whether he was negligent in not taking hold of the railing of said steps, or in attempting to do so, as he approached them.

Appeal from superior court, Fairfield county; Frederick B. Hall, Judge.

Action by Henry W. Hoyt against the city of Danbury to recover damages for personal injuries claimed to have been caused by a defective highway. The court found the facts, and rendered judgment for plaintiff for \$2,600, and defendant appeals. Reversed.

The finding of facts was as follows: "On November 9, 1894, at 8:30 a. m., the plaintiff, while walking easterly on the sidewalk on the south side of West street, in the city of Danbury, at a point on said sidewalk at the divisional line between the property of the town and city of Danbury, upon which the city hall building stands, and the property of Frank E. Hartwell, by reason of the defective and dangerous condition of the sidewalk at said point, as hereinafter stated, fell upon the sidewalk, and upon and down certain wooden steps at said place, and sustained a serious injury to his back and spine. The defective and dangerous condition of said highway and sidewalk consisted in and arose from the fact that soon after the completion of the city hall building, in 1886, which was erected at the joint expense of the town and borough of Danbury, the sidewalk north of the city hall building, which, with the sidewalk in front of the Hartwell property, descended by a gradual slope to Main street, which is immediately east of said city hall property, was cut down, and a stone wall running north and south was erected along the divisional line between said city hall property and said Hartwell property, and across the sidewalk on the south side of West street, so as to leave along the entire width of said sidewalk a perpendicular descent, to one going easterly on said sidewalk, of between three and four feet, and rendering it necessary, while said wall and descent remained, to use steps to pass from one of said grades to the other. After the completion of said city hall building said sidewalk was so cut down, and said wall erected, and movable wooden steps, with a wooden railing on each side of said steps, constructed, all upon the property of said town and borough, without the authority or action of said bor-

ough, under the superintendence of the ward-
en of said borough and of the selectmen
of said town. The railings upon said steps
coincided with the lines of the traveled walk
of the sidewalk west of said steps, and were
about six feet apart, and extended over the
coping stone of said wall, which said coping
stone was about one foot in width, and form-
ed the upper step above said wooden steps.
Said work of cutting down said sidewalk
and building said wall and steps was paid
for by said town and borough. There was
no reasonable occasion for thus cutting down
said sidewalk, and leaving said declivity to
be passed over by steps, nor has there been
any reasonable necessity for the continuance
of said dangerous condition. I do not find
that it was intended that said declivity and
steps should permanently remain upon said
sidewalk. Said declivity with said steps
upon said sidewalk have at all times since the
same were constructed been dangerous, and
have rendered said sidewalk unsafe for pub-
lic travel, and have been a nuisance to the
public having occasion to travel upon said
sidewalk, and the defendant has at all times
been negligent in thus suffering the same to
remain upon said highway. Said steps were
not in themselves defective, either in mate-
rial or manner of construction, nor were they
out of repair at the time of the plaintiff's in-
jury. Said city hall building and said wall
and steps were upon premises which at the
time of the plaintiff's injury were jointly
owned in fee by the defendant and said town
of Danbury. At the time of the plaintiff's
injury it was the duty of the defendant to
keep the highway in question in a reasonably
safe condition for public travel. At the time
of said accident the plaintiff was familiar
with the said sidewalk, and knew of the ex-
istence of said declivity and steps, and fre-
quently passed over the same. The plaintiff
has but one arm, and upon the morning in
question carried under his arm a package
containing a pair of child's shoes. At the
time of the accident the said sidewalk and
steps were covered with snow which had
fallen during the previous night to a depth of
three or four inches. I do not find the said
sidewalk or steps were rendered dangerous
for travel by reason of said snow, nor was
the defendant negligent in not having caused
the removal of said snow. At the time of
the accident the plaintiff, in approaching said
steps to descend the same, was walking a
little to the right of the middle of the walk,
and was in the exercise of due care. He
had stepped one foot upon the said coping
stone of said wall, and had raised the other,
and was in the act of stepping down upon the
wooden steps when his foot upon the coping
stone slipped, probably because of snow
upon said stone, and he was unable in any
manner to save himself from falling. He
did not take hold of the railing of said steps,
nor did he attempt to do so, as he approached
said steps. I find that the plaintiff was

without contributory negligence. I do not
find that the plaintiff's fall was caused by
the presence of snow upon said sidewalk or
steps. I do not find that the plaintiff would
have fallen had said declivity not existed.
The plaintiff gave due notice to the defend-
ant of said injury, but did not give the notice
required by statute for injuries caused by
snow or ice. The said city hall building
was planned to be used in part, and at all
times since its erection has been used in part,
for other than municipal purposes, and from
such other uses the owners thereof have de-
rived an income."

Upon the trial of said cause, and during
the cross-examination of one of the defend-
ant's witnesses, counsel for the defendant
made a general objection to all evidence in
proof of any claimed defect in said highway
by reason of the cutting down of said side-
walk and the use of steps at the place afore-
said, upon the ground that the question
whether said sidewalk should be so cut down
and such steps used were questions to be
determined by the municipal authorities, and
not by the court. It was agreed that all evi-
dence of said character should be received
subject to said objection.

Upon the foregoing facts, counsel for the
defendant claimed, as matters of law, that
plaintiff was guilty of contributory negli-
gence; that the accident in question was oc-
casioned by snow on said sidewalk and
steps; that by the pleadings the only defect
alleged was in the steps aforesaid, and that
in the absence of any defect in the construc-
tion of said steps, or in their condition at
the time of the accident, the plaintiff could
recover no more than nominal damages; that
the act of changing the grade of said side-
walk and of cutting down the same as afore-
said, and using steps, was the act of said
borough of Danbury, and that, said borough
authorities having decided to so change said
grade and use said steps, the defendant was
not liable in this action, beyond nominal
damages, in the absence of any defect in the
construction of said steps, or in their condi-
tion at the time of the accident; that upon
all the facts aforesaid the plaintiff was only
entitled to recover nominal damages.

The complaint was in two counts. The first
alleged that the defendant was charged with
the duty of keeping all the streets within its
limits in repair, and that the highway in ques-
tion was defective, in this: that the sidewalk
in front of the city hall property at the point
where the steps then led, and now lead, from
the sidewalk in front of the premises of Frank
E. Hartwell, adjoining said city hall prop-
erty on the west, to the sidewalk in front of
said city hall property, was about four feet
perpendicularly below the said sidewalk in
front of the said premises of said Frank E.
Hartwell, by reason of the former having been
cut down from a gradually inclined and safe
grade to the condition just above described,
rendering said sidewalk dangerous and de-

fective,—the only means of passing from the said higher to the said lower sidewalk being dangerous and defective wooden steps,—which said condition of said highway at said point was well known to the defendant, and had existed, and had been by said city permitted to exist, for an unreasonable length of time. The second count alleged that the defendant owned the city hall property in fee simple, and had, with gross negligence, willfully and unlawfully, permitted to remain and maintained on and in the sidewalk in the highway in front of, and on the north side of, said city hall building, and on said premises of the defendant, and in and on that portion of said sidewalk immediately adjoining and in continuation of the sidewalk in front of said premises of said Frank E. Hartwell, an unsafe and exceedingly dangerous place, obstruction, and pitfall, to wit, a perpendicular stone wall about four feet in height, directly in the line of said sidewalk and across the whole width thereof, and arising from the said sidewalk in front of said city hall building to the said sidewalk in front of the said premises of said Frank E. Hartwell, next adjoining, constituting in and on said premises at said point a dangerous obstruction, pitfall, and nuisance, with only steep, dangerous, and defective wooden steps, built and maintained by the defendant, connecting the aforesaid higher and lower portions of said sidewalk.

The appellant assigned sundry errors of law, among which were that the court erred in holding that the plaintiff slipped "probably because of snow upon said stone," and at the same time refusing to find that the plaintiff's fall was caused by the presence of snow upon said sidewalk; and in holding that the city could be held liable, when not responsible for the presence of the snow, and when no notice was given of the accident within 15 days, as required by statute, and in holding on the pleadings that the plaintiff could recover more than nominal damages, when the defendant showed and the court finds that the steps alleged in the declaration to be "steep, dangerous, and defective" were not in any way defective or out of repair, and in overruling its several claims of law above mentioned. The defendant also assigned sundry errors in not finding certain facts according to its request, and in the finding as made; and the evidence bearing upon these points was made part of the record, under chapter 100, Pub. Acts 1895.

Lyman D. Brewster and Henry A. Purdy, for appellant. Samuel Tweedy, for appellee.

BALDWIN, J. (after stating the facts). The immediate occasion of the plaintiff's fall was his slipping on the coping stone of a wall by which a sidewalk built upon one plane, on a street descending a hill, was divided from a sidewalk built upon another, three or four feet lower. Against this wall, as a means of descent, had been placed a flight of wooden steps, down which he fell. It is found by the

trial court that the sidewalk and steps were covered with snow which had fallen during the previous night to the depth of three or four inches, and that he "was in the act of stepping down upon the wooden steps when his foot upon the coping stone slipped, and he was unable in any manner to save himself from falling, probably because of snow upon said stone." The defendant requested a further finding that the snow had been somewhat beaten down by persons who had passed along the street so as to leave the sidewalk and steps in a slippery condition, and that it was the snow on the coping stone which caused both the slip and the fall. These requests were refused, and the refusal is made (under chapter 100, Pub. Acts 1895, § 493, § 7) the subject of several of the reasons of appeal.

Gen. St. § 2873, provides that no action can be maintained against a municipal corporation charged with the repair of a highway, on account of an injury received from its defective condition by reason of snow or ice, unless written notice be given to it of the nature of the claim within 15 days after the occurrence of the accident. No such notice was given by the plaintiff, and the want of it is set up by the defendant as a reason why only nominal damages should have been assessed. In order to present this question of law, and also that as to the proximate cause of the accident, it was entitled to an explicit finding, if one were possible, as to whether it was or was not the snow on the coping stone which caused the plaintiff to slip; for, had there been no slip, there would have been no fall. The finding merely states that the snow was the probable cause.

In civil actions it is not necessary that the triors should be free from all reasonable doubt as to the proper conclusions to be drawn from the evidence. Every lawsuit looks to two results,—to end a controversy, and to end it justly; and in the administration of human government the first is almost as important as the last. It is enough, therefore, if the judgment rests, not, indeed, on mere conjecture, but on a probability so strong as to induce a reasonable belief in an impartial mind. *Stone v. Stevens*, 12 Conn. 219, 230; *Curtis v. Railroad Co.*, 18 N. Y. 534, 542; *Haskins v. Haskins*, 9 Gray, 390, 393. When there is found by the trior to be such a probability in respect to the existence of a fact material to the issue, the parties have a right to demand that he shall go one step further, and find this fact; for only thus can their contest be brought to a complete and final determination. We do not, however, find it necessary to inquire whether, upon the evidence certified, there was an error in law in not deducing, as a necessary inference from the facts proved, the fact that the snow was the cause of the slip, or whether, if there had been such an error, it would be remediable in this proceeding. The finding, in stating without qualification that

it was the probable cause, imports that it was the cause. Had the degree of probability been insufficient to produce a reasonable belief in the mind of the trier, there should have been, and presumably would have been, no mention of the snow at all in that connection. The fall down the steps having been occasioned by a slip of the foot, which was caused by treading on slippery snow, the snow on the walk was at least one of the defects in the street to which the accident was immediately due. Except for this snow, the coping stone and the steps below it were in good condition. Had it not been for the break in the level of the sidewalk on the line of the wall, the fall, indeed, might not have occurred; but, as things were, it was a natural consequence of the slip, and a part of the same event.

The trial judge has incorporated in the finding the following remarks: "I do not find the said sidewalk or steps were rendered dangerous for travel by reason of said snow. * * * I do not find that the plaintiff's fall was caused by the presence of snow upon said sidewalk or steps. * * * I do not find that it was intended that said declivity and steps should permanently remain upon said sidewalk. I do not find that the plaintiff would have fallen had such declivity not existed." The object of such a finding is to place upon the record a statement either of all the facts proved upon the trial, or of enough of them properly to present the questions of law raised by the appeal. Gen. St. § 1132. Statements of matters as to which no finding whatever is made are irrelevant, unless they bear upon exceptions taken for want of such a finding. That the court, in the case at bar, did not find that the fall was caused by the snow, certainly cannot be deemed equivalent to a finding that the fall was not caused by it, and is therefore immaterial to the issue. That must be determined upon the facts that were found. *Crane v. Transportation Line*, 50 Conn. 341, 344.

The first count of the complaint avers that the plaintiff's injuries resulted from a defect in the street, from its having been cut down four feet, by a perpendicular fall of level, the upper and lower walks being only connected by "dangerous and defective wooden steps." The finding is that this mode of constructing the sidewalk rendered it dangerous and unsafe, but that the steps themselves were in no way defective, and that the plaintiff slipped on the snow, and because of it, before he reached them, while walking upon the higher level. Two defects in the highway are thus presented, which contributed to the plaintiff's fall,—the slippery condition of the sidewalk, and the sudden change of grade. Had the plaintiff walked off the coping stone into the air, without paying any regard to the steps, his fall could have given him no cause of action, for it would have been due to his own want of ordinary care. His fall was in fact not chargeable to any

fault of his own, but that which proves this proves also that it was occasioned, not by any defect in the construction of the highway, but by a defect of repair. He was without fault, because his foot had suddenly slipped on the new-fallen snow, and he was unable to recover his balance in time to avoid what must otherwise be the natural consequence of a slip on that stone, namely a fall down the steps. The slip was an accident which he was not bound to anticipate, and he therefore was not responsible for the cause of his injury. But neither was the defendant, since it is found that it had not been negligent in respect to the removal of the snow. If it were so that under no circumstances could steps be lawfully made a part of a sidewalk built for use in descending a hill, a different result might be reached. Slips on the ice are common in our climate during several months in the year, and the danger to which travelers are thus exposed must be taken into account by those charged with the duty of providing and maintaining sufficient highways. Such a duty had been imposed on the borough of Danbury, and carried with it the correlative right of determining the mode of their construction. As to which, out of any appropriate modes of building the particular sidewalk in question, was to be chosen, it was for the borough to decide; and, so long as the mode selected was an appropriate and lawful one, its decision was not subject to collateral review in a suit of this nature. The introduction of steps with a suitable railing in such a sidewalk might be a proper means of facilitating passage. The superior court had the right to determine whether they were properly constructed and in good repair, but not to pronounce the walk defective because not built on an unbroken grade.

The cause of action stated in this count depends wholly on Gen. St. § 2673, which provides that "any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair." A statutory liability of this general description has rested upon our towns, and such municipal corporations as have been their successors, since early colonial times. Originally it took the form of a criminal proceeding (*Revision 1702*, p. 10), and the remedy given has always been confined within narrow limits by judicial construction. *Hewison v. New Haven*, 34 Conn. 131, 142; *Beardsley v. City of Hartford*, 50 Conn. 529, 545; *Lounsbury v. City of Bridgeport*, 66 Conn. 360, 364, 34 Atl. 93. The charge is thrown on the party who was bound to keep the highway in repair, and whose neglect to fulfill this duty was the cause of the injury. The neglect on which any such action must be founded is therefore a neglect of repair. A defect in the plan upon which the highway was constructed is not within the statute. If such a defect naturally results in a direct injury to an owner of adjacent land, he has

his action at common law for this invasion of his proprietary right. *Mootry v. Town of Danbury*, 45 Conn. 550, 556. But injuries which it may occasion to travelers cannot be made the subject of any action in their favor. They are the result of an error of judgment on the part of the officers of a public corporation on which has been cast the burden of discharging a governmental duty of a quasi judicial character. For consequential damage thus occasioned to members of the general public the common law never gave a remedy, nor has the statute changed the rule. If, indeed, a defect in the plan of construction should be so great as soon to require repairs in order to make the highway safe for travel, a neglect to make these repairs might found an action, but the plaintiff's case would be no stronger than if the road had been originally built in the best manner. So, were the plan of construction adopted one which was totally inadmissible,—as, for instance, if the sidewalk in question in the case at bar had been left with its grade broken simply by a four-foot wall, without the provision of steps, or had the steps provided been insecure, or unguarded by a proper railing,—the highway would have been in such a defective condition as to have been out of repair from the beginning. Nothing of this kind is disclosed by the finding. That states, on the contrary, that the steps leading from one grade to the other were not defective, either in material or manner of construction, nor out of repair, at the time of the plaintiff's injury. The borough charter (5 Sp. Laws, p. 468, § 3) empowered the warden and burgesses to order and construct sidewalks "according to the grade and plan and of such materials as" they should designate. The use of steps in a city or borough sidewalk is one of several permissible means of overcoming a steep grade. *Beardsley v. City of Hartford*, 50 Conn. 543. It was for the municipal authorities to decide whether it was the best means of constructing this particular walk, and their decision was not subject to review by the courts. *Mills v. City of Brooklyn*, 32 N. Y. 489; *Jones v. New Haven*, 34 Conn. 1, 14; *Healey v. New Haven*, 47 Conn. 305, 314.

The plaintiff contends that these principles were inapplicable, because the superior court has found that the sidewalk in question was constructed under the superintendence of the warden of the borough, "without the authority or action of said borough." In view of all the facts found, this contention is unsound. The existence of some technical defect in the authority of the warden who superintended the construction is not a material fact in issue. It is not true that the action of the borough in respect to an appropriate construction of a sidewalk can be signified only by the passage of a formal vote ordering the construction. It appears from the finding that in 1886 a new sidewalk was made necessary by the action of the borough in erecting, in connection with the town, a city hall building; that this side-

walk, being in front of land owned in common by the borough and the town, was then constructed under the supervision of the warden and one of the selectmen and that a portion of the expense of such construction (that is, of so separating the grade and building the steps) was paid for by the borough. It further appears that for eight years the borough maintained this sidewalk. Indeed, the allegation of the complaint which is the foundation of the plaintiff's cause of action is that the construction of the sidewalk "at said point was well known to the defendant, and had existed, and had been by said city permitted to exist, for an unreasonable length of time." A sidewalk such as is described in the finding may, in law, be an appropriate plan of construction in a highway laid out on a hillside; and this sidewalk, made necessary by the action of the borough, constructed under the superintendence of its chief officer, accepted, paid for, and maintained for eight years or more by the borough and its successor, the city, must be treated for the purposes of this action as being at the time of the accident a construction of the highway authorized by the proper municipal authorities; and no defect in the plan of construction can be a neglect of repair, within the meaning of the statute imposing upon the defendant a liability for neglect to keep the highway in repair.

The second count of the complaint charges the defendant with gross negligence in permitting to remain and in maintaining on premises owned by it in fee, and used as the site of its city hall, a perpendicular wall, four feet high, extending across the sidewalk, constituting a dangerous obstruction, pitfall, and nuisance, with only steep, dangerous, and defective wooden steps, built by it to connect the higher and lower portions of the walk. The allegation of the defective character of the steps is negated by the finding. The owner of the fee is not in fault for permitting such a sidewalk, constructed under municipal authority, to remain in accordance with municipal approval. Such, as a legal conclusion from the facts appearing in the finding, was the walk in question in this case. The defendant inherited the city hall from the borough of Danbury, which had approved the construction of the walk and steps as a proper means of overcoming the steepness of the grade of the street. The facts found showed, therefore, that the charge of negligence had not been proved. The authority of the borough to determine how the walk should be built was not less because it happened also to own the land upon which it was to be laid. It was only the duty of the city to keep it in repair, and no defect of repair was shown, except that due to the recent snowfall, as to which it is found the defendant was not in fault. There was error, therefore, in awarding the plaintiff substantial damage under either count.

The defendant claims that the facts found

show that the plaintiff was guilty of contributory negligence, in not attempting to take hold of the railing as he approached the steps. As he had but one arm, and was carrying a package under that, he was undoubtedly in a situation requiring the use of more than ordinary caution. Whether, however, he exercised due care or not, in view of all the attending circumstances, was a pure question of fact, as to which the finding of the trial court is conclusive.

We have had no occasion to consider the other errors assigned, or to consult the testimony, certified in connection with the finding, for the purpose of a clearer understanding of the questions of law that arose in the course of the trial below, inasmuch as the finding, as it stands, sufficiently presents those which are decisive of the case. There is error, and a new trial is ordered. The other judges concurred.

LITTLE v. GEER et al.

(Supreme Court of Errors of Connecticut. July 13, 1891.)

WILLS—USE AND INCOME OF RESIDUE—POWER OF DISPOSITION—CONSTRUCTION—POSSESSION OF PERSONALTY—WASTE—INJUNCTION.

1. A testator gave to his wife the use and income of his estate till her remarriage or death, and authorized his executor, in case such use and income should prove insufficient, to sell any part of the estate as he might deem necessary, and use the avails for the wife's "proper and comfortable maintenance and support." The will provided for a final distribution among the testator's heirs. A codicil appointed the wife executrix, and gave her the privilege of using as much of the principal as she might desire for her support, with full power to sell and convey any of the estate she may see fit, and freely use the avails thereof as long as she remains a widow. *Held*, that the widow takes no absolute estate, but is confined to what she may require "for her comfortable and proper maintenance and support."

2. The possession of the real estate belongs to the widow till her remarriage or death, and during such time she holds the personal property as trustee for the remainder-men, and may be required (Gen. St. § 559) to give a bond for its safe-keeping.

3. So long as the widow acts in good faith, the amount she may appropriate for her own support must be left to her own discretion; but wastefulness, or an unreasonable appropriation, may be restrained by a court of equity on the complaint of any of the remainder-men.

Case reserved from superior court, New London county; Ralph Wheeler, Judge.

Suit by Philo Little, administrator, against Albert P. Geer and others, to determine the construction of the will of Jeremiah C. Geer, of Groton, deceased, brought to the superior court and reserved, upon the facts stated in the complaint, for the consideration and advice of the supreme court of errors. Will construed.

A. P. Tanner, for plaintiff and for defendant Juliette Geer. Solomon Lucas, for the other defendants.

ANDREWS, C. J. The will and codicil of Jeremiah C. Geer are as follows:

"I, Jeremiah C. Geer, of the town of Groton, in the county of New London, state of Connecticut, being of sound and disposing mind and memory, do make and ordain this to be my last will and testament in manner and form following; that is to say: First, I will, order, and direct that my executor hereinafter named pay all my just debts and funeral charges. Then I give, devise, and bequeath unto my wife, Juliette Geer, my gold watch and chain and ornaments belonging to the same. I also give, devise, and bequeath to my beloved wife, Juliette Geer, the use, income, improvement, and avails of all the rest and residue of my estate, whether real or personal, wherever the same may be situated, and of whatever it may consist, for her to have, hold, use, possess, and enjoy so long as she remains my widow, or until her decease; and in case the use and income of my said estate, real and personal, shall be insufficient for her comfortable and proper maintenance and support, then I authorize and empower my executor to sell any and such of my estate, either real or personal, according to his best judgment, as he shall deem necessary, and to appropriate and freely use the avails arising from such sale for her proper and comfortable maintenance and support. Then, upon the decease or marriage of my said wife, Juliette Geer, I will, order, and direct that all the rest and residue of my estate, both real and personal, be divided into ten (10) equal parts or shares except the following item: I give, devise, and bequeath to my daughter Eliza Bliven, wife of Henry Bliven, the sum of one dollar, because I have done liberally by her in years past. I give, devise, and bequeath to my son Jeremiah C. Geer, Jr., two (2) of such parts or shares; to my son Albert P. Geer two (2) of such parts or shares; to my daughter Mary Ann C. Welch, wife of Albert Welch, two (2) of such parts or shares; to my daughter Victoria M. Case, wife of Frank Case, of Greenport, Long Island, two (2) of such parts or shares; and the remaining two (2) shares or parts to Mortimer Edgar Williams, otherwise called Edgar M. Geer. To enable my executor the more easily to divide and distribute what shall remain of my said estate on the decease or marriage of my said wife, and which she shall not have used during her life or widowhood, into tenths as aforesaid, I hereby authorize & empower him at his discretion to sell all or any part thereof, whether real or personal, and to execute any and all proper instruments for the conveyance of the same. Lastly, I nominate, constitute, & appoint Walter J. Starr, of the town of Groton, county of New London, state of Connecticut, executor of this, my last will and testament, hereby revoking and annulling all other wills by me made before this time."

"I, Jeremiah C. Geer, of Groton, in the county of New London, state of Conn., do make this codicil to my last will and testament dated July 30th, 1889, viz.: Besides giving my wife,

Juliette Geer, the use and income of all my estate as therein written, I now, by this codicil, give and bequeath to her the privilege of using as much of the principal as she may desire for her comfort and maintenance, with full power and authority to sell and legally convey any of my estate, both real and personal, as she may see fit, and to freely use the avails thereof as long as she remains my widow. Since making the foregoing will, Walter J. Starr, who was named as executor, has removed from the state. I now name, constitute, and appoint my wife, Juliette Geer, executrix of my said last will and this codicil, instead of said Starr, without her giving bonds."

It appears that Mrs. Geer declined to be the executrix of her husband's will, and that the plaintiff was appointed administrator with the will annexed. She was the second wife of the testator. He had children by a prior marriage, and it is stated she had children by a former husband. There are four questions propounded in the complaint on which the advice of this court is asked: "First. Does the widow of the testator, the said Juliette Geer, take, by said will and codicil, an absolute estate in the rest and residue of the estate referred to in said quoted sections? Second. If the said widow does not take an absolute estate, by whom should the same be held during her widowhood, and to whom should the plaintiff deliver the same? Third. Is the widow's right to said estate confined to what she may require for a liberal, comfortable maintenance during her widowhood? Fourth. Is the amount that she may appropriate for that purpose subject to the determination of the court of probate in a case of dispute that she is appropriating more than she ought?"

The language of the will, read in the light of the facts, indicated that the testator did not intend to give his wife an absolute estate in the whole of his property. The use of all his property is given to her during her widowhood. He desired to provide liberally for her during that period. But he remembered also his children and grandchildren who were his heirs, and intended that they should take something from his estate. He evidently expected there would be something left after the death or remarriage of his widow. In answer to these questions we say:

First. No. The widow does not take an absolute estate in the rest and residue. *Peckham v. Lego*, 57 Conn. 553, 19 Atl. 392; *Mansfield v. Shelton*, 67 Conn. 390, 35 Atl. 271.

Second. The possession of the real estate belongs to the widow, to whom the plaintiff should deliver it. The possession of the personal property is regulated by section 559 of the General Statutes. If held by a trustee, he may be required to give a bond for its safe-keeping. She would hold the personal property as a trustee for those entitled to the remainder.

Third. The widow is confined to what she

may require "for her comfortable and proper maintenance and support."

Fourth. So long as the widow conducts reasonably and in good faith, the amount she may appropriate for her own support must be left to her own discretion. If, however, she should indulge in wastefulness, or should seek to appropriate to her own use more of the estate than is reasonable for her support as stated in the will, then she may be restrained by a court of equity on the complaint of any of the remainder-men.

The superior court is advised to render judgment in accordance with this opinion. The other judges concur.

STARR CASH & PACKAGE CAR CO. v. STARR.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

COURTS—ORIGINAL JURISDICTION—SUPERIOR COURT—JURISDICTIONAL AMOUNT—BRINGING IN NEW PARTIES—TIME OF MAKING MOTION—CONTINUANCE—EVIDENCE—REOPENING CASE.

1. In an action to compel defendant to transfer to plaintiff a certain patent, alleged to have been bought by defendant for plaintiff, and with its money, and for an injunction, the fact that the complaint concluded with a claim for \$5,000 damages brought it within the jurisdiction of the superior court, though the complaint alleged that the patent was bought for \$300.

2. The question of jurisdiction was not affected by an oral waiver of all claims for damages, after an entry of defendant's default.

3. Two years after defendant's default, and on the eve of trial granted at his request, it was too late for him to move that another be cited in as a co-defendant.

4. In an action by a foreign corporation, the admission in evidence of plaintiff's charter after the opening arguments, followed by a refusal to grant an adjournment to enable defendant to present new testimony, was not ground of appeal, when opportunity to offer any evidence bearing on that thus introduced by plaintiff was not denied.

5. Where a default is taken in a suit on a contract entered into with a foreign corporation, its capacity to make the contract is admitted, where defendant was allowed to participate in the trial, and put in evidence as if a general denial had been interposed.

Appeal from superior court, New London county; Milton A. Shumway, Judge.

Action by the Starr Cash & Package Car Company against Joseph Starr to compel defendant to transfer to plaintiff a certain patent pursuant to a contract between the parties, for an injunction, and for damages. There was a default entered against defendant, and plaintiff waived its claim for damages. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The complaint alleged that, the defendant being the business manager of the plaintiff company, it was agreed between them that he should endeavor to buy for its benefit, and with its funds, a certain patent held by one Spring, and procure an assignment of it to himself, to be held subject to its order, and to be transferred to it on demand; that he

succeeded in buying it for \$300, paying that sum from funds furnished by the plaintiff; that he afterwards refused to transfer it to the plaintiff on demand, and was now threatening and attempting to use and sell the patent for his own benefit; and that the plaintiff was seriously embarrassed and damaged thereby. The defendant made default of appearance, and judgment was entered against him by default at the first term. Three months later a motion by the defendant to open the default was made and denied. Nine months afterwards an entry was made upon the docket that the plaintiff orally withdrew all claim for damages. The defendant then appeared, and moved to erase the cause from the docket on these grounds: A judgment had been rendered at a previous term, which had never been set aside, and the plaintiff had withdrawn all claims for damages. The only remaining claim was for equitable relief, and the matter in demand was less than \$500, and no hearing in damages could now be had, and no facts found whereon the judgment rendered at a previous term could be supported. This motion was denied, the court first permitting an amendment of the docket entry above mentioned, at the plaintiff's request, by substituting "waived" for "withdrew." The plaintiff then presented a draft of a judgment file, and asked that it be signed by the court, without any hearing. This was overruled (Robinson, J.) on the objection of the defendant. Three months later he filed a motion that Spring might be cited in as a co-defendant; alleging that he had bought from Spring under a written agreement not to assign over the patent, except upon certain conditions therein expressed, and for the collection by the defendant of certain damages for its infringement, and that the present directors of the plaintiff were the managers of a rival concern, which was liable for such damages to a large amount, and brought this suit for the benefit of said concern, and not for that of the plaintiff, but to defeat the rights of Spring and the defendant. This motion was denied, and the case was then heard just as if a general denial had been pleaded; the plaintiff being required to go forward, and the defendant allowed to introduce evidence in his own behalf. The finding stated these facts: The plaintiff is a corporation organized in 1892, under the laws of West Virginia, for the purpose of making and dealing in cash cars, etc., with its principal place of business in Connecticut. Its subscribed capital was \$500 (with the privilege of increasing the capital to \$50,000), and \$50 only was paid in. It began business in Connecticut, manufacturing under certain patents issued to the defendant, who was its general manager, and was soon threatened with suits for infringement of other patents. Counsel were consulted, and upon due examination, and at an expense of over \$300 (paid by the plaintiff), it was found that its use of the Starr patents did constitute such an infringement, and that it was advisable to buy another pat-

ent held by one Spring. The allegations in the complaint were true. The defendant, after the purchase, formed the purpose of defrauding the plaintiff, and claims the patent purchased as his own. His refusal to transfer it broke up the plaintiff's business. During the argument of the cause the plaintiff asked leave to offer its charter in evidence, claiming that it supposed it had been previously laid in, and it was admitted against the defendant's objection. The defendant thereupon moved for an adjournment in order to procure further evidence. Being asked by the court if it related to any question raised by the introduction of the charter, he said that he claimed the right to make a further defense on all the merits of the case, and that he was not ready to go on at that time. The court thereupon denied his motion, being of opinion that it was made simply for purposes of delay, and that his rights would not be prejudiced by its disallowance.

Hadlai A. Hull and Charles F. Thayer, for appellant. Frank T. Brown and Tracy Waller, for appellee.

BALDWIN, J. (after stating the facts). This case was brought within the jurisdiction of the superior court by the claim with which the complaint concluded, for \$5,000. The previous allegation that the patent in controversy had been bought by the defendant at the price of \$300 did not necessarily import that it was worth no more. Its value to the plaintiff, for aught that appears on the face of the complaint, or the loss sustained by the refusal to assign it on request, may have been the full amount of the damages demanded. The oral waiver of all claims for damages, made after the entry of the default, did not affect the question of jurisdiction. The complaint remained as it was before. It was not, and could not have been, amended by the waiver. Amendments of pleadings can only be made in writing. The docket entry of this waiver originally read that all claims for damages were withdrawn. The court had power to allow its amendment so as to describe the plaintiff's act as a waiver instead of a withdrawal. Whichever word was used, however, the legal effect would be the same, namely, that, although an assessment of damages was still claimed in form upon the face of the record, it was in fact no longer desired.

The defendant came too late with his motion that Spring be cited in as a co-defendant. It was not filed until two years after the entry of his original default, and upon the eve of the trial for which he had been contending. For this cause its denial was fully within the discretion of the superior court.

The admission of the charter in evidence after the opening arguments, followed by a refusal to grant an adjournment in order to enable the defendant to present new testi-

mony, constituted no ground of appeal. Opportunity to offer any evidence bearing on that thus introduced by the plaintiff was not denied, and the court was under no obligation to go further.

The defendant contends that as the complaint described the plaintiff as a foreign corporation, and did not allege that it had power to make the contract with him upon which the suit was predicated, it could make out no case without the production of its charter; and so, having not produced it at the time when the arguments commenced, he had not before been put in a position which made it incumbent on him to produce any testimony in defense. Had the parties gone to trial on the general issue, this point would have been untenable. Rules of Practice *xxi.*, § 3, 58 Conn. 588. The judgment by default deprived the defendant of any right to plead. As the superior court properly held, however, it did not, without more, entitle the plaintiff to the equitable relief which it claimed in its complaint. It was entitled to such relief only as might properly be awarded upon these claims, so far as it was able to make out by satisfactory proof the case which it had set up. A default in an action for legal relief admits the material facts declared on as constituting a cause of action, and that, if these do constitute a cause of action, the plaintiff has a right to recover at least nominal damages. A default in an action for legal and equitable relief, followed by a waiver of all claims for damages, simply establishes the plaintiff's right to go forward and prove the matters he has alleged, unembarrassed by any written pleadings on the part of the defendant, and with no other delays or formalities than such as may be deemed necessary to insure that equity shall be done. It does not under our practice, and it did not under the original practice in English chancery, entitle him to treat the matter of his complaint as confessed, 2 Swift, Dig. p. 253; Thomson v. Wooster, 114 U. S. 104, 110, 5 Sup. Ct. 788. After a default, whether in a legal or an equitable action, a defendant has no absolute right to be heard as to the terms of the judgment, without leave of the court, although ordinarily a motion for such leave is treated as granted as of course, without any formal order. In this case the defendant was allowed to participate in the trial, and introduce evidence, as fully as if a general denial had been interposed. He could ask nothing more, and the rule that upon an issue so formed, in a suit founded on a contract entered into with a foreign corporation, its capacity to make the contract is admitted, is fatal to his present contention. Proof of the charter not being necessary to support the contract declared on, its introduction out of the regular order could give him no right to reopen his whole case. There is no error. The other judges concurred.

NEW LONDON WATER BOARD v. PERRY.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

CONDEMNATION OF WATER RIGHTS — DAMAGES — PROCEDURE.

1. Defendant, as a riparian owner on two brooks, to a point below their junction, and of the land lying between them, and having an ice pond on the smaller brook, had a right to connect them by a canal, in order to feed his ice pond from the larger brook in case the natural inflow was at any time insufficient. A city condemned the right to all the waters of the larger brook for the use of its inhabitants, and compensation was awarded to defendant therefor. *Held*, that defendant's rights in the waters of the smaller brook, with respect to the reasonable rights of other riparian proprietors below him, were in no manner affected by such appropriation of the waters of the larger brook, and he was entitled to no compensation for any consequential damages he may suffer should his obstruction of the flow of the smaller brook to fill his ice pond infringe the rights of the riparian owners on the larger brook below the junction.

2. In such proceeding it was within the discretionary power of the judge before whom it was brought to allow an amendment specifically stating what plaintiff claimed to be included under its vote of condemnation.

Appeal from superior court, New London county; Milton A. Shumway, Judge.

Application by the board of water commissioners of the city of New London against Walter R. Perry and others to ascertain and determine the amount of their damages for the appropriation of their land and riparian rights by the applicant. There were findings of fact and an award of compensation, from which defendant Walter R. Perry appeals. No error.

The application was based upon votes of the plaintiff, under authority of Sp. Laws, vol. 10, p. 157, adopting a plan of its engineer, as described in a certain report, with maps and surveys, on file in its office, for securing an additional water supply for New London from Briggs brook; and condemning and taking "the right to construct and maintain upon lands of Walter R. Perry, in the town of Waterford, hereinafter described, a dam and reservoir known as 'No. 2,' and to collect the waters of said Briggs brook by means of said dam and reservoir No. 2, and a dam and reservoir known as 'No. 3,' to be constructed near the source of said brook,—the location of which dams and reservoirs is shown in said report, surveys, and maps,—and distribute the waters so collected by pipe lines into the city of New London"; and condemning, taking, and appropriating "all lands, rights, easements, and privileges that may be necessary for carrying out the plan so adopted," including an eight-foot strip of land for a pipe line. It named several parties, including said Perry, as "the persons affected by said plan, having lands, rights, easements, and privileges at and below said dam and reservoir No. 2"; adding the following: "The rights, easements, and privileges so condemned, appropriated, and taken are those claimed by the said proprie-

tors at and below dam No. 2 respectively to the flow of the waters of said brook unimpeded by said dams and reservoirs Nos. 2 and 3." An amendment was afterwards allowed, reading as follows: "The rights and privileges claimed to be so condemned, appropriated, and taken are the right on the part of the petitioners, as against said proprietors, to construct and maintain dams and reservoirs at the locations designated as Nos. 2 and 3, and pipe lines leading therefrom, all of them sufficient in size, material, height, capacity, and method of construction to detain, collect, withhold, and divert all the waters of Briggs brook above dam No. 2, and conduct the same by said pipe lines into the city of New London, for the use of its inhabitants, and thereby to condemn the right, privilege, and easement as now enjoyed by said proprietors to have the waters of said Briggs brook flow to them respectively unobstructed, undiminished, and undiverted. And your petitioners therefore request your honor to estimate and determine the amount of compensation which the respondents ought, respectively, to receive for any and all damages occasioned by the action of the board by the withholding, collecting, detaining, and diverting all the waters of said stream above the location of said dam No. 2." The allegations in the application were found true, and the following special finding was also made: "The defendant Perry was at the time of the beginning of the proceedings of condemnation the owner of one hundred and six acres of land situated near to and northwest of the city of New London. Running through said land a distance of about one-half mile, is a stream called 'Briggs Brook,' upon which stream the plaintiff proposed to place a dam, designated on the map as 'Dam No. 2.' There is running through said land another stream, called 'Edgecomb Brook,' which joins said Briggs brook on land of the defendant below said dam No. 2. On said Edgecomb brook the defendant had established and had in operation for about nine years an ice plant consisting of a pond formed by a dam on said Edgecomb brook, with an ice house, ice machinery, and a barn near said pond. At the time the said ice plant was established on Edgecomb brook, the defendant did not own any more than a small part of the land through which Briggs brook flows, but he became the owner of the greater part of land on Briggs brook about three years before these proceedings were instituted. The land last acquired by the defendant lies on both sides of said Briggs brook, and is known as the 'Cavaly Farm,' containing about 100 acres, and adjoins the land before owned by the defendant on Edgecomb brook, and Edgecomb brook flows into Briggs brook on or near the boundary of the land last acquired by the defendant. On Briggs brook, below the junction of Edgecomb brook, is situated the ice pond and ice houses of Benjamin Rogers and others, which have been used and occupied by said Rogers for harvesting and stor-

ing ice for market for more than 20 years. Of the total area drained by Briggs brook, a little less than 70 per cent. will be taken therefrom by the erection of the dam as proposed by the plaintiff. The land of the defendant below the dam called 'Dam No. 2,' is so situated that a dam may be constructed, and the water ponded on land of the defendant. Such pond would have an area of about nine acres, and, if constructed, would have to be located wholly upon the Cavaly farm, the last acquired land of the said Perry, as above mentioned."

In assessing damages to the Rogers heirs and to said Perry it was assumed by the court that each had acquired the right to use and occupy the premises named, and had acquired the right to use the water of Edgecomb and Briggs brooks in the same manner and to the same extent as they were in fact used and occupied by them, and compensation was given each of them accordingly for the damages sustained severally by them, occasioned by diverting the water of Briggs brook in the manner set out in the application, and to said Perry additional compensation was given for the land taken and to be occupied in construction of pipe lines as described in said application. The entire drainage area of Edgecomb brook is 200 acres; of Briggs brook, 1,257 acres. The drainage area of Briggs brook diverted by the taking of the plaintiff is 1,052 acres. None of the water of Edgecomb brook is taken by the plaintiff. The water of Briggs brook is of value to said Perry in supplying water to his ice pond on Edgecomb brook, though not used by him for that purpose. The damage arising to said Perry by reason of the diversion of the water of Briggs brook, and depriving him of the use thereof for the purpose named, as well as for all other purposes for which it can be used, was considered, and compensation given therefor. The contingency that the riparian owners below said Perry might at some time hereafter insist that he cease from using Edgecomb brook for ice purposes, as the same is now used by him, in case said Perry has not the right so to use it, was not considered as affecting his damages or compensation for diverting the waters of Briggs brook. It did not appear that said Perry had not the right to use Edgecomb brook for cutting and taking therefrom ice for mercantile purposes. Eight thousand dollars was assessed as the compensation due to Perry, and he appealed, assigning sundry errors, which are stated in the opinion.

Hadlai A. Hull and William F. M. Rogers, for appellant. Walter C. Noyes, for appellee.

BALDWIN, J. (after stating the facts). The main claim of the appellant is that he should have been given larger compensation for the impairment of his right to avail himself of his ice pond as fully as heretofore. This pond is on Edgecomb brook, above its junction with a larger stream, known as "Briggs Brook." All the water of Briggs brook north of dam

No. 2 (which is above this junction), the water board has voted to appropriate. The appellant, as a riparian owner upon both brooks down to a point below their junction and of the land lying between them, had a right to connect them by a canal, in order to feed his ice pond, should he at any time find its natural inflow insufficient, from the waters of Briggs brook. This source of supply has now been condemned by the action of the appellee, and the damage thus occasioned to him has been included in the sum assessed in his favor. What he complains of is that nothing was included for such consequential loss as he may hereafter suffer should his interruption of the natural flow of Edgecomb brook, for the purpose of filling his pond, or by harvesting ice, be at any time an infringement of the rights of riparian proprietors on Briggs brook below the junction. By these condemnation proceedings the drainage area of Briggs brook is so far appropriated to the use of the city of New London that what remains is less than that of Edgecomb brook. What has been the greater stream may thus become the smaller, and the riparian proprietors below their junction must henceforth rely for their supply of water mainly on what is contributed by Edgecomb brook, and flows through the appellant's ice pond. But the action of the water board has in no way diminished his rights in the water of Edgecomb brook, whether ponded or unponded, running or frozen. He had before the right to make a reasonable use of it, and for that purpose to detain or pond it in a reasonable manner, having in view the size and capacity of the stream, and the reasonable rights of riparian proprietors below, whether upon the same stream or of one to which it is a tributary. *Mason v. Hoyle*, 56 Conn. 255, 265-268, 14 Atl. 783; *Elliott v. Railroad Co.*, 10 Cush. 191, 195. This right he retains unimpaired and unaffected by the appropriation by the appellee of the waters of Briggs brook. The riparian proprietors upon that have been awarded just compensation for their loss, and can henceforth expect to enjoy of the waters above the dam which is to be built across it only what, from time to time, the city may have no occasion to use. They stand, in relation to the appellant, precisely as if Briggs brook, above that dam, had never existed. The waters which it supplied may have been so abundant that the diminution and occasional interruption of the flow of Edgecomb brook, due to its use by the appellant, caused them no substantial injury, while they may now suffer great inconvenience from his continuance of the same use. If so, for the damage thus occasioned, so far as it may be the natural consequence of what has been done with respect to Briggs brook, they have been fully paid, and, so far as it may be due to the maintenance of the ice pond on Edgecomb brook, they retain all rights of action that they have ever had as lower riparian proprietors upon the channel through which its waters flowed. If it was reasonable for the appellant,

prior to these condemnation proceedings, as an upper riparian proprietor upon Edgecomb brook, and irrespective of his rights in Briggs brook, to pond and use its waters, as he did, for ice purposes, it will be reasonable for him to continue in the same course of action; and otherwise it will not be. These waters remain the same, and his rights in them as a riparian owner remain the same.

It is found that the Rogers ice pond has been maintained for more than 20 years on Briggs brook, not far below the junction. It has been fed by both brooks. Henceforth its supply from one of them will be small and precarious; but from the other it will receive as much as before, and its owners have no prescriptive right to demand more. Prescription is measured by adverse user, and their user has been limited to such water as the appellant, because he found its use unnecessary for the purposes of his ice pond, allowed to flow over his dam. If he has been hitherto consuming more water from Edgecomb brook than was reasonable, an action could have been brought in their favor, notwithstanding they had suffered no actual damage. *Parker v. Griswold*, 17 Conn. 288, 306. If he should hereafter consume more than is reasonable, an action of the same character would be open to them. His rights in Edgecomb brook are neither greater nor less than they were before he became a riparian proprietor upon Briggs brook. The judge of the superior court states in his finding that his assessments of damages were made on the assumption that the owners of each ice pond had acquired the right to use the waters flowing into it in the manner in which they were then using them, and to the same extent. So far as the appellant is concerned, we do not understand this to mean anything more than that it was assumed that he had then a right to do what he then was doing by virtue of his riparian proprietorship. It was not an attempt to adjudicate upon his rights after the condemnation proceedings were consummated, as against the owners of land lower down upon the stream.

It is contended that the report, maps, and surveys referred to in the application were insufficient to give a complete description of the rights and property taken. This objection was not taken before Judge Shumway, and cannot, therefore, be considered on appeal. The amendment, stating what the appellee claimed to be included in its vote of condemnation, was properly allowed. The vote, indeed, could not thus be altered; but by stating what was claimed to be its legal effect any opportunity for misconception of the appellee's position was removed. By its terms there was appropriated the right to construct two reservoirs into which "to collect the waters of Briggs brook," and to "distribute the waters so collected by pipe lines into the city of New London." The amendment states that under this is claimed the right to construct dams, reservoirs, and pipe lines, "sufficient in size, material, height, capacity, and method of con-

struction to detain, collect, withhold, and divert all the waters of Briggs brook above dam No. 2." An appropriation for public use of "the waters" of a brook is, unless otherwise limited, an appropriation of all its waters, and an appropriation by means of reservoirs and distributing pipes naturally implies that they shall be sufficient in all respects to answer the public necessities. The appellee's claim was fully warranted by the language of the vote, and the interests of both parties were promoted by having it distinctly stated upon the record. It is a necessary incident of proceedings of this nature that the judge before whom they may be brought should have power to allow reasonable amendments at any stage of the hearing. There is no error. The other judges concur.

RYAN v. CHELSEA PAPER MANUF'G CO.
(Supreme Court of Errors of Connecticut. July 13, 1897.)

APPEAL—REVIEW—INJURY TO EMPLOYEE.

1. Where there might be an honest difference of opinion as to the conclusion of negligence from the evidence, the finding of the trial court is conclusive.

2. Plaintiff, an employé of defendant, was called upon to operate a machine, and was injured in so doing. Shortly before the accident, defendant had reduced the distance between the roll and cylinder of the machine one-half, which arrangement was unusual and unknown in the ordinary use of the machine, and greatly increased the hazard of operating it, and of which plaintiff was given no notice, which failure to give notice was the proximate cause of the injury. *Holt*, that plaintiff could recover.

3. A conclusion of a trial court not inconsistent with clear rules of logic, where taken from incongruous evidential facts, is not reviewable.

Appeal from superior court, New London county; John M. Thayer, Judge.

Action by John J. Ryan against the Chelsea Paper Manufacturing Company to recover damages for personal injuries claimed to have been caused by the negligence of the defendant. Defendant submitted to default. Facts found and judgment rendered for the plaintiff for \$1,500 damages, and appeal by the defendant for alleged errors in the rulings of the court. No error.

W. A. Briscoe, for appellant. Joseph T. Fanning, for appellee.

HAMERSLEY, J. The defendant operated in one room in its factory three Fourdrinier machines for drying paper, known as No. 1, No. 2, and No. 3, respectively. Each machine was tended by two workmen, one called a "machine tender," and the other a "back tender." The plaintiff had been in the employ of the defendant as a back tender on machine No. 3 for about 22 months, when, while temporarily tending machine No. 2, his hand was caught in the machinery, and injured so that amputation was necessary. The plaintiff brings this action to recover of the defendant damages for his injury, alleging in the first count

that the defendant was negligent in supplying him with machinery for his work which was defective and unsafe, and in the second count that the defendant was negligent in not notifying the plaintiff of a change in the arrangement of the machine by which the danger in using it was greatly increased, and that his injury was caused by said change and failure to notify him thereof. The facts found by the trial court do not support a judgment on the first count. The defendant claims that the judgment on the second count is erroneous because—"First, the trial court required of the defendant a higher standard of duty in the conduct of its business than the law imposes; second, the court required of the defendant a less degree of care than is required by law." As to the second claim, the finding states that the plaintiff had been employed in like capacity on similar machines for 20 years, and was skilled in and thoroughly understood the operation of the same, and that at the time of his injury he exercised due care and skill. The standard of duty applied to the plaintiff by the court was the great skill and high degree of care requisite in operating a machine known to the operator to be a dangerous machine. The degree of care required by law is not greater than this. The real grievance of the defendant is that the court, in applying a correct rule of law, did not find the plaintiff guilty of contributory negligence, and the claim is urged that negligence on the part of the plaintiff follows as a necessary conclusion from the circumstances detailed in the finding. We cannot say that an application of the rules of law to the detailed circumstances leads necessarily to the conclusion of negligence. We think the question of negligence presented to the court below clearly depends on the conduct of the plaintiff under the special circumstances of the case, involving the exercise of sound discretion in the trier, based upon his experience as to what a reasonably prudent man would have done under such conditions, and that the "facts and circumstances are of such a nature that honest, fair-minded, capable men might come to different conclusions." In such case the question of negligence is one of fact, and the conclusion of the trier, applying a correct standard of duty, is conclusive. This principle was settled in *Farrel v. Railroad Co.*, 60 Conn. 239, 21 Atl. 675, and 22 Atl. 544, and has been repeatedly affirmed.

The main reliance, however, of the defendant, is on its first claim. It appears in the finding that the plaintiff's employment involved the duty, not only of tending machine No. 3, but also, when the back tender on either of the other machines might be temporarily absent, of supplying his place on that machine, if called upon by its machine tender, and that in pursuance of this duty he was working on machine No. 2 when the accident happened. The machines were dangerous to operate, and there was a risk of injury to the skilled workman using due care. This risk the plaintiff assumed, and

his employer was not responsible for an injury resulting from the ordinary operations of the machine. It is not found that there was any structural defect in the machine that might make the employer responsible. The finding describes machine No. 2 as consisting in part of an open iron frame supporting two rows of steel cylinders and two series of rolls. Each series of rolls carries an endless band of felt, which guides the wet pulp in its course through the machine in the process of being dried. When the paper becomes broken, as it frequently does, the operator has to seize the end of the paper and place it in proper position between the felt and the cylinders. The main danger to the operator consists in the nearness of the rolls to the rapidly revolving and highly heated cylinders, and the great rapidity with which the pulp or paper passes through the machine. All the rolls are supported on iron stands set in the open iron frame, and are movable, and from time to time some of them are slightly changed in order to tighten or loosen the endless felt. It appears that a week or two before the accident the defendant changed the position of one of the rolls by discarding the iron stand on which it was supported in its usual place, and bolting a wooden block to the iron frame for its support in the new position. The roll was thus lowered, and the distance between the face of the roll and of the cylinders on each side of it reduced one-half. This change was not the slight change occasionally made for the purpose of loosening or tightening the felt. It was not made in the ordinary use of the machine for drying paper. It was made in order to run the paper off the machine without running it over the last cylinder of the upper tier, or under the last cylinder of the lower tier, so that these last two cylinders might be employed to dry the felt, and not the pulp or paper. And this change, or some other device for drying the felt, was made necessary by the fact that the felt on this machine at the time became too wet for its successful operation when the paper was carried through the entire machine. The plaintiff had never known one of the rolls between the cylinders to be thus placed, and they could not be so placed and operated while the last cylinders of the two tiers were used for the purpose of drying paper. No witness was produced on the trial who ever saw a roll so placed before. The court finds that by reason of this change "the space within which the paper must be caught was greatly lessened, liberty of action in the operator obstructed, and the danger and hazard attending the work which the plaintiff was called upon to perform was greatly increased." Notice of this change was at once given to the back tender of machine No. 2, but no notice thereof was given to the plaintiff by the defendant, and he did not know of the change in the position of

the roll when called to work upon the machine at the time of the accident. It was in attempting to seize the paper between the cylinders above this roll that the plaintiff's hand was caught and injured, and the plaintiff's injury was proximately caused by the failure of the defendant to notify him of the said change, and the increase in the dangerous character of the machine caused thereby.

The rule of law applicable to these facts is plain. If the change in machine No. 2 was merely an ordinary adaptation of the machine to the purpose for which it was made, which a skilled operator must be presumed to anticipate,—such, for instance, as the slight change necessary to keep the felt bands at proper tension,—the risk of injury was one assumed by the plaintiff in accepting his employment. On the other hand, if the change was one unknown in the ordinary use of the machine, made to adapt it temporarily to a special and unusual purpose, calling for a difference in operation, and greatly increasing the danger, then it was the duty of the defendant to notify the plaintiff before requiring him to operate the machine in its altered condition. *O'Keefe v. Paper Co.*, 66 Conn. 38, 45, 33 Atl. 537. It is evident that the court below applied this rule, and so did not require of the defendant a higher standard of duty in the conduct of its business than the law imposes. But the court did find as a fact that the change made in the machine was of the latter description, and the defendant urges the insufficiency of the evidential facts found to support the decision of the court upon the real character of the change made. Apparently the evidence on this point was not as full as it might have been; but the court had to act on the evidence produced, and we cannot say, on the evidential facts appearing in the finding, that the conclusion reached is logically unsound, even if we could review such a conclusion. It appears that the change was made by the machine tender of No. 2 in obedience to the defendant's direction, and that notice was at once given to the back tender of that machine, although not to the plaintiff, who was back tender of No. 3. There possibly may be a question whether the defendant discharged its full duty in notifying those in charge of machine No. 2, so that the real negligence was that of a fellow servant, the machine tender of No. 2, in calling the plaintiff to his assistance without advising him of the change. If such question can be considered doubtful, it does not appear that evidence necessary to fully present it was produced on the trial, and no claim of the kind was made in the court below or in this court.

The other claims assigned in the appeal, bearing on the question of contributory negligence, are claims of fact disposed of by the finding. In order to give the defendant every opportunity to urge its claims of law, the judge has detailed the evidential facts

quite fully; and one or two, especially relating to the plaintiff's ignorance of the change and his care in operating the machine, are apparently inconsistent with other facts found, and this inconsistency was strongly urged by the defendant in argument. The ultimate conclusion to be drawn from incongruous evidential facts is within the province of the trier, and not reviewable; certainly not unless the conclusion reached is necessarily inconsistent with clear and settled rules of logic. There is no error in the judgment of the superior court. The other judges concurred.

THRESHER v. BARRY.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

CONTRACT BY MARRIED WOMAN—VALIDITY—CONSIDERATION.

In a suit against a husband on a lease the wife was made garnishee, and certain of her property was attached as his estate. The property so attached had always been treated by both husband and wife as the separate estate of the wife, and by the husband's acts had become such in law. *Held*, that a contract by the wife with an attorney, on her personal credit, for the purpose of securing the release of such property from such attachment, was sufficient, under Gen. St. §§ 984, 987, to support a judgment against the wife for the fees and disbursements of such attorney.

Appeal from court of common pleas, New London county; Walter C. Noyes, Judge.

Action by S. S. Thresher against John Barry and wife to recover for attorney's fees. The facts were found and a judgment rendered in favor of plaintiff, as against the wife, from which judgment defendant Bridget S. Barry appeals. No error.

The husband filed no answer, and did not appear at the trial. The wife filed an answer, and was heard, the following facts being stated in the finding: She was married in 1872. In 1891 she mortgaged land belonging to her to secure the performance by her husband of the covenants in a lease to him of a farm. Suit was afterwards brought against him on these covenants, and in the action she was made a garnishee, and certain of her personal property and choses in action were attached as his estate. What was thus attached, while it had not been conveyed to her for her separate use, had always been treated by both him and her as such, and his conduct in respect to it had been such as to divest him of the interest he would otherwise have had in it by law. She employed the plaintiff, upon her personal credit, to defend the action, and protect her interests therein. He did so successfully, and obtained judgment for the defendant, whereby all attachments were discharged. His services were reasonably worth the amount of the judgment rendered in his favor, and were rendered under a contract with her, upon her personal credit, for the benefit of herself and her separate estate.

Solomon Lucas and C. W. Comstock, for appellant. Charles F. Thayer, for appellee.

BALDWIN, J. (after stating the facts). It is immaterial whether the mortgage security given by the defendant was or was not valid in favor of the mortgagee. Her property was afterwards taken on attachment against her husband, and she had the right to make a contract for professional assistance in securing its release, and for this purpose to pledge her personal credit. One way of regaining its possession would be to contest the cause of action of the attaching creditor. If he had none, it might well be that a judgment against him could be obtained in the attachment suit with less of delay or expense than would be incident to a new action brought for a direct vindication of her rights. She preferred this method of redress, and it proved successful. It is found that she owned what, by her husband's acts, had become in law her separate estate. *Jennings v. Davis*, 31 Conn. 134. Her contract with the plaintiff was therefore sufficient to authorize this action and support the judgment. Gen. St. §§ 984, 987. There is no error. The other judges concur.

BOUTON v. DOTY.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

DEED—RESERVATION OF POWER TO MORTGAGE—VALIDITY—EXECUTION OF POWER—MORTGAGE—SPECIFICATION OF AMOUNT SECURED.

1. A deed conveyed a fee, subject to a life estate in the grantor, and "reserving the right to occupy and use the premises * * * as fully and freely as I might do if the fee and title was to remain in myself, with full power to mortgage said premises to raise money for my own personal benefit at any time I may desire for and during my natural life." The grantor warranted the title against all demands "except any claim that may arise under the reservation aforesaid." *Held*, that the grantor retained the right to mortgage the fee, and not merely his life estate.

2. The grantor of a fee, subject to a life estate in himself, may reserve the power to mortgage the fee.

3. A deed to defendant, subject to a life estate in the grantor, reserved a power to mortgage the premises "to raise money for my own [the grantor's] personal benefit." Defendant agreed to supply the grantor with so much money as his necessities from time to time should require, but, having refused to fulfill his agreement, plaintiff, at the request of the grantor, who was in want, rendered him personal services, and expended money to provide him with necessities, taking a mortgage of the premises to secure the debt and future advances which plaintiff agreed to make. *Held*, that the mortgage was given to raise money for the grantor's personal benefit, within the meaning of the power reserved in the deed.

4. Said mortgage, to the extent of the amount actually due at foreclosure, was valid against defendant, though it did not set forth the character of the debt, but purported to secure a present indebtedness for a specified sum.

Appeal from superior court, Fairfield county; George W. Wheeler, Judge.

Suit by Lucretia R. Bouton against Augustus E. Doty and another to foreclose a

The facts out of which the questions upon the appeal arise are the following: On the 24th of August, 1888, Orrin A. Doty was the owner in possession of the premises described in the complaint, and on that day he executed in due form of law, and delivered to his nephew Augustus E. Doty, a deed, marked "Exhibit A," of the material parts of which the following is a copy: "Know ye that I, Orrin A. Doty, of the town of New Canaan, in the county of Fairfield and state of Connecticut, for the consideration of one thousand dollars received to my full satisfaction of Augustus E. Doty, of the town of Stamford, in said county and state, and for the further consideration that the said Augustus E. Doty is to supply me from time to time with so much cash as my necessities may require, over and above any income that I may receive from the property hereinafter described, do give, grant, bargain, sell, and confirm unto the said — all those two parcels of land, with the buildings thereon standing, situated in said town of New Canaan, and bounded and described as follows, to wit: The first parcel, containing eighteen (18) acres, more or less, is bounded," etc. "The second parcel, containing ten (10) acres, more or less, is bounded," etc.,—"together with all my live stock and personal property now on said premises or elsewhere, saving and reserving the right to occupy and use the premises, stock, and personal property as fully and freely as I might do if the fee and title was to remain in myself, with full power to mortgage said premises to raise money for my own personal benefit at any time I may desire for and during my natural life, and to sell any of the stock and personal property, and to use the receipts therefrom as I may desire, with the understanding and agreement that all increase in stock and personal property shall belong to said grantee, subject to the foregoing reservations. To have and to hold the above granted and bargained premises, with the privileges and appurtenances thereof, unto him, the said grantee, his heirs and assigns, forever, to his and their own proper use and behoof. And also I, the said grantor, do, for myself and heirs, executors, and administrators, covenant with said grantee, his heirs and assigns, that at until the en-sealing of these presents I am well seised of the premises, as a good, indefeasible estate in fee simple, and have good right to bargain and sell the same in manner and form as is above written, and that the same is free from all incumbrances whatsoever. And furthermore I, the said grantor, do by these presents bind myself and my heirs forever to warrant and defend the above granted and bargained premises to the said grantee, his heirs and assigns, against all claims and demands whatsoever, except any claim

set my hand and seal this 24th day of August, A. D. 1888. Orrin A. Doty. [Seal.]" On October 30, 1888, said Orrin A. Doty executed and delivered the note and mortgage described in the complaint to the plaintiff, in order to raise money for his personal benefit. The plaintiff has lived with O. A. Doty for many years, taking care of his house and him, no amount of compensation having been agreed upon between them. She finally said she would leave unless Mr. Doty paid her what he owed her. Thereupon he consulted counsel, and made demand on A. E. Doty that he support him in accordance with the terms of Exhibit A. A. E. Doty refused. Whereupon O. A. Doty, then being an old man and alone in the world, proposed that the plaintiff should remain and care for him, and provide him with moneys to secure the necessities of life, and he would give her a mortgage to secure her for services rendered for his benefit, and for moneys advanced and to be advanced for his benefit. The plaintiff agreed to this, and the said note and mortgage were executed on the day demand was made on A. E. Doty. Said A. E. Doty after the making of Exhibit A lived for a short time with said Orrin Doty. They failed to agree, and A. E. Doty left the house of Orrin Doty, and never returned to it or did anything towards the support or care of Orrin Doty thereafter. So far as appeared in evidence, no demand according to the terms of Exhibit A other than the demand detailed in paragraph 2, was made upon said A. E. Doty. The sum due upon said mortgage note \$892.18, which was money raised for the personal benefit of said Orrin A. Doty, note and mortgage are still owned by plaintiff, and are wholly unpaid. The \$892.18 was made up as follows: \$100 for services rendered O. A. Doty plaintiff before the execution of said note and mortgage, and expressly recognized to be a part of the consideration of said note and mortgage by said \$100 was for money expended by plaintiff for said O. A. Doty before execution of said note and mortgage, made and recognized to be a consideration of said note and mortgage by said O. A. Doty; \$242.18 expended by the plaintiff for the support of said O. A. Doty at his request, subsequent to the execution of said note and mortgage for the necessities of life. A mortgage for moneys raised, for the personal benefit of said O. A. Doty, to his knowledge and to provide him with. The said A. E. Doty would have suffered plaintiff render the moneys for

form the consideration of said note and mortgage. At the date of the execution of said note and mortgage the matter set forth in Exhibit 3 formed a part of the agreement under which said note and mortgage were executed. The said O. A. Doty died September 25, 1894, as appears upon the records of this court in this action.

Upon the trial the plaintiff offered Exhibit 3 as evidence to prove, or tending to prove, an acknowledgment of an existing indebtedness by Orrin A. Doty to the plaintiff at the date of the execution of said note and mortgage, and to show the agreement made between the plaintiff and said O. A. Doty at the time of execution of said note and mortgage. To this offer the defendant objected because (1) the instrument appeared to be a declaration made after the execution of the mortgage, and related to the consideration; (2) that it did not appear from Exhibit 3 that the declarations were for the benefit of said O. A. Doty; (3) that the defendant was not bound by any declarations made by O. A. Doty after the execution of the said mortgage. The court overruled the objection and admitted the evidence, and the defendant duly excepted. The plaintiff claimed and offered in evidence certain leaves from a book, marked "Exhibit 4," of original entries of moneys expended and advanced by the plaintiff at the request and direction of said O. A. Doty, and for his personal benefit, to prove or tending to prove in part the consideration for said note and mortgage. To this offer the defendant objected because it tended to prove an expenditure of moneys advanced subsequent to the execution of the said note and mortgage, while the mortgage called for a present consideration, and was inadmissible against the defendant. The court overruled the objection and admitted said leaves, being part of Exhibit 4, in evidence, and the defendant duly excepted to the ruling. The defendant claimed as follows: (1) That the reservation is of a power to mortgage for the sole purpose of raising money to be used during the lifetime of the mortgagor, and for his personal benefit; (2) that the intention of the parties was to limit the mortgaged estate to the lifetime of the mortgagor; (3) that, even if the intention was to extend the mortgage to the fee, such a reservation, and any mortgage made under it, would be void; (4) that there is no power in a court of equity to extend the limits of the power reserved, beyond the extent set forth in the reservation, because of any claimed equities in the plaintiff's favor, even if such equities existed; (5) that the failure to disclose in the mortgage the exact and true condition and nature of the consideration renders the mortgage void as against this defendant; (6) that the evidence does not meet, and is at variance with, the complaint.

Exhibit 3, referred to in the finding, is as follows: "This agreement, entered into this 7th day of November, 1893, by and between Orrin A. Doty and Lucretia R. Bouton, both

of New Canaan, county of Fairfield and state of Connecticut, witnesseth that whereas, the said Orrin A. Doty is indebted to the said Lucretia R. Bouton in the sum of six hundred and fifty dollars for services rendered and money loaned within the last five years for the personal benefit of the said Orrin A. Doty; and whereas, the said Orrin A. Doty has executed a note for the sum of one thousand dollars, secured by a mortgage of certain premises, to the said Lucretia R. Bouton, for the purpose of raising money for the personal benefit of the said Doty: Now, therefore, it is mutually agreed by and between the said parties hereto, as to disposition of said money so raised, that the said Lucretia R. Bouton shall retain six hundred and fifty dollars of said money in payment of the aforesaid indebtedness, and the three hundred and fifty dollars balance to be delivered by the said Bouton to such person as the said Orrin A. Doty shall designate, to be expended for said Doty as he shall direct. In witness whereof we have hereunto set out hands and seals the day and date first above written. Orrin A. Doty. [L. S.] Lucretia R. Bouton. [L. S.] In presence of Chester Comstock, J. H. Rowland, Jr." Exhibit 4, referred to in the finding, consisted of original entries of cash expended and advanced by the plaintiff for Orrin A. Doty from October 23, 1893, to August 2, 1894, inclusive, amounting to \$192.13.

The complaint alleges, in substance, that on October 30, 1893, Orrin A. Doty owed the plaintiff \$1,000, as evidenced by his note to her of that date for said sum payable on demand at a named bank; that on said day, to secure said note, said Doty, by his deed to her of that date, mortgaged to the plaintiff the first of the two parcels of land described in Exhibit A; that said note was still owned by the plaintiff, and was due and wholly unpaid; that on the 24th of August, 1888, Orrin A. Doty had executed and delivered to Augustus E. Doty the instrument marked "Exhibit A," a copy of which was made part of the complaint; that the mortgage and note described in the complaint were executed by Orrin A. Doty to raise money for his personal benefit; that Augustus E. Doty claimed an interest in said mortgaged premises by virtue of said Exhibit A, which interest was subject to said mortgage; and that Orrin A. Doty was in possession of said premises. To this complaint Augustus E. Doty filed the following demurrer, which the court overruled: "Said defendant demurs to the plaintiff's complaint, because he says: (1) It appears in and by the allegations of the complaint that the mortgage therein described was made under, and in pursuance of the provisions of, the instrument marked 'Exhibit A,' and it further appears by the provisions of said instrument that the said Orrin A. Doty had conveyed (prior thereto) to this defendant the fee of the premises described in said complaint, reserving to himself a life estate therein, and expressly reserving to himself only the right to mortgage said

premises for the purposes set forth therein, for and during his natural life, and that the interest conveyed to this defendant by said instrument is not subject to said mortgage, but that the life interest only of the said Orrin A. Doty in said premises was conveyed to the plaintiff by said mortgage." He then answered over as follows: "(1) The said defendant avers that he has not any knowledge, or information thereof sufficient to form a belief, regarding paragraphs 1, 2, and 3 of the plaintiff's complaint. (2) Paragraphs 4 and 6 are admitted. (3) Paragraphs 5 and 7 are denied." The court rendered judgment for the plaintiff.

The following are the errors assigned upon this appeal: "The court erred and mistook the law in the following particulars: (1) In overruling the defendant's demurrer to the plaintiff's complaint; (2) in admitting as evidence, against the objection of the defendant, the memoranda marked 'Ex. 3'; (3) in admitting as evidence, against the defendant's objection, the leaves from the book marked 'Ex. 4,' as tending to prove the plaintiff's complaint; (4) in holding that, upon the facts as found by the court, said mortgage was valid as against the defendant; (5) in holding, upon the facts found, that the rendering of personal services by the plaintiff to O. A. Doty, and the acceptance of the said services by O. A. Doty, was 'the raising of money by O. A. Doty for his personal benefit'; (6) in holding, upon the facts found, that the said mortgage was given by O. A. Doty to raise money for his personal benefit; (7) in holding, upon the facts found, that said mortgage was executed and delivered in compliance with, and in the lawful exercise of, the power to mortgage as reserved in 'Ex. A'; (8) in holding that the testimony establishing the facts found was not at variance with the plaintiff's complaint. (9) in holding said mortgage valid as against this defendant, notwithstanding that it did not disclose the true contract between the mortgagor and mortgagee."

Michael Kenealy, for appellant. J. Belden Hurlbutt and H. Whitmore Gregory, for appellee.

TORRANCE, J. (after stating the facts). The errors assigned may be grouped as follows: (1) Those relating to the extent and validity of the power reserved by Orrin A. Doty in Exhibit A; (2) those relating to the validity of the mortgage sued upon; (3) those relating to the admission of evidence and the question of variance. And they will be considered in the order stated.

One of the important questions in the case relates to the construction of that part of the deed to the nephew which purports to reserve to the grantor the power to mortgage. The reservation of this power occurs in a part of the deed which reads as follows: "Saving and reserving the right to occupy and use the premises * * * as freely as I

might do if the fee and title remained in myself, with full power to mortgage said premises to raise money for my own personal benefit at any time I may desire for and during my natural life." A power of this kind can be created by deed as well as by will, and in a deed it can be reserved to the grantor as well as granted to another. 2 Washb. Real Prop. (2d Ed.) p. 314. And no question is made in this case as to the right of the grantor to reserve a power of some kind over the land, but only as to the extent of the power reserved. The defendant contends that the power reserved is only a power to mortgage the premises during the life of the grantor (in other words, a power to mortgage his own life estate); and one of the grounds (perhaps the principal one) on which this claim is based is the phrase, "for and during my natural life." The defendant says this phrase qualifies and limits the clause, "with full power to mortgage said premises to raise money for my own personal benefit at any time I may desire." On the contrary, we think it qualifies the preceding clause, "saving and reserving the right to occupy and use the premises * * * as fully as I might do if the fee and title remained in myself." In the first place, such a qualification of this clause seems to be necessary and natural, as the use and occupancy therein reserved are not otherwise expressly limited; but it is not necessary in the other clause,—at least, not to limit the time within which the power must be exercised; for that, clearly, by other parts of the clause, is limited to the life of the grantor. In the next place, if the phrase in question is construed as qualifying the extent of the power reserved so as to leave in the grantor authority to mortgage his life estate only, then there was no reason whatever for making the reservation at all, for he could have done that without any reservation. Such a power was clearly not what the parties intended, because it would not have accomplished the purpose for which the power to mortgage was reserved,—for no one would have advanced any considerable sum, or such as the grantor might need before he died, on the frail security of his life estate; and because the exception in the covenant of warranty clearly contemplates incumbrances made under the power upon the estate of the grantee, and not merely upon that of the grantor. On the whole, we are of opinion that the intention of both parties to this deed was that the grantor should have the power to mortgage the "premises," including the estate of the grantor and grantee; that this intention clearly appears, is expressed in apt words, and should be carried out unless some rule of law forbids it.

But the defendant says, "If the reservation includes the power to mortgage the fee, that such reservation is void," because (1) it is repugnant to the deed; (2) it is, in effect, a reservation for the benefit of a stranger to the

deed; (3) because it is, in effect, a reservation of a power to create a freehold to commence in futuro; and (4) because, "as a reservation or as an exception, the power reserved lacks words of inheritance, and so is simply of the life estate."

The first objection is not tenable. The estate conveyed to the grantee was a fee, subject to the life estate and the power reserved. That was merely a power to incumber in a certain way the fee and the life estate, and not to destroy the estate of the grantee. Its exercise gave him, at all events, the right to redeem. It might not be exercised at all, or to a slight extent, and he was willing to take his chances in this respect. But all these objections proceed, we think, upon a misapprehension as to the nature and effect of a power of this kind. A power is a method "of causing a use, with its accompanying estate, to spring up at the will of a given person." *Williams, Real Prop.* 245. It is an authority conferred upon one person to dispose of property vested in himself or in another person. It is a mode of disposing of property which operates under the statute of uses or wills, and it vests in the donee of the power a present, indefeasible, executory interest in such property. *Tied. Real Prop.* §§ 558, 559. In the present case the deed in question, in this aspect of it, operates under the statute of uses, the "principles" of which, says the court in *Bryan v. Bradley*, 16 Conn. 474-483, are "a part of our common law." Under this statute it is no objection to the validity of a power that its exercise may wholly defeat the estate conveyed to the grantee in the deed conferring it, nor that it is created for the benefit of a stranger to that deed or estate, nor that its exercise may create a freehold in futuro. For these reasons we think the power reserved was a valid power to mortgage the fee of the land.

The next questions relate to the validity of the mortgage given under the exercise of this power. Was the power properly exercised? It is true, undoubtedly, "that the law is exceedingly strict in requiring a precise compliance" with all the conditions and restrictions imposed by the instrument creating or reserving the power, both as to the manner and the time of execution, and other matters of like nature. 2 Washb. *Real Prop.* p. 317; *Tied. Real Prop.* § 567. In the case at bar the power is to be exercised only "to raise money for my [the grantor's] own personal benefit at any time I may desire." As we understand it, the only claim made by the defendant upon this part of the case is that the money found to be due upon the mortgage was not money raised for the grantor's personal benefit, within the meaning of the above clause. He does not claim that in any other respect the power was not properly exercised, assuming that the grantor could mortgage the fee at all. Under the circumstances out of which the deed in question grew, and for the reasons given in *Imlay v. Huntington*, 20 Conn. 146, 169, 170, we think the above clause ought to receive a

liberal construction in favor of the grantor. The court below has found that the defendant utterly failed to carry out the terms of the deed on his part to be performed, and refused to do so; that the grantor would have suffered for want of the necessities of life if the plaintiff had not done work and expended money in his behalf; and, further, that the entire amount found due was "for moneys raised, or their equivalent, for the personal benefit of Orrin A. Doty, with his knowledge and at his request, and to provide him with the necessities of life." Upon the facts found, we are satisfied that the mortgage was given to raise money for the grantor's personal benefit, within the meaning of the reservation.

The defendant further claims that the mortgage ought not to be held valid as to him because "it did not set forth truly or fairly the character of the indebtedness." It is undoubtedly true, as a rule, that a mortgage, to be valid against subsequent bona fide purchasers and incumbrancers, must be so drawn that the record of it will give notice, with reasonable certainty, of the nature and amount of the incumbrance upon the property; but the rule has no application to this case, in favor of the defendant, for he is not a subsequent purchaser, nor attaching creditor, nor a subsequent incumbrancer of any kind. The note and mortgage were given in good faith to secure a debt then existing, and future advances which the plaintiff had bound herself to make, and all the defendant is called upon to pay in order to redeem is the amount found to be actually due upon the note. There is nothing here of which he can justly complain. We think the mortgage was a valid mortgage for the amount found to be due. We are also of opinion that the court did not err in admitting the testimony objected to, that there is no foundation for the claimed variance between the complaint and testimony, and that there is nothing in these matters to justify or deserve further discussion. There is no error. The other judges concurred.

LA BARRE v. CITY OF WATERBURY.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

AMENDMENT OF PLEADING—DEFAULT OF DEFENDANT—NOTICE.

1. In its discretion, a court may permit a plaintiff to amend his complaint after a default by defendant and after a hearing in damages to the court.

2. Where, on default of defendant, and on hearing in damages, a plaintiff, over defendant's objection, seeks to prove that he gave defendant city notice of injury required by Gen. St. § 2673, it is not improper for the court to direct plaintiff to amend his complaint by alleging the giving of such notice.

3. Where, on default of defendant, the court permitted plaintiff to amend by the insertion of allegations essential to a recovery in substantial damages, and the court informed defendant, "if he desired, he could plead anew, or be further heard with his witnesses," it is not error, six

months after such amendment, to render judgment for substantial damages, though defendant filed no further pleading.

Appeal from district court, New Haven county; Albert P. Bradstreet, Judge.

Action by Amelien La Barre against the city of Waterbury to recover damages for personal injuries claimed to have been caused by a defective highway. Facts found, and judgment rendered for the plaintiff for \$500, and appeal by the defendant for alleged errors in the rulings of the court. No error.

Lucien F. Burpee, for appellant. Edward F. Cole, for appellee.

HALL, Special Judge. The complaint in this action, to recover damages for a personal injury sustained by the plaintiff by reason of snow and ice upon a sidewalk in Waterbury, contained no allegation that notice had been given the defendant, as required by section 2673 of the General Statutes. The defendant having suffered a default, the plaintiff, upon a hearing in damages to the court, offered to prove the fact that such notice had been given. To the admission of this evidence counsel for defendant objected upon the ground that the complaint contained no allegation that notice had been given, and that the notice offered was insufficient, in that it did not properly describe the defect complained of in the highway. The defendant does not complain of any ruling of the court in admitting this evidence. The record does not show that the court received it, or made any ruling upon the questions presented by the defendant's objections; and as, in the defendant's brief, it is conceded that the points thus raised were never decided, we assume that the evidence so offered was not received, and that, in view of the subsequent proceedings, the court deemed it unnecessary to make any ruling upon these questions. The record discloses that some time after the hearing the court ordered the plaintiff to amend his complaint by setting forth the fact that notice of his injury had been given to the defendant, and of the nature and cause thereof, and of the time and place of its occurrence; that the plaintiff thereupon filed a motion to be permitted to amend his complaint in compliance with the direction of the court, which amendment was allowed; that the court informed counsel for the defendant that, "if he desired, he could plead anew, or be heard further with his witnesses"; that several months thereafter the court rendered judgment for substantial damages, the defendant, in the meantime, having failed either to file an answer or other pleading, or to present further evidence upon the hearing in damages. By his appeal the defendant complains of the action of the court in so ordering the plaintiff to amend his complaint, and in rendering judgment after the amendment,

and before the pleadings had been completed. Though the plaintiff had not an absolute right to amend his complaint during the hearing in damages (*Gulliver v. Fowler*, 64 Conn. 565, 30 Atl. 852; *Trustees, etc., v. Christ Church*, 68 Conn. 372, 36 Atl. 797), the court, under sections 1023-1027 of the General Statutes, had discretionary power to permit the amendment to be made. The time before judgment within which the amendment might be allowed was within the court's discretion, and the exercise of such discretion cannot be reviewed. By section 6, rule 3, under the practice act (*Practice Book*, p. 14), the court may permit an amendment at any stage of the trial. The defendant suffered no injury from the fact that the court ordered the plaintiff to make an amendment. The allowance of the amendment, upon the plaintiff's motion, was the only act of the court which affected the defendant's interests. But we see no impropriety in the court suggesting, or even directing, the amendment under the circumstances shown by the record. Sufficient authority for such direction may be found in section 9 of the practice act (*Practice Book*, p. 4).

There was no error in the action of the court in rendering judgment for substantial damages, after the amendment was allowed, and before further pleadings were filed. It is true that by his default the defendant only admitted the truth of the allegations of the complaint at that time, and that the absence of an essential allegation in the complaint could not be supplied by proof offered by the plaintiff upon the hearing in damages. *Shepard v. Northampton Co.*, 45 Conn. 58; *Pitkin v. Railroad Co.*, 64 Conn. 490, 30 Atl. 772. Assuming, then, that having proved his actual damage, evidence of which was presumably offered upon the hearing, the plaintiff could have recovered judgment for a nominal sum only, in the absence of an allegation in the complaint that the statutory notice had been given to the defendant, yet, as the amendment related back to the commencement of the action, the plaintiff's evidence of the extent of his injury, already before the court, became applicable to the complaint as amended. *Towns of Windham & Chaplin v. Litchfield*, 22 Conn. 232. Upon the pleadings as they stood after the allowance of the amendment, the plaintiff's case thus became complete, and he was entitled to a judgment for the actual damages proved, unless his right to such judgment should be defeated by evidence offered by the defendant. *Crane v. Transportation Line*, 48 Conn. 363. Since it is by a fiction of law that the amendment allowed in this case related back to the commencement of the action, it was undoubtedly the duty of the court, in permitting the amendment, to see that the rights of the defendant were not injuriously affected. *Bennett v. Collins*, 52 Conn. 3; *Comstock's Appeal from Com-*

missioners, 55 Conn. 219, 10 Atl. 559; *Towns of Windham & Chaplin v. Litchfield*, supra. In the opinion of the court, in the case last cited, Judge Hinman says: "The amendment related back to the commencement of the suit, and the petition, in the judgment of law, was from its commencement, as it is now. It is true, this is a fiction of law, and for that reason would not be suffered to operate unjustly upon the respondents." Did not the court, in allowing the amendment to the complaint, carefully guard the interests of the defendant? After so material an amendment had been made, the defendant was clearly entitled either to have the default opened, and be permitted to plead to the complaint, or to an opportunity to present evidence to prove either that no notice or only an insufficient notice had been given to the defendant. If the defendant desired to avail itself of either of these privileges, a motion to that effect should have been made to the trial court. The court not having denied the defendant either of these rights, there is no ground for the claim that the judgment was erroneously rendered before the pleadings were closed. *Ritchie v. Waller*, 63 Conn. 166, 28 Atl. 29. Not only was the right to plead anew or present further evidence not denied the defendant, but defendant's counsel was expressly informed that either of these privileges would be granted, and final judgment was not, in fact, rendered till nearly six months after the amendment was allowed. The defendant having remained silent after such notice, the court might very properly have rendered its final judgment at a much earlier day. As the record does not show that the court ruled upon the question of the sufficiency of the alleged notice, we do not consider the second assignment of errors. There is no error. The other judges concur.

HALL, Special Judge, sat in place of FENN, J., who was unable to attend court.

NEW YORK, N. H. & H. R. CO. v. LONG et al.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

EMINENT DOMAIN—TAKING LAND FOR RAILROAD PURPOSES—NECESSITY—PROCEEDINGS TO APPOINT APPRAISERS—EVIDENCE.

1. Under Gen. St. § 3460, providing that railroads may take such land as they deem necessary for their purposes upon the approval of the railroad commissioners, where a railroad company has expressed its intention to take land for its purposes as a railroad, and has obtained the approval of the railroad commissioners thereto in the manner prescribed in the statute, the question of the necessity and the extent of the taking is settled.

2. Where a railroad company applies for the appointment of appraisers to estimate damages for the taking of land for its purposes, the essential fact of necessity is shown by an authenticated copy of the vote of the applicant to take and the ordering of the taking of the land described, with a like copy of the doings of the railroad commissioners thereunder.

3. In the taking of land for railroad purposes, the approval of the railroad commissioners is the essential fact to show necessity, and it is immaterial that the expression of the corporate will which receives such approval was formulated outside the state, so such expression binds the corporation.

4. On the hearing of an application by a railroad company for the appointment of appraisers to estimate damages for taking land for its purposes, the averment in the application that the company could not obtain the land by agreement was directly denied, and it was averred that the land was sought to be taken for steamboat purposes. The parties relied on one G. to prove the averment in the complaint, and also the averment in the answer. *Held*, that it was error not to allow defendants to ask G. whether at the time he was trying to buy the property he did not say "that it was wanted for steamboat purposes,"—the inability to obtain the land "for railroad purposes" being essential to jurisdiction to appoint appraisers, under Gen. St. § 3464.

Appeal from superior court, New London county; Milton A. Shumway, Judge.

Application by the New York, New Haven & Hartford Railroad Company for the appointment of appraisers to estimate damages for the taking by such company of land belonging to George M. Long and others for railroad purposes. From an order appointing appraisers, Long and others appeal. Reversed.

This was an application to a judge of the superior court for the appointment of appraisers to appraise and value certain lands and easements belonging to the defendants, which the plaintiff has elected and intends to take for railroad purposes. The application is this: "To the Honorable Milton A. Shumway, a Judge of the Superior Court of the State of Connecticut: The application of the New York, New Haven and Hartford Railroad Company, a railroad corporation under the laws of this state, respectfully represents: (1) Said railroad company, on February 8, 1896, as set forth in the following resolution by its board of directors, took for railroad purposes the lands therein described, viz.: 'Resolved, that this company, subject to the approval of the railroad commissioners, hereby takes for additional tracks, turnouts, and freight and passenger stations and depots at New London, Connecticut, the following piece or parcel of land situate, lying, and being in said town of New London, and bounded and described as follows, to wit: The tract belongs to George M. Long, Edward T. Pettigrew, and Thomas Hamilton, all of the town of Groton, Conn., and is bounded on the north and west by lands belonging to or leased by this company, on the east by New London Harbor, and on the south by lands now or late of George H. Powers; together with all easements, franchises, and rights connected with or appurtenant to said described tract and parcel of land.' (2) The said George M. Long, Edward T. Pettigrew and Thomas Hamilton, named in said resolution, are the owners of said tract of land as aforesaid, and of all the easements, franchises, and rights con-

nected therewith or appurtenant thereto, except a right or easement belonging to Ambrose Lester, of New London, in said state, to maintain and use water pipes as now laid across said land for the purpose of supplying vessels with water, and with the right of access and of mooring a water boat for the convenient exercise of said right. Thomas F. Morgan, of Groton, is the owner of a mortgage interest in the said lands. (3) On March 27, 1896, the railroad commissioners of this state, after due notice to all parties in interest, to wit, to the aforesaid persons, and after due hearing, had made their order and finding approving the taking by said railroad company of said land with the easements, franchises, and rights connected therewith or appurtenant thereto, a copy of which finding and order is hereto annexed as Exhibit A. (4) Said railroad company, on February 8, 1896, had, and ever since has had, the right to take said real estate, as above described, for said purposes, and, although it has endeavored to agree, has been unable to obtain said real estate by agreement with the parties interested therein. Wherefore said railroad company applies to your honor for the appointment of appraisers, as provided by statute, to estimate all damages that may arise to any person from the taking and occupation of the aforesaid real estate for railroad purposes, and for such other and further relief as it may be entitled to receive. Dated at New London, this 7th day of January, 1897."

The record also includes a certified copy of the vote of the plaintiff's directors, recited in the first paragraph of the application. And also a certified copy of the doings of the board of railroad commissioners, referred to in the third paragraph. Exhibit A is as follows: "Exhibit A: State of Connecticut, Office of the Railroad Commissioners. Hartford, March —, 1896. Upon the foregoing application of the New York, New Haven and Hartford Railroad Company, after due notice to all parties in interest, and after due hearing of said parties at the time and place stated in said notice, we find that the property described in said application consists of a tract of land situated on New London Harbor, in said New London, bounded as appears in said application, with riparian rights or franchises in said harbor connected with or appurtenant to said land, and with a right or easement belonging to Ambrose Lester, of said New London, to maintain and use water pipes as now laid across said land for the purpose of supplying vessels with water, and with the right of access and of mooring a water boat for the convenient exercise of said right. We further find that said land, with said easements, franchises, and rights connected therewith or appurtenant thereto, as described in said application and vote of condemnation, are necessary to said railroad company for the purposes set forth in said application and vote, and we approve the taking by said railroad company for such purposes of such land, with

such easements, franchises, and rights. Geo. M. Woodruff, Wm. O. Seymour, Alex. C. Robertson, Railroad Commissioners."

The judge issued an order of notice. The parties defendant appeared before him on the day named, and filed a demurrer to the application, which was overruled. The defendants then filed an answer setting up four defenses. The first defense admitted the second paragraph of the application, and denied the other paragraphs. The second defense alleged that the said vote of the plaintiff's directors was passed "not within the territorial limits of the state of Connecticut." The third defense averred that there was no necessity for the plaintiff to take the said property, or any part thereof. The fourth defense is as follows: "Fourth defense: To so much of said application as asks for the appointment of appraisers to fix the value of the easements, franchises, and rights referred to in the said vote set forth in said application, the defendants say: Paragraph 1. That there is no necessity for the applicant to take the whole or any part of said easements, franchises, and rights for railroad purposes, or for any purpose for which the applicant could lawfully take the defendants' property. Par. 2. The defendants allege that either the whole or the greater part of the easements, franchises, and rights referred to in said alleged vote set forth in said application are outside of the limits of any survey made by the railroad company, and outside the territorial limits of any location intended to be occupied by any structure whatever by the said applicant. Par. 3. Certain easements, franchises, and rights referred to in said paragraph 1 are necessary to the applicant only for the purpose of establishing and continuing a line of boats or ships, and for the purpose of prosecuting the business of transporting goods, wares, merchandise, and passengers by water, and not as a railroad corporation. Par. 4. Some part of said easements, franchises, and rights are sought to be obtained by the applicant by this process for the purpose of enabling a water carrier or transportation company to have and use the same for the purpose of carriage and transportation for hire of goods, wares, merchandise, and passengers upon the high seas. Par. 5. There is no description of the easements, franchises, and rights claimed to have been taken, and this objection was made before the railroad commissioners. Par. 6. Before the railroad commissioners the defendants objected and protested against any action being taken therein, because no taking of the property in question was alleged in the application to said board, and because there was no sufficient and accurate description of the property to be taken alleged or contained in the application to said board, and because there was no sufficient and definite purpose alleged for the claimed taking, and because the nature of some of the easements, franchises, and rights was such as not to be subject of a taking as claimed by the applicant. Par. 7. The map showing the property claimed to have been

taken, and produced before and acted upon by the railroad commissioners, and lodged with them and made part of their finding, differs materially from the property claimed to be taken as described in the vote constituting the alleged taking. Par. 8. The said property described in said vote constituting the alleged taking was never, and is not, within the layout or location of the applicant's road or right of way, and was never, and is not, within its line of road, location, or right of way as altered, located, approved, or established. Par. 9. There was no notice or warning given of the alleged meeting of the said board of directors touching or relating to the subject-matter of the taking of the property in question, or relating to any proposed action, vote, or resolution, in respect to such taking. Par. 10. The whole number of directors were not present at said alleged meeting, nor did the full board of directors participate in said meeting or vote."

To these defenses the plaintiff demurred, except paragraphs 4 and 7 of the fourth defense. These paragraphs were denied. The judge heard the parties, and found the issues of law and fact for the plaintiff, and appointed appraisers. The finding of facts is this: "Finding. (1) Upon the trial of the issues of fact as on file, the said applicant, the New York, New Haven & Hartford Railroad Company, offered the testimony of S. A. Gardiner to prove the allegations of paragraph 4 of its complaint, that the said applicant had endeavored to agree, but had been unable to obtain the property in question by agreement with the parties interested therein. The respondents then, for the purpose of proving the allegations of the fourth paragraph of the fourth defense, asked said Gardiner the following question: 'Second. At the time you were trying to agree with G. M. Long & Company for the purchase of this property, did you not say to them that it was wanted for steamboat purposes?' The applicant objected to this question on the ground that parol evidence of this character was not admissible to contradict the formal recorded vote of condemnation, and that the declarations of the agent of the corporation could not change the purposes for which the property was taken in such vote of condemnation. The evidence was excluded, and the respondents duly excepted. (2) On said trial the respondents offered parol evidence to show, as they claimed, that a certain map was produced before the railroad commissioners at the hearing before them, which said map limited and confined the property taken, and confined the description of the property so as to include only the wharf superstructure upon said property, and did not include the wharfage rights extending towards the channel of and into the harbor of New London. The respondents also offered to show, in connection with said evidence, that it was agreed that said map should be marked, and should become a part of the finding of the railroad commissioners approving of the taking of

the land described; that said map was marked, but that it was not on file in the railroad commissioners' office. To this evidence the applicant objected. It was excluded, and the respondents duly excepted. (3) All the allegations of the application are found true. The allegations of the answer, which were held to be sufficient in law, are found not true; and appraisers were appointed as appears by the record in the cause." The demurrer to the application was overruled, and the demurrer to the respondents' answer was sustained in part and overruled in part, as appears on file. The defendants appealed to this court.

Henry Stoddard and Tracy Waller, for appellants. Augustus Brandegge and Hadlai A. Hull, for appellee.

ANDREWS, C. J. (after stating the facts). Section 3464 of the General Statutes enacts that, "When any railroad company shall have the right to take real estate for railroad purposes, and cannot obtain it by agreement with the parties interested therein, it may apply to any judge of the superior court for the appointment of appraisers to estimate all damages," etc. The application in this case is brought under that section. It purports to set forth facts from which it will appear that the applicant, a railroad company, has the right to take for railroad purposes the real estate described in the first paragraph, and that it cannot obtain the same by agreement with the parties interested therein. The judge held that both these propositions were properly averred and had been proved, and thereupon appointed the appraisers. The defendants' appeal contains a long list of assignments of errors. They can, however, all be considered under the two propositions above indicated: Did the facts show that the applicant, being a railroad company, had the right to take the real estate described for railroad purposes? And was it unable to obtain the same by agreement with the parties interested therein? And, perhaps, the third question: Were any errors committed in the course of the hearing? It was necessary for the judge to answer the first two questions in the affirmative before he had jurisdiction to appoint the appraisers. And it is necessary now, in order that the appointment be a valid one, that the third question be answered in the negative. To answer these questions with clearness, it will be useful to recur briefly to fundamental principles. The constitution provides "that the property of no person shall be taken for public use without just compensation therefor." Const. art. 1, § 11. "In its application to the condemnation of land for railway use, the word 'taken,' in the constitution, means the exclusion of the owner from use and possession, and the actual assumption of exclusive possession by the railroad corporation at the termination and as the result of judicial proceedings." *Woodruff v. Catlin*, 54 Conn. 279, 6 Atl. 854. See, also, *Shannahan v. City of*

Waterbury, 63 Conn. 424, 28 Atl. 611; Stevens v. Battell, 49 Conn. 163. Title to all property is held on the implied condition that it must be surrendered to the government, either in whole or in part, when the public necessities, evidenced according to the established forms of law, demand. Todd v. Austin, 34 Conn. 88; People v. Mayor, etc., of New York, 32 Barb. 112. This power to appropriate private property is the eminent domain. And every species of property which the government may require may be seized and appropriated under this right. Cooley, Const. Lim. (6th Ed.) 646. Primarily, the power to exercise this right resides with the legislature. It is a right which appertains to sovereignty. Clark v. Town of Saybrook, 21 Conn. 324; New York, H. & N. R. Co. v. Brston, H. & E. R. Co., 36 Conn. 198; Goodwin v. Wethersfield, 43 Conn. 438; 2 Hill. Real Prop. 585; Rand. Em. Dom. § 99. But power to exercise this right may be conferred by the legislature on an individual, a board, or a corporation. Olmstead v. Camp, 33 Conn. 532; Bradley v. Railroad Co., 21 Conn. 294; Eaton v. Railroad Co., 51 N. H. 504. What the legislature really does in such cases is to declare the public use and the existence of a public necessity for the condemnation of land to such use, and then to confer on the individual, the board, or the corporation the right to select the property which is to be appropriated to that use. Thus, in the flowage laws, the legislature confers the right to take land on the individual who desires to erect a dam. In the highway laws the right to take land for highways is conferred on the selectmen of the towns or committees of the superior court, and in cases of railroads the right is conferred on the corporation owning the railroad. Cemetery associations, water companies, street railways, and other like companies are other instances of the same kind. In each case the legislature declares that public necessity requires the condemnation of land for such public use. The power is a political one, or, as sometimes called, a legislative or administrative one. When exercised by the legislature, its decision of the question of the necessity of condemnation for such public use, and as to the extent, necessity, and propriety of the taking, is ordinarily conclusive. With its decision the courts cannot ordinarily interfere. Todd v. Austin, supra; Woodruff v. Catlin, 54 Conn. 297, 6 Atl. 849; Woodruff v. Railroad Co., 59 Conn. 63, 20 Atl. 17; Varick v. Smith, 5 Paige, 137; Kramer v. Railroad Co., 5 Ohio St. 146; In re Union Ferry Co., 98 N. Y. 139; Cooley, Const. Lim. 648. The act of the legislature is the only adjudication necessary on this question, unless the constitution has required something further. When this power is exercised by a corporation upon which the legislature has conferred the right to use it, all the steps required by the legislature must be complied with. And when these required steps have been complied with, then the decision of the corporation as to the

extent, necessity, and propriety of the taking is as conclusive as when made by the legislature itself. Town of Harwinton v. Catlin, 19 Conn. 520; Cockcroft's Appeal, 60 Conn. 161, 22 Atl. 482; People v. Smith, 21 N. Y. 595; In re Fowler, 53 N. Y. 60; Ash v. Cummings, 50 N. H. 501; In re Mt. Washington Road Co., 35 N. H. 134; National Docks Ry. Co. v. Central R. Co., 32 N. J. Eq. 755; Cooley, Const. Lim. 660. The exercise of the power by the legislative appointee is still the exercise of a political power, which the courts may not control. U. S. v. Jones, 109 U. S. 519, 3 Sup. Ct. 346. Doubtless, the courts may, in any case, inquire whether or not the steps prescribed by the legislature have been taken, and whether the use for which sequestration is authorized is, in its nature, a public, and not merely a private, use. If any legislative appointee should in fact use the property taken for any other use than the one which the legislature had declared to be a public use, it could be restrained by an injunction or other suitable remedy.

The legislature of this state has provided that railroads may take any such land as they deem necessary for their purposes upon the approval of the railroad commissioners in the manner pointed out in the statutes (Gen. St. § 3460), and so has, in effect, declared that land taken by a railroad company for railroad purposes is taken for a public use (Gen. St. §§ 3460-3462). Bradley v. Railroad Co., 21 Conn. 294. Whenever, then, any railroad company has expressed its desire and intention to take land for its purposes as a railroad, and has obtained the approval of the railroad commissioners thereto in the manner set forth in the statutes, it would seem, under the authorities, that the question of the necessity and the extent of the taking was settled beyond dispute. But the taking is not complete till the compensation to be paid to the landowner is ascertained, and either paid or secured. Unlike the adjudication of the necessity and extent of the taking, the whole process by which the compensation is ascertained is judicial. Cooley, Const. Lim. 695; Ames v. Railroad Co., 21 Minn. 241. "The legislature may determine what private property is needed for public purposes. That is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." Monongahela Nav. Co. v. U. S., 148 U. S. 312, 327, 13 Sup. Ct. 626. The landowner is not entitled, as a matter of right, to a jury trial, because the constitution has not so required; but he is entitled to have an impartial tribunal, with the usual

rights and privileges which attend judicial investigations. It is a suit at law. *Searl v. School Dist. No. 2*, 124 U. S. 197, 8 Sup. Ct. 460. Under our practice the application to the judge to appoint the appraisers is the first step in the judicial process; and, as we have indicated, it was necessary for the judge to pass upon the questions presented in the statute and alleged in the application before he had jurisdiction to appoint the appraisers. The power to appoint implies the power to pass upon and decide the jurisdictional facts.

The authenticated copy of the vote of the applicant to take and the ordering of the taking of the land described, with the like copy of the doings of the railroad commissioners, answer the first question in the affirmative. These records were in the nature of a judgment. The defendants urge two points which may not be included in the supposed judgment: That the vote was not passed in this state, but in the state of New York; and that the applicant company is not authorized to take land in New London. In the taking of land for railroad purposes in this state the approval of the railroad commissioners is the essential fact; and, when that approval is duly given, it is not very material that the expression of the corporate will which receives that approval was formulated outside the territorial limits of the state. Of course, it must be an expression of the corporate will which binds the corporation. In the year 1889 the legislature authorized the applicant to increase its capital stock, and to exchange its own stock for the stock of its leased lines, of which the Shore Line Railroad was one; and provided that when such exchange was completed all the franchises of the leased road should be merged in and belong to the applicant. After this lapse of time, and there being no averment to the contrary, we are not prepared to say that this applicant is not empowered to take the land described. We think the first general question was correctly answered by the judge of the court, as it must be now, in the affirmative.

The second general question was decided as one of fact, and that decision is binding on this court unless there is some error. We pass, then, to the third question.

The legislature does not intend that any railroad company shall have the right to take land for its purposes by the power of eminent domain unless it has exhausted all reasonable efforts to obtain the land it desires by agreement. The averment that "it cannot obtain it [the land] by agreement with the parties interested therein" is a necessary one, and must be proved before the appraisers can be appointed. *Williams v. Railroad Co.*, 13 Conn. 397. It was a condition precedent to the right to take the land. *Town of Torrington v. Nash*, 17 Conn. 197. This averment in the present application was denied. The first defense was a direct

denial of this averment. The fourth paragraph of the fourth defense was, in effect, an averment that the lands, easements, etc., were sought to be taken, not for railroad purposes, but for steamboat purposes,—an indirect denial. This defense was traversed by the applicant. Upon the issues of fact so joined the burden of proof was on the applicant to prove its averment that it was unable to obtain the land by agreement; and the burden was on the defendants to prove the fourth paragraph of its fourth defense. For these purposes it would seem that both parties depended upon the testimony of Capt. S. A. Gardiner. The defendant asked Capt. Gardiner this question: "At the time you were trying to agree with G. M. Long & Co. for the purchase of this property, did you not say to them that it was wanted for steamboat purposes?" This question was objected to by the applicant, and was excluded. We think this was error, and, as it seems to us, a material error. It does not appear whether this question was asked on cross-examination of Capt. Gardiner as a witness for the applicant, or was asked of him as a witness of their own. Nor does it make any difference. The question was admissible in either way, and the answer should have been received. The objection to this question, and the ruling upon it, missed the point to which the question was directed. It was not asked for the purpose of contradicting the vote of the applicant, or in any way to affect that intent. It was asked for the purpose of showing precisely what took place between Capt. Gardiner and the defendants at the time he attempted to negotiate with them in respect to the land. The applicant averred that they needed the land for railroad purposes, and that they could not obtain it by agreement. The averment means, if it has any meaning in the application, that they could not obtain it for railroad purposes, by agreement. If they had sought to obtain it by agreement only for steamboat purposes, then the averment of the application was not proved, and the fourth paragraph of the fourth defense was proved. There is error, and the case is remanded for further proceedings according to law. The other judges concur.

CHATFIELD v. BUNNELL et al.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

MALICIOUS PROSECUTION — MALICE — PROBABLE CAUSE — EVIDENCE — MITIGATING DAMAGES — LEADING QUESTION — REDIRECT AND CROSS EXAMINATION — NEW TRIAL.

1. In an action against P. and B. for malicious prosecution of plaintiff for theft of \$17 from them (it being claimed by plaintiff that it should be inferred that they acted with malice, from the fact that they knew he took the money under a claim that he had attached it on a writ against J., an actress, in which they and C. had been made garnishees, and it being denied that it was bet-

money, and appearing that it had been taken in by P. for tickets sold by him, as treasurer of a theater belonging to B., on a night when J. was playing at the theater, and plaintiff having testified that he began service of the writ by leaving a copy with P., as garnishee, and taking \$12, which he found in the box office, stating at the time to P. that he attached it, and that P. then disclosed that he was not indebted to J., and that the money was claimed by B. as his property, and also by C. as his, and defendants having testified that plaintiff went away after leaving the copy with P., and later came back stealthily, and seized the money without any explanation, and made off with it, and that when P. made up his accounts for the evening's sales he found that \$17 was missing), it is a proper subject of inquiry, on the issue of whether defendants had probable cause for believing that plaintiff stole \$17 of their money, how much money was taken, and whether it was or was not believed by them to be theirs; and it is therefore error to refuse to allow P. to state the method in which he handled the receipts from the different classes of shows for which he sold tickets, defendants' claim being that as to one class he acted as agent of B., but as to another as agent of outside parties, who hired the theater for the night; that on the night in question he was selling tickets for shows of each class; and that it would appear from his answer how they had come to the result that plaintiff took \$17, instead of \$12, as claimed by him; and also error to refuse to allow B. to state whether it was possible for him to tell to whom the receipts at the box office on any night belonged, without consultation with P., when P. had been selling tickets for different shows.

2. A question why witness did not owe C. is a leading one, he not having already testified that he did not owe C.

3. Testimony that plaintiff in an action for malicious prosecution voluntarily surrendered himself to the officer who had the warrant, and was not subjected to an actual arrest, is admissible in mitigation of damages.

4. Plaintiff in an action for malicious prosecution for theft of money from defendants having on cross-examination stated that he did not know when he took the money that it belonged to J., a third person, though he supposed it did, was entitled on redirect examination to explain by stating that he believed it belonged to J.

5. Plaintiff in an action for malicious prosecution for theft of money from defendants, which he took from the possession of defendant P. after serving on him copy of writ against J., in which defendants were made garnishees, may be asked on cross-examination whether he did not understand when he left the copy with P. that, if P. had any of J.'s money in his hands, the garnishment tied it up; as, if he did so understand, he must have also understood that his subsequent seizure of the money was improper, so that it would be a legitimate argument that he took it, not under the writ, but as a wrongdoer, whom persons without a legal education might well suppose occupied the position of a thief.

6. One who heard defendants' statements to another cannot state whether they made the same statements to him; testimony in gross as to the similarity of separate and distinct conversations with different persons not being permissible.

7. Motion to the supreme court to have verdict set aside as against evidence, made under Acts 1893, c. 51, after like motion had been denied by the trial court, will be granted only in a clear case.

Appeal from superior court, New Haven county; John M. Thayer, Judge.

Action by Ransom Chatfield against George B. Bunnell and another for malicious prosecution. Judgment on a verdict for \$900 for plaintiff. Defendants appeal, and also move to set aside verdict as against evidence. Motion denied. Judgment reversed.

The findings showed the following facts: Upon the trial the plaintiff offered evidence to prove, and claimed to have proved, that on the 10th day of May, 1895, he was a deputy sheriff of New Haven county, and that he then had in his hands, for service as such officer, a lawful writ of attachment against one Jean Pardee, wherein the defendants and John Clark were named as garnishees; that said Pardee was an actress then playing an engagement at the Hyperion Theater, in New Haven; that said Bunnell, one of the defendants, was manager of said theater, and that the defendant Peterson was the treasurer thereof, and as such sold tickets at the box office for admission to said theater; that the plaintiff on the evening of said day, at about 8 o'clock, began the service of said process, by leaving a duly-attested copy thereof in the hands of said Peterson, in said box office, and by attaching \$12, in bank bills, which he found there, as the property of said Pardee; and that later in the evening he left like copies with the other garnishees at the theater, and afterwards duly completed the service of said writ, and returned it to the court to which it was returnable; that, after he had so served said writ upon the garnishees, said Bunnell caused him to be arrested and detained without warrant in said Bunnell's private office at said theater, and threatened to have him prosecuted, and that later, on the 14th day of June, 1895, the defendant maliciously caused him to be prosecuted before the city court of New Haven on the charge of theft, by making complaint to Mr. Matthewman, the city attorney, and charging the plaintiff with that crime; and that he was afterwards arrested and tried on said charge, and acquitted. The defendants offered evidence to prove, and claimed to have proved, that the plaintiff did not attach said money at the time he left the copy with Peterson, but that, having left the copy, he departed from the box office, and that after some time he returned stealthily from one side of the box office, thrust his hand through the window, and seized the package of bank bills, which was lying upon the shelf, and made off with the money, leaving no further papers with Peterson, and giving no explanation of the act; that later in the evening, when Peterson made up his accounts, he found \$17 discrepancy; that the plaintiff was not detained nor arrested at the theater that evening, and that the defendants took no action in the matter until after the suit against Miss Pardee had been tried by the justice before whom it was returnable, because they expected that by the determination of that suit the money taken by the plaintiff would be returned to them; that shortly after the justice trial, they not having been called upon to disclose, and the money not having been returned to them, they went to the late Tilton E. Doolittle, then state's attorney, in order to ascertain their rights, and were by him referred

to Mr. Matthewman, and that to him they made a fair and impartial statement of all the facts, and stated to him that they had come for the purpose of finding out their rights; that said Matthewman characterized the plaintiff's act in taking the money as a theft, and caused the plaintiff to be prosecuted for that crime; and that the defendants had no other part in said prosecution, except to appear when lawfully summoned before said city court to testify their knowledge of the transaction. The plaintiff, in testifying to the occurrences at the theater, testified that at the time he left the copy with Peterson the latter disclosed that he was not then indebted to Jean Pardee, and that he had previously been served with other papers, and also testified that the defendant Bunnell claimed that the money taken was his, and that the other garnishee, Clark, claimed that it was his. The defendants called Mr. Peterson as a witness, and the following question was put to him: "Will you state to the jury, please, the method, or whether there is any difference at all in the manner, in which the receipts from the shows is handled by you?" The question was objected to by the plaintiff's counsel as irrelevant, immaterial, and incompetent. Counsel for the defendants claimed it upon grounds stated by him as follows: "Your honor will observe that there is a discrepancy. The amount of money taken was \$12. Your honor has heard the statement made and claimed on our part that the amount taken may have been \$17; and we think we have a right to show why it was that Mr. Peterson made that amount seventeen, instead of twelve, and that we can only do by showing to the jury the method of handling the receipts, and what became of them, in that house. As a matter of fact, our claim is that that night, when he came to balance his cash, there was a discrepancy of \$17. Now, further, a claim was made by Mr. Bunnell that night that that money was his, and not Jean Pardee's. Now, that the jury may understand how it was that one could claim it and another could claim it, our claim is that we ought to be permitted to show to this jury that for a certain class of shows Mr. Peterson, as the agent for Mr. Bunnell, handles all the money. On the other hand, for a class of entertainments for Mr. Bunnell, in which Mr. Bunnell rents his house, Mr. Peterson becomes the agent of the parties renting it, and is then not the agent of Mr. Bunnell. Then, further than that, I desire to show that on this night in question he was selling tickets for a class of entertainments in which Mr. Bunnell was entitled to handle all his receipts through his agent, Mr. Peterson, and he was also selling tickets for other shows in which Mr. Peterson was not his agent at all, but the agent of other people. This jury cannot understand this fully unless he is permitted to testify in relation to the handling of these receipts,—whose they

were on the night in question." The objection was sustained. The defendant Bunnell was called as a witness for the defense, and the following question was asked him by defendants' counsel: "Isn't it true, Mr. Bunnell, that, when Mr. Peterson is selling tickets for three shows at a time, it is impossible for you to tell, without consultation with Mr. Peterson, to whom the money belongs when it is received there?" The question was objected to as irrelevant and immaterial by plaintiff's counsel. The objection was sustained. The plaintiff had testified that before serving the copy upon Peterson he had watched the box office on the evening of May 10, 1895, and seen persons purchase tickets and pass along into the theater. The defendants, for the purpose of showing that none of the money received at the box office for tickets sold for the entertainment upon that night belonged to Jean Pardee or her assignee, John Clark, and for the purpose of showing that payment had already been made to Clark, asked the witness Peterson the following question: "Why did you not owe him [Clark] that night?" The question was objected to by the plaintiff's counsel. The objection was sustained. The plaintiff, to prove that he was arrested, tried, and discharged, offered testimony of the captain of police of the city of New Haven, with the record book of arrests kept in the police office, and the testimony of the clerk of the city court of New Haven, with the files and records of that court. By these records it appeared that the warrant was served and the plaintiff arrested by Henry D. Cowles, sergeant of police. The defendants called said Cowles as a witness, and for the purpose of proving that before he had time to serve the warrant, after it had been placed in his hands, the plaintiff appeared at headquarters and gave himself up, he was asked by their counsel the following question: "Now, you say the warrant was given to you. Did you arrest Chatfield?" The plaintiff's counsel objected to the question on the ground that the plaintiff made no claim for damages on account of any ill treatment, harshness, or physical injury in making the arrest, but only for the ignominy and disgrace brought upon the plaintiff by the malicious prosecution. The objection was sustained. The plaintiff offered evidence to prove, and claimed to have proved, that the defendants, when they went to City Attorney Matthewman, stated to him that the plaintiff had stolen \$17 from the box office at the Hyperion, and that they had come to him to his satisfaction. The defendants claimed and offered evidence that they did not make such statement, but an essentially different one, that said Cowles was present when the statement was made. Said Cowles, having testified as to the statement made in his presence to Matthewman, was asked by defendants' counsel the following question, for the purpose of showing that they had made a

same statement to him in the absence of Matthewman: "I want to know whether they made the same statements to you they made to Mr. Matthewman." This question was objected to in behalf of the plaintiff. The objection was sustained. The plaintiff, upon cross-examination by counsel for the defendants, was asked the questions whether, on May 10th, when he took the \$12, he knew to whom it belonged. To this inquiry he replied that he then supposed that it belonged to Miss Pardee. This answer was not objected to, but the question was repeated; and the witness, being required to give a direct answer, answered, "No." On his redirect examination by his counsel he was asked the following question: "Now, you were asked with regard to this \$12 in money that you took there at the theater on the night of May 10th, and you were asked if you knew that it belonged to Miss Pardee. Did you believe that it belonged to her?" Counsel for the defendants objected to this question, but the objection was overruled. The answer of the plaintiff to this question was, "I did; yes." The plaintiff testified that, in serving the copy of the Pardee writ upon Peterson, he reached through the window of the box office, and handed the copy to Peterson, and that in withdrawing his hand he took the \$12 which he saw upon the shelf, and stated to Peterson that he attached it. Upon cross-examination, counsel for the defendants asked him: "Didn't you understand, Mr. Chatfield, when you put that writ in Mr. Peterson's hands, that, if he had in his hands any money belonging to Jean Pardee when you did it, it tied that money up in his hands?" This question was objected to as irrelevant, immaterial, and incompetent, and the objection was sustained.

Lynde Harrison and Edmund Zacher, for appellants. Charles S. Hamilton, for appellee.

BALDWIN, J. (after stating the facts). Upon the trial in the superior court, it was not disputed that the plaintiff was prosecuted for a theft of \$17 from the defendants, in consequence of a complaint made by them to the city attorney of New Haven, and that he was acquitted of the charge. In order to make out his case, he was bound to show that they acted from malice, and he asked the jury to infer this from the fact (among others) that they knew he took the money under a claim that he had attached it on a writ against an actress named Pardee, in which they and also one Clark had been made garnishees. The defendants denied that it was her property; and it appeared that it consisted of certain bank bills taken in by Peterson, one of the defendants, for tickets sold by him as treasurer of an opera house belonging to Bunnell, the other defendant, at the box office, on a night when Miss Pardee was taking part in a play upon the stage. The plaintiff introduced evidence that he began the service of the writ by leav-

ing a copy with Peterson, as a garnishee, and taking possession of \$12 in bills which he found in the box office, stating at the same time to Peterson that he attached it; that Peterson then disclosed that he was not indebted to Miss Pardee; and that the bills were claimed by Bunnell as his property, and also by Clark as his. The defendants introduced evidence tending to show that the plaintiff went away after leaving the copy with Peterson, and then, some time later, came back stealthily, thrust his hand through the window of the box office, seized the bills, without any word of explanation, and made off with them, and that, when Peterson afterwards made up his accounts for the evening's sales, he found that \$17 was missing. Peterson was then asked, as a witness in their behalf, to state the method in which he handled the receipts from the different classes of shows for which he sold tickets; their claim being that as to one class he acted as the agent of the defendant Bunnell, but as to another as the agent of outside parties, who hired the opera house for the night; that on the night in question he was selling tickets for shows of each class; and that it would appear from his answer how they had come to the result that the sum taken by the plaintiff was \$17, instead of \$12, as claimed by him. Bunnell was also asked by his counsel whether it was possible for him to tell to whom the receipts at the box office at any night belonged, without consultation with Peterson, when the latter had been selling tickets for three different shows. In determining whether the defendants had probable cause for believing that the plaintiff stole \$17 of their money, among the proper subjects of inquiry would be how much money was taken, and whether it was or was not believed by them to be theirs. If Peterson's position was such as to make him accountable to Bunnell for certain receipts, and to third parties for other receipts, according to the class of show for which he might sell tickets, and he only could tell what kind of tickets he had sold on any particular night, these were facts which the defendants had a right to bring out in testimony. There was error, therefore, in excluding each of these questions.

The plaintiff testified that before serving his writ he saw persons buy tickets from Peterson, and then pass into the theater, and it appeared that Miss Pardee had assigned her interest in the receipts to Clark. The defendants claimed that all that was due to Clark had been paid prior to the attachment, and, for the purpose of showing this, asked Peterson why he did not owe Clark that night, which question was excluded. The cause of objection is not stated upon the record, and the ruling is therefore to be upheld, if there is any ground upon which it can be supported. The question was obviously a leading one, unless the witness had already testified that he did not owe Clark; and, as the finding does not show that any such testimony had

been given, it follows that the record discloses no error in its exclusion.

The plaintiff having produced record evidence of his arrest, as alleged in his complaint, upon the prosecution for theft, the defendants offered evidence that he voluntarily surrendered himself to the officer who had the warrant, and was never really arrested at all. Objection was made and sustained to this evidence on the ground that the plaintiff made no claim for damages for any ill treatment, harshness, or physical injury in making the arrest, but only for the ignominy and disgrace brought upon him by the prosecution. The defendants' exception to this ruling is well taken. They could fairly make claim that less of ignominy and disgrace was incident to a prosecution in which the plaintiff was not subjected to an actual arrest than to one in which his person was taken into the custody of an officer, and the testimony which the question asked was calculated to elicit would have been entitled to consideration in mitigation of damages.

The plaintiff testified on cross-examination that he did not know when he took the money that it belonged to Miss Pardee, though he supposed it did. On his redirect examination he was asked whether he believed it to be hers, and replied in the affirmative. This question was properly admitted. While he was not on trial for theft, he had the burden of proving that the defendants had charged him with that offense without probable cause. His admission that he took the bills without knowing that they were Miss Pardee's property might have been used against him in the argument to the jury with more effect had he not been allowed to explain it by affirming his belief in her title.

The plaintiff was asked on cross-examination whether he did not understand when he left the copy with Peterson that, if the latter then had any money of Miss Pardee's in his hands, the garnishment tied it up. This question was erroneously excluded. If he did understand such to be the law, he must also have understood that his subsequent seizure of the money in Peterson's possession was improper; and it was a legitimate argument to address to a jury, that, under such circumstances, he took it, not under his writ, but as a mere wrongdoer, whom ordinary men, who had not had a legal education, might well suppose to occupy the position of a thief.

The sergeant of police, who heard the defendants' statements to the city attorney (as to the nature of which there was contradictory evidence), was asked by their counsel whether they made the same statements to him. This question was properly excluded. A witness cannot thus be allowed to testify in gross as to the similarity of separate and distinct conversations with different persons on the same subject.

The defendants, upon the rendition of the verdict, moved in the superior court to have it set aside on the ground that it was against

the evidence. After due consideration this motion was denied, a few days later, whereupon, and within six days after judgment, they filed a similar motion, to obtain the same relief from this court, under the act of 1893 (chapter 51, p. 228). It was informally drawn, being simply entitled by the caption in the cause in the superior court, and not addressed, as it should have been, to this court. Passing by this defect, however, we are of opinion that the verdict was not so palpably contrary to the evidence before the jury as to require us to grant a new trial upon this motion. In the determination of this question, great weight is due to the action of the trial court in denying the original motion filed immediately upon the conclusion of the trial, when the whole case was fresh in its recollection. Its decision did not, indeed, preclude the defendants from bringing the case here upon another motion to the same effect; but it is only in a clear case that, under such circumstances, we should feel justified in coming to a different result. *Bissell v. Dickerson*, 64 Conn. 61, 72, 29 Atl. 226; *Johnson v. Norton*, 64 Conn. 135, 29 Atl. 242. The motion to set aside the verdict as against evidence is denied, but there is error on the appeal, and upon that a new trial is ordered. The other judges concurred.

BOGUE v. TOWN OF MONTVILLE.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

SOLDIERS—BOUNTY TO VOLUNTEERS—EVIDENCE—HARMLESS ERROR.

1. In an action against a town for a bounty for enlisting as a soldier, promises made by an agent of the state to plaintiff are not admissible against the town, he not being shown to have been its agent.

2. Plaintiff in an action against a town for a bounty for enlisting as a soldier is not prejudiced by evidence that he received a bounty from the state.

3. In an action against a town based on a vote to pay a bounty to residents who should enlist as soldiers so as to count on its quota under a recent call for volunteers, the rejection of a resolution to pay said bounty to re-enlisted veterans, offered at a town meeting shortly after the passage of the vote, is admissible, as contemporaneous exposition, against one who had re-enlisted prior to such call and vote, though but for such re-enlistment, and the enlistment of others at the time, whereby the town had furnished men in excess of its quota, it would have had to furnish more men than it did under the last call.

4. Acts 1895, providing that a liability for a bounty, when one once existed against a town, may be sued on without regard to the statute's limitations, gives no right to a bounty where one had never before been entitled to one.

Appeal from superior court, New London county; John M. Thayer, Judge.

Action by George F. Bogue against the town of Montville. Judgment for defendant. Plaintiff appeals. Affirmed.

Action to recover a bounty claimed by the plaintiff to be due to him from the defendant. The complaint sets forth two votes—

of the town as follows: "(1) On August 3, 1864, the defendant, the said town of Montville, duly and legally passed the following vote: 'Voted, that the selectmen of the town of Montville be, and they are hereby, authorized to pay to each resident of the town who enlists or procures a substitute or a recruit who shall count on the quota of this town under the recent call of the president, the sum of three hundred dollars, and the selectmen are hereby authorized to draw on the town treasurer for the same; said recruit to be enlisted for three years. Voted, that the selectmen of this town be, and are hereby, authorized to employ one or more persons to aid them in filling the quota of the town under the last call of the president for volunteers, and to draw orders on the town treasurer for paying all necessary expenses which they may deem just and proper.' (2) On August 30, 1864, the defendant, the said town of Montville, duly and legally passed the following vote: 'Voted, that the selectmen be, and are hereby, authorized to give to each person, resident of Montville, who may enlist and count on the quota of said town, the sum of two hundred dollars in addition to the three hundred dollars already voted at a previous meeting, provided he enlists for three years.'" There were several defenses, one of which denied that the plaintiff was entitled to recover any bounty under said votes. Judgment was rendered for the defendant, and the plaintiff appealed. The finding is that: (1) On January 9, 1862, the plaintiff, who was then a resident of the defendant town, enlisted from said town as a volunteer for three years in the army of the United States for the suppression of the Rebellion. (2) On February 8, 1864, at Thibodeaux, La., he re-enlisted, as a volunteer from said town of Montville, in said army, for three years, or the war. (3) Upon said re-enlistment he received from the state of Connecticut a bounty of \$300. (4) On July 1, 1864, the defendant had furnished 13 men in excess of its quota, and the plaintiff's re-enlistment aforesaid was one of the last 13 enlistments credited to said town on the records of the adjutant general's office. (5) On July 18, 1864, a call for 500,000 men was made by the president of the United States. (6) The number of men to be raised by the defendant under said call, as fixed by the adjutant general, was 25. Except for the excess of men theretofore furnished, the number to be raised under said call would be 38. (7) On August 3, 1864, the defendant town, upon proper warning, passed the vote set forth in the first paragraph of the complaint. (8) On August 17, 1864, at a town meeting duly warned for the purpose of determining whether the defendant would pay the bounty of \$300 to re-enlisted veterans, it was voted by the defendant to indefinitely postpone the matter. (9) On August 30, 1864, at a meeting of the defendant town duly warned, the vote set forth in the second paragraph of the com-

plaint was passed, and at the same meeting a resolution proposing to pay said bounty to veteran volunteers who had re-enlisted in the 13th C. V. (one of whom was the plaintiff) was rejected. Said proposition was embraced in the warning of said meeting. (10) The call referred to in said votes was that of July 18, 1864, above mentioned. (11) The plaintiff did not re-enlist on the faith of said votes set forth in the complaint, or either of them, and he was not requested to re-enlist by the defendant or its agents; and he was not induced to re-enlist as aforesaid by any promise or inducement on the part of said town or its agents. (12) The plaintiff was honorably discharged from service under the said re-enlistment in May, 1866. (13) The plaintiff never received either of the bounties voted in the votes set forth in the complaint. (14) Upon the trial the plaintiff offered evidence to prove that in February, 1864, Col. Joseph Selden came, as the agent of the state, sent by Gov. Buckingham, to the place where the plaintiff's regiment was then stationed in the field, for the purpose of securing the enlistment of recruits and the re-enlistment of veterans, and that, as one of the inducements to re-enlist, he promised the plaintiff, as well as the other members of the regiment, that he could make his choice of the town to which he would be credited, and that he should receive any bounty voted by such town to men who should be credited to it as a part of its quota under any subsequent call of the president for volunteers, and that, relying upon such promise, he re-enlisted, and chose to be credited to the town of Montville. To this evidence the defendant objected on the ground that it did not appear that Col. Selden was the agent of the town. The plaintiff's counsel, being inquired of by the court, stated that he could not show that Col. Selden was acting for the defendant. The defendant's objection was thereupon sustained, and said evidence was excluded. The plaintiff's counsel duly excepted. (15) The defendant offered evidence to prove that the plaintiff received a bounty of \$300 from the state upon his said re-enlistment. To this evidence the plaintiff's counsel objected as irrelevant. The court overruled the objection and received the evidence. The plaintiff duly excepted. (16) The defendant offered evidence to prove that on the 17th day of August, 1864, a special town meeting of the defendant town was called to vote upon the question of paying the \$500 bounty to re-enlisted veterans, and the matter was indefinitely postponed, and that at the meeting on the 30th of August, 1864, a resolution was offered to pay said bounty to re-enlisted veterans, and was rejected. To all this evidence the plaintiff objected as irrelevant. The court overruled the objection and admitted the evidence. The plaintiff duly excepted.

Seneca S. Thresher, for appellant. Charles W. Comstock, for appellee.

ANDREWS, C. J. (after stating the facts). The judgment of the superior court is conclusive against the plaintiff, unless there is some error in its proceedings. We have inspected the record, and do not find any such error. The ruling in the fourteenth paragraph of the finding is correct, as we think, and for the reasons given. Col. Selden was not the agent of the town. No reason is stated why the evidence mentioned in the fifteenth paragraph was objected to, nor why it was offered. At any rate, it could have done the plaintiff no harm. The evidence mentioned in the sixteenth paragraph was clearly admissible. It was contemporaneous exposition.

We think the court construed the town votes correctly. Those votes looked to the future. The purpose of the town in passing them was to save itself from a draft. For that purpose the quota of the town was only 25. The plaintiff was not one of that number.

The act of 1895, on which it is said this action is brought, does not impose any new liability. It only professes to enact that a liability for a bounty, when one once existed against any town, may be sued on, and that the statute of limitations shall not be pleaded by the defendant in any such action. Here the plaintiff never was entitled to the bounty sued for. There is no error. The other judges concurred.

MOONEY v. CLARK et al.

(Supreme Court of Errors of Connecticut. May 25, 1897.)

Concurring opinion. For former report, see 37 Atl. 506.

TORRANCE, J. The act of June 22, 1895, provides for an abatement of a nuisance dangerous to life, resulting from the intersection of railroad tracks and highways at grade within the limits of the city of Bridgeport, at the expense of the municipality and railroad company responsible for its existence; and it authorizes the board of railroad commissioners to make the necessary order for this purpose, and provides for an agreement between the company and certain persons named in the act, as representatives of the city, for the purpose of facilitating the performance by the railroad commissioners of the duty imposed upon them. In this the legislature does not exceed its powers.

It was claimed on behalf of the plaintiff that the act authorizes an agreement, not merely for the purpose of aiding the commissioners in making a proper order, but for the purpose of binding the city by obligations other than those involved in the elimination of grade crossings, and that a valid agreement for such purpose requires the action of the municipality; also, that the act authorizes a donation by the city to the railroad cor-

poration for the building of additional tracks and a new drawbridge, contrary to the provisions of the twenty-fifth article of the amendments to the constitution. I agree that it is not necessary to pass upon these questions in order to sustain the demurrer to the plaintiff's complaint,—the only question now before us; but I deem it proper, in concurring in the opinion, to negative any implication that these questions are affected by the decision.

HAMERSLEY, J., concurs.

Appeal of NORWALK ST. RY. CO.¹

(Supreme Court of Errors of Connecticut. July 13, 1897.)

CONSTITUTIONAL LAW—DISTRIBUTION OF POWERS OF GOVERNMENT—JUDICIAL POWERS—WHAT CONSTITUTE—WHEN MAY BE EXERCISED.

1. Under Const. 1818, art. 2, § 1, providing that the powers of government shall be divided into three distinct departments, and each of them confided to separate magistracies, the general assembly has no judicial power, and it cannot confer such power on a court, or on a judge thereof.

2. Nor can a court or a judge thereof exercise a power not judicial.

3. Pub. Acts 1893, c. 169, and Pub. Acts 1895, c. 283, provide that, before any railway company shall construct its road in the streets of a city, the city authorities, or the superior court, or a judge thereof, on appeal, shall approve the plan of construction, and that a neglect by the city either to approve or disapprove within 60 days shall be deemed equivalent to a disapproval, authorizing an appeal. *Held*, that the power which the superior court or a judge thereof is required to exercise is legislative, and not judicial.

4. The exercise of judicial power by a judge of the superior court is not limited to times when he is holding a stated session of court; but such powers may be exercised at chambers and in vacation.

Baldwin, J., dissenting.

Appeal from superior court, Fairfield county; Frederick B. Hall, Judge.

Petition by the Norwalk Street-Railway Company to Frederick B. Hall, a judge of the superior court, for the establishment of a plan for the location and construction by petitioner of a street railway in the city of Norwalk. From a judgment as prayed, the mayor and council of the city of Norwalk appeal. Reversed.

The petition in this case represents that on April 4, 1896, the Norwalk Street-Railway Company presented a plan for the location and construction of its railroad in the streets of the city of Norwalk, to the mayor and council of said city, and that the mayor and council failed to notify the petitioners, within 60 days of that date, in writing, of their decision upon said plan, and asks the judge to accept or modify the same, as he might deem equitable. Due service of the petition was made. Upon the hearing, the mayor and council moved that the "appeal" be dismissed, "because the questions raised by this

¹ Rehearing pending.

appeal involve only the consideration and determination of matters not of a judicial character, and the tribunal to which the appeal is taken has no jurisdiction to hear and determine any matters except those of a judicial character." This motion was denied, and the judge rendered a judgment accepting and adopting a plan (being the plan presented to the mayor and council, modified in some respects) for the location and construction of the railroad. The only questions raised by the assignment of errors, and pressed in argument, were: Can the "superior court or a judge thereof" validly exercise a power which is not "a judicial power," within the meaning of the constitution? Was the action of the judge in this case an exercise of such judicial power?

Goodwin Stoddard and E. M. Lockwood, for city of Norwalk. John W. Alling and George D. Watrous, for Norwalk St. Ry. Co.

HAMERSLEY, J. (after stating the facts). The act of 1893¹ confers upon city councils certain powers in establishing regulations for the location, construction, and operation of street railways, and requires a council, if requested by a railway company, to take

¹ Pub. Acts 1893, c. 160, provides as follows: "Sec. 2. Whenever any railway company shall have been chartered by the general assembly of this state for the purposes of operating street railways in any town, city or borough, or whenever any such corporation already organized has been, or shall be given, the right to lay additional tracks in any such town, city or borough, or whenever any street railway company shall desire to change its motive power, before such company shall proceed to construct such railway, lay additional tracks, or change its motive power, it shall cause a plan to be made showing the highway or highways, street or streets, in and through which it proposes to lay its tracks, the location of the same as to grade and to the center line of said streets or highways, such change or changes, if any, as are proposed to be made in any street or highway, the kind and quality of track to be used and the method of laying the same, the motive power to be used in propelling its cars, and the method and manner of applying the same, which plan shall be presented to the mayor and court of common council of any such city, the selectmen of any such town, or the warden and burgesses of any such borough, within their respective jurisdictions, who shall thereupon, upon public notice, proceed to a hearing of all persons interested therein, and after such hearings may accept and adopt such plan, or make such modifications therein, as to them shall seem proper, and shall, within sixty days after the presentation of such plan to the local authorities, notify said company in writing of their decision thereon, and of such modifications therein as they may deem proper. The refusal or neglect of any such local authority to notify said company of its decision within said period of sixty days as aforesaid shall be deemed to be a refusal to approve and accept said plan as presented by said company. Nothing in this act shall be construed so as to prevent such street railway company from presenting to such local authorities a plan or plans as heretofore provided, until said street railway company and local authorities shall agree upon the same, and no such company shall construct such railway, lay additional tracks, or change its motive power except in accordance with a plan approved by the authorities aforesaid."

some action within 60 days, and to notify the company in writing of its action. Whenever a council fails to give such written notice, the act of 1895² confers the same powers upon the "superior court or any judge thereof," to be exercised on application of a railway company, and calls this application an "appeal." The power so conferred on the court is described in the act of 1893 as the power to approve and adopt a location and lay-out of a street railway, with such modifications therein as shall seem proper, in respect to the streets to be occupied, the location of the same as to grade and to the center line of the streets, and changes to be made in the street, the kind and quality of the track to be used, the motive power to be used, and the method of applying the same. Can such powers be conferred on the superior court? The limitation of their exercise to cases where there has been a prior failure of a municipal board to act cannot affect the principle involved. If the legislature can confer the power in a limited class of cases by calling an original application for its exercise an "appeal," it can confer the power in all cases without limitation.

This court has said in *Brown v. O'Connell*, 36 Conn. 432, 446: "No judicial power is vested by the constitution in the general assembly,

² Pub. Acts 1895, c. 283, provides as follows: "Section 1. Whenever the warden and burgesses of any borough, the mayor and common council of any city, or the selectmen of any town shall make, pass, or render any decision, denial, order, or direction with respect to any matters relating to street railways which, by virtue of any public or private act or resolution, now are, or may hereafter be, within the respective jurisdictions of such warden and burgesses, mayor and common council, or selectmen, any street railway company affected thereby may appeal from any such decision, denial, direction, or order within thirty days from the service of notice upon such street railway company of the rendition, making, or passage of such decision, denial, direction, or order, to the superior court, or any judge thereof; such appeal shall be by petition to such court or judge, and shall state specifically the portion or portions of such decision, denial, direction or order appealed from, and the reasons of such appeal; and such court or judge shall order such notice as may be deemed reasonable to be given to such selectmen, mayor and common council, and warden and burgesses of the time and place of appearance in answer to such petition, and upon the time fixed for appearance and answer, or as soon thereafter as said court or judge shall order, such appeal shall be tried by said court or judge, and said court or judge shall make such orders in reference to said matters appealed from as may by it or him be deemed equitable in the premises, and the decision of said court or judge shall be final and conclusive upon the parties. And whenever such warden and burgesses, mayor and common council, or selectmen shall, under the provisions of section two of chapter clix. of the Public Acts of 1893, be deemed to have refused to approve and accept any plan presented by any street railway company, said street railway company shall have a like right of appeal therefrom to said superior court, or any judge thereof; and said court or judge shall have the same powers with reference to said plan and the acceptance or modification thereof that said municipal authorities would have had under the provisions of said act, and may make all such orders with reference thereto as may be deemed equitable."

either directly or as an incident of the legislative power, and the general assembly cannot confer it. * * * It was one of the objects which the people had in view, in framing and adopting the constitution, to divest the general assembly of all judicial power. * * * While the entire legislative power is vested in the general assembly, the judicial power is separated from it, and vested in the courts 'as a separate magistracy.' It is obvious * * * that the judicial power is not conferred by the general assembly, but vests, by force of the constitution, in the courts. * * * It was therefore competent for them [the legislature] to provide for the organization of the court in question [a city police court], and to define the jurisdiction it should possess; and, when so constituted, the judicial power of the state vested in it, by force of the constitution, to the extent of the jurisdiction so defined." In an opinion by Judges Hinman, Sanford, Butler, and Dutton, the constitution is thus defined: "The constitution of the state, framed by a convention elected for that purpose, and adopted by the people, embodies their supreme original will in respect to the organization and perpetuation of a state government, the division and distribution of its powers, the officers by whom those powers are to be exercised, and the limitations necessary to restrain the action of each and all for preservation of the rights, liberties, and privileges of all, and is therefore the supreme and paramount law, to which the legislative, as well as every other branch of government and every officer in the performance of his duties, must conform. Whatever that supreme original will prescribes, the general assembly and every officer or citizen to whom the mandate is addressed must do; and whatever it prohibits, the general assembly and every officer and citizen must refrain from doing; and if either attempt to do that which is prescribed in any other manner than that prescribed, or to do in any manner that which is prohibited, their action is repugnant to that supreme and paramount law, and invalid." Opinion of the Judges, 30 Conn. 593.

It is claimed that Wheeler's Appeal, 45 Conn. 313, recognizes a sovereign power in the legislature, not derived from the constitution, in addition to that embraced in the grant of legislative power, and unrestrained by the division of the powers of government into distinct departments; and this case is relied on as justifying the legislation now in question. It is unnecessary to discuss the precise point determined by the judgment in Wheeler's Appeal, but the ground on which the opinion seeks to justify the judgment is erroneous. It is this: The opinion says it is "obvious from the past history of our own jurisprudence and long-continued legislative practice that we have reserved a much larger field for legislative action than has ever been recognized" in other states. This divergence is due "in part, and perhaps principally, to the very extensive powers which were originally conferred on the general assembly by the charter of Connecticut. Under

this charter, the general assembly exercised executive and judicial functions. Upon the adoption of the constitution of 1818, which divided the powers of government, it was logical to hold that all judicial functions of the general assembly were at an end; and this claim was made at an early date, but not accepted by this court. *Starr v. Pease*, 8 Conn. 547; *Day v. Cutler*, 22 Conn. 625; *Booth v. Town of Woodbury*, 32 Conn. 126. If, then, an act of the state legislature is not against natural justice or the national constitution, and it does not appear affirmatively and expressly that there is some provision in the constitution forbidding it, we must hold it to be *intra vires* and valid."

There are no affirmative and express provisions in the constitution forbidding the exercise by the general assembly of the equity jurisdiction which in former days was exclusively exercised by the "general court"; and so the proposition asserted is broad enough to justify acts of the general assembly administering this branch of jurisprudence. Such a doctrine is subversive of the American idea of constitutional government. It affirms that the checks established by the division of governmental power have no existence in this state; that when the constitution says, "The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy," it means, "The general assembly shall exercise every power of sovereignty which it is not forbidden to exercise by some affirmative and express provision of the constitution;" that the mandate, "The legislative power of this state shall be vested in two distinct houses, to be styled the 'General Assembly,'" does not mean what it says, but means, "The governor and council and house of representatives in general court assembled" shall continue, under the style of the "General Assembly," to exercise the supreme power of the state in all matters whatever not forbidden by some affirmative and express provision herein contained; that the mandate, "The judicial power of the state shall be vested in the supreme court of errors, the superior court," etc., means nothing, or means, "such portion of the judicial power as the general assembly shall not exercise by itself or other agencies." This doctrine originates in an expression in the opinion of Daggett, J., in *Starr v. Pease*, *supra* (Hosmer and Bissell, JJ., concurred in the judgment, and Peters, J., dissented), an expression not necessary to support the judgment rendered, for the validity of a legislative divorce—the matter in dispute—must rest on the claim that it is a law fixing a status on grounds of public policy, and is not a mere adjudication of private rights. *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 721. Judge Daggett says that it is urged that by the "New Constitution" there is an entire separation of the legislative and judicial departments, and that now the legislature can

pass no act not clearly warranted by the constitution; that precisely the opposite of this is true; that from the settlement of the state there have been certain fundamental rules by which power has been exercised, which were embodied in an instrument called by some a "constitution" and by others a "charter"; that the charter gave extensive power to the legislature, and left everything almost to their will; that, when the new constitution was framed, it adopted a bill of rights, provided for the election and appointment of certain organs of the government, such as the legislative and other departments, and imposed on them certain restraints; that it found the state sovereign and independent, with a legislative power capable of making all laws necessary for the good of the people, not forbidden by the United States constitution, nor opposed to sound maxims of legislation, and left them in the same condition, except so far as limitations were provided. This statement was substantially repeated in *Pratt v. Allen*, 13 Conn. 124, although the judgment in that case was supported on other grounds. In some respects the views of those engaged in framing a constitution, as to its meaning, are entitled to peculiar regard, but not in all respects, and especially not as to the extent of the radical change involved in the adoption of a written constitution. Such a change brought into existence an absolutely new branch of jurisprudence, which judges trained under a different and antagonistic system were not peculiarly fitted to comprehend. In *Starr v. Pease*, however, the only judge who was a member of the convention of 1818 emphatically dissented. The error of Judge Daggett was fundamental. It was more than an error in the construction of language. It was based on the denial of the essential meaning of a written constitution.

Prior to 1818 the whole sovereign power was exercised by the people, unrestrained by anything except their present will, through a body of magistrates chosen annually, and deputies chosen semiannually. This was a democracy, as close to a pure democracy as it is possible for a representative government to be. There were certain forms established by legislation, and certain fundamental principles generally acknowledged as true and important; but there was no power that could enforce them. They depended on the unrestrained will of the people, as expressed semiannually. This body of laws and customs might be broadly called a "constitution." But they were not, and the government was not a constitutional government, in the American sense, which was then taking definite shape, through the influence of the United States constitution. There was no fundamental law made by the sovereign—the people—embodying their supreme original will, in pursuance of which, and in accordance with which alone, governmental power could be exercised. Such a

law is in its very nature a grant of power; a grant by the sovereign to the governmental agencies established; a grant for the very purpose of preventing the sovereign from itself exercising the powers granted (for such exercise by the sovereign must, of necessity, be unrestrained and arbitrary). And so the grant is made to three distinct departments or magistracies, each deriving its delegated power direct from the sovereign, through the constitution. The only sense in which a constitution may be termed a "limitation," rather than a grant of power, is that the power granted to each department is given broadly, and covers the whole range of that division of power, except as limited by the constitution. It was this new form of government that the people demanded and established in 1818. It was this new form of government that the advocates of the so-called "charter government" for 30 years successfully opposed. They claimed that they had a constitution, because they did not realize what a constitution meant, or were afraid of the restraints it imposed. The idea of a constitution was centered in the separation of judicial and legislative powers, and the grant of each power to a distinct magistracy. On this the fight for change of government was largely made.

When the legislature that called the convention of 1818 met, Gov. Wolcott told them that their mandate from the people was "that the legislative, executive, and judicial authorities of our own government be more precisely defined and limited, and the rights of the people be declared and acknowledged." The committee appointed on a revision of the form of civil government, in their report, said that the state was then "destitute of fundamental laws defining and limiting the powers of the legislature"; that the organization of the different branches of the government, and the separation of their power, rested on "the frail foundation of legislative will or discretion." The resolution reported by them, and adopted by the legislature, recommended to the people of the state to assemble and choose delegates who should meet in convention, and, if "by them deemed expedient, proceed in the formation of a constitution of civil government for the people of this state"; and said constitution, when ratified and approved by the people, "shall be and remain the supreme law of this state." There was then a democracy exercising supreme power through deputies chosen semiannually, but no constitution of civil government, in the American sense of that term. In these deputies, when assembled in general court, consisted "the supreme power and authority of this state." When so assembled, they had "the power and voice of all the free-men deputing them"; i. e. the whole power vested in the sovereign,—the people. By virtue of this power so deputed, they recommended to their sovereign to abolish the existing form of government, to establish a new form of civil government, and to appoint delegates

to frame a constitution for that purpose, which, when adopted by the sovereign, should be a permanent grant of his power to the agencies therein named, under the limitations therein expressed. This, again, was declared when the convention met, and "resolved that this convention do deem it expedient to proceed at this time to form a constitution of civil government for the people of this state." The constitution adopted declared that the people of Connecticut, grateful for having been permitted to enjoy a free government (i. e. a democracy), in order more effectually to define and secure the liberties derived from their ancestors (i. e. the English heritage of civil liberty), heretofore resting on "the frail foundation of legislative will or discretion," do "ordain and establish the following constitution and form of civil government."

The convention adopted the constitution on September 15th; the people approved and ratified it; and on October 12, 1818, it became the constitution of civil government of the people of Connecticut. On that day and thereafter all powers of government were exercised only by virtue of the authority granted in that instrument. It was "the original supreme will of the people," from which all authority was derived. This clearly appears from section 3 of article 10, by which the existing rights and duties of corporations are confirmed and established, subject to the regulations contained in the constitution. Officers previously commissioned are authorized to exercise their offices until the 1st of June following. Laws not inconsistent with the constitution are continued in force until altered or repealed in pursuance of the constitution; and the general court to be formed in October is granted all powers, not repugnant to the constitution, which they now possess, until the first Wednesday of May following. When it is remembered that the last session of the "general court" had no power whatever, except that granted by the constitution, the theory that this general court handed over to the general assembly established by the constitution undefined sovereign power, not derived through that instrument, appears in its naked absurdness. No declaration could be more clear and specific than on October 12, 1818, the democracy first established in 1637 ceased to exist, and the general court or assembly through which the powers of that democracy had been exercised was then abolished, and every power of government thereafter exercised found its authority only in the constitution of civil government then adopted by the people as the supreme law of the state. This result was recognized by those who had opposed, as well as by those who had advocated, the revolution. William L. Stone, editor of the Connecticut Mirror, speaking for the former, said: "Our form of government, under which for near two hundred years all have enjoyed privileges and blessings unknown to any other

people upon earth, has been swept away." John N. Niles, editor of the Hartford Times, speaking for the latter, said: "A government of men has been superseded by a government of laws. * * * Distinct and independent bodies of magistracy have been constituted; their powers and duties defined, limited, and separated." Trumbull, Hist. Notes Const. Conv. 1818, p. 59.

The forms of procedure under the constitution were so similar to those under the former government, and were so largely administered by men who were not only fixed in the old ways of thought, but opposed to the radical change involved in the adoption of a constitution, that it is not strange that some legislation should pass unchallenged, and dicta of judges pass current, clearly contrary to the supreme law. But the form of government established in 1818 cannot be destroyed in that way. This change in the structure of government was a pregnant fact, which any one, long settled in the belief that an exercise of the whole unrestrained power inherent in an absolute democracy, through a body of delegates frequently chosen, furnished the best organic plan for ruling a commonwealth, might well find it difficult to accept in its full significance. The views of Judge Daggett, as expressed in *Starr v. Pease*, on the effect of a constitution, are those of an able and thoughtful jurist; but we find it more easy to reconcile them with the traditions in which he had been educated, and the conditions existing during the greater part of his long and extensive practice at the bar, than with the plain provisions of the constitution itself. It was the expression of these views that led up to the dictum in *Wheeler's Appeal*. The other two cases cited do not support the dictum. *Day v. Cutler* was an action on a promissory note, which involved the validity of a legislative divorce. *Ellsworth, J.*, assumed the validity of the divorce, and held the note given in connection with it to be valid, and *Waite, J.*, concurred. *Hinman, J.*, tried the case below, and gave no opinion. *Church, C. J.*, said: "It may be too late now to discuss the question whether, since the powers of this government were separated by the constitution of 1818, and distributed to the distinct executive, legislative, and judicial departments, respectively, the general assembly can constitutionally exercise the power of granting divorces. This has been doubted by some of our best jurists." But, passing that, he held that, in any event, the note in suit was not valid; and in this opinion *Storrs, J.*, concurred. *Booth v. Town of Woodbury* does not support, but denies, the dictum. The court expressly says the legislative power is granted to the general assembly by the constitution. We do not recall a case that necessarily depends on the theory of Judge Daggett, followed in *Wheeler's Appeal*, unless it be that case. Other utterances of this court are wholly inconsistent with the the-

ory. In the opinion of the judges above cited, the true meaning of a constitution is conclusively stated. In *Brown v. O'Connell*, supra, the power of the legislature to either exercise or confer judicial power is denied. The case of *In re Clark*, 65 Conn. 17, 41, 81 Atl. 522, plainly assumes that the legislature is confined to the exercise of legislative power. In *State v. Conlon*, 65 Conn. 478, 488, 33 Atl. 519, we say: "The legislative power of this state is, in the broadest terms, vested in the general assembly. This power is, in a certain way, defined and limited by the provisions dividing the powers of government into distinct departments, and by those relating to the operation of the state government and duties of particular officers. But, unlike the constitutions of many states, it contains no specific limitations on the exercise of legislative power, except some slight restrictions in one or two recent amendments. The limitations, however, are no less real, and perhaps more effective, than if phrased in specific terms." In *State v. Williams*, 68 Conn. 131, 149, 35 Atl. 24, 421, the opinion of the court assumes that only legislative power is granted to the general assembly; and the dissenting opinion of Andrews, C. J. (in this matter not antagonizing the majority), states that, upon the ratification of the constitution, "the former government by general assembly was finally and forever dissolved. The people, in the exercise of their sovereignty, established a new government, in three separate and independent departments, whose powers were to be exercised, and exercised only, in accordance with their supreme original will, embodied in the constitution." Page 169, 68 Conn., and page 426, 35 Atl.

But no dicta of judges, no doubtful or improper legislation, can alter the plain fact that in 1818 the people, in the exercise of their sovereignty, granted to the general assembly then constituted the legislative power, and forbade their exercise of other than legislative power (unless specially granted), and granted to this court and other courts then constituted the judicial department,—the judicial power,—and forbade their exercise of other than judicial power. The assertion of original and consistent opponents of a constitution that the victory of 1818 was a barren victory, that constitutional government, as known to the people of the United States, is unknown to Connecticut, and that the fundamental principles of constitutional law have here no existence, however often repeated, cannot affect the paramount authority of the supreme original will of the people, as plainly declared in the constitution itself. The unequivocal mandate therein contained, that the powers delegated or granted by the sovereign,—the people,—through the constitution, shall be divided into three distinct departments, and those belonging to each confided to a separate magistracy, and the equally unequivocal mandate

that the powers granted to the general assembly (unless by some specific provision) shall be confined to the exercise of the "legislative power of this state," and the powers granted to the judiciary shall be confined to the exercise of "the judicial power of the state," are binding upon this court at all times. These mandates are the voice of the sovereign, speaking ever with a present authority, from which there is no escape. The incapacity of the legislature to execute a power which is essentially and merely a judicial power, and of the judiciary to execute a power which is essentially and merely a legislative power, as well as the limitation of the meaning of legislative power by force of certain primary principles of government plainly embodied in the constitution, and by the necessities involved in the separation and independence of distinct departments of government, is fundamental to the very existence of constitutional government, as established in the United States. *Wilkinson v. Leland*, 2 Pet. 627; *Houston v. Williams*, 13 Cal. 24; *Taylor v. Porter*, 4 Hill, 140; *Cochran v. Van Surley*, 20 Wend. 365; *Campbell's Case*, 2 Bland, 209. This court has not hesitated to affirm and apply the principle here involved. *Brown v. O'Connell*, Opinion of the Judges, *In re Clark*, and *State v. Conlon*, supra. We believe Wheeler's Appeal to be the only case that necessarily may involve a different view, but, for the reasons given, it is powerless to change the principle. The supreme court of the United States has uniformly held that a law conferring on the courts a power which is not a judicial power, within the meaning of the constitution, is unconstitutional, and that such power cannot be lawfully exercised by the courts. Note by court on *Todd v. U. S.*, 13 How. 53; *Ex parte Siebold*, 100 U. S. 398.

The power which Judge Hall was asked to exercise in the present case does not seem to us to be a judicial power, within the meaning of our constitution. It is claimed that the difficulty of defining the powers of government renders impracticable the enforcement by this court of their division, and so makes nugatory the most important command of the constitution. A difficulty attends the application of a general principle to particular cases, and sometimes, the more vital the principle, the greater the difficulty. This was felt when the United States supreme court first dealt with a conflict between a law of congress and the constitution. It was felt still more when the court began to apply the general principle that a state law dealing with internal police may, to a certain extent, validly occupy a field of legislation, within the exclusive jurisdiction of the United States. It is a peculiarity of the essence of constitutional government that the judicial department must deal with such difficulties; otherwise, constitutional provisions for the guaranty of civil liberty, the harmonious separation of state and national functions, as well as the separation of governmental de-

partments, become a solemn mockery. But the difficulty now alleged is more apparent than substantial. Chief Justice Marshall says: "The legislature makes, the executive executes, and the judiciary construes, the law." *Waymon v. Southard*, 10 Wheat. 46. The supreme court of the United States, speaking by Justice Field, says: "The distinction between a judicial and legislative act is well defined. The one determines what the law is, and what the rights of the parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it." *Sinking Fund Cases*, 99 U. S. 700.

One controlling consideration in deciding whether a particular act oversteps the limits of judicial power is the necessary inconsistency of such acts with the independence of the judicial department, and the preservation of its sphere of action distinct from that of the legislative and executive departments. A main purpose of the division of powers between legislature and judiciary is to prevent the same magistracy from exercising in respect to the same subject the functions of judge and legislator. This union of functions is a menace to civil liberty, and is forbidden by the constitution. There is no intrinsic difficulty in recognizing a plain infraction of such prohibition. It is true that the different magistracies must act upon the same subjects, for every matter that may be dealt with by the state government may be acted on by each department thereof; but the action must be that belonging to the department whose powers are invoked. The main difficulties suggested in argument result from a failure to distinguish between the exercise of a legitimate power and the employment of necessary means for exercising that power. The grant of the powers embraced in one of the great departments of government carries with it the right to use means appropriate to the exercise of that power. Any attempt to cripple the power through metaphysical classification of the means essential to its exercise must produce difficulties, if not absurdities. For example, the power to make laws may require the accurate ascertainment of facts. For this purpose, witnesses must be summoned, examined, and conclusions drawn from their conflicting testimony. This is a means peculiarly appropriate to the judicial power and the ordinary mark of an exercise of that power; yet, when so employed by the legislature (without violation of other constitutional provisions), it is a means within the limits of legislative power. But should the legislature, after the passage of an act, attempt, by another act, to adjudicate the rights of parties which have arisen under its provisions, such act, although only means appropriate to legislation might be employed, would be an exercise of judicial, and not of legislative, power. It would be void, because it involves the union, in the same magistracy, in respect to the same matter, of the functions of judge and legislator. Again, there are certain necessary executive acts which cannot

be performed without the power of enforcing immediate obedience to an order authorized by law. The employment of legal restraint for the purpose of securing the essential immediate obedience is a means peculiarly appropriate to the exercise of judicial power; but for such purpose, and subject to the restrictions of other provisions of the constitution, it is a means within the limits of the executive power. In *re Clark*, 65 Conn. 17, 31 Atl. 522; *Murray v. Land Co.*, 18 How. 272.

So, means of a legislative nature must be used by courts in establishing necessary rules of practice, and by executive officers in making regulations for the conduct of subordinates. Again, appointment to office is in the nature of an executive act. Apart from the purpose of the appointment, it is an exercise of executive power. Our own constitution, like most constitutions, provides for certain elective and legislative appointments; but, except in the cases specified, appointment to office is an exercise of executive power, unless used as a means appropriate to the exercise of powers granted to another department, and, when so used, it is not the exercise of executive power, within the meaning of the constitution. The constitution of the United States specifies the methods of appointment. Certain officers must be appointed by the president in concurrence with the senate. All other officers shall be appointed in the same way. "But the congress may, by law, vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments." In commenting on this clause, the United States supreme court says that the appointing power designated in respect to inferior officers "was, no doubt, intended to be exercised by the department of the government to which the officers to be appointed most appropriately belong." *Ex parte Hennen*, 13 Pet. 257. In affirming the validity of the law providing for the appointment of supervisors of elections by circuit courts, the supreme court held that there were reasons why such appointments might most appropriately be made by courts, relied on this clause as giving a certain discretion to congress in assigning such appointments to the appropriate department, and, referring to the intimation in *Ex parte Hennen*, said: "In the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void." *Ex parte Siebold*, 100 U. S. 371, 398.

Under our state constitution, appointments other than those whose mode is prescribed are governed by the division of governmental powers. This question has never come before us directly. It was incidentally considered in some recent cases in connection with the law allowing an appeal from the action of county commissioners in granting licenses. In *Smith's Appeal*, 65 Conn. 135, 31 Atl. 529, we held that the statute required the county commissioners to select, as the recipient of a li-

cense, one having "a personal fitness to perform the quasi public duties required by law of a licensee"; i. e. one who is shown to be suited or adapted to the orderly conduct of a business which the law regards as dangerous to public welfare, unless conducted by a carefully selected person duly licensed, whose fitness to the legal requirements must be determined in view of the statutory regulations. In *Hopson's Appeal*, 65 Conn. 140, 31 Atl. 531, we held that the selection or appointment of such a licensee was a means apparently appropriate both to the exercise of executive and judicial power; that the uniform practice of courts and legislature in so treating such appointment might be safely accepted when the distinction to be drawn must be subtle and doubtful; and that the action of the superior court upon an appeal from the county commissioners is a judicial proceeding in so far that the judgment of the court may be reviewed by this court when founded on a misconception of the law (as was held in *Smith's Appeal*, supra, and in *Beard's Appeal*, 64 Conn. 523, 30 Atl. 775); but that errors claimed in the lawful exercise of discretion in making the selection or appointment could not be reviewed. Such proceeding by appeal is an anomalous one. It confounds process for invoking the exercise of judicial power by way of ordinary judicial proceedings in protecting an individual against the illegal acts of a public officer with the use of the power of appointment as a means incident to the full exercise of judicial power. It is evident that the justification of such judicial appointments must be found in the circumstances peculiar to each case.

While the necessity and right of each department to use the means requisite to its unfettered operation is clear, it is equally clear that when one department not only uses the means appropriate to another, but uses them for the purpose of executing the functions of that other department, it is not in the exercise of its granted power. The legislature, by judicial means, may find the facts showing that a charter subject to repeal ought to be repealed, and act in the exercise of its legislative functions. *Crease v. Babcock*, 23 Pick. 344. But when, by the same means, it attempts to adjudge the forfeiture of a charter not repealable, it acts in the exercise of a judicial function, and in excess of its power. This distinction is illustrated in the decisions of the United States supreme court dealing with legislative regulations of charges by railroad companies. The regulation of such charges is held to be distinctly a legislative function, which may be delegated by the legislature to a subordinate legislative or administrative body; but if this subordinate body or the legislature, exceeds its powers, and a person is thereby injured in his rights of property, he may invoke the judicial power to determine that question of legal injury; and the reasonableness of the charges, although a question legislative in its nature, must be reviewed by the court, as necessarily incident to the exercise

of its judicial power. But, if the court should attempt to establish for the future a schedule of charges, it would exceed the limits of judicial power; it would act as legislator in respect to a matter as to which it must also act as judge. As was said by Mr. Justice Brewer in one of the latest of this class of cases: "The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission. They do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable, as between the carriers and the shippers. They do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found to be so, to restrain its operation." *Reagon v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047. The same distinction is noted by this court in referring to the anomalous process for protection against illegal taxation, provided by section 3860 et seq. of the General Statutes. In construing that statute, we held that "the assessment of property for taxation is an administrative proceeding; the judicial power is called into action to remedy an illegal assessment"; but that the law did not impose upon the superior court the duties of assessors, nor purport to give the court general authority to review the action of the assessors or board of relief. *Ives v. Town of Goshen*, 65 Conn. 456, 459, 32 Atl. 932. It is true, however, that in cases arising under statutes enabling the court to settle rights of person or property invaded by illegal acts of administrative boards, and which may be questioned rather for the defective process provided than for any substantial misconception of the limits of judicial power, this distinction has not been marked, as it must be when the validity of a statute is directly put in issue. We think this distinction is decisive of the present case.

The meaning of the act of 1893, relating to street railways, is uncertain in several particulars; but there can be no doubt that it confers on municipal authorities, in addition to certain executive powers, the power of establishing regulations and conditions (within the limitations prescribed) which shall control all the street railways in the state, in the location, construction, and operation of railways. There can be no doubt that making such regulations is essentially and distinctively a legislative function. It is also certain that the judicial power does not include the exercise of such a legislative function, and that the duty of making such regulations cannot be imposed upon the superior court, because it involves the exercise of legislative power by the court, and because a power in the legislature to impose such duties is inconsistent with the existence of an independent and separate judicial department of government. The power to

make the superior court a subordinate legislative body for one purpose involves the power to so utilize it for every purpose. But it is equally certain that the judicial power does extend to the protection of every right of person or property that may be invaded by a municipal council in the unlawful exercise of the powers conferred by the act of 1893. This judicial power may be called into action by any appropriate process. The act of 1895 provided, among other things, that an aggrieved person might appeal from an order made by a municipal council in pursuance of the act of 1893; that such appeal should be a petition to the court, which should specifically state the portion of the order appealed from, and the reasons, and be served on the council, and that such appeal should be tried by the court, and appropriate judgment rendered. Construing this act as we have construed other acts authorizing appeals from the action of legislative and administrative boards, as providing a non-descript kind of process intended to serve the combined purposes of a writ of injunction, certiorari, and mandamus, or of any other process for invoking the judicial power to determine a legal injury complained of, we substantially held in *Central Railway & Electric Co.'s Appeal*, 67 Conn. 197, 214, 35 Atl. 32, that a party aggrieved by such illegal order might find lawful redress in this way. Our attention was not directed to the possible limitations of the redress. We went to the furthest limit in our desire to give effect to a legitimate intention of the legislature, most inadequately expressed. But the act of 1895 goes further, and contains an additional provision, which is not fairly susceptible of being construed as merely providing for a process to bring into action the judicial power of the court, and which, without any action by a municipal council other than a failure to act within a limited time, purports to transfer to the court all the powers conferred upon municipal councils by the act of 1893. The distinction between the two provisions of the act is vital. The application to the court in such case is called an "appeal,"—an unfortunate name, because it does not express the real function of the process. "Appeal," in the sense of transfer of jurisdiction from one court to another, cannot be predicated of any process by which a court is called upon to determine the legality of an act done by officers of another department. In this sense there can be no appeal from a common council to a court, any more than there can be an appeal from the legislature to the court, or from the court to the legislature. In appeals from the court of probate to the superior court we sometimes speak of the superior court as being for that case the court of probate, and speak correctly, for probate jurisdiction is within the judicial power, and may be exercised by the superior court; but when we speak in the same way, as occasionally we have spoken, in comment-

ing on the discretionary power that may be exercised in one of these amorphous "appeals" from administrative boards, the expression is allowable only as a figure of rhetoric. The so-called "appeal" in this case is not a process to invoke the judicial power. It is simply an application to the superior court to exercise a legislative function. The conditions on which the act of 1893 authorizes such an application cannot affect its real nature. They only serve to limit for the time being the extent of the evil involved.

We have assumed, as was assumed in argument, that the act of 1895 purports to confer the powers in question upon a judge, in his exercise of the judicial power vested in the superior court, and does not purport to appoint, for the exercise of the powers, an executive officer, designated by an official title, instead of by name. If the latter were true, the judge would be at liberty to accept or decline the appointment, and this court would have no jurisdiction to review his action. Legislation authorizing process (mostly under the misleading name of "appeal") for invoking the judicial power, to be returned to a judge of the superior court or to the "superior court or any judge thereof," has produced some confusion in respect to the nature of the power thus exercised. This court has decided that a "writ of error" (which formerly, in connection with the auxiliary means of reservation, was the only process for calling into action its jurisdiction) does not lie without a judgment or an award in the nature of a judgment (*Williams v. Railroad Co.*, 13 Conn. 110, 118); and also that this court has cognizance only of writs of error from the superior court (*Green v. Hobby*, 8 Conn. 165; *Humphrey v. Marshall*, 15 Conn. 341, 345; *Trinity College v. City of Hartford*, 32 Conn. 463, note). But these decisions did not hold that judicial power could be exercised by a judge of the superior court only when holding a stated session of court. The legislation which followed the decision in *Trinity College v. City of Hartford*, providing for a proceeding in error to this court from the final judgment rendered by a judge of the superior court in the exercise of his jurisdiction, could have no application unless such judgments are rendered in the exercise of the judicial power vested in the superior court. In *Clapp v. City of Hartford*, 35 Conn. 66, 73, 220, 222, decided shortly after the enactment of this legislation, language is used indicating that a judge in such case does not exercise that power, and this language is followed in the dissenting opinion in *Central Railway & Electric Co.'s Appeal*, 67 Conn. 228, 35 Atl. 32. But such views cannot be maintained. "The superior court," in which judicial power is vested by the constitution, is a magistracy consisting of the judges. The manner in which they shall exercise that power must to a large extent be governed by legislation in respect to procedure. Ordinarily, that power can only be exercised at a formal session of court, which may be held for some purposes by one judge, and for

other purposes by two or more judges. But some things within the limits of judicial power may more properly be done by a judge in chambers; and jurisdiction which should ordinarily be intrusted only to a judge while holding a formal session of court may, in cases of emergency, be exercised in vacation. That most important portion of judicial power invoked by the writ of habeas corpus would be seriously crippled if it could only be exercised at a formal session of court; so with the granting of injunctions and other incidents of chancery jurisdiction. A large portion of the judicial power, from its very nature, can be lawfully exercised only at a formal session of court; and it may be true that the exercise of other judicial power by a judge in chambers, justifiable in case of emergency, has been carried too far, and that it would be better if all "appeals" or other process intended to invoke the judicial power should be made returnable to a court in session, unless in plain cases of emergency; but, when process for bringing such matters before a judge in chambers is provided by law, the jurisdiction which he exercises must be within the judicial power vested by the constitution in "the superior court." This view is indicated in our decision in *Central Railway & Electric Co.'s Appeal*, supra. We think the act of 1895 intended to impose the duties therein prescribed upon a judge of the superior court, in his exercise of "the judicial power" granted to the judicial department. As the present application calls for an exercise of power which is not a judicial power, within the meaning of the constitution, it should have been dismissed.

In no way has the confidence of the people in their superior court been more clearly shown than in the increasing number of instances in which special process has been provided for obtaining, in a summary manner, its aid in protecting rights liable to be infringed by the action of executive officers and administrative boards. This court fully appreciates the desirability and necessity of enlarging and simplifying procedure so as to call into action, in the most speedy and effectual manner, the judicial power for the purpose of dealing with all questions arising under changing conditions, which it may properly determine, and has endeavored to construe legislation for that purpose, sometimes perhaps with apparent inconsistency, so as to give the fullest possible effect to the legislative intent. The law under consideration, however, goes too far. It involves a recognition by the court of a right to exercise powers plainly beyond the scope of that judicial power confided to it by the constitution, and to exercise these powers not as incident to some legitimate judicial function, but, in the first instance, independent of any purpose except the mere execution of the powers. We cannot recognize such a right, because the recognition leads inevitably to the obliteration of any line of separation between the judicial and other departments of government. There is error in the judgment com-

plained of, and it is reversed. The other judges concurred, except BALDWIN, J., who dissented.

BALDWIN, J. (dissenting). I concur in the view that divorces may be granted by the general assembly in cases where no court has jurisdiction to act, and that the judgments in *Starr v. Pease*, 8 Conn. 547, and *Day v. Cutler*, 22 Conn. 625, can therefore be supported. I also concur in overruling the decision in *Wheeler's Appeal*, 45 Conn. 308, but do so upon the ground that the legislation which was there in question assumed to grant to a particular person a special and exclusive privilege from the community, of applying for extraordinary judicial relief, as to a particular cause of action, in derogation of the general laws. I dissent in other respects from the judgment and opinion of the court.

The whole legislative power of the state is vested in the general assembly. Except for the few restrictions which the constitution imposes upon it, that body is as free and untrammelled as the people would themselves have been had they retained the lawmaking power in their own hands, or as they are in adopting such constitutional amendments, from time to time, as they think fit. *State v. Williams*, 68 Conn. 131, 149, 35 Atl. 24, 421.

One of these restrictions is the subject of article 2, entitled "Of the Distribution of Powers." As originally reported to the constitutional convention by the committee charged with the duty of preparing the draft of a constitution, this article read thus:

"Article Second. Distribution of Powers.

"Section 1. The powers of government shall be divided into three distinct departments, and each of them confided to a separate body of magistracy, to wit, those which are legislative to one, those which are executive to another, and those which are judicial to another.

"Sec. 2. No person or collection of persons, being of one of those departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

This article, except for some merely formal alterations in the first section, was a copy of one adopted by Mississippi in the preceding year. 2 Poore's Const. 1056. Objection was made in our convention to the second section, and 10 days later that was stricken out, without a division. Jour. Conn. Const. Conv. pp. 78, 55. This seems to me clearly to evince an intention not to attempt to limit the functions that might be imposed upon those holding a place in any particular one of the three magistracies to such as should be strictly incident to their special department. It was sufficiently implied from the first section, in connection with the three following articles, relating to the legislative, executive, and judicial departments, that no legisla-

tive power should be exercised except by the general assembly, and no judicial power except by judicial officers. The supreme executive power (not, as in the constitution of the United States, the executive power) was also exclusively vested in the governor. But the framers of our constitution, differing from many of those who had fulfilled similar tasks for other states, recognized the fact that it is practically impossible to establish in every instance a plain line of demarcation between legislative, executive, and judicial functions, and deemed it unnecessary to deprive the state of such services as it might desire from any of its citizens, because he held office in a department to which they might not properly pertain. See 2 Story, Const. § 524; Pom. Const. Law, § 173. Certain judicial and executive officers were, by article 10, § 4, expressly debarred from the general assembly; but I find no other provision to prevent the discharge by any magistrate of public duties in addition to those peculiarly belonging to his special department, whether he assume them voluntarily or they be imposed as a statutory duty. There are powers of government which in one sense are, as the case may be, legislative or judicial, and in another sense are not. The powers ordinarily granted to municipal corporations to regulate their local affairs, and pass by-laws or ordinances, are of a legislative character. Such ordinances have, within their proper sphere, the force of law; but no one would contend that they are void because not passed by the general assembly. The rules of practice and pleading prescribed by the judges of the superior court from time to time are also law as to the cases to which they apply; but the legislative action from which they proceed is really made, by the statute which authorizes them, an incident of judicial power. The jurisdiction long exercised by our courts with respect to the lay-out of new highways is of an administrative quite as much, to say the least, as of a judicial nature. The general assembly might itself give such relief, and sometimes does. *State v. Williams*, 68 Conn. 181, 35 Atl. 24. It might confide these functions to an administrative board, like the railroad commissioners. It can give an appeal from such a board to the courts. *Westbrook's Appeal*, 57 Conn. 95, 104, 17 Atl. 368; *Fairfield's Appeal*, 57 Conn. 167, 172, 17 Atl. 764. It can give a similar appeal to a taxpayer who claims that his property has been assessed upon an undue valuation, or who objects to the licensing of a particular liquor seller. Such an appeal may serve to turn the matter of controversy into a cause of a judicial nature. *Beard's Appeal*, 64 Conn. 526, 534, 30 Atl. 775. Yet its origin may still so far determine the form of proceeding as to leave the court free to exercise a discretionary power, unfettered by the ordinary rules that govern judicial trials. Its function is, in truth, one both judicial and executive in its nature, and

so one which the general assembly might properly commit to either the judicial or executive department, or to both. *Hopson's Appeal*, 65 Conn. 140, 146, 31 Atl. 531.

Our statutes were revised in 1821, three years after the adoption of the constitution, by a very able commission, headed by Chief Justice Swift. They fully appreciated the great revolution that had been accomplished by the constitutional distribution of the powers of government. Revision 1821, p. 150. Part of their task was to weed out all existing legislation that was inconsistent with it. Nevertheless, this Revision retained the old provisions authorizing the county courts to lay county taxes, and added one charging them with the duty of taking care of, letting, selling, or buying county property, at their discretion (pages 141, 250); gave any two justices of the peace in any town power to make rules for confining or killing dogs when necessary for public safety (page 179); authorized any justice of the peace to commit a witness who refused to answer any proper question put to him by grand jurors, meeting as a court of inquiry (page 260); and forbade tanning except by persons who had proved their skill to the county court, and received a license from it for the purpose (page 306). Our statutes since the Revision of 1821 have contained continually increasing grants of jurisdiction to our courts and judges over matters of administrative procedure. They rest, it seems to me, on solid ground of public convenience and practical necessity; and if it be claimed, as in this case, that the constitutional provision as to the distribution of powers has been transgressed, "the sufficient answer is [to quote from a recent opinion of this court, in which all the judges concurred] that these great functions of government are not divided in any such way that all acts of the nature of the functions of one department can never be exercised by another department. Such a division is impracticable, and, if carried out, would result in the paralysis of government. Executive, legislative, and judicial powers, of necessity, overlap each other, and cover many acts which are in their nature common to more than one department. These great functions of government are committed to the different magistracies in all their fullness, and involve many incidental powers necessary to their execution, even though such incidental powers, in their intrinsic character, belong more naturally to a different department." *In re Clark*, 65 Conn. 17, 38, 31 Atl. 522. Courts may properly be called upon to aid administrative tribunals in the exercise of their powers, whenever there is need of judicial relief. The dignity and independence of the judiciary is in no way impaired by making it ancillary, in such cases, to the work of another department. *Commerce Commission v. Brimson*, 154 U. S. 447, 487, 14 Sup. Ct. 1125.

The applicant in this case holds a franchise from the state for the construction of a railway in certain streets in the city of Norwalk.

The general laws provide that in such a case the city authorities, or the superior court, or a judge thereof, on appeal, shall first approve the plan of construction, and that a neglect by the city either to approve or disapprove, within a time specified, shall be deemed equivalent to a disapproval. It was undoubtedly competent for the general assembly to grant this franchise, and to guard against its improper exercise by giving the city supervisory powers. It was equally within its appropriate domain to grant an appeal to some suitable tribunal from any unreasonable conditions which the city might impose. I do not think that it can be said, as matter of law, that the superior court, or a judge thereof, is an unsuitable tribunal, or one upon which the constitution forbids such duty to be imposed. The function so conferred upon it may, perhaps, be regarded as one both judicial and executive in its nature. If so, the long-continued practice of the state has settled, if it was ever doubtful, to quote from another of our recent opinions, "the true meaning of the constitutional requirement that judicial and executive powers shall each be confided to a separate magistracy, so far as it affects this question. Such a practical construction may safely be accepted when the theoretical distinction to be drawn by the court must be subtle and doubtful." *Hopson's Appeal*, 65 Conn. 140, 146, 31 Atl. 531. I think, however, that the appeal to Judge Hall may fairly be regarded as a judicial proceeding, calling for the exercise of judicial power. He was bound to dispose of it in accordance with the fundamental rules of law. *Hopson's Appeal*, 65 Conn. 140, 148, 31 Atl. 531. His decision, subject to that limitation, was "final and conclusive upon the parties." Pub. Acts 1895, p. 631. Here is a cause, brought before a judicial magistrate, to redress a wrong, and so obtain the benefit of a public grant; known rules of procedure; a party plaintiff and a party defendant; provision for a final judgment determining the right in controversy, and for an appeal to this court for error in law. *Central Railway & Electric Co.'s Appeal*, 67 Conn. 197, 206, 35 Atl. 32. Such a proceeding, it seems to me, may fairly be termed "judicial." But, if it be deemed to involve only an exercise of quasi judicial or administrative power, for reasons already stated I think such a power can be lawfully conferred on a judge of the superior court. Controversies as to the manner in which the use of a franchise, granted for the public benefit, shall be guarded in the public interest, may ordinarily be settled either by legislative, judicial, or administrative proceedings, at the will of the legislature, as it may be expressed in the grant, or in the general laws passed to regulate its exercise.

The fact that the city of Norwalk took no action upon the plan submitted by the railway company does not seem to me to vary the appellate character of this proceeding. Inaction, under such circumstances, was as

prejudicial to the company as adverse action. It is always competent for a legislature to treat a failure to dissent within a reasonable time as equivalent to assent, or an omission to accept as equivalent to a refusal. *Gillfillan v. Canal Co.*, 109 U. S. 401, 3 Sup. Ct. 304. I do not, however, regard the duty of the judge of the superior court to take cognizance of this petition, as at all dependent on its being in the nature of an appeal. In my opinion, it would have been the same had the statute authorized the submission of the plan of construction to him as an original proceeding. *U. S. v. Ritchie*, 17 How. 525. The constitution required the establishment of a superior court, but its "powers and jurisdiction," as well as those of all inferior courts, were left to "be defined by law." Article 5, § 1. The statute which governs this case is such a law. It defines the powers and jurisdiction of the superior court and of its judges as to a particular class of controversies. A difference of opinion between a municipal corporation and a private corporation as to what is a reasonable use of a legislative franchise affecting the public highways, which difference must be settled before the franchise can be used at all, seems to me to present a case which it is eminently proper to place within the jurisdiction of a court. An analogous proceeding at common law was that by writ of certiorari, in the exercise by the court of king's bench of a general superintending power over not only inferior courts, but any persons invested by the legislature with power to decide on the property or rights of the citizen. *Le Roy v. Mayor*, etc., 20 Johns. 430, 438; *Mendon v. County Comrs*, 2 Allen, 463, 465. Had the general assembly authorized a railway company, whose plan of construction, though duly submitted to the city authorities, had neither been approved nor disapproved, to apply to the superior court for a mandamus to compel them to act, there could have been no objection to such a remedy. But, if such a matter can be brought before the judiciary in that way, is it not a mere question of legislative policy whether an opportunity shall be granted to seek full relief in the same forum by substituting, for an authority that has failed to do its duty, an authority not less fitted to decide impartially, and better fitted to weigh evidence and construe the law? To me it seems also a mere question of legislative policy whether or not to confer upon the courts in the first instance the right to pass upon the plan of construction proposed as the mode of exercising a railway franchise. A law to that effect would define their jurisdiction none the less because it extended it. It would remit for judicial decision an administrative question, but one involving rights of property, and so affecting large public interests as to call for a prompt and final decision. It would, in my view, become a judicial question as soon as the law brought it before judicial authority in a judicial proceeding. *People v. Long Island R. Co.*, 134 N. Y. 506, 31 N. E. 873.

MORAN et al. v. BENTLEY.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

PARTNERSHIP—ACCOUNTING—FAILURE OF PROOF—
NEW CAUSE OF ACTION—AMENDMENT
AFTER TRIAL.

1. In an action for an accounting the complaint alleged that B. was a partner with plaintiffs in the L. Lumber Co.; that he sold the stock of merchandise to that firm, that while the partnership existed he had in his possession effects of the firm, and had the management of them for himself and as bailiff of plaintiffs; that when the firm dissolved he took possession of all its effects for the mutual benefit of himself and plaintiffs. The evidence showed that plaintiffs and B. agreed, as between themselves, that B. should not be a partner; that all that he did was done at the request of plaintiffs to enable them to carry on business under the name of the L. Lumber Co.; that, while B. was held out as a partner, his sole relation to plaintiffs was that of a creditor furnishing a loan of capital and credit. *Held*, that plaintiffs were not entitled to an accounting from B.'s personal representative, because the cause of action pleaded and the one proved were different.

2. The complaint could not be amended, after trial, to conform to the proof, without entitling defendant to a trial of the facts alleged in the amended complaint, since such amendment would have changed the cause of action.

Case reserved from superior court, New London county; Silas A. Robinson, Judge.

Action by James Moran and another against Julia C. Bentley, administratrix of Andrew J. Bentley, deceased, for an accounting, and for damages. Reserved on a finding of facts for the consideration and advice of the supreme court of errors. The superior court is advised that on the facts found plaintiffs are not entitled to an accounting.

Solomon Lucas and Hadlia A. Hull, for plaintiffs. Frank T. Brown and John C. Geary, for defendant.

TORRANCE, J. In this case the plaintiffs, claiming to be the surviving members of a co-partnership called the New London Lumber Company, alleged to have consisted of themselves and one Andrew J. Bentley, now deceased, seek by way of equitable relief against the administratrix of Bentley an adjustment of the co-partnership accounts, and an accounting by the defendant for the property and effects of said co-partnership received and possessed, as it is alleged, by Bentley, during his lifetime. Upon the pleadings and the finding of facts made by the trial court the case was reserved for the advice of this court.

The complaint is as follows: "(1) That on the 2d day of November, A. D. 1885, they, the plaintiffs and the said Andrew J. Bentley, of said town of New London, and then in full life, entered into a co-partnership at said town of New London under the name and style of the New London Lumber Company, for the purpose of carrying on in said town of New London a lumber business; and that said co-partnership so formed entered into the lumber business at said town

of New London on said day, and that said co-partnership was continued and carried on at said town of New London until the 1st day of January, A. D. 1893, when the same was dissolved by mutual consent. (2) By the terms of said co-partnership agreement the said company was to and did receive from the said Andrew J. Bentley a large amount of property at an inventory price, which inventory and the said price affixed are now in the possession of the defendant, and withheld by her from the plaintiffs. The said Andrew J. Bentley was to receive payment for said stock so delivered to said company at said inventory price, a reasonable sum as rental for the premises occupied by the said company, and repayment for and interest on all his contributions of capital to said company in money or other property at the rate of 6 per cent. per annum, with annual rents; and the net profits of the business were to belong to the plaintiffs. (3) From the said 2d day of November, A. D. 1885, to the said 1st day of January, A. D. 1893, and during all the time, and when said company was transacting its business as aforesaid, the said Andrew J. Bentley, deceased, had in his possession certain goods, choses in action, and moneys, and all of the aggregate value of \$600,000, and all of which belonged to the plaintiffs and the said Andrew J. Bentley jointly as such co-partners under the name and style of the New London Lumber Company, and which the said Andrew J. Bentley, deceased, possessed in part in his own right and in part as bailiff of the plaintiffs, and had the care and management and disposition of the same for the mutual benefit of the plaintiffs and the said Andrew J. Bentley, deceased, as such co-partners, and to render his reasonable account thereof when thereto requested. (4) At the time said co-partnership was dissolved as aforesaid the said Andrew J. Bentley took possession of all the effects of said co-partnership, and of great value, to wit, of the value of \$20,000, and which belonged to the said Andrew J. Bentley in his own right jointly with the plaintiffs as co-partners as aforesaid, and which the said Andrew J. Bentley then and thereafter possessed in part in his own right and in part as bailiff of the plaintiffs, to dispose of for the mutual benefit of the said Andrew J. Bentley and the plaintiffs, and to render his reasonable account thereof to the plaintiffs when thereto requested. (5) The said Andrew J. Bentley, during his life, did not render his reasonable account of said property and effects of said co-partnership so as aforesaid received and possessed by him in his own right and as bailiff of the plaintiffs during his lifetime, though often requested so to do. (6) On the 18th day of March, A. D. 1895, the said Andrew J. Bentley, at said town of New London, died intestate, and the defendant was by the court of probate for the probate district of New London appointed, became, and

now is the lawful administratrix on his estate; and an order of limitation of time within which the creditors of said estate should present their claims to the defendant was passed by said court of probate. (7) The defendant has never rendered any account of said property, or the proceeds thereof, so as aforesaid received and possessed by the said Andrew J. Bentley by him in his own right and as bailiff of the plaintiffs, since the decease of the said Andrew J. Bentley, though often requested so to do. (8) There was due to the plaintiffs, under said co-partnership agreement, from the said Andrew J. Bentley, at the time of his decease, and now is, upon a just and lawful accounting of the property so as aforesaid received and possessed by the said Andrew J. Bentley in his own right and as bailiff of the plaintiffs, the sum of \$34,000, which has never been paid, or any part thereof. (9) The plaintiffs presented the said claim of \$34,000, with interest thereon, to the said defendant, within the time allowed by the court of probate for the district of New London for the presentation of claims against the estate of said Andrew J. Bentley, and on the 23d day of December, A. D. 1895, the defendant disallowed in writing said claim."

The plaintiffs claim by way of equitable relief an adjustment between the parties to this suit of the co-partnership accounts of the said late co-partnership the New London Lumber Company; an accounting by the defendant for the property and effects of said co-partnership received and possessed by the said Andrew J. Bentley, deceased; \$38,000 damages.

The answer filed reads as follows: "(1) Paragraphs 2 and 8 of the plaintiffs' complaint are denied. (2) Paragraphs 6 and 9 are admitted. (3) As to paragraphs 1, 3, 4, 5, and 7, the defendants have not sufficient knowledge to form a belief."

Upon the trial of the cause upon these pleadings the court found the following facts:

(1) Andrew J. Bentley, against whose estate this action is brought, died on the 18th day of March, 1895.

(2) The defendant, on the — day of March, 1895, was duly appointed and qualified as administratrix of his estate.

(3) On the last day of October, 1885, said Bentley, who for a long time prior thereto had been, under the name of the Columbia Steam Saw & Planing Mills, engaged at New London in the wholesale lumber business, and, to a limited extent, in the retail lumber business, entered into an agreement with the plaintiffs, who for several years had been his employes in said business, — Moran from September, 1879, and Peck from November, 1881.

(4) Mr. Bentley's purpose in entering into this agreement was to assist the plaintiffs in a business start.

(5) Said agreement was as follows: (a) Said Bentley, who was a man of property, agreed to furnish to the plaintiffs, both of whom were without means, a stock of merchandise,

to enable them to carry on a retail lumber business at New London, under the name of the New London Lumber Company. (b) And, further, that the stock of merchandise then in Mr. Bentley's retail department should be the stock so to be furnished by Mr. Bentley, and that the same should be taken at a valuation, and that the plaintiffs should pay said Bentley the value thereof, with interest at the rate of 6 per cent. per annum. (c) And, further, that said Bentley should not be responsible for any of the debts of said company, should not bear any of its losses, nor participate in any of its profits. The profits were to be divided equally between Peck and Moran. (d) And, further, that neither of the contracting parties was to indorse accommodation paper for or consider without the consent of the others.

(6) Immediately after the making of this agreement, the plaintiffs and said Bentley signed and caused to be published in two daily newspapers in the city of New London the following, to wit: "The New London Lumber Co. Yards, Winthrop St., E. New London. No crossing of railroad tracks. Spruce, hemlock, and white pine lumber, lath and shingles. Wholesale and retail. We have the largest and best assortment in Eastern Conn. To contractors and builders we can offer very favorable prices. Spruce frames cut to build a specialty. William L. Peck. James Moran. Andrew J. Bentley, 'Special.'"

(7) In the same issue of one of the New London papers there appeared the following news item, which was known to and commented upon by Mr. Bentley: "A New Enterprise. The New London Lumber Co. is a new enterprise here, and one that is going to be successful from the start, for it possesses every element of success,—youth, energy, and determination to overcome every obstacle. The firm is composed of William L. Peck and James Moran, with A. J. Bentley as a special partner. The names are enough to command the confidence of every one, and The Telegraph expects to chronicle the biggest boom in the lumber business heretofore known in New London."

(8) After the making of the agreement heretofore referred to, and up to the time of his death, Mr. Bentley continued his wholesale lumber business under the name of the Columbia Steam Saw & Planing Mills, in which these plaintiffs had no pecuniary interest except as mere employes, for they still continued in the employ of Mr. Bentley in said wholesale business after the making of said agreement, each at a salary paid by Mr. Bentley.

(9) After the formation of said the New London Lumber Company, new sets of books were opened for each the New London Lumber Company and the Columbia Steam Saw & Planing Mills, and it was agreed that the bookkeeper who kept these sets of books should be paid by the New London Lumber Company. The yards of the two companies were close together.

(10) At first it was the practice of Mr. Bent-

ley to do the carting of lumber and material for the New London Lumber Company at a price per thousand feet. The practice was to give Mr. Bentley credit for such amounts on the books of the New London Lumber Company.

(11) Subsequently this practice was changed, and in place of it was substituted an arrangement by which Mr. Bentley furnished at his own cost all the teams used in the business of both lumber yards, and by which the New London Lumber Company was to furnish, at its own cost, the teamsters for the teams, and also to furnish at its own cost the man who worked in its own yard.

(12) Subsequent to the making of the agreement by which the New London Lumber Company was created, Mr. Bentley furnished the plaintiffs for the retail trade the stock of goods agreed on, the value of which was nearly \$12,000. This stock was inventoried and entered on the books of the New London Lumber Company as a charge to it. The amount was also credited to Mr. Bentley in the books under the name of the Columbia Steam Saw & Planing Mills, and at various times thereafter said Bentley furnished additional merchandise to said lumber company.

(13) Between the formation and the dissolution of the New London Lumber Company the entire stock of goods had changed.

(14) It was further agreed that neither Moran nor Peck should draw any money from said lumber company until such time as the business should warrant it.

(15) Such money as these plaintiffs had and drew during the lifetime of this concern was obtained and drawn under the following circumstances, and in the following manner, to wit:

(16) When this lumber company was formed, both of the plaintiffs were in the employ of Mr. Bentley,—Moran at the rate of \$65 a month, and Peck at the rate of \$550 per year for at least the first year he was in Mr. Bentley's employ; but what rate he actually received after this first year and up to the date of the formation of the New London Lumber Company did not appear in evidence, nor was any specific rate agreed on by Peck and Bentley.

(17) After the lumber company was formed, they continued in the employ of Mr. Bentley in his own sole and separate wholesale business, but no specific rate of wages was agreed upon for either of them.

(18) Moran spent all of his time in Mr. Bentley's business, and Peck spent about one-quarter of his time therein, and the rest of his time he spent in the business of the New London Lumber Company.

(19) Mr. Bentley spent his time about his own separate business, giving little attention to the business of the lumber company, but did sometimes advise Peck when the latter sought his advice about matters of the lumber company.

(20) From and after the formation of the

lumber company, when either of these plaintiffs wanted money, they asked for such sums at the office as they wanted, and it was paid to them; Moran during this time drawing from Mr. Bentley at the rate of \$150 per month, and Peck drawing at a larger rate per month than this, but what the exact rate was did not appear in evidence.

(21) During the first four years of the existence of said New London Lumber Company the bank deposit account, both for said company and for the Columbia Steam Saw & Planing Mills (which meant Mr. Bentley), were kept in the name of the lumber company, and checks were drawn thereon to pay both lumber company obligations and Columbia Mills obligations; and during the remaining years of the life of said lumber company said bank deposit account was kept in the name of the Columbia Steam Saw & Planing Mills, and checks drawn thereon to pay both lumber company obligations and Columbia Mills obligations.

(22) These deposits were kept in the above manner simply as matter of convenience. The account books of the lumber company and the account books of the Columbia Mills were so kept as to show the exact state of this deposit account between them. The ledger of the New London Lumber Company and the ledger of the Columbia Mills both showed to which concern the money actually belonged, and these ledgers also showed for the benefit of which concern the several sums went that were checked out.

(23) Some liens, to secure the price of lumber furnished by said New London Lumber Company, were placed upon the land records of New London and of Waterford. Liens for the Columbia Mills and liens for said lumber company were kept entirely distinct.

(24) One of the lumber company's liens was sworn to and placed upon the records by Mr. Bentley, and one by Mr. Moran, and one by Mr. Peck, but all in the names of Peck, Moran, and A. J. Bentley, describing them in some as partners under the firm name of the New London Lumber Company, and in another (to wit, in Exhibit G) as "associates" under the name of the New London Lumber Company.

(25) In one instance, on December 19, 1839, a piece of land in Waterford was taken in payment of a \$450 lumber bill due to the lumber company, and the deed marked "Exhibit A" is the deed taken in such transaction.

(26) In another instance the lumber company furnished lumber to one Benjamin Stark, and took in its name in payment thereof an interest in a schooner, the Mary H. Brockway.

(27) On one occasion, to wit, on August 21, 1891, subsequent to the taking of the deed named in paragraph 25, a deed of a small strip of the land described in said deed was executed by the plaintiffs and said Bentley, describing them as partners.

(28) The remainder of said land, and said interest in the Mary H. Brockway, remained in

the name of the lumber company, and belonged to it.

(29) During the existence of said lumber company Mr. Bentley wrote some business letters, in which he described Moran and Peck as partners of himself.

(30) As to the public and persons dealing with the lumber company, it was the intention of the plaintiffs and Mr. Bentley to hold out Mr. Bentley's relation to the plaintiffs as that of a partner; but, as between themselves, neither Mr. Bentley nor the plaintiffs had any intention that he (Bentley) should sustain to the plaintiffs any relation other than that of one furnishing a loan of capital and of credit. The business of the New London Lumber Company was in fact the business of Moran and Peck, and the plaintiffs so understood it from the beginning; and these business relations of these three men continued just as they had been from the inception, in 1885, without any change, down to December, 1892, when the matter of dissolution of the New London Lumber Company hereinafter referred to came up.

(31) It appeared in evidence that in the latter part of 1892 Mr. Bentley deemed it inadvisable to continue the transaction of the wholesale lumber business of himself and the retail business of the plaintiffs through the agency of two concerns, and the formation was suggested by him of a corporation, to be known as the A. J. Bentley Lumber Company; and in pursuance of this plan the New London Lumber Company was dissolved, and the following notice, written by Mr. Bentley, and signed by Moran, Peck, and Bentley, was published in the New London Day: "Notice. The co-partnership heretofore existing in the name and style of the New London Lumber Co. is this day dissolved by mutual consent. All persons having claims against said company are requested to present the same at once, and those indebted are notified to come and settle the same without delay with either of the undersigned at the office of the Columbia Steam Saw & Planing Mills. James Moran. William L. Peck. A. J. Bentley, 'Special.' New London, Dec. 31, 1892."

(32) When this dissolution took place, the New London Lumber Company was owing Mr. Bentley, or, what was the same thing, the Columbia Steam Saw & Planing Mills, for capital furnished, labor, and for interest on the capital so provided by Mr. Bentley, and the plaintiffs thereupon sold and transferred to Mr. Bentley, at an agreed price, the entire stock of merchandise of the New London Lumber Company then on hand.

(33) The accounts that were outstanding on the books of the New London Lumber Company were collected as they could be, and such collections as were made were entered on the books of the New London Lumber Company, and the money therefrom was turned into the bank deposit account of the Columbia Steam Saw & Planing Mills.

These books, continuing to be kept right along, will show what was collected, and anything that is still outstanding and uncollected of these accounts these books should also show.

(34) There never was any settlement between said plaintiffs and the said Bentley, and no evidence was offered to show which of said parties would be indebted to the other on such settlement.

(35) I find that there was, as between said Bentley and the plaintiffs, no partnership, unless upon the foregoing facts such partnership existed as a matter of law.

(36) At the session of the general assembly next after the dissolution of said New London Lumber Company, to wit, in April, 1893, in pursuance of the plans to form a corporation to carry on the lumber business, Mr. Bentley procured the passage of a charter, which charter is found on page 320 of the Special Acts of that year, and begins with the following language: "Resolved by this assembly, that Andrew J. Bentley, James Moran, and William L. Peck, all of the town of New London, and such other persons as shall be associated with them, be, etc."

(37) When this plan of a new corporation was suggested and undertaken, it was understood that whatever sum upon a settlement of the affairs of the New London Lumber Company was found to be coming to Moran and Peck over and above the debts of said company, and over and above what they owed Mr. Bentley, they were to have allowed them in the stock of this new corporation.

(38) Mr. Bentley lived over two years after the dissolution of the New London Lumber Company (the two plaintiffs remaining in his employ), and almost two years after the act was passed incorporating the A. J. Bentley Lumber Company; but it should be added in this connection that the work of the organization of the new concern was delayed on account of the extensive work of preparing the land purchased as a site for the new business, and such delay was, so far as appeared in evidence, without any fault on the part of the plaintiffs. Mr. Bentley returned from the South shortly before his death to complete the plans for organizing said corporation, but became too ill to do so, and died before said corporation was organized, or any of its stock subscribed for.

(39) The accounts of the New London Lumber Company and the accounts of the Columbia Steam Saw & Planing Mills are quite voluminous, and the examination thereof, and an accounting, would probably consume considerable time.

The general question arising upon this record is as to what judgment shall be rendered thereon, and the answer to this depends upon two other questions, namely: (1) Does the finding support the complaint? (2) If not, are the plaintiffs entitled to an accounting upon the facts as found? The complaint alleges that Bentley was a partner in the New Lon-

don Lumber Company; that he sold and delivered the merchandise mentioned in the complaint to that firm; that during all the time the co-partnership existed he had in his possession goods, choses in action, and moneys of said firm to the value of \$600,000, and had the care and management of the same for himself and as bailiff of the plaintiffs; and that when the firm dissolved he took possession of all its effects, amounting to \$20,000, to dispose of the same for the mutual benefit of himself and the plaintiffs, and to render an account thereof when requested, which he never rendered, though often requested to do so. The finding is that Bentley was not a partner unless upon the facts found as matter of law he was one, and we are of opinion that as matter of law he was not a partner. The clear import of the finding is that the plaintiffs and Bentley agreed that, as between themselves, Bentley should not be a partner. All that he did and said, as found upon the record, was done at the request of the plaintiffs "to assist the plaintiffs in a business start," and "to enable them to carry on a retail lumber business at New London under the name of the New London Lumber Company." It was distinctly understood and agreed between Bentley and the plaintiffs from beginning to end that the plaintiffs were the partners; that Bentley was not a partner, notwithstanding the fact that he was to be held out, and was to hold himself out, at all times to the world as a partner; and that Bentley's sole relation to the plaintiffs was, and was to remain, that of a creditor "furnishing a loan of capital and of credit." Here, then, was an express agreement on the part of the plaintiffs that if Bentley, for their benefit, would assume, as to outsiders, all the liability of a partner, he should still remain as to them, what he in fact was, not a partner, but a creditor. The law did not forbid the making of such an agreement, and we see no reason why the plaintiffs should not be bound by it. It being thus found that Bentley was not a partner, one of the material allegations of the complaint is negatived; and, this being so, it follows by way of inference, and it is also in effect found, that the other material allegations in the second, third, and fourth paragraphs of the complaint dependent upon the alleged co-partnership are also negatived. It thus appears that the plaintiffs' case as alleged in the complaint and the plaintiffs' case as found by the court differ from each other very materially. The case as alleged is based on the existence of a co-partnership between Bentley and the plaintiffs for seven or eight years, while the case as found is that no such co-partnership ever existed. The relief prayed for is based entirely upon the case as alleged in the complaint. It is specifically for an adjustment of the co-partnership accounts, and, in effect, for an accounting by Bentley as a co-partner, through his representative. "A judgment in favor of the plaintiffs upon this record would be one based upon a cause

of action not alleged, and would be erroneous, if properly objected to." *Greenthal v. Lincoln*, 67 Conn. 372, 35 Atl. 206; *Pitkin v. Railroad Co.*, 64 Conn. 482, 30 Atl. 772. This is not a case of mere variance, or mere defect of proof, but a case of failure to prove the cause of action alleged in its entire scope. As is well said in *Southwick v. Bank*, 84 N. Y. 420-428, pleadings are essential in every system of jurisprudence, and there can be no orderly administration of justice without them; but if a party can allege one cause of action, and then recover upon another, his complaint will serve no useful purpose; it will rather serve to ensnare and mislead his adversary. Nor is this a case where the complaint can, after trial, be amended so as to conform to the proof without entitling the defendant to a trial of the facts alleged in the amended complaint, for such an amendment would, of necessity, change substantially the cause of action now stated, and this would entitle the defendant to file new pleadings, and to a trial of the new case thus presented. *Bennett v. Collins*, 52 Conn. 3; *Pitkin v. Railroad Co.*, 64 Conn. 482, 30 Atl. 772. Under these circumstances we do not feel called upon to express any opinion upon the question whether, if the cause of action found had been the cause of action alleged, the plaintiffs, upon the facts found, would or would not be entitled to an accounting. As we understand the record, the only question presented by it is whether, upon the pleadings as they stand, the plaintiffs, upon the facts found, are entitled to a judgment for an accounting, and we are of opinion that they are not, and the superior court is so advised. The other judges concurred.

WALSH v. CITY OF ANSONIA et al.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

MUNICIPAL CORPORATIONS—LAY-OUT OF STREET—PROCEDURE.

A committee appointed by the common council of a city, under Pub. Acts, c. 286, for the placing of bounds to mark the limit of Third street, reported that they were unable to find the original lines; that they had caused an engineer to survey and lay out the street; that they recommended the adoption of such lay-out, described in a map attached to their report; and that, "to do this, it will be necessary to give a hearing to the property owners, as it is in fact a new lay-out." Thereafter notice to property holders, signed by the same persons that constituted said committee, and by the city clerk, was given as follows: "Notice of Hearing on Lay-Out on Street Lines for Third Street. You are hereby notified to appear before the undersigned, a committee appointed by the * * * common council, * * * to be heard relative to establishing and locating a lay-out for Third street." *Held*, that it did not appear that the committee appointed for the placing of bounds was proceeding to make a lay-out, but that they merely recommended a new lay-out, and that thereafter, having been appointed a committee relative to a lay-out, they were taking the first step towards it, pursuant to the city charter, providing that, before the common council shall determine to lay

out a street, it must cause notice, signed by the city clerk, of such proposed action, and specifying time and place for the property owners to appear before a committee appointed by them, and be heard in relation thereto, to be served on such property owners, and if, after such hearing, the common council shall determine to make a proposed lay-out, they shall appoint a committee to make it, and report it to them.

Appeal from superior court, New Haven county; Silas A. Robinson, Judge.

Suit by Mary Walsh against the city of Ansonia and others to restrain the making of a new lay-out of a city street. A demurrer to the complaint was sustained, and judgment rendered for defendants. Plaintiff appeals. Affirmed.

Charles S. Hamilton and Denis T. Walsh, for appellant. V. Munger, for appellees.

HALL, Special Judge. The plaintiff, who is the owner of land in the city of Ansonia, bounded southerly by the highway known as "Third Street," made an application to the municipal authorities, under the provisions of section 5, c. 286, Pub. Acts 1895, for the placing of bounds to mark the limits of said highway upon her land; and upon said application, by resolution of the common council, the persons named as defendants were appointed a committee to establish lines on Third street. The committee reported to the common council, in substance, that they had been unable, from any known records, to find the original lines of the street, and that, as most of the monuments which were supposed to mark the original lines, as established some 40 years prior to that time, had either been misplaced or removed, the committee had caused a civil engineer to survey and lay out the street so as to cause as little injury as possible to the abutting landowners, and at the same time retain the city's right to a 50-foot street, and that the committee recommended the adoption of a lay-out described in a map accompanying the report made by said civil engineer as the lines for said Third street. "To do this," say the committee at the close of the report, "it will be necessary to give a hearing to the property owners, as it is, in fact, a new lay-out." After the above report was made, the following notice, addressed to the plaintiff, and signed by the defendants, and countersigned by the city clerk, was sent to the plaintiff: "Notice of Hearing on Lay-Out on Street Lines for Third Street. You are hereby notified to appear before the undersigned, a committee appointed by the board of common council of the city of Ansonia, at [naming time and place], then and there to be heard relative to establishing and locating a lay-out or street line for Third street, in the city of Ansonia." The foregoing is the substance of the first seven paragraphs of the complaint. Paragraph 8 of the complaint alleges that the defendants, under said pretended notice and appointment, "threaten to make a new lay-out of said Third street,

placing the same arbitrarily according to their own notions, without regard to the original and established lay-out of said highway, which can easily be determined, in a proper manner, by examination of the proper records; and the defendants threaten, in said manner, to set up said new, pretended lay-out, and to take up, remove, destroy, and obliterate all the marks, signs, bounds, and means of identification of said Third street." The plaintiff further alleges, in effect, that, in the original deed of the premises, certain of the boundary lines are described by reference to the boundary line on Third street; that, if the monuments which marked the original boundaries are lost or destroyed, she may be involved in litigation with her neighbor on the north, who claims a portion of her premises, and may lose some of her land; and that the evidence necessary to be used in a pending action brought by the plaintiff, for the restoration of the lost boundaries on said highway, will be destroyed. The complaint prays for an injunction to restrain the defendants from making a new lay-out of Third street by said committee, or in any manner, except in pursuance of the provision of the city charter, and from removing the bounds of said highway through said committee. To this complaint the defendants demur. The grounds of the demurrer are, in substance: (1) That it appears from the complaint that, in proceeding to make said lay-out, the city authorities are acting, in all respects, in accordance with law, and in the exercise of the powers conferred by the city charter to lay out and alter its highways; (2) that the facts alleged fail to show that the plaintiff will sustain such loss and damage as will justify the granting of the injunction asked for. The plaintiff has appealed from the judgment of the superior court sustaining the demurrer.

The right of the city of Ansonia to make a new lay-out of Third street, which may change the lines as they were originally established, and which may necessitate the removal of monuments marking the old lines, is granted by the charter which gives to the city exclusive authority and control over its streets, and the sole and exclusive power to lay out, alter, and discontinue all highways and streets existing or hereafter to be made within said city. Sp. Acts 1893, p. 932, § 42. This proposition is not disputed by the plaintiff's counsel. The prayer for an injunction is based upon the claim that the action of the city in making such a lay-out is not in accordance with the provisions of the charter defining the manner in which such lay-outs or changes must be made; and the restraining order asked for is that the defendants be enjoined from making a new lay-out of Third street in any other manner than that pointed out by the charter. Counsel for plaintiff contends that the facts alleged in the complaint show that the acts of the defendants are unlawful, in that they show that the committee appointed by the common

council upon the plaintiff's application for the placing of bounds to mark the lines of the highway have themselves already made, or attempted to make, or that this committee, under the authority of said appointment, is about to make, a new lay-out of Third street. Such a conclusion is not justified by the facts alleged. On the contrary, from the report of that committee, considered in connection with the notice which was afterwards sent to the plaintiff, both of which are set forth in full in the complaint, it is manifest that the committee have never attempted the exercise of such power, and that neither they nor the common council have supposed that the committee, under their appointment, was authorized or possessed the power to make a new lay-out of Third street. The committee do say in their report that they have instructed a civil engineer "to survey and lay out said street"; but can it be fairly claimed that these words indicate an intention on the part of the committee to themselves make the lay-out, when in the same report they recommend to the mayor and common council the adoption of the lay-out described in the maps submitted with the report, and say to the common council that its adoption will involve the making of a new lay-out, and the giving of a hearing to property owners?

It appears beyond any question from the averments of the complaint that the committee which was appointed by the common council at the plaintiff's request, believing that it was impossible for them to correctly designate the original lines of Third street, did no more than to recommend, as the best means of accomplishing the purpose for which they were appointed, that the city authorities, in the manner provided by the charter, make a new lay-out of the street, as indicated by the maps and survey which the committee had procured to be made. Such recommendation—and this was the extent of the committee's action—has certainly worked no injury to the plaintiff. What action was taken by the common council upon this report the plaintiff has sufficiently informed us by setting forth in the complaint the notice signed by the individuals who are made defendants, and by the city clerk, which was afterwards served upon the plaintiff. The plaintiff is thereby notified to appear and be heard before a committee appointed by the common council, relative to establishing, changing, and locating a lay-out or street line for Third street. When read with section 42 of the act incorporating the city of Ansonia, above cited, it is perfectly manifest that, having received the report of the committee appointed to mark the lines of Third street, the common council appointed the same persons a committee to hear property owners upon the question of whether a new lay-out of Third street should be made, and thus, in a lawful manner, took the first step towards making a new lay-out of Third street, under the provisions of the city charter. If the city authorities of Ansonia propose to change the line, or

make a new lay-out of Third street, and their power to do so is unquestioned, how should they proceed? Section 42 of the city charter describes the steps which must be taken: First. Before the common council shall determine to lay out, change, or discontinue any highway or street, or designate any building line, it must cause a notice, signed by the mayor or clerk of said city, describing, in general terms, such proposed action, and specifying a time and place when and where all persons whose land is proposed to be taken or affected thereby may appear before them, or a committee by them appointed, and be heard in relation thereto, to be served upon such property owners. Second. The common council, or, in case a committee is appointed, then the committee, must give a hearing to the parties in interest. Third. If, after such hearing, the common council shall determine to make a proposed lay-out or alteration, they are to appoint a committee of their own body to make the lay-out or alteration, and report the same to the common council, with a descriptive survey of the street. Fourth. The common council must then estimate and appraise the damages and benefits resulting or accruing to the parties in interest. Fifth. In case parties in interest refuse to accept such estimate of the common council, the mayor must appoint three freeholders of the city, who are to hear the parties, and assess the benefits and damages. Sixth. The descriptive survey must be signed by the mayor, and recorded, and the damages assessed to the parties paid or deposited in the city treasury.

From the facts stated in the complaint, the city authorities were apparently proceeding as directed by their charter when they were stopped by the temporary injunction. The committee, notice of the future meetings of which was served upon the plaintiff, was appointed by the common council to give a hearing to the parties upon the question of whether a new lay-out of Third street should be made. If the original lay-out of Third street could easily be determined by an examination of the proper records, an opportunity was thus given the plaintiff, by proving that fact to the committee, to show that the new lay-out of Third street was unnecessary. That this is not the committee appointed under the charter to make the actual lay-out, but a committee whose only duty is to hear the parties, and to report to the common council upon the question whether the lay-out or alteration should be made, is readily ascertained from an examination of section 42. The committee to make the lay-out is not appointed until the parties in interest have been heard, and the common council, after such hearing, has determined to make the lay-out; and no notice of its meeting is required to be given to the parties in interest, nor is any hearing granted to parties in interest before such committee. Though paragraph 8 of the complaint substantially alleges that the committee before

whom the plaintiff was notified to appear, and also the city, threaten that a new lay-out of Third street will be made by said committee, this allegation is manifestly the statement of a conclusion from the facts already set forth, and no such deduction can fairly be made from these facts. The facts alleged in the complaint show no reason for the claim that the defendants are proceeding unlawfully, or from any misunderstanding of the purpose of the municipal authorities in the action they have taken. The legitimate inference from all the facts alleged is that the committee first appointed have never attempted, and do not intend, to make the lay-out proposed; that the committee appointed to hear the parties are not authorized to make, and do not intend to make, such lay-out; that the common council have not yet determined whether such lay-out should be made; and that their action in appointing a committee to hear the parties in interest upon that question, and report to the common council, was lawful, and in accordance with the provisions of the charter. Since the common council, in appointing a committee to hear the parties, has taken the proper preliminary step towards making a new lay-out of Third street, and so long as the municipal authorities, in making the new lay-out, proceed in the manner required by the charter, it is of no consequence whether the committee appointed to place the bounds on Third street exceeded their authority in procuring a survey and proposed new lay-out to be made and submitted to the common council. As the plaintiff is not, for the reasons already stated, entitled to the injunction prayed for, it is unnecessary to decide whether the injury which it is alleged would result to the plaintiff from a change in the lines of the street is such as would warrant the granting of an injunction, if the city authorities were not proceeding according to the requirements of their charter. There is no error. The other judges concurred.

HALL, Special Judge, sat in place of FENN, J., who was unable to attend court.

STATE (LANDIS, Prosecutrix) v. BOROUGH OF VINELAND.

(Supreme Court of New Jersey. June 3, 1897.)

TAX SALE—RETURN OF WARRANT—CERTIFICATE OF SALE.

1. The return of a warrant for sale of lands for delinquent taxes, made by a collector of taxes of a borough, which return is not accompanied with a copy of the required notice of such sale, or with proof that it was published, posted, and mailed as required by law, is fatally defective.

2. Although no certificate of sale has been issued upon such a defective return, the owner of lands which had been sold under the warrant is entitled to have the return examined by a writ of certiorari, and vacated.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of Matilda T. Landis, against the bor-

ough of Vineland, to set aside a tax warrant issued to sell lands for taxes. Collector's return vacated.

Argued February term, 1897, before DIXON and MAGIE, JJ.

Charles K. Landis, Jr., for prosecutrix.

MAGIE, J. The certiorari in this case has brought before us a warrant issued by the borough of Vineland, and directed to its collector of taxes, commanding him, for the taxes assessed thereon for the year 1894, to sell certain lands (including lands of the prosecutrix), and what purports to be the return of said warrant, made by the collector of taxes, by which it appears that he had made sale of the lands of prosecutrix to the borough of Vineland. The writ calls for the certificate of such sale, but none has been returned, and it appears that none has been made. Prosecutrix claims that the collector's return is defective in several particulars. By section 16 of the supplement to the borough act of 1878, which was approved March 23, 1888 (1 Gen. St. p. 196), the mayor and council of any borough organized under that act are required to enforce the payment of taxes assessed upon lands within the borough by issuing their warrant to the borough collector for the sale of such lands in the manner provided for by the act entitled "A further act concerning taxes, making the same a first lien on real estate and to authorize sales for the payment of the same," approved March 14, 1879, and the several supplements thereto. By a stipulation between the attorneys of the prosecutrix and the defendant it appears that the borough of Vineland was organized under the borough act of 1878. Assuming that the above-mentioned supplement to that act was within the power of the legislature to pass, and that the purpose of the legislature was properly expressed, it is clear that the purpose of the provisions of section 16 was to enable and require the sale of lands for delinquent taxes within boroughs to be made in conformity with the requirements of the general act of March 14, 1879 (3 Gen. St. p. 3353). By section 4 of that act, before the collector may sell any lands under his warrant he must give notice of the time and place of sale by advertisement in a newspaper, by setting up copies of his notice in five most public places in the borough, one of which must be at or near the lands, and by mailing a copy of his notice to the owner. By section 6, as amended by a supplement approved March 12, 1880 (3 Gen. St. p. 3356), the collector is required to return with his warrant copies of the notices of the sale, with proof of their publication, posting, and mailing. The objection of prosecutrix is that the return in this case is not accompanied by any copy of the notice of sale, nor by any proof that it was published or posted or mailed as required by the acts referred to. In these respects the return is fatally deficient, for nothing accompanies it but a sort of certificate of the collector that

he had posted "the notice of delinquent taxes" in certain places. This obviously is no compliance with the law. Upon such a return no valid certificate of sale could be made, nor could a conveyance of the lands made thereon be supported. *Jones v. Landis* Tp., 50 N. J. Law, 374, 13 Atl. 251. Although no certificate has been issued upon this return, prosecutrix, in my judgment, is entitled to relief as against it, and the writ in this case was properly allowed. The return is a step in the municipal proceeding to enforce the payment of taxes upon prosecutrix's lands. Upon the doctrine laid down in the court of errors in the case of *Hoxsey v. City of Paterson*, 39 N. J. Law, 489, the illegal and unauthorized action of municipal officers tending towards final action of a municipal body which would be injurious to an individual may, upon his prosecution, be examined under a certiorari, and vacated. See, also, *Mowery v. Camden*, 49 N. J. Law, 106, 6 Atl. 488. Upon this ground it is concluded that the collector's return must be vacated, but not set aside.

PENNSYLVANIA R. CO. v. PFUELB.

(Supreme Court of New Jersey. June 7, 1897.)

RAILROADS—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE.

1. John Pfuelb, in attempting to cross the railroad track of the plaintiff in error on foot, walked over the east-bound track immediately after a train had passed him on that track, and was struck and killed by a train moving in the opposite direction on the west-bound track. He had a clear view of the track in the direction from which the east-bound train came for three-quarters of a mile, and no danger to him was apparent on that track. It was his duty to look and listen before he reached the west-bound track. If he had done so, he could not have failed to see the coming train. The fact that he walked on the west-bound track in front of the train is conclusive evidence that he did not look. He was, therefore, chargeable with contributory negligence, and a verdict should have been directed for the defendant.

2. The fact that the flagman at the gates had neglected to let them down before the decedent walked to the east-bound track, did not absolve the decedent from the duty of looking and listening before he went upon the west-bound track. It was notice to him that he could not rely upon the care of the flagman, and should have warned him, at least, not to abate his care for his safety.

(Syllabus by the Court.)

Error to circuit court, Essex county; Child, Judge.

Action by Barbara Pfuelb, administratrix of the estate of John Pfuelb, deceased, against the Pennsylvania Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Argued February term, 1897, before DEPUE, VAN SYCKEL, and LIPPINCOTT, JJ.

Vredenburg & Garretson, for plaintiff in error. Samuel Kalisch, for defendant in error.

VAN SYCKEL, J. This is a suit against the Pennsylvania Railroad Company and the Lehigh Valley Railroad Company to recover dam-

ages for causing the death of plaintiff's intestate at the railroad crossing at East Kinney street in the city of Newark by a passenger train of the Lehigh Valley road, running from New York westward on the track of the Pennsylvania road. There were gates at the crossing, operated by a gateman in the employ of the last-named company. The jury found in favor of the Lehigh Valley Company, and must, therefore, have concluded that the statutory signals were given by that company. The writ of error is prosecuted to review judgment against the Pennsylvania Company. Two of the plaintiff's witnesses testified that when they reached the gates at the crossing they saw a train approaching from the direction of Elizabeth on the east-bound track, and they waited until it had passed over the crossing. The gates were then up, and the deceased was on foot, five or six steps behind them. These witnesses then passed over the east-bound track in safety, and also over the west-bound track. The intestate followed them. He passed over the east-bound track, and was struck and killed on the west-bound track by the train from New York. There was also evidence from which the jury could have found that the decedent, on account of obstruction of the view by the east-bound train, could not see the train on the west-bound track until he reached the furthest rail of the east-bound track. This was the case as presented by the testimony of the plaintiff, and thereupon the counsel for the plaintiff in error moved to nonsuit the plaintiff below.

The trial judge properly ruled that the existence of the gates did not absolve the traveler from stopping, looking, and listening before he stepped upon the tracks, but he declined to grant the motion, because there was no evidence in the case to show that the decedent did not stop, look, and listen, and there was no proof of such circumstances and such a situation at the time of the accident as would make it obvious that the decedent must have failed to look and listen. The case being, then, bare of proof either way upon that subject, negligence of the decedent could not be presumed, and there was, therefore, no error in refusing to nonsuit. After the refusal of this motion, the defendant, on the trial, introduced testimony to show that by actual measurement upon the ground a person standing at the southeast gate, where decedent entered, could see the tracks towards New York for a distance of 2,285 feet, and in the opposite direction for a distance of 4,537 feet. The east-bound track is 4 feet 8½ inches wide, and is distant 7 feet from the west-bound track. This testimony was not challenged, or in any respect controverted, except as to how far the view would be obstructed by a train passing on the east-bound track. Thereupon the court was requested to direct a verdict for the Pennsylvania Company, because the decedent was guilty of contributory negligence, and error is assigned upon the refusal so to do. The decedent was on foot. He could see to the

southwest, along the tracks, for over three-quarters of a mile, and no danger was apparent from that direction. When he reached the northerly rail of the east-bound track, he was in no danger whatever, and in no situation of peril to interfere with the exercise of a calm judgment. If he had stopped there for an instant, and looked to the northeast, he could not have failed to see the train which struck him. If he had looked, he was in a place of safety, and would not have walked into a position where death was almost certain. That he did put himself in front of the train is incontestable evidence that he did not look. *Railroad Co. v. Righter*, 42 N. J. Law, 180. The exercise of reasonable prudence on the part of the decedent would have protected him from injury. It was his duty to look before he passed upon the west-bound track, and his obvious failure to do so was negligence on his part which contributed to the fatality. *Railroad Co. v. Hefferan*, 57 N. J. Law, 149, 30 Atl. 578. On the part of the plaintiff below it is urged that the gates were up, and the east-bound train obstructed the view of the train from New York. These circumstances, in my judgment, should have operated as a warning to the decedent, and made his duty the more imperative to be on his guard against danger. He saw the train passing while the gates were up, and knew, therefore, that the gateman had neglected his duty, and that he could not rely with confidence upon the fact that the gates were up; and if he could not see a train coming from New York by reason of the east-bound train obstructing the line of vision, he was clearly guilty of negligence in not waiting a few moments until the obstruction was removed. This was the view taken by this court in *Railroad Co. v. Ewan*, 55 N. J. Law, 574, 27 Atl. 1064, the circumstances there not differing substantially from those presented by the case under review. In the *Ewan* Case, Mr. Justice Dixon, who delivered the opinion of the court, says: "As the plaintiff reached the nearest track, a freight train was going towards his left on the track furthest from him; that this train made a 'tremendous noise,' as the plaintiff described it, and emitted smoke, which settled down upon the tracks; that the plaintiff stood upon the nearest track, which he knew to be not in use, until the freight train passed the street crossing, and then, knowing that the middle track was used for trains coming from his left, he looked towards the left, and, seeing nothing but smoke upon the tracks, and hearing no whistle or bell, he proceeded to walk across at his usual gait, and was struck by a train coming from the left on the middle track. From these circumstances it is apparent that the plaintiff, without any reason for haste, went upon the track, when it was evident to him that he could neither see nor hear any train which he was aware might be approaching, and when the causes of his inability to see and hear were so fleeting that in a few seconds they would have gone. It seems indisputable that such conduct was neg-

ligent. In the exercise of reasonable prudence, a man could not expose his life to a peril which he knew might be imminent, if a delay of a few moments would assure him of safety, unless impelled by some motive of extreme urgency." This reasoning is pertinent with equal force to the case before us, and, in our judgment, there was error in the refusal of the trial court to direct a verdict for the plaintiff in error, and therefore there must be a reversal.

CLIFFORD v. STATE.

(Supreme Court of New Jersey. June 7, 1897.)

HOMICIDE—PROVOCATION—TRIAL—EVIDENCE.

1. It is not error to overrule a question, if the court permits another question in substantially the same form to be propounded to the witness. If the prisoner has the benefit of the evidence to which he is entitled, he is not prejudiced in maintaining his defense.

2. Where the provocation consists only in words, and a weapon is used which will probably produce death, words are not an adequate provocation to reduce the offense of murder to manslaughter.

(Syllabus by the Court.)

Error to court of oyer and terminer, Hudson county.

Edward Clifford was convicted of murder, and he brings error. Affirmed.

Argued February term, 1897, before DEPUE, VAN SYCKEL, and LIPPINCOTT, JJ.

Speer & Hoffman and Allan L. McDermott, for plaintiff in error. Chas. H. Winfield, for the State.

VAN SYCKEL, J. The plaintiff in error was convicted of murder in the first degree in the court of oyer and terminer of the county of Hudson. The first two alleged errors relied upon for reversal appear in the case as follows, in the testimony of John W. Boro, a witness produced on behalf of the defense in the trial court: "Q. You say you have known him for a number of years. What were his actions that night, as compared with his actions usually? (Objected to. Objection overruled.) A. I remarked that night that he was acting differently from what he had previously. Q. In what way did he act differently? A. He was following this man up, and from one side of the room to the other, and going over and looking out of the door, and coming in again, and walking up to me, and talking kind of foolish talk. Q. Foolish talk? A. Yes. Mr. Winfield: I ask that that be stricken out, 'foolish talk.' The Court: It is a conclusion. I will strike that out. (Defendant prays exception, which exception is allowed, and the same is signed and sealed accordingly. Job H. Lippincott, P. J. [L. S.] R. S. Hudspeth, J. [L. S.]) Q. What was his condition that night as to whether he was excited or not? A. Well, as I said before, I couldn't say as he was extra excited, but he was walking up and down the room, talking more to this man than to anybody

else. This man was a stranger to me. Q. Having known him for the number of years you have testified to, in your opinion was his conduct that night different from his conduct as you had known it in the years before? (Objected to.) The Court: You may ask him what his mental condition is from what he has observed, but when you undertake to compare conduct I think it is incompetent to ask a man whether he acted differently on one occasion than he did on another. I will overrule this question. (Defendant prays exception, which exception is allowed, and the same is signed and sealed accordingly. Job H. Lippincott, P. J. [L. S.] R. S. Hudspeth, J. [L. S.] Q. From what you knew of him, was his conversation that night rational or irrational? A. Irrational. I remarked so to Mr. Filon." It is conceded that a nonexpert witness may state facts and express an opinion in respect to the sanity of a defendant. Vanauken's Case, 10 N. J. Eq. 192; Koccls v. State, 56 N. J. Law, 46, 27 Atl. 800. The witness was permitted to state that the defendant was acting differently that night from what he had previously acted, and he was also permitted to testify in what respect his actions on the night of the homicide differed from his usual manner of conducting himself. The words "foolish talk," in the last answer, were stricken out because, in the opinion of the trial court, it was a conclusion of the witness, and not a statement of a fact. Whether these words should have been stricken out is immaterial in this case, because the witness was afterwards asked the following question: "Q. From what you knew of him, was his conversation that night rational or irrational? A. Irrational. I remarked so to Mr. Filon." The witness having been permitted to testify that the prisoner talked irrationally, he was not prejudiced by striking out the words "foolish talk," and that cannot, therefore, constitute ground for reversal. Crimes Act, § 89 (Revision, p. 284). Nor was the prisoner prejudiced in maintaining his defense upon the merits by the ruling of the court upon the question whether, in the opinion of the witness, the prisoner's conduct that night was different from his conduct as the witness had known it in the years before. This question having been objected to by the prosecuting attorney, the court said: "You may ask him what his mental condition is from what he has observed, but when you undertake to compare conduct I think it is incompetent to ask a man whether he acted differently on one occasion than he did on another. I will overrule this question." The court had previously allowed the witness to tell in what particulars the conduct of the prisoner had been different, in order to show upon what facts his opinion of the prisoner's mental capacity was based, and expressly said that the witness could give his opinion of the prisoner's mental condition, which he did in answer to the next question. All the court excluded

was a general statement by the witness that the prisoner acted on that night differently from what he had acted before in respect to matters not pertaining to his mental state. The witness was not denied the right of testifying to any fact "in addition to those he had given in his previous answer." The opinion of the witness in regard to conduct not pertaining to the impairment of the prisoner's mind was not competent, and was properly rejected.

The other errors relied on for reversal relate to the charge of the court to the jury. The court charged "that, where the provocation consists only in words, and a weapon is used, the result of which will probably cause death, there words are not reasonable or adequate provocation to reduce the offense to manslaughter." This is the well-settled rule, and no error is found in this part of the charge. Warner v. State, 56 N. J. Law, 691, 29 Atl. 505; State v. Zellers, 7 N. J. Law, 220. The court also charged the jury that, to constitute murder in the first degree, the killing must be "willful, deliberate, and premeditated"; that "willful" means an intentional act as distinguished from casualty or accident, and that "deliberate" is used to indicate the purpose formed in a mind capable of conceiving a purpose. Although this was not a full and accurate definition of the word "willful" as applied in the criminal law, yet, under the circumstances presented by the evidence in this case, it in no wise prejudiced the defense set up, or impaired any right of the prisoner. The charge of the court that the jury might consider whether the prisoner had a motive to commit the crime, and, if no motive was found, that would weigh in favor of the prisoner, but, if a motive was disclosed by the evidence, that might throw light upon the question whether the prisoner intended to kill, is unexceptionable. With respect to the effect of temporary derangement of the prisoner's mind by the use of intoxicants, the instructions to the jury were very favorable to the prisoner. The judgment below should be affirmed.

PAUL v. KERSWELL.

(Supreme Court of New Jersey. July 13, 1897.)
UNRECORDED DEED—NOTICE—RECITALS IN SUBSEQUENT DEED—BONA FIDE PURCHASERS.

1. A deed to H. by B.'s heirs recited that J., owning a certain tract of land, caused it to be laid out into lots, a number of which were conveyed by deeds acknowledged and recorded, as by reference to said deeds, "recorded according to law, or intended so to be, will fully appear," there remaining unsold a large portion of said tract; and that "whereas, the said J., by a deed, conveyed the portion remaining unsold as aforesaid unto B., etc. Then followed the granting clause, whereby such heirs conveyed to H. all their estate, title, interest, etc., in and to said tract "so vested in them as aforesaid, being the undisposed of portion of all the following tracts of land," describing them. *Held*, that such recital was not notice to H., and those who deranged

title from him, of an unrecorded deed of one of such lots, executed and delivered by J. 31 years before H.'s deed was executed.

2. The title of a bona fide purchaser is transmitted to his vendee, regardless of the latter's knowledge of the facts.

Ejectment by Henry B. Paul against Henry Kerswell, in which there was a finding for defendant. Heard on rule to show cause why a new trial should not be granted. Rule discharged.

Argued June term, 1897, before DEPUE, VAN SYCKEL, and LIPPINCOTT, JJ.

Samuel H. Richards and Thomas E. French, for plaintiff. Joseph H. Gaskill, for defendant.

DEPUE, J. This was an action of ejectment to recover lot No. 115, part of a tract of land in the county of Camden. The case was tried before the court without a jury, and resulted in a finding for the defendant. Joseph W. Souder and William W. Deklyne, in 1851, owned a farm at Palmyra, of which the premises in question were a part. December 5, 1851, they conveyed lot No. 115 to John Perkins. This deed was not recorded until May 15, 1887, 35 years after its delivery; and there is no proof that Perkins ever exercised any act of ownership over the premises. Perkins died March 13, 1886, and in proceedings for the partition of his estate the lot was sold to and conveyed to the plaintiff by deed dated March 3, 1887. The above is the title on which the plaintiff relied. On the 18th of October, 1852, Deklyne conveyed to Joseph Souder the undivided one-half of the whole premises, describing it by metes and bounds. Souder then became the owner in entirety. October 29, 1860, Joseph Souder conveyed to Benjamin Souder, and on the 18th of March, 1882, the heirs of Benjamin Souder conveyed to Hovey the undisposed of "portion of all the following described premises," describing the whole farm by metes and bounds. August 12, 1886, Hovey conveyed eight lots to Blackburn, among which was lot No. 115, the premises in dispute. September 21, 1886, Blackburn conveyed lot No. 115 and three other lots to Findley. Findley took possession, and erected a house, partly on the premises in controversy. June 10, 1892, Findley conveyed to Kerswell, the defendant. The plaintiff's title is first in point of time, but the deed to Perkins, not being recorded until after the defendant's title originated, is invalid as against the defendant, unless the title he took was impaired by notice of the prior unrecorded deed to Perkins. The burden of proving such notice rests upon the plaintiff. *Coleman v. Barklew*, 27 N. J. Law, 357. To meet that issue the plaintiff relies upon the recital in the deed from the heirs of Benjamin Souder to Hovey. That deed recites that Joseph W. Souder, "being seised and possessed in fee of a certain tract of land, caused the same to be laid out into building lots, a number of which were con-

veyed by deeds duly acknowledged and executed," etc., "as by reference to said deeds, recorded according to law, or intended so to be, will fully appear; and that there remaining unsold of the said tract so divided into building lots as aforesaid a large portion thereof; and whereas, the said Joseph W. Souder by a deed," etc., "conveyed the portion remaining unsold as aforesaid into Benjamin K. Souder," etc. Then follows the granting portion of the deed, whereby the grantors, as heirs of Benjamin K. Souder, conveyed to Hovey "all their estate, right, title, interest, claim, property, possession, residue, remainder, and demand into and out of the property or tract of land so vested in them as aforesaid, being the undisposed of portion of all the following tracts of land." Then follows a description of three several tracts of land by metes and bounds, each separately described. The lot now in question is part of one of the tracts so described. In *Roll v. Rea*, 50 N. J. Law, 264, 12 Atl. 905, it was held that "one claiming title to lands is chargeable with notice of every matter affecting the estate which appears on the face of any deed forming an essential link in the chain of instruments through which he derives his title, and also with notice of whatever matters he would have learned by any inquiry which the recitals in those instruments made it his duty to pursue." In that case the conveyance was of the right, title, and interest of the grantor in a certain tract of land which had been laid out into building lots by maps filed in the clerk's office. It contained a stipulation that the conveyance should not conflict with the title to any part of the premises previously sold and conveyed by the grantor to any party or parties, and that the deed was subject to such conveyances. The defendant claimed title under an earlier deed, which had not been recorded, and contended that, though the deed had never been recorded, the plaintiff had notice of it before she took her conveyance. The court, in dealing with this aspect of the case, said that, the grantee in the deed containing the stipulation "being informed that out of a large tract of land held for sale in parcels some parcels had been conveyed to purchasers, but having no information that any of these purchasers had failed to record their deeds, he was warranted in assuming that they had observed this statutory duty for the protection of their interests. * * * The fact that the plaintiff's deed did not define the residue which it conveyed might have suggested to some minds an inquiry from the grantor as to what had previously been sold, but such a suggestion would have been reasonably answered by the presumption that the records afforded all the needed information." The deed to Hovey is not, in this respect, in conformity with the deed under discussion in *Roll v. Rea*, in that the recital in it is of conveyances recorded or intended to be recorded. But the principle adjudged

In that case applies to this case. The deed to Perkins was made in 1851, and the deed by the heirs of Souder to Hovey was made in 1882, and Hovey was warranted in assuming that the observation of the statutory duty to record the deed would not have been delayed for so long an interval of time; and the evidence discloses that those under whom the defendant claims title had done everything that was reasonably necessary to ascertain the condition of the title. Perkins, although he resided near by, and saw the premises were being disposed of, never took possession, or exercised any act of ownership, or made any claim of title. There is no pretense that Hovey had any knowledge of the existence of the Perkins deed, and the proof is that he caused a thorough and exhaustive examination of the records in the office of the county clerk to be made. Blackburn, who was Hovey's agent prior to the time the deed was made, and acted as his agent afterwards, testified that he went to Mt. Holly, and examined the records, and that he made efforts to ascertain who held the unrecorded deeds for this property; that he advertised in the Philadelphia Ledger for three or four insertions; that he made inquiry in the neighborhood of officials, and any one he could get to talk with that knew anything about the land; that he made inquiries of old residents of the town, "I suppose I could name a hundred, maybe, if I could think of them; most everybody I could talk with;" that he inquired of Joseph W. Souder whether he had any record of the lots conveyed; that Souder said he had not, "and said he couldn't tell me what he had conveyed; that I would have to go to the records in Mt. Holly, and find it out; that he had a list of the property sold, but couldn't tell me what became of them"; and that the first knowledge he had that there was an outstanding title to lot No. 115 was a few months before, when he was told by the plaintiff's attorney that he had some claim against the lot, and that he never heard the slightest intimation that there was an outstanding interest or claim to that lot before. Blackburn himself took title from Hovey for lot No. 115, August 12, 1886, and conveyed to Findley September 21, 1886. He was also agent for Findley in erecting a house on this and the adjoining lot, and prepared the deed from Findley to the defendant. As already mentioned, Blackburn testified that he had no intimation of an outstanding claim to or interest in this lot until this controversy arose. The proof is plenary that Blackburn and Findley at least were bona fide purchasers without notice. Nor is there anything in the case on which to impute to the defendant knowledge of the Perkins title. I have referred to the Blackburn and Findley title for the reason that the active efforts of Blackburn to ascertain what conveyances had been made of lots for which deeds had not been recorded clearly invest the title of these grantees with the character of title acquired

by purchase bona fide within the protection of the registry act. To that title the defendant succeeded; the rule of property being well settled in this state that a person, though he may have had notice of a previous outstanding title, may protect himself in virtue of the title of his vendor, to whose title he, by a subsequent purchase, has succeeded. The title of a prior purchaser, being perfect by reason of its having been acquired bona fide, will be transmitted to his vendee,—a rule that is necessary to secure to a bona fide purchaser without notice the full benefit of his purchase. *Holmes v. Stout*, 10 N. J. Eq. 419-429, 437; *Sharp v. Shea*, 32 N. J. Eq. 65; *Roll v. Rea*, supra. There is also evidence of an adverse possession for the statutory period, on which the trial court was justified in finding title by adverse possession. The rule to show cause should be discharged.

WEST JERSEY R. CO. v. ABBOTT et al.
(Court of Errors and Appeals of New Jersey.
July 1, 1897.)

RAILROADS—FIRES SET BY LOCOMOTIVES—LEGISLATIVE REGULATIONS—QUESTION FOR JURY.

1. When the legislature has authorized railroad companies to use the dangerous element of fire for engendering steam for the propulsion of trains, and have enacted regulations in respect to the precautions to be taken to prevent the escape of fire from the smokestacks of their engines, *held*, that such legislative regulations define and limit the duty of the companies in respect to the precautions required against such escape of fire.

2. *Held*, further, that it is error to permit a jury to determine whether or not, on account of excessive drought rendering the communication of fire more easy, it was the duty of such companies to take such care as would be sufficient to prevent the escape of any fire from the smokestacks of their engines.

(Syllabus by the Court.)

Error to supreme court.

Action by Abbott and others against the West Jersey Railroad Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Joseph H. Gaskill, for plaintiff in error. David J. Pancoast, for defendants in error.

MAGIE, O. J. The writ of error in this cause brings up for review a judgment of the supreme court in favor of defendants in error and against plaintiff in error in an action of tort for the burning of certain woodlands of defendants in error by fire alleged to have been started by a locomotive operated by plaintiff in error. It is deemed necessary to consider only one of the numerous assignments of error. From the evidence contained in the bills of exception it is clear that at the time the fire was claimed to have been communicated from the company's locomotive there had been a protracted and excessive drought, and that the herbage and trees near the railroad were in a condition peculiarly and unusually ready to take fire. In dealing with this phase

of the case, the trial judge used this language in his charge to the jury: "Is a company, during an exceedingly dry season, with grass, herbage, leaves, and the earth itself all along its route parched by an unusually long period of drought and heat, negligent in allowing its spark arrester and ash pans * * * to throw fire at all?" To the substantial part of this portion of the charge the plaintiff in error prayed an exception, which was duly allowed. It is obvious that the submission of that question to the jury by implication permitted the jury to find that if, under the circumstances occasioned by the excessive drought, the railroad company allowed any fire at all to escape from the spark arrester or ash pans, it might be found to have neglected a duty which devolved upon it. Upon this plain implication this part of the charge is open to review. But it may be properly added that the learned judge did not leave his instruction to implication, for he added, in the same connection: "Although the company had the right to use fire by law, * * * is it, in your judgment, its duty, in times of great danger by reason of drought in localities through which it travels, to exercise increased or sufficient care to prevent fire escaping from its engines? * * * If, in your judgment, the company was negligent in allowing fire to escape at all from its engines in such a dry season, * * * and if, in your judgment, it should have exercised increased care or sufficient care in such a dry season, and failed to do it, and was therefore negligent, * * * then the statute referred to by defendant does not protect the company from liability for originating the fire," etc. It will be perceived that the question presented by the exception is whether a railroad company authorized by law (as it appeared this company was) to operate a railroad for the transportation of passengers and freight may be held liable for injuries occurring from fire communicated by its engines, if, in the judgment of a jury, it was its duty, because of an excessive drought, and the consequent danger of communicating fire, to take sufficient care to prevent any escape of fire whatever from its engines. The question, in my judgment, admits of but one answer, and that is that no such duty devolves upon railroad companies, or can be imposed upon them by the finding of a jury. Railroad companies have authority to use the dangerous element of fire in the propulsion of their trains. The danger is in the escape of the fire they are permitted to use upon adjoining lands, to the destruction of property thereon. In the absence of statutory regulations in respect to the precautions to be taken by railroads against such danger, doubtless the companies using, though by authority, the dangerous machines, would, upon the principles of the common law, be under a positive obligation to employ all reasonable precautions against doing harm thereby to others. But in that case a requirement that a railroad company should, in times of excessive drought, absolutely prevent all escape of fire

from its engines, or be liable for the consequences, would be not a reasonable, but an unreasonable, rule of precaution; for it seems that no device has yet been invented that will absolutely, and at all times, control the escape of sparks capable of igniting inflammable matter. Such a rule, therefore, would compel the companies either to abandon their duty to the public in running their trains, or be answerable for every fire communicated, no matter how cautious they had been in using the best practicable means to prevent its escape. But statutory regulations on this subject have been made. They are contained in sections 13-16 of "An act respecting railroads and canals," approved March 27, 1874 (2 Gen. St. p. 2668). By section 13, which was originally adopted in 1865, railroad companies were required in general terms to take and use all practicable means to prevent the communication of fire from their engines. By section 15, which came into our legislation in 1873, it was made their duty to place on the smokestack of every engine a screen, so as to prevent, as much as practicable, the escape of fire. By section 16 proof that injury was done by fire communicated from an engine is made prima facie proof of a violation of the regulations of the statute, but subject to being rebutted by evidence that all practicable means for preventing such communication had been taken and used. When the legislature enacts regulations in respect to any precaution to be taken in the use of a dangerous instrumentality by those whom it has authorized to use it, those regulations define and limit the measure of duty in respect to that particular sort of precaution. The statute which we have had under consideration also enacts that railroad companies shall give certain specified audible signals of the approach of its trains to the crossing of a public highway. It was settled in this court that the regulations in respect to audible signals were exclusive, and, if obeyed, would exonerate a railroad company from liability for a collision at a crossing arising from a failure to hear such signals, and that it was erroneous to permit a jury to determine whether or not, on account of the prevalence of a dense fog or other impediment to sight and sound, other audible signals ought not to have been given. *Railroad Co. v. Leaman*, 54 N. J. Law, 202, 23 Atl. 691; *Hackett v. Railroad Co.*, 58 N. J. Law, 4, 32 Atl. 265. In the case before us the legislature has prescribed what duty a railroad company must perform in respect to the escape of sparks from the smokestack of its engines. The prescribed duty does not require the company at any time to absolutely prevent the escape of such sparks, but only to take and use all practicable means to that end. Proof that they have taken and used such means furnishes a defense in that respect. It is obvious that to permit a jury to find that a railroad company was at any time under a duty to take sufficient care to prevent the escape of any fire at all is incongruous with the regulations of the legislature, and at variance

with the doctrine of the case last cited. Without examining the other assignments of error, the judgment must, for the error above pointed out, be reversed.

MIDDLETON v. MIDDLETON.

(Court of Errors and Appeals of New Jersey.
June Term, 1896.)

For majority opinion, see 35 Atl. 1065.

DIXON, J. The husband filed a bill in the court of chancery, praying a divorce a vinculo, because of desertion by his wife. The wife answered, denying the desertion, and by way of cross bill she charged her husband with extreme cruelty, and for that cause prayed a divorce a mensa et thoro, with alimony. Subsequently she amended her cross bill, by adding a charge of adultery, but she did not alter her prayer. On trial before a vice chancellor, he found that the wife was not guilty of desertion, and that the husband was guilty both of extreme cruelty and of adultery, and thereupon a decree was made that the parties be divorced a mensa et thoro forever; that the wife should have alimony; and that the husband should, under the act of March 4, 1891 (2 Gen. St. p. 1274), forfeit his right of curtesy.

I agree with the vice chancellor that the testimony proves the extreme cruelty of the husband, and does not prove desertion by the wife, and therefore think the decree for divorce and alimony is right. The decree for forfeiture of curtesy cannot, I think, be supported, for the reason that it is not embraced within the prayer of the cross bill. It is therefore, in my judgment, unnecessary to consider the evidence of adultery, or to pass upon the constitutionality of the act of March 4, 1891; for, whatever conclusion I might reach on those matters, my determination as to this decree must remain the same. Hence I decline to vote upon the constitutional question.

CONSOLIDATED TRACTION CO. v. WHELAN et al.

(Court of Errors and Appeals of New Jersey.
July 1, 1897.)

APPEAL — ERRORS IN RECORD — RULE TO SHOW CAUSE — INJURY TO WIFE — ACTION BY HUSBAND AND WIFE — PLEADING — JUDGMENT.

1. The allowance of a rule to show cause does not prevent assignment of errors upon the record.

2. In actions brought by husband and wife for injury done to the wife, if the husband desire to add thereto claims in his own right arising ex delicto, under section 22 of the practice act, the better practice is to present his claim by a separate count, designating the damages sought by him. The verdict should assess the damages on each claim, and the judgment should distinguish them accordingly.

3. When a declaration in an action by hus-

band and wife contains only a single count, which, after averring an injury to the wife, and also that the husband had expended money and lost her services by reason of such injury, concludes to the damage of both plaintiffs in a single sum, a verdict awarding damages to both plaintiffs, and a judgment accordingly, are not erroneous. Such a declaration does not present the husband's claim as added to the action.

(Syllabus by the Court.)

Error to supreme court.

Action by Mary and James Whelan against the Consolidated Traction Company. Judgment for plaintiffs was affirmed in the supreme court, and defendant brings error. Affirmed.

Depue & Parker, for plaintiff in error.
James F. Minturn, for defendants in error.

MAGIE, C. J. The assignments of error are all made upon the record. On behalf of defendants in error it is urged that the court should not consider the question thus raised, because a rule to show cause was allowed in the court below. But this contention is wholly without basis—First, because it does not appear in the record, nor is it otherwise shown, that any rule to show cause was allowed; and, second, because the allowance of a rule is only a waiver of bills of exceptions, and merely debars the party holding such bills from assigning error thereon, leaving him entirely without restriction as to errors in the record. 2 Gen. St. p. 2574, § 246.

Plaintiff in error claims that the verdict and judgment disclosed in the record are erroneous. Its contention is that the action is brought by husband and wife for an injury done to the wife, and that the husband has added to the action claims in his own right arising ex delicto, out of the injury done to his wife, and that the verdict ought to have awarded damages to both plaintiffs for such amount as the jury deemed would compensate the wife, and to the husband for such amount as they thought he was entitled to, and that the judgment should have been entered accordingly. The verdict assessed the damages of both plaintiffs at \$2,750, and the judgment is that they recover of defendant "their said damages." The declaration shows that the action is brought for an injury done to the wife by the negligence of defendant, and that the husband had authority to "add thereto" claims in his own right, arising out of that injury, by the provisions of section 22 of the practice act. 2 Gen. St. p. 253. The provisions of section 22 were taken from section 40 of the English common law procedure act of 1852, with a single variation. The English act permits the husband to add to the joint action claims in his own right generally; our act limits the claims the husband may add to the joint action to those arising ex delicto. Both acts contain a provision that separate actions brought in respect of such claims—i.e. claims of husband and wife in the right of the wife, and claims of the husband

in his own right—might be consolidated. Had the separate claims in this case been made the basis of separate suits, and had such suits been consolidated, I apprehend that no question could be made as to the propriety and necessity of separate verdicts on each separate claim, and that the judgment should have indicated the amount to be raised upon each. Can there be any doubt that when the husband, having control of the joint action *Railroad Co. v. Goodenough*, 55 N. J. Law, 577, 28 Atl. 3), undertakes to add thereto claims in his own right, a like practice must be pursued? I think not. Such has been, so far as my observation goes, the invariable practice in such cases. If, therefore, the record discloses that the husband plaintiff has added claims in his own right to this action by himself and his wife for an injury done to her, the verdict, which awards damages only upon the joint claim and the judgment, which has furnished relief only to the wife, are, at the least, irregular.

One issue presented has not been disposed of. Whether the defendant below could take advantage of the irregularity need not be decided. An examination of the declaration is convincing that no claims of the husband plaintiff in his own right were added to the action. The declaration contains but a single count. It is true that in that count it is averred that he had expended money in the cure of his wife, and had lost her services during the time of her illness; but the conclusion of the declaration is to the damage of the plaintiffs in one sum of \$10,000, "in consequence of which a right of action hath accrued to them." The "ad damnum" clause is therefore single and limited. *Weber v. Railroad Co.*, 35 N. J. Law, 409. Under the English act, the practice seems to have been to present the claims in separate counts, with separate claims for damages. *Hemstead v. Gas, etc., Co.*, 3 Hurl. & C. 745; *Morris v. Moore*, 19 C. B. (N. S.) 359. In my judgment, it is the practice which ought to be adopted and followed under our statute. Upon such separate counts, separate issues would be presented, to which the jury would respond, and the judgment entered would preserve the separate rights of husband and wife in the total recovered. The defendant would also be enabled to question the propriety of the verdict upon the evidence respecting each claim. Even if a single count could be framed to include both claims, it is obviously necessary that it should distinguish in the conclusion the damages sought upon each claim. A count which demands damages only upon the joint claim, as does the count in this record, cannot be considered, whatever the averments as to the husband's claims may be, as including such claims in the action. We find, therefore, no error in the record, for the judgment is entered upon a verdict which answers the only claim for damages which the declaration made. Let the judgment be affirmed.

WILLIAMS v. CAMDEN & A. R. CO.

(Supreme Court of New Jersey. July 14, 1897.)

STREET RAILROADS—INJURY TO PASSENGER—NEG-
LIGENCE AND CONTRIBUTORY NEGLIGENCE—QUES-
TIONS FOR JURY—DEATH—EXCESSIVE DAM-
AGES.

1. In an action against a street-railroad company for the death of plaintiff's intestate, deceased's son, about 12 years old, testified: That, when the car on which deceased was a passenger came to the street, it stopped, and his "father went to alight, and as he was just about—just had one foot off when the car started, and it threw him, and he fell; and it stopped again, and I got off. I guess the car went not more than a couple of feet after it started. It was just a simple lurch of the car." That his father's right foot was lame, and he stepped off on the other foot. A physician testified that deceased, immediately after he was hurt, said to him that he was afraid the car would not stop, and he jumped off. The conductor testified that deceased started to get off the car before it came to a full stop, but "I think the car had stopped when I helped him off." Three other witnesses testified that deceased attempted to get off the car before it stopped. Another testified that deceased lost his balance and fell off, and that the car had not then stopped. *Held*, that a verdict for plaintiff would not be disturbed.

2. In an action for the death of a bricklayer, contractor, and builder, 57 years old, it appeared that he was sober and industrious, had accumulated over \$2,000, and was never known to be sick. A physician testified, as a result of an examination and tests made soon after the accident, that deceased was in the last stages of Bright's disease, and could not have lived more than 10 days if he had not been injured. On the facts testified to by him, two other physicians gave it as their opinion that deceased was in the last stages of such disease. One said he could not have lived over a month; and the other, that in such case the duration of life is limited, and the sufferer is likely to have his earning capacity cease suddenly from slight cause. Another physician testified that, about a month before the accident, he examined deceased for insurance, and found his kidneys in a normal condition, and that death was caused by peritonitis. *Held*, that a verdict for \$3,800 would not be set aside as excessive.

Action by Margaret Williams, administratrix of the estate of John Williams, deceased, against the Camden & Atlantic Railroad Company, to recover for the death of plaintiff's intestate, caused by defendant's negligence, in which there was a verdict for plaintiff. Heard on rule to show cause why the verdict should not be set aside. Rule discharged.

Argued February term, 1897, before VAN SYCKEL, LIPPINCOTT, and DEPUE, JJ.

Clarence L. Cole, for plaintiff. Joseph H. Gaskill, for defendant.

DEPUE, J. The deceased, on the 3d of August, 1894, was a passenger on the trolley line of street cars of the defendant in Atlantic City. The company's cars consisted of a trolley car and a trailer at the rear. The deceased was riding in the trailer, and, in attempting to alight from the car at North Carolina avenue, received injuries by a fall which caused his death, on the 10th day of August. The plaintiff, as his administratrix, brought this suit under the statute. The case was tried at the Atlantic circuit, and resulted in a verdict for

the plaintiff, with damages assessed at \$3,800. The reasons relied on for a new trial are: First, because, by the weight of the evidence there was no negligence on the part of defendant; second, because, by the weight of the evidence, the damages are grossly excessive.

The evidence mainly relied on, on the part of the plaintiff, was the testimony given by the son of the deceased, John G. Williams, a lad between 11 and 12 years of age at the time this accident happened. He is described by the trial judge as "bright enough,—quite bright." He left the car right behind his father. He testified that, "when the car came to that avenue, it stopped, and my father went to alight, and as he was just about—just had one foot off when the car started, and it threw him, and he fell; and it stopped again, and I got off. I guess the car went not more than a couple of feet after it started. It was just a simple lurch of the car." On cross-examination he testified that, after the car stopped, his father attempted to alight, and had one foot on the ground, and the car started, and threw him. He also testified that his father had a lameness in his right foot, and that he stepped off on the other foot. The contention on the part of the defendant is that the deceased either jumped or stepped from the car while it was in motion, and was thrown, or that, having alighted from the car in safety when it was stopped, he tripped and fell, and in this way received his injuries. The evidence on this subject is conflicting. The contention that the deceased jumped from the car while it was in motion is sustained only by the testimony of Dr. Ullmer, who testified to a conversation with the deceased immediately after he was hurt, in which he said that he had signaled the car to stop at North Carolina avenue, and was afraid they would not stop, and that he jumped off. Among the witnesses called by the defense who spoke directly of the occurrences at that time was George D. Kraft, who testified that the deceased stepped off the car as if he was going to step off backward, before the car stopped, and it threw him on his side. On the cross-examination this witness said: "He got right up, and walked off the car while it was in motion. He didn't step off. He got up on the step, and was thrown off." Gerew says that he tried to get off just before the car came to a standstill. It was going very slow at the time he stepped. Malatesta testified that the first thing he saw was the deceased lying on the ground; that he did not see him thrown from the car, or trying to alight from it; that, when he saw the car, it was moving, but it stopped in a few feet. The car moved, and then the car stopped, and then it moved again after a few minutes. Frank French testified that the first he saw was the deceased on the ground, and the conductor jumping off the car, and another man was in the act of picking him up; that the man was on the ground when he first saw him, and that he did not know how he got there. Scott Mathis testified that the car had

not stopped when the deceased attempted to get off; that the car was running very slow, almost at a standstill; that the conductor and another gentleman got off the car, and took him to the sidewalk; that he does not remember whether or not he saw him get off the car. Woodruff testified that the deceased lost his balance, and the car had not stopped at that time, not quite; that, after the deceased fell, the car stopped, and did not start again until the deceased had been taken to the sidewalk, all of two minutes, and that the car did not start up at all until after the deceased had been taken to the sidewalk; that the deceased was simply falling off the car bodily when he saw him. Phillip A. Ward, called by the defendant, was the conductor of the train or car from which the deceased alighted. He testified that the deceased started to get off the car before it came to a full stop, but "I think the car had stopped when I helped him off the car to the ground"; that, after the car stopped to let the deceased off, it did not start again until after he was carried to the sidewalk. The effect of the admission testified to by Dr. Ullmer is very much impaired by the condition of the deceased at the time of his conversation with the doctor. He had been seriously injured, and, for the purpose of reviving him, had been given whisky. It is further impaired by the fact that no one of the witnesses who saw the occurrence testifies that the deceased did in fact jump from the car. The testimony on this subject, even as given by the defendant's witnesses, is conflicting. The conductor testifies that he helped him down from the car in safety. Other witnesses called for the defense say that the conductor left the car after the deceased had fallen to the ground. In this conflict of evidence, the trial judge submitted the case fairly to the jury. In reviewing the evidence, the trial judge commented on the youth of the boy, and his interest in the case. After speaking of the situation of the boy, he concluded his observations as follows: "Just how that car stopped, and where it stopped, and when it started, and where it halted finally, are very much in conflict in this case, and you will have to determine that for yourselves from the evidence. The boy is here. He speaks of his surroundings, and you are to judge for yourselves whether his statement is the correct one, or whether the others, whose attention may and may not have been in other directions, and who at one moment saw it, and at another moment did not see it,—you are to reconcile these things, so as to determine just how that accident occurred." The case having been submitted fairly to the jury, we see no reason to disturb the verdict.

The other reason relied on for a new trial is that the damages awarded by the jury are excessive. The deceased was 57 years old at the time of the accident. He left, surviving him, his widow, and three children, of the ages, respectively, of 17, 14, and 11. He was a bricklayer by trade, and followed the

business of contracting and building in Philadelphia. He was sober, industrious, and prosperous in business, and had accumulated property valued at upward of \$2,000, the proceeds of his earnings. At the time of the accident he was in good health, and was never known to be sick. Evidence was put in by the defendant tending to show that prior to this accident the deceased was suffering from Bright's disease of the kidneys. Dr. Ullmer testified that, shortly after the accident happened, he removed urine from the bladder of the deceased, and made an analysis, which proved the presence of large amounts of albumen; that on a subsequent analysis he discovered tube casts and fatty globules, which was proof of Bright's disease. He also testified as a result of the analysis that the deceased was in the last stages of Bright's disease; that the condition of the deceased, in his opinion, was such that before the accident the deceased might have done some work, but could not have done a good day's work; and that, if he had not met with this or any other accident, he could not see how he could have lived longer than ten days or two weeks. Dr. Getchel and Dr. Godfret were called as expert witnesses. They made no analysis of the urine taken from the bladder of the deceased, and expressed their opinion upon the facts testified to by Dr. Ullmer. These witnesses both testified that, on the result of the analysis given by Dr. Ullmer, the deceased was suffering with Bright's disease in its last stage. Dr. Getchel testifies that he did not see how it was possible to fix the number of days that the deceased would have lived with the disease at that stage; that, with care with respect to his diet and mode of life, he did not think he could have lived more than a month. Dr. Godfrey says it would be difficult to say what the probable duration of his life might have been, but from his experience in this matter, when the urine is found loaded with albumen, and the tube casts are present, the duration of life is limited. A man afflicted as the deceased is described is likely to have his earning capacity cease suddenly from any slight cause, and almost at any time. This testimony was directed to that portion of the issue which consisted in ascertaining the value of the life of the deceased to his next of kin. That the injuries the deceased received in alighting from the car, however they arose, were the immediate cause of his death, is incontestable. On the other hand, Dr. McCandless was called by the plaintiff. This witness had attended the deceased professionally before this occurrence, and on the 3d of July made an examination of the deceased, with a view of his obtaining a policy of insurance on his life. The doctor testified that he made a general examination of the heart and lungs, tested the urine, and asked him about his general condition of health, and that the result of his examination was

that the deceased was then in general good health; that, in testing the urine, he applied the boiling test and the nitric acid test, and the result showed that his kidneys were in a normal condition. The doctor attended the deceased after he returned to Philadelphia, after the accident, and he testified that the cause of his death was peritonitis. On this head, the trial judge instructed the jury that, in determining the pecuniary injury resulting from the death of the deceased to his widow and next of kin, they were to take into consideration the condition of the man and his chances of life, "as you conclude from the evidence, his general health and his earning capacity, and that, in considering the length of life which the deceased would have enjoyed, the jury must take into consideration all the evidence concerning the existence of Bright's disease, and then determine the probable duration of life, and the probable earnings during that period." The case was fairly submitted to the jury, and we cannot say that the damages awarded are so excessive as to justify setting aside the verdict. The rule to show cause is discharged.

STARACE v. ROSSI.

(Supreme Court of Vermont. Washington.
Jan. Term, 1897.)

INTOXICATING LIQUORS — ACTIONS FOR PRICE —
JUDICIAL NOTICE—PLACE OF CONTRACT—
ORIGINAL PACKAGES.

1. Judicial notice will be taken, in an action for price of wine, that wine is intoxicating.
2. Where an order for wine was taken in Vermont by plaintiff's agent, and sent to and accepted by plaintiff in another state, where he lived, the contract was in part made in Vermont, so as to prevent recovery for the purchase price (V. S. § 4464), the sale being contrary to the laws of Vermont, though bought for personal use by the purchaser for culinary and drinking purposes.
3. Where contract for sale of intoxicating liquor is made partly in Vermont, and is contrary to statute, there can be no recovery of purchase price, though it comes into the state in original packages; Act Cong. Aug. 8, 1890, providing that liquor transported into a state in original packages or otherwise for consumption therein shall, on arrival, be subject to the laws of the state enacted in the exercise of its police power, as though the liquor had been produced in the state.

Exceptions from Washington county court; Taft, Judge.

Assumpsit by Starace against Rossi for price of wine. Heard on agreed statement of facts. Judgment for defendant. Plaintiff excepts. Affirmed.

Richard A. Hoar, for plaintiff. W. A. Lord, for defendant.

ROWELL, J. The wine for the price of which recovery is sought was Italian wine, not made in this state, and commonly known as "sour wine." The like cannot be bought at the town agencies in this state, but only of Italian dealers, and it is used exclusively by Italians for culinary and drinking pur-

poses; and the wine in question was bought by the defendant for these purposes, and not for sale, gift, nor distribution contrary to law, and it was not thus disposed of. The order for it was taken at Barre by a broker, who was plaintiff's agent in the transaction, and was sent to and accepted by the plaintiff in New York, where he lived. It is unlawful to sell spirituous or intoxicating liquor in this state except as provided by statute, although the purchaser intends to make, and does make, a lawful use of it. V. S. § 4460. This case does not come within the exception, but, on the contrary, plaintiff's agent incurred a penalty for his part in the transaction. V. S. § 4505. But it is said that it does not appear that the wine was spirituous or intoxicating, as it is not so stated in the agreed facts. There is a class of liquors that everybody knows to be intoxicating. Rum, gin, and brandy are of that class; and therefore an indictment for selling them contrary to law need not allege that they are intoxicating. *State v. Munger*, 15 Vt. 290. Nor need they be proved to be intoxicating. *Com. v. Peckham*, 2 Gray, 514; *Snider v. State*, 81 Ga. 753, 7 S. E. 631. In *State v. Barron*, 37 Vt. 57, it is said that wine belongs to that class, as it is universally acknowledged to be intoxicating, and held that it comes within the prohibition of the statute for the same reason, and that affirmative proof that it is intoxicating is not necessary. In *Wolf v. State*, 69 Ark. 297, 27 S. W. 77, the court took judicial notice that wine is intoxicating, as that is a matter of common knowledge. To the same effect, see 11 Am. & Eng. Enc. Law. 582; note to *Lanfair v. Mestier*, 89 Am. Dec. 694; *Jones v. Surprise*, 64 N. H. 243, 9 Atl. 384. The statute prohibits recovery for intoxicating liquor, or the value thereof, except such as is sold or purchased in accordance with its provisions. V. S. 4464. But it is claimed that the contract for the liquor was made in New York, and that, therefore, recovery therefor can be had. The answer to this is that the contract was, in part, at least, made in this state, and that prevents recovery as effectually as though it had been wholly made here. *Backman v. Wright*, 27 Vt. 187; *Backman v. Mussey*, 31 Vt. 547. But it is said, if this is so, still it must be taken from the agreed facts that the wine came here in original packages, and therefore could be lawfully sold here. This contention has no force in view of the act of congress of August 8, 1890, which provides that all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale, or storage, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors or liquids had been produced in such state or territory, and

shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. St. 51st Cong. 1889-90, c. 728. After the passage of this act, to remove all doubt about the validity of our statutes theretofore enacted relating to intoxicating liquors or liquids, as applied to such liquors or liquids when brought into the state in certain circumstances, and to the end that the due administration of justice should not be thereby hindered, delayed, nor thwarted, the legislature re-enacted all of those statutes that had not been repealed. Acts 1890, No. 40. But such re-enactment was not necessary. In *re Rahrer*, 140 U. S. 545, 562, 11 Sup. Ct. 865. Judgment affirmed.

BEVERWYCK BREWING CO. v. OLIVER.

(Supreme Court of Vermont. Chittenden.

Jan. Term, 1897.)

INTOXICATING LIQUORS—ACTION FOR PRICE—PLACE OF CONTRACT.

Where orders for beer, sent for defendant, from Vermont, to plaintiff, in another state, were pursuant to a prior conversation in Vermont between the parties, wherein defendant arranged to have whatever he might order shipped in a particular way, the contract is fairly made in Vermont, so that recovery of the purchase price cannot be had.

Exceptions from Chittenden county court; Rowell, Judge.

Assumpsit by the Beverwyck Brewing Company against John N. Oliver for price of beer. Judgment on a verdict directed for defendant, and plaintiff excepts. Affirmed.

The deposition of the plaintiff's manager was, in part, to the effect that he understood from the defendant that the lager was to be used by the latter only for legitimate purposes in the manufacture of a light hop beer, and that the arrangement was that it should be shipped under the direction "(L. W.)" to save the defendant "the necessity of going into court and satisfying it that such lager was intended for a legal use."

D. J. Foster, for plaintiff. R. E. Brown, State's Atty., for defendant.

MUNSON, J. The manager of the plaintiff corporation deposes that the lager beer for which recovery is sought was sold and delivered to the defendant in Albany, N. Y., on orders received there from time to time by letter or telegram. But it further appears from his deposition that before any order was sent he had a conversation with the defendant at Burlington, in this state, in regard to orders which might thereafter be given; and the deposition seems fairly to mean, and is construed by counsel to mean, that the orders in question were sent pursuant to what was then said. In that conversation, although no order was given or promised, the defendant arranged to have whatever he might order shipped in a particular manner. This distinguishes the case

from *Backman v. Mussey*, 31 Vt. 547. It is apparent that the orders afterwards sent out and accepted did not embrace the whole agreement; for, if they had been filled in disregard of the understanding had at Burlington, the defendant could have relied upon that as a part of the contract. See *Hobart v. Young*, 63 Vt. 363, 21 Atl. 612. It appears, then, from the plaintiff's own testimony, that the contract was fairly made in this state. It was, therefore, unenforceable, and the court properly directed a verdict for the defendant. V. S. §§ 4460, 4464; *Backman v. Wright*, 27 Vt. 187; *Starace v. Rossi*, 69 Vt. —, 37 Atl. 1109. Judgment affirmed.

TOWN OF BARRE v. SCHOOL DIST. NO. 5 IN BARRE.

(Supreme Court of Vermont. Washington.
Jan. Term, 1897.)

SCHOOL DISTRICT—DISSOLUTION.

A school district in the town of Barre, which was abolished by Acts 1892, Nos. 20, 21, and which, pursuant to a vote in 1893, divided its funds among taxpayers of the district, is liable in an action by the town of Barre for such funds, under Acts 1894, No. 165, § 73, providing for the recovery by such town of school funds of any old school district of the town.

Exceptions from Washington county court; Taft, Judge.

Action by the town of Barre against school district No. 5 in Barre. From a judgment for plaintiff, defendant brings exceptions. Affirmed.

The defendant was a school district until Acts 1892, Nos. 20, 21, took effect. March 28, 1893, it voted "to divide the surplus funds in the treasury among the taxpayers of the district, pro rata, on the grand list." The treasurer had on that date, after the settlement of the pecuniary affairs of the district, \$83.12, derived from taxes of the district and state, the public moneys, and the Huntington fund, and on the same day divided the money in accordance with the vote. The plaintiff is the town mentioned in section 73 of No. 165 of the Acts of 1894, and the defendant is entirely within the present limits of the plaintiff. Demand was seasonably made after April 1, 1893.

John W. Gordon, for plaintiff. Richard A. Hoar, for defendant.

START, J. The money the defendant voted to divide among its taxpayers was by law devoted to the purpose of maintaining public schools, and the defendant held it in trust for this single purpose. It had no right or power, either before or after the act of 1892, abolishing schools districts, took effect, to divert any of it from the purpose to which the law had devoted it; and its attempted division of its funds among the taxpayers was null, and is not a defense to this action. The cases of *Town of Barre v. School Dist. No. 13 in Barre*, 67 Vt. 108, 30 Atl. 807, and *Town School Dist. of Barre v. Cook*, 68 Vt. 88, 34 Atl. 33,

are sufficient authority for this holding. Section 73 of No. 165 of the Acts of 1894 provides that school funds remaining in the hands of any old school district in the town of Barre may be recovered in the name of the town. Therefore the action is properly brought by the town of Barre. Judgment affirmed.

GILLEY et al. v. CITY OF BARRE.

(Supreme Court of Vermont. Washington.
Jan. Term, 1897.)

HIGHWAYS IN CITY—PETITION—COUNTY COURT—AMENDMENT.

Under a statute providing that a petition may be addressed to the county court for the establishment of a highway wholly within a city after the city trustees have refused to lay out the same, it is error for the county court to permit an amendment seeking the establishment of only a part of the highway originally applied for.

Exceptions from Washington county court; Taft, Judge.

On a petition for highway by Gilley & Abbott against the city of Barre. From an order allowing a motion to amend, defendant brings an exception. Reversed.

The original petition had been presented to the street commissioners of the city of Barre, and the petition to the county court was brought upon their refusal to establish. The petition called for a highway in the city of Barre, across designated lots, to the division line between the city of Barre and town of Barre, "to connect with a highway petitioned for from said division line to near the residence of John Trow, in said town of Barre." The defendant moved to dismiss the petition on the ground that the highway called for extended into two towns. The petitioners thereupon moved to amend by striking out the words above quoted. The amendment was allowed, and the motion to dismiss denied.

W. A. Boyce, for plaintiffs. Richard A. Hoar, for defendant.

ROSS, O. J. The defendant's motion to dismiss is addressed to what appears on the face of the petition. The petition calls for laying out and establishing a highway wholly within the city of Barre, to connect with a highway in the town of Barre. It does not ask for the laying out and establishment of a highway in two towns. The court properly refused to grant the motion. The defendant also excepted to the holding of the court allowing the petitioners to amend their petition so as to include only a part of the highway for the laying out of which they petitioned the trustees of the city of Barre. The statute provides that applications for laying out highways wholly within the city must be made to the trustees of the city. It is only upon their neglect or refusal to lay out the highway petitioned for that the petitioners can apply to the county court for its establishment. The county court, in legal effect, is a court of ap-

peal, in regard to the identical matter presented to the trustees for action. *Town of Whittingham v. Bowen*, 22 Vt. 317; *French v. Holt*, 53 Vt. 384. The amendment allowed makes the petition call for laying out only of a part of the highway included in the original petition. It is quite a different matter from that presented to the trustees of the defendant. What their action might have been on the amended petition is wholly unknown. It might have been such that the petitioners would have had no occasion to come or to call the defendant before the county court. The statute gives the defendant the right to have its trustees act upon the matter included in the petition before it can be called upon to answer to the same in the county court. Hence this amendment was improperly allowed. This exception is sustained, and the judgment allowing the amendment is reversed, and cause remanded to be further proceeded with.

PARKER v. PARKER.

(Supreme Court of Vermont. Washington. Jan. Term, 1897.)

ASSUMPSIT—AGAINST TRUSTEE.

One to whom money is given to keep at interest, and pay the fund to another on her reaching a certain age, may be sued therefor at law on her reaching that age, the trust being then at an end.

Exceptions from Washington county court; Ross, Chief Judge.

Assumpsit in the common counts by Grace L. Parker against Taylor O. Parker. Plea, the general issue. Verdict was directed for defendant, and plaintiff excepts. Reversed.

J. P. Lamson, for plaintiff. John W. Gordon, for defendant.

TAFT, J. The only question in this case is whether the plaintiff can maintain an action at law to recover the claim in controversy, or whether her only remedy is in equity. The defendant received \$1,100 in certain mortgage notes that were subsequently paid him. He was to take care of the fund, keep it on interest, and when the plaintiff and her sister, respectively, became of age, he was to pay \$500, with its accumulations, to the plaintiff, and \$600, with its accumulations, to the sister. The defendant insists that this transaction created such a trust that it can be settled only in a court of equity; relying upon the case of *Congdon v. Cahoon*, 48 Vt. 49. That was the case of a trust created by a deed of real estate and the gift of certain mortgage notes. The trustees were to take charge of the property, collect the income thereof, and expend it, and, to some extent, expend the principal, in support of the wife of the grantor in the deed, and four of his children. The beneficiaries were not entitled to equal shares of the income, but it was to be used, in the discretion of the trustees, in the support of them all. The plaintiff was one of the four chil-

dren, and upon arriving at full age, when she was entitled to a certain share of the property, brought an action at law to recover it. The trust was still an active one. The trustees were to continue as such until the youngest child arrived at its majority, and there had been no settlement of the trustees' accounts. The plaintiff's share of the fund could not be determined except by a settlement of the trustees' accounts. It was necessary that all the parties in interest should be parties to any settlement made, and it was very properly ruled that the plaintiff could not recover at law any share that might, upon the settlement of the account, belong to her. The legal title of the property was in the trustees, and the only remedy any of the parties in interest had was in a court of equity that had complete and exclusive jurisdiction of the subject-matter. The case before us is different in essential particulars from that case. The defendant received the money; was under a duty to keep it bearing interest, and to pay the fund to the plaintiff upon her arrival at the age of majority. He was not authorized to expend any money whatever for the support of the plaintiff, and could have no claims in respect to it, unless it was for his services in the care of it. The trust ended when the plaintiff became of age. She was then entitled to the money, and the legal title of the property became vested in her at that time. This being so, she has a right to maintain an action at law to recover it. The reason why a cestui que trust cannot maintain an action at law against the trustee is because the legal title of the property is in the latter, and not in the beneficiary. The defendant should account to the plaintiff. There can be no difficulty in determining the amount of the trustee's expenses for administering the trust, and any valid claim of that nature can be deduced from the amount of the funds in his hands before any judgment is rendered against him. The plaintiff is entitled to the \$500 and the accumulations, less any valid expenses of the defendant in respect to the fund, and any payments heretofore made. This case is ruled by that of *Lynde v. Davenport*, 57 Vt. 597; and see the cases therein cited. It has been held that in case of an active trust the trustee is liable to an action at law in behalf of the beneficiary if any portion of the trust funds is separated from the main fund, and the trustee promises to pay the beneficiary the amount. Under this principle, there was testimony which required a submission of the case to the jury, as there was evidence tending to show that the defendant, when the money was demanded of him, replied that, if the plaintiff would go with him, he would pay her a part of it, and secure her for the balance. She did go with him, as he proposed, stayed over night with him, but, when asked for it in the morning, he said he was not ready to pay. This, if true, would entitle her to a recovery; but it is unnecessary to place the case upon this

ground, as we think the equitable estate had ended, and the action at law was maintainable. Judgment reversed and cause remanded.

DYER v. DEAN et al.

(Supreme Court of Vermont. Bennington.
Jan. Term, 1897.)

DEMURRER—WAIVER—REPLICATION—MERGER—MORTGAGES—PRIORITY—GIFT.

1. Questions arising under demurrer to petition are waived, the demurrer not being brought forward for hearing, and the cause being heard on petition and answer.

2. Facts in answer, if well pleaded, must be taken as true, there being no denial by replication, though the answer is not responsive, and is made by way of belief.

3. Assignment of a mortgage to the wife of the mortgagor, who has an inchoate right of homestead and dower in the mortgaged premises, does not work a merger, and consequent extinguishment of the mortgage.

4. A first mortgage, being valid, may be enforced by a donee thereof as against second mortgages.

Appeal from chancery court, Bennington county; Start, Chancellor.

Petition by John K. Dyer against W. R. Dean and others to foreclose a mortgage. Decree for petitioner. Defendant Graves appeals. Affirmed.

The petition alleged that the defendant W. R. Dean and his then wife, Minerva, executed the mortgage to one Houghton, and the same was duly recorded; that upon the death of Houghton his heirs assigned the debt and mortgage to Mary F. Dean, who was the wife of W. R. Dean, the mortgagor; that afterwards Mary F. Dean assigned to the petitioner; that W. R. Dean had executed a second mortgage to Colburn and Ames as trustees; that both trustees had deceased, and that the defendant Graves had been appointed trustee in place of Ames, and administrator upon the estate of Colburn. The case was heard upon the petition and the answer of Graves. The material allegations of the answer, besides those which appear in the opinion, were the following: That W. R. Dean had executed the second mortgage to Colburn and Ames, trustees, to secure the payment of the amount due from him upon settlement of his account as trustee under the same trust, representing that there was no prior incumbrance upon the mortgaged premises; that Colburn and Ames, in reliance upon the representation, accepted the mortgage, and neglected to take the available means to collect the debt until all other means had been lost; that Mary F. Dean and the petitioner knew all the facts when they received their respective assignments. The defendant insisted that the mortgage sought to be foreclosed should be postponed to his.

W. B. Sheldon, for appellant. F. C. Archibald, for appellee.

TAFT, J. The defendant Graves answered, and incorporated in his answer a demurrer, as-

signing as special causes want of parties and want of a proper allegation of an assignment of the mortgage to the petitioner. The first three points in the brief of the defendant Graves were upon questions raised by the demurrer. The demurrer was not brought forward for hearing, and therefore the questions arising under it were waived, and will not be considered by this court. *Wade v. Pulsifer*, 54 Vt. 45; *McLane v. Johnson*, 59 Vt. 237, 9 Atl. 837; *Holt v. Daniels*, 61 Vt. 89, 17 Atl. 786. The cause was heard upon petition and answer. There being no denial of the latter by way of replication, the facts therein set forth, if well pleaded, must be taken as true (*Doolittle v. Gookin*, 10 Vt. 265); and this is the rule although the answers are not responsive to the petition (*Slason v. Wright*, 14 Vt. 208); and although made by way of belief (*Gates v. Adams*, 24 Vt. 70); and, if the facts so stated constitute a full defense, the bill must be dismissed (*Slason v. Wright*, 14 Vt. 208). The question, then, arises whether the facts set forth in the answer constitute a full defense to the petitioner's claim. The defendant Graves, in his answer, does not aver that the note held by the petitioner has been paid. He says that "whether said note is now justly due and owing, and has not been paid according to the effect of the same, this defendant has not sufficient knowledge or information to form a belief so as to admit or deny the averment of the petition in this respect"; but he avers that the effect of the transfer of the note and mortgage to Mary F. Dean, as stated in the petition, was a merger of the claim, and in law and in equity a payment and extinguishment of the debt by a merger of the title under said mortgage in the superior title of said Mary F. and her husband, W. R. He does not deny the transfer and assignment of the note and mortgage, but rather the legal effect of it. That is, he claims, as matter of law, that upon the transfer of the debt and mortgage to Mary F. the same was extinguished, she then being the wife of the mortgagor, and having an inchoate right of homestead and dower in the premises. But this is not true as matter of law. A married woman may purchase or take the transfer of a debt secured by mortgage upon the real estate of her husband, and in which she may have inchoate rights, and hold the same against her husband, without a merger of the debt in any superior title of herself and husband. The defendant further answers that there was no valid and bona fide assignment, sale, and transfer of the note and mortgage by Mary F. Dean to her son John K. Dyer. He does not deny the assignment in form, but states that it was made without any good, valuable, or sufficient consideration, and therefore was void as to the defendant, and that such pretended assignment, etc., were made for the purpose of reviving said mortgage debt, which had been paid and satisfied. It is the legal effect of the assignment which he challenges. This claim is not tenable. If Mary F. Dean held the mortgage and the note secured there-

by, she had a right to transfer the same to the petitioner, and he could hold the same, even if it was a gift from his mother to him; and any person having a subsequent interest in the premises could not defend by showing that the note and mortgage came to the petitioner by way of gift. There is nothing in the answer which constitutes a defense to the claim of the petitioner. The subsequent allegations with reference to the validity of the defendants' claim are not in question, and constitute no defense to the rights of the petitioner. They simply give the defendants a right to redeem. The decree of the chancellor was correct, and the same is affirmed, and cause remanded.

WHITE'S ESTATE v. WHITE'S ESTATE.

(Supreme Court of Vermont. Chittenden.
Jan. Term, 1897.)

CONTRACT—CONTINGENT LIABILITY—APPEAL FROM
PROBATE COURT—AMENDMENT OF PLEADING.

1. A sister, when ill, surrendered notes to her brother with the understanding that he should be released from paying anything upon them if she died, but, if she recovered, he was to pay the interest on the sums named in the notes, if she needed it. *Held*, that her estate might recover of his estate for interest on said sums, which she needed while living, after her recovery, and which he had refused to pay.

2. On appeal from the probate court to the county court, and where the cause has been tried by a referee, judgment must be rendered according to the facts reported, though the plaintiff recovered interest on the common money counts in assumpsit, as the county court could have allowed such amendments as the nature of the demand required.

Exceptions from Chittenden county court; Tyler, Judge.

Action by the estate of Adeline White against the estate of Hiram S. White on an appeal from probate. Declaration, the common counts in assumpsit. Pleas, the general issue with notice, and statute of limitations. Heard on the report of a referee. Judgment for the claimant for the sums named in the report, with interest. The defendant excepted. Affirmed.

Adeline White died in October, 1890, and Hiram White in June, 1893. After the death of Adeline, and before the death of Hiram, her estate was settled by her administrator, who investigated this claim against Hiram, and declined to prosecute it unless indemnified by the heirs. In the settlement and distribution of her estate, Hiram received his portion as an heir, and no appeal was taken. It was understood by all that Hiram claimed the notes as a gift. After the decease of Hiram and the appointment of commissioners upon his estate, this claim was presented in the name and with the authority of Adeline White's administrator, but in the interest, first, of one of the heirs, and afterwards of the assignees of one of the heirs, of Adeline White, who indemnified the administrator.

Roberts & Roberts, for plaintiff. C. M. Wildes and E. R. Hard, for defendant.

START, J. It appears from the referee's report that Hiram S. White and Adeline White were brother and sister. In March, 1886, Adeline was ill, and her condition such that she deemed it prudent to make her will, and to dispose of two notes she held against Hiram. She made her will, and delivered the notes to Hiram, to dispose of as he saw fit; and he destroyed them. Adeline intended the notes should not be a part of her estate to be distributed under her will, and that Hiram should be released from the payment of any part of the principal, and from paying the interest thereon in the event of her death; but there was an understanding between them that, if she recovered, and needed the income which the notes would have produced had they not been surrendered, Hiram should see that she had it during the remainder of her life. She recovered, and lived until October, 1890. During this time, she needed the income for her support and maintenance, and from time to time applied to Hiram for money, and he sent or handed her different sums at different times, as she needed, to an amount equal to what the interest on the notes would have been to the summer of 1889, when he neglected and refused to furnish her any further sums, although payment of such interest was demanded by her, and although he knew her needs were practically the same they had theretofore been during the time covered by his payments. The referee also finds that during the last six years of her life she had on deposit in a bank \$1,500, but, notwithstanding this finding, he reports that she needed the income which the notes would have furnished had they not been surrendered. The findings that Adeline intended that Hiram should be released from the payment of interest in the event of her death, and that there was an understanding between them that, if she recovered, and needed the income which the notes would have given her had they not been surrendered, Hiram should see that she had it during the remainder of her life, must be construed together; and, when so considered, it is clear that the release in the event of her death referred to death from her then illness, and that it was not intended that Hiram should be released from the payment of the equivalent of interest, if she needed it, unless she died from her then illness. Therefore a condition was attached to the surrender of the notes, that, if she recovered, and needed the income which the notes would have yielded had they not been surrendered, Hiram should pay it; and the notes were surrendered with this understanding. She having recovered, and needed the income, the condition attached to the surrender of the notes was operative and binding upon Hiram; and the income the notes would have produced had they not been surrendered became due and payable absolutely, and without any contingency. On the neg-

lect or refusal of Hiram to pay the same on demand, a cause of action accrued against him; and this cause of action was not extinguished by her death, and nothing has been done or omitted by her heirs or the legal representatives of her estate that has the effect to work an estoppel or bar the action. Whether Adeline was in need of the income the notes would have given her if they had not been surrendered was a question of fact for the referee, and the defendant is concluded by the finding. The evidence is not referred to, and there is nothing in the report from which we can say that the finding was upon insufficient evidence. She may have needed more money than she expended, and we cannot say that she did not need the money deposited in the bank and the income the notes would have yielded. The defendant insists that the interest cannot be recovered under the common money counts in assumpsit. The cause having been referred and tried by a referee, judgment must be rendered according to the facts reported, if the county court had power to allow an amendment to the declaration, that would include the item of interest, if such amendment was necessary. *Dennis v. Stoughton*, 55 Vt. 371; *Granite Co. v. Farrar*, 53 Vt. 585. As the cause came to the county court by appeal from the probate court, the county court could allow such amendments to the declaration as the nature of the demand required. *Cutting v. Ellis' Estate*, 67 Vt. 70, 30 Atl. 688. Judgment affirmed, and cause certified to the probate court.

KENT v. MILES.

(Supreme Court of Vermont. Washington. Jan. Term, 1897.)

ARREST — WARRANT — COMMITMENT FOR SAFE-KEEPING.

1. One against whom an indictment has been found may be legally arrested on a warrant issued in term time, but not delivered until vacation, or on a warrant issued in vacation.

2. An officer directed by a warrant to arrest a person, and have him forthwith to appear before the court, may, the court not being in session when he arrives, commit him to jail for safe-keeping till court again convenes.

Exceptions from Washington county court; Taft, Judge.

Action by James M. Kent against L. D. Miles. Plea, the general issue and special plea of justification. Replication, *de injuria*. Verdict directed for defendant. Plaintiff excepts. Affirmed.

T. J. Deavitt, W. W. Lapoint, and John W. Gordon, for plaintiff. W. W. Miles, for defendant.

TYLER, J. Action, trespass for false imprisonment. It appears that the plaintiff was indicted for perjury at the September term, 1887, of Orleans county court; that a bill of indictment was returned into court, and filed on the 14th of the same September; that a

warrant for the plaintiff's arrest was then issued, but was not delivered to the defendant until October 5th, several days after the close of that term. The defendant, as sheriff of the county, arrested the plaintiff at Montpelier, in the county of Washington, on the day he received the warrant, and on the following day took him, and committed him to the jail in Orleans county. On the 7th of October, the defendant released him from custody, but rearrested him on the same day, upon another warrant issued on that day by the clerk of Orleans county court. It is for these alleged arrests and the confinement that the plaintiff seeks to recover damages. It was held in *Durant's Case*, 60 Vt. 176, 12 Atl. 650, that the clerk might issue a warrant in vacation for the arrest of a person against whom an indictment had been found. Therefore there can be no question as to his right to deliver to an officer in vacation a warrant issued in term time. The direction in the warrant was to apprehend the body of the plaintiff, and have him forthwith to appear before the county court in and for said county of Orleans, at Newport, to answer, etc. It was held in *Kent v. Miles*, 68 Vt. 48, 33 Atl. 768, that, the court not being in session when the defendant arrived at Newport with the plaintiff, it was the defendant's duty, under the warrant, to keep and detain him until the court again convened, and that he could lawfully commit him to jail for safe-keeping. That decision is conclusive of the legality of the arrest and commitment on the first warrant. In *re Miles*, 52 Vt. 600. The case is not controlled by V. S. § 1701, which relates to service of legal process where the officer is directed by the process to commit to jail. *Durant's Case* is full authority as to the legality of the arrest and commitment upon the second warrant. Judgment affirmed.

MEMORANDUM DECISIONS.

BALDWIN MEMORIAL METHODIST EPISCOPAL CHURCH v. RICE et al.

(Court of Appeals of Maryland. June 23, 1897.)

SUBROGATION—PAYMENT—EVIDENCE.

Appeal from circuit court, Anne Arundel county. Petition by the Baldwin Memorial Methodist Episcopal Church against Emma F. Rice and others for the sale of land of the estate of William Rice, deceased, for the payment of petitioner's claim. From a judgment for defendants, petitioner appeals. Affirmed.

As shown by her answer to the petition, the contention of Mrs. Rice, referred to in the last lines of the opinion, is as follows, viz.: "That after the property sold under a decree of this court had been sold to the purchaser, Moss, Baldwin informed the respondent Emma that Moss could not pay down cash for the land, but that the money had to be raised to pay the creditors, and he would raise the money to pay the creditors until

Moss could pay the purchase money, which would refund to him the amount of money which he would be obliged to raise, and that the defendant Emma F. Rice would have to pay him interest on the money which he borrowed until what time Moss should pay the purchase money to him. The said Emma agreed to this without knowing from whom Mr. Baldwin intended to borrow the money, simply because she placed implicit confidence in Mr. Baldwin, and she continued to pay such sums of money, from time to time, for interest, as Mr. Baldwin demanded of her, without knowing anything whatever of the true state of the case until she became better informed, when she discovered that she had been misinformed and misled about the whole transaction; that there was no mortgage upon the property; that the purchaser, Moss, had paid the whole purchase money, and that there was more than enough money in Mr. Baldwin's hands to satisfy, and more than satisfy, all the claims against the estate of her husband, and when she was thus informed she refused to pay any further interest on the debt; that in his lifetime she made demand upon Mr. Baldwin for a statement of accounts, after she had become informed of the true state of the case, and that from time to time he promised to give her a statement, but died without having done so. These respondents therefore deny any indebtedness whatever on the part of the estate of the said William Rice to any person whatever, except as the mortgage of Nicholas W. Brown to Robinson Bros., by assignment, is a lien upon the interests of the several persons who executed the said mortgage."

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, ROBERTS, and BOYD, JJ.

Edward C. Gantt, for appellant. James M. Munroe, for appellees.

BRISCOE, J. On the 15th day of April, 1873, a creditors' bill was filed in the circuit court for Anne Arundel county for a sale of the real estate of William Rice, deceased, for the purpose of paying his debts, alleging an insufficiency of the personal estate in the hands of the administrator for that purpose. On the 7th of January following, a decree in the usual form was passed, and Andrew C. Trippe was appointed trustee to make the sale. A portion of the real estate was sold, to wit, 60 acres, more or less, for the sum of \$1,225.62. This sale was duly reported, and ratified by the court on the 7th of July, 1874, and shortly afterwards the case was referred to the auditor to state an account. Nothing further appears to have been done towards the settlement of this estate until the 5th of March, 1895, when a statement of claims and an auditor's account was filed, and from which it appears that the sum of \$969.51 still remained due and unpaid to the creditors of Rice. On the 7th of March, 1895, the appellant the Baldwin Memorial Methodist Episcopal Church, of Anne Arundel county, filed a petition in the case, and, after reciting the original proceedings, alleged, in substance, that all of the claims against the estate have been fully paid and were paid in full by one Reginald W. Baldwin, in his lifetime, who acted as the attorney of Trippe, the trustee; that Baldwin borrowed from the petitioner the sum of \$1,000 for this purpose, and applied it to the payment and satisfaction of these claims. It further states that the money thus borrowed was to be secured by a lien on the real estate remaining unsold by the trustee; that the widow of Rice and her children were informed of this indebtedness, and to the 1st of January, 1893, paid the annual interest of \$60 to the petitioner. It further alleges that, inasmuch as the deficit was paid by the money loaned by the petitioner, and applied for that purpose, it is entitled to be subrogated to the rights of the claimants, as against the real estate unsold by the trustee. The prayer of the petition is for a sale of the real estate for the payment of the petitioner's claim, and for general relief. This petition was answered by Mr.

Trippe, the trustee, who disclaimed any knowledge of the loan, and by the widow and children of William Rice, deceased. Testimony was taken, and after a hearing of the case the petition was dismissed. It is from the order dismissing the petition that this appeal has been taken. It thus appears that the only question presented on this appeal is whether the appellant has made such a case as to entitle it to relief by the remedy of subrogation, and this depends upon whether its money paid the indebtedness which is alleged to have remained unpaid after the application of the proceeds of the sale of the real estate in the hands of the trustee. We have carefully examined the testimony as disclosed by the record, and we fully concur in the views expressed by the learned judge in the court below: "That it is not possible, from the evidence furnished, to establish clearly what was the exact relation between the indebtedness to be paid at the time of the death of the intestate and the funds that became available in the hands of the administrator and trustee for the payment of the same. This seems to be a matter of little better than pure speculation. Hence it is impracticable to ascertain definitely, and with any reasonable certainty, what balance of indebtedness there was to pay after the exhaustion of the proceeds of the land sold in this case, which obviously would be the measure of the petitioner's rights, if any, against the land remaining unsold. But let us suppose this balance to be ascertained and settled. Then, to justify the relief asked, it must conclusively appear this balance was paid by the money of the petitioner. To show this would necessarily be the first step in the petitioner's case, and upon this point the proof is utterly vague and indefinite. The last payment made by Baldwin on account of the estate here in question was made, according to the evidence, on the 6th of April, 1881. The amount then paid is not the exact amount claimed to have been loaned to him by the petitioner for the purposes of the estate here involved, and there is nothing about the payment, as to time, amount, or circumstance, that affords any intrinsic evidence of its having been made with the proceeds of the alleged loan. The loan is claimed to have been made out of a donation of \$10,000 received by the petitioner, which Baldwin was authorized to invest, and it was certainly in the power of the petitioner, or ought to have been, to have fixed the precise time at which the donation was received, so as to show that the loan could have been made out of the donation in time to have enabled Baldwin to have made payment of the indebtedness in question with the proceeds thereof. Now, upon this point of the time of receiving the donation, two witnesses have testified on the part of the petitioner,—one indefinitely that the donation was received by the petitioner in 1881 or 1882, and the other definitely as to the year, putting it in 1881, but indefinitely as to the precise or even approximate time in 1881. The petitioner's proof, therefore, fails to show even that the donation in question had been received on the 6th of April, 1881, at the time the last payment just referred to was made by Baldwin. On the other hand, Mrs. Rice's testimony is that she paid interest on the \$1,000 for 16 years, which would take the advance of that amount, if made by Baldwin, back of the time at which the donation was received by the petitioner; and this testimony, if true,—and it is not contradicted,—gives color to the claim of Mrs. Rice that the advance made by Baldwin was to reimburse him out of the purchase money for the land reported as sold in this case." The order of the court dismissing the petition will be affirmed, with costs. Order affirmed, with costs.

McNEAL v. STATE. (Court of Appeals of Maryland. April 1, 1897.) Appeal from criminal court of Baltimore city. Edward McNeal was convicted of a violation of the lottery law (Laws 1894, c. 310, § 178), and appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, RUSSUM, and BOYD, JJ. T. C. Ruddell and B. Chambers Wickes, for appellant. Harry M. Clabaugh, Atty. Gen., for the State.

BOYD, J. This judgment will be affirmed for the reasons given in the case of *Ford v. State* (decided at this term) 37 Atl. 172, as the same questions are presented in the two cases. Judgment affirmed, with costs.

STATE v. SMITH. (Court of Appeals of Maryland. June 17, 1896.) Appeal from circuit court, Frederick county. Walter Smith was indicted for bastardy. From a judgment sustaining a demurrer, the state appeals. Reversed. Glenn H. Worthington, for appellant. Harry M. Clabaugh, Atty. Gen., and William H. Hinks, State's Atty., for Frederick county.

BOYD, J. In this case the court below sustained the demurrer to the indictment, and entered judgment for the traverser. The appellee did not file a brief, but the state did. As we understand from it and from the petition for a writ of error that the demurrer was sustained on the ground that the act of 1894 (chapter 108) was unconstitutional as to offenses committed prior to its passage, it will only be necessary for us to refer to the opinion filed in the case of *Lynn v. State* (decided at this term) 35 Atl. 21, in which we held the contrary. Judgment must therefore be reversed, and the case remanded, to the end that the traverser may be tried. Judgment reversed, and a new trial ordered.

CURRIE v. LEHIGH VALLEY TERMINAL RY. CO. (Court of Errors and Appeals of New Jersey. June Term, 1896.) Appeal from chancery court. William D. Edwards, for appellant. Charles L. Corbin, for respondent.

PER CURIAM. Decree unanimously affirmed, for the reasons given in the court of chancery. See 54 N. J. Eq. 84 33 Atl. 824.

HERTZ et al. v. CARR et al. (Court of Errors and Appeals of New Jersey. June Term, 1896.) Appeal from chancery court. Chandler W. Riker, for appellants. James E. Howell, for respondents.

PER CURIAM. Decree unanimously affirmed, for the reasons given in the court of chancery. See 54 N. J. Eq. 127, 33 Atl. 194.

INHABITANTS OF TOWNSHIP OF BLOOMFIELD v. MAYOR, ETC., OF BOROUGH OF GLEN RIDGE. (Court of Errors and Appeals of New Jersey. March 4, 1897.) Appeal from court of chancery. Bill by the inhabitants of the township of Bloomfield against the mayor and council of the borough of Glen Ridge. From a decree sustaining a demurrer to the bill (33 Atl. 928), complainants appeal. Affirmed. Collie & Swayze, for appellant. Cault & Howell, for respondent.

PER CURIAM. For the reasons given in No. 27, between the same parties, argued at November term, 1896 (37 Atl. 63), the decree in this case is affirmed.

MILLER et al. v. BANNISTER. (Court of Errors and Appeals of New Jersey. June Term, 1896.) Appeal from chancery court. Frederic W. Stevens, for appellants. Robert H. McCarter, for respondent.

PER CURIAM. Decree unanimously affirmed, for the reasons given in the court of chancery. See 54 N. J. Eq. 121, 32 Atl. 1066.

POTTER et al. v. ASHHURST et al. (Court of Errors and Appeals of New Jersey. June Term, 1896.) Appeal from chancery court. S.

Meredith Dickinson and A. T. Freedley, for appellants. William M. Lanning, for respondent. Elizabeth Ashhurst. Charles E. Gummere and Francis Rawle, for respondents William H. Potter and others.

PER CURIAM. Decree unanimously affirmed, for the reasons given in the court of chancery. See 53 N. J. Eq. 608, 32 Atl. 698.

PRICE et al. v. FORREST. (Court of Errors and Appeals of New Jersey. April 22, 1897.) Appeal from court of chancery. Suit by Anna M. Forrest, administratrix of Samuel Forrest, deceased, and another, against Rodman M. Price and others. Decree for complainants. Defendants appeal. Affirmed. McGee, Bedle & Bedle, for appellants. Cortlandt & Wayne Parker, for respondents.

LIPPINCOTT, J. This appeal from the final decree of the court of chancery in this cause brings up for decision the rights of the parties under the act of congress set out in the pleadings, and under section 3477 of the Revised Statutes of the United States. These questions having been passed upon in the opinion of this court on the appeal from the decree of the chancellor overruling the pleas of the defendants in this cause (35 Atl. 1075), the decree now appealed from, for the reasons there given, must be affirmed, with costs.

SWAIN v. EDMUNDS. (Court of Errors and Appeals of New Jersey. March Term, 1896.) Appeal from chancery court. Thomas E. French and William H. Corbin, for appellant. Howard Carrow, for respondent.

PER CURIAM. Decree unanimously affirmed, for the reasons given by the ordinary. See 53 N. J. Eq. 142, 32 Atl. 369.

GUIMARAES et al. v. BERKING et al. (Court of Chancery of New Jersey. June 15, 1897.) Bill by Pauline Guimaraes against Max H. Berking and others for the appointment of Augustus F. Brombacher and Peter M. Tuttle as trustees under the last will and testament of Charles H. Berking, deceased. Order granted. Joseph P. Osborne, for complainant. W. L. Gellert, for defendants.

REED, V. C. I have come to the conclusion to appoint Mr. Augustus F. Brombacher as trustee under the last will and testament of Charles H. Berking, deceased, in the place of Pauline O. Berking, deceased. Mr. Brombacher seems to be a man of business capacity, experience, and integrity. The only objection to his appointment is his residence outside of the state, but that objection is overcome by the fact that he was named in the will of Charles H. Berking, to whom he was related by affinity, and with whom he had been closely connected in business transactions, as his adviser. He did not take upon himself the duties of executor and trustee under the will for reasons which are explained in his testimony, and which were deemed at the time to be advantageous to the estate. Those reasons no longer exist, and I have concluded to appoint him as one of the trustees. Because he lives beyond the state, I shall connect with him in the office, in response to the sentiment of the majority of the beneficiaries, Mr. Porter M. Tuttle. The estate is estimated at about \$175,000. They must execute a bond in twice that amount, conditioned for the faithful performance of their duties as such trustees.

CHARLES E. HIRES CO. v. HIRES et al. (Supreme Court of Pennsylvania. July 15, 1897.) Appeal from court of common pleas, Philadelphia county. Suit by Charles E. Hires Company against George A. Hires and others individually and as partners trading as George A. Hires Company, for injunction. From an

interlocutory decree, defendants appeal. Appeal dismissed. William W. Porter, for appellants. J. Willis Martin and Francis Rawle, for appellee.

PER CURIAM. This appeal is from the interlocutory decree of April 27, 1897, continuing the preliminary injunction theretofore granted against George A. Hires, one of the defendants, and awarding a like injunction against the other defendants, and each of them, etc., until the further order of court. A careful consideration of the record in connection with the specifications, etc., has not convinced us that there is any error in the decree of which the defendants, or either of them, have any just reason to complain. We are all of opinion that the cause should be permitted to proceed in the court below to final hearing and decree; and, in view of that, discussion of the questions now presented is neither necessary nor desirable. The appeal is dismissed, at appellants' costs, but without prejudice, etc.

In re CONTESTED ELECTION OF CARDIN. (Supreme Court of Pennsylvania. April 12, 1897.) Appeal from court of quarter sessions, Schuylkill county; Cyrus L. Pershing, Judge. Contest by certain citizens of the borough of Shenandoah of the election of John J. Cardin as a justice of the peace of said borough. From a decree holding the election void, contestee appeals. Affirmed. John F. Whalen and Wm. A. Marr, for appellant. A. W. Schalck, for appellees.

STERRETT, C. J. This case involves the same question that has been considered and decided in opinion just filed at No. 544, January term, 1896 (In re Lawlor, 37 Atl. 92). For reasons given in that case this decree is affirmed, with costs to be paid by the appellant.

In re COYLE. (Supreme Court of Pennsylvania. April 12, 1897.) Appeal from court of quarter sessions, Schuylkill county. Contest by certain citizens of the election of Philip E. Coyle as justice of the peace in the borough of Mahoney City. From a decree that his election was void, and that he was not entitled to hold the office, said Coyle appeals. Affirmed. John F. Whalen and Wm. A. Marr, for appellant. Geo. J. Wadlinger, for appellee.

STERRETT, C. J. This case was argued with No. 544 of January term, 1896 (In re Lawlor, 37 Atl. 92), and involves substantially the same question. For reasons given in opinion just filed in the case referred to, the decree in this case is affirmed, with costs to be paid by the appellant.

DELAWARE & H. CANAL CO. v. SCRANTON TRACTION CO. (Supreme Court of Pennsylvania.)

PER CURIAM. And now, June 1, 1897, it is ordered that the decree of the supreme court entered in within case on the 14th day of April, 1897 (37 Atl. 122), be modified as follows: The execution of the injunction is suspended so far as to permit the Scranton & Pittston Traction Company to run its cars over Wyoming crossing for housing at its car barns, also cars disabled or out of repair to and from the repair shops, also its wreck cars, until 1st day of July, 1897.

HARTMAN v. FUSSELL.

(Supreme Court of Pennsylvania. April 12, 1897.)

APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

Appeal from court of common pleas, Chester county.

Action by Samuel S. Hartman against Morris Fussell. Judgment for plaintiff. Defendant appeals, assigning as error parts of the instructions. Affirmed.

H. H. Gilyson, for appellant. Alfred P. Reid, for appellee.

PER CURIAM. This suit is in the nature of an action for deceit. It is grounded on alleged false representations in regard to the property known as the "Globe Paint Works," the undivided half interest in which was sold by the defendant to the plaintiff, whereby the latter was deceived, and fraudulently induced to purchase and pay for the same. The alleged misrepresentations are twofold: (1) That the mill would grind from five to six tons of marble or material per day, when in fact it would grind only from one and a half to two tons in that time. (2) That the defendant and his associate, Patterson, owned all the machinery in the mill, when in fact they owned none of said machinery except the pulverizer and its attachments. The burden of proof was on the plaintiff. His right to recover depended on questions of fact which it was the special province of the jury to determine. Those questions were fairly submitted with instructions which, considered as a whole, appear to be adequate, and free from substantial error. No question is raised either as to the introduction of incompetent or irrelevant testimony or the exclusion of evidence that should have been received; nor is there any doubt that the testimony properly before the jury was quite sufficient, under the charge of the court, to justify them in finding as they did. The verdict necessarily implies a finding of the facts substantially as claimed by the plaintiff. There is nothing in either of the five specifications of error that requires discussion. Judgment affirmed.

HEISEY v. RAPHO TP. (Supreme Court of Pennsylvania. May 31, 1897.) Appeal from court of common pleas, Lancaster county. Action by Elizabeth Heisey for herself and the minor children of John H. Heisey, her deceased husband, against the township of Rapho, to recover for the death of decedent through the alleged negligence of defendant. From a judgment for plaintiff, defendant appeals. Affirmed. A. C. Reinhold and Wm. D. Weaver, for appellant. Brown & Hensel, for appellee.

PER CURIAM. A careful perusal and consideration of this record has not disclosed any error that would justify us in sustaining any of the 20 specifications; nor do we think there is anything in either of them that requires discussion. The case depended very largely on disputed questions of fact, which the jury, to whom they were adequately and correctly submitted, have by their verdict resolved thereon in favor of the plaintiff. Presumably they were right. We cannot say they were wrong. Discussion of the questions intended to be raised by the assignments of error would consume time to no useful purpose. Judgment affirmed.

HUMMEL et al. v. KISTNER et al. (Supreme Court of Pennsylvania. July 15, 1897.) Appeal from court of common pleas, Snyder county. Bill by Ed. M. Hummel and others against Anna C. Kistner and another. From a decree for defendants, complainants appeal. Affirmed. A. W. Potter, Chas. P. Ulrich, and J. Simpson Kline, for appellants.

PER CURIAM. For the reasons stated in the opinion of this court in the case No. 190, January term, 1897 (37 Atl. 815), the decree in this case is affirmed.

In re JONES. (Supreme Court of Pennsylvania. April 12, 1897.) Appeal from court of quarter sessions, Schuylkill county; Cyrus L. Pershing, Judge. Contest by certain citizens of the borough of Mahoney City of the election of Jonathan L. Jones as justice of the peace of said borough. From a decree holding the election void, contestee appeals. Affirmed. John F.

Whalen and Wm. A. Marr, for appellant. Geo. J. Wadlinger, for appellers.

STERRETT, C. J. This case was argued with No. 544 of January term, 1896 (In re Lawlor, 37 Atl. 92), and involves substantially the same question. For reasons given in opinion just filed in that case, this decree is affirmed, with costs to be paid by the appellant.

McGOWAN v. LINCOLN PARK & STEAM-BOAT CONSOLIDATED CO.

(Supreme Court of Pennsylvania. April 19, 1897.)

CORPORATIONS—OFFICERS—SALARY.

Appeal from court of common pleas, Philadelphia county; T. K. Finletter, Judge.

Action by George McGowan against the Lincoln Park & Steamboat Consolidated Company to recover for services rendered by plaintiff as president of defendant corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

The minutes of defendant's board of directors show that on March 16, 1893, "it was moved by Mr. Benton, seconded by Mr. Klemmer, that the salary of the president of this company be fixed at \$5,500 per year; salary to date from January 1, 1891." The salary was paid plaintiff for the time prior to the resolution.

Edward G. McCollin, John F. Lewis, and Hampton L. Carson, for appellant. M. J. Ryan and John G. Johnson, for appellee.

PER CURIAM. If the plaintiff's claim covered the two years prior to the resolution of 16th March, 1893, there would be much force in the contention of the defendant that past services could not be paid for in that way. But the resolution was general in its terms, and most clearly applied to future services as well as past. In this case there is no claim for services during the first two years, and the evidence is simply overwhelming that for the subsequent time the defendant company constantly recognized its liability. There was, therefore, no legal difficulty in the way of recovery for the time subsequent to March 16, 1893. The facts were submitted to the jury in a fair and impartial charge, and the verdict was, in accordance with the weight of testimony, in favor of the plaintiff. The assignments of error are all dismissed. Judgment affirmed.

PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANTING ANNUITIES v. AMERICAN FIRE INS. CO.
(Supreme Court of Pennsylvania. April 19,

1897.) Appeal from court of common pleas, Philadelphia county. Bill by the Pennsylvania Company for Insurance on Lives and Granting Annuities, trustee and administrator of C. H. Baker, deceased, against the American Fire Insurance Company, to compel defendant to cancel on its books the transfer of 87 shares of its stock, alleged to have been transferred to others than plaintiff under void powers of attorney, and to issue to plaintiff a new certificate for that number of shares, or to pay plaintiff the value of said shares. Decree for plaintiff. Defendant appeals. Affirmed. J. P. Townsend and E. Hunn Hanson, for appellant. John Hampton Barnes, Geo. Tucker Bispham, and John G. Johnson, for appellee.

DEAN, J. There is no substantial distinction between the facts in this case and those in the case between same plaintiff and Franklin Fire Insurance Company, in which last, opinion and decree have been handed down this day. 37 Atl. 191. For the reasons given in that case, the decree of the court below is affirmed in this one.

HORTON v. SIMMONS. (Supreme Court of Rhode Island. May 11, 1897.) Assumpsit by Charles H. Horton against Henry E. Simmons, as administrator of estate of plaintiff's mother, claiming that defendant held certain funds as trustee for plaintiff. Defendant pleaded the general issue, and under it claimed as a defense the coverture of intestate, and had judgment. Plaintiff petitions for a new trial. Denied. Page & Owen, for plaintiff. Bassett & Mitchell, S. S. Lapham, and Robert W. Burbank, for defendant.

PER CURIAM. We think that the coverture of the defendant's intestate is a defense to the plaintiff's suit, and that his remedy is by a bill in equity to establish a trust, and for an account.

WARWICK & COVENTRY WATER CO v. ALLEN et al. (Supreme Court of Rhode Island. June 11, 1897.) Suit by the Warwick & Coventry Water Company against John B. Allen and others, recalled from master for amendment of decree. For former opinion, see 35 Atl. 579. James Tillinghast, for complainant. Joseph C. Ely and Herbert Almy, for respondents.

PER CURIAM. By inadvertence on the part of the court the decree referring the cause to the master to take an account, heretofore entered, did not conform to the decision of the court as embodied in its rescript. The omission being inadvertent, we think the decree may be amended, in accordance with the respondent's motion to that effect. Eq. Rule 53. We therefore recall the cause from the master for the amendment of the decree.

END OF CASES IN VOL. 87.

INDEX.

ABANDONMENT.

Of highway, see "Highways."

ABATEMENT.

Of nuisance, see "Nuisance."

ABATEMENT AND REVIVAL.

Revival of judgment, see "Judgment."

Sufficiency of plea in abatement, see "Pleading."

An action of covenant survives on the death of defendant.—*Sprague v. Greene* (R. I.) 699.

A plea of another suit pending must allege that it was pending when the plea was pleaded.—*Gardner v. Keihl* (Pa.) 829.

Pendency of a prior action is the subject of a plea in abatement, and not of a motion to quash a second writ.—*Gardner v. Keihl* (Pa.) 829.

Pendency of an action against the owner of a vessel for injuries caused by it does not abate an action against the owner of the towboat for the same accident.—*Inhabitants of Cumberland County v. Central Wharf Steam Towboat Co. (Me.)* 867.

ABORTION.

Where the indictment, under Gen. St. § 1411, charges that the act was unnecessary to preserve life, in the absence of evidence, the presumption that it was not necessary sufficiently sustains the averment.—*State v. Lee* (Conn.) 75.

Evidence as to the conduct of prosecuting witness after the commission of the alleged crime, held admissible.—*State v. Lee* (Conn.) 75.

ABUTTING OWNERS.

Assessment for public improvements, see "Municipal Corporations."

ACCIDENT.

See "Negligence."

At crossing, see "Railroads."

ACCIDENT INSURANCE.

See "Insurance."

ACCOUNT.

Accounting by executors and administrators, see "Executors and Administrators."

Complainant was not denied an accounting in a suit to enjoin infringement of a trade-mark, because, in a prior suit against defendant's selling agent for the same purpose, no accounting had been demanded.—*Clark Thread Co. v. William Clark Co. (N. J. Ch.)* 599.

ACTION.

See, also, "Abatement and Revival"; "Limitation of Actions"; "Pleading"; "Trial"; "Venue."

37 A.—71

Against carriers, see "Carriers."

—city, see "Municipal Corporations."

—county, see "Counties."

—gas company, see "Gas."

—railroad company, see "Railroads."

—receiver of depositary, see "Depositaries."

—street-railroad company, see "Street Railroads."

By and against husband and wife, see "Husband and Wife."

—partners, see "Partnership."

—trustees, see "Trusts."

By bailee, see "Bailment."

By corporation, see "Corporations."

By executors and administrators, see "Executors and Administrators."

For bounty, see "Bounties."

For death by wrongful act, see "Death."

For deceit, see "Fraud."

For divorce, see "Divorce."

For injuries by animal, see "Animals."

—caused by defective bridge, see "Bridges."

For maintenance of pauper, see "Paupers."

For negligence, see "Negligence."

For rent, see "Landlord and Tenant."

Injunction against actions at law, see "Injunction."

On contract, see "Contracts."

On liquor dealer's bond, see "Intoxicating Liquors."

On negotiable instruments, see "Bills and Notes."

On policy, see "Insurance."

Particular actions, see "Account"; "Action on the Case"; "Assumpsit, Action of"; "Attachment"; "Ejectment"; "Death"; "Fraud"; "Garnishment"; "Libel and Slander"; "Malicious Prosecution"; "Mandamus"; "Money Received"; "Partition"; "Prohibition"; "Quo Warranto"; "Replevin"; "Seduction"; "Specific Performance"; "Trespass."

To abate nuisance, see "Nuisance."

To contest will, see "Wills."

To foreclose mortgage, see "Mortgages."

To set aside chattel mortgage, see "Chattel Mortgages."

A count in trover cannot be joined with one in assumpsit.—*Bull v. Mathews* (R. I.) 536.

Right of employé, after termination of contract, to institute suit, determined.—*Woodbridge v. Pratt & Whitney Co. (Conn.)* 688.

ACTION ON THE CASE.

Case is proper remedy for damage by pigeons negligently permitted to fly abroad.—*Taylor v. Granger* (R. I.) 13.

ACTS.

See "Statutes."

ADJOINING LANDOWNERS.

The owner of a vacant lot may erect a screen on his own premises in order to prevent his neighbor, who builds up to the line between them and places doors in his building, from making use of them.—*Klie v. Von Broock* (N. J. Ch.) 469.

ADJUDICATION.

Operation and effect of former judgment, see "Judgment."

(1121)

ADMEASUREMENT.

Of dower, see "Dower."

ADMINISTRATION.

Of estate assigned for benefit of creditors, see "Assignments for Benefit of Creditors."
— of decedent, see "Executors and Administrators."

ADMIRALTY.

See "Towage."

ADMISSION.

As evidence, see "Evidence"; "Criminal Law."

ADULTERY.

As ground for divorce, see "Divorce."

ADVERSE POSSESSION.

See, also, "Limitation of Actions."

Complaint *held* insufficient to establish plaintiff's title by adverse possession.—City of Baltimore v. Coates (Md.) 18.

Continuous adverse possession for 20 years *held* to authorize presumption that the person taking possession *held* under a deed.—Hasson v. Klee (Pa.) 184.

User of a passway *held* not to oust the owner of the land of possession.—Botsford v. Wallace (Conn.) 902.

AFFIDAVITS.

For injunction, see "Injunction."

AGENCY.

See "Principal and Agent."

ALIENS.

Right to sue for death by wrongful act, see "Death."

ALTERATION OF INSTRUMENTS.

Alteration of ballots, see "Elections."

AMENDMENT.

Of petition to establish highway, see "Highways."

Of pleading, see "Pleading."
— in equity, see "Equity."

ANIMALS.

Validity of ordinance prohibiting dogs from running at large, see "Municipal Corporations."

Admissibility of evidence in an action for damages from the bite of a dog determined.—Kelly v. Alderson (R. I.) 12.

Under Pub. St. c. 93, making licensed dogs property, a person who kills one is liable to its owner, unless the killing was within the provisions of the chapter.—Harris v. Eaton (R. I.) 308.

ANNUITIES.

Annuity created by will in lieu of dower is apportionable on death of annuitant.—Rhode Island Hospital Trust Co. v. Harris (R. I.) 701.

ANSWER.

See "Pleading."

APPEAL AND ERROR.

See, also, "Certiorari"; "Prohibition"; "Trial."
Costs on appeal, see "Costs."
Damages for frivolous appeal, see "Costs."
In criminal cases, see "Criminal Law."

Appeal should not be dismissed for nonpayment of costs, where a check for the sum was given to prothonotary within the time prescribed, and was accepted as payment, but was not presented.—Burns v. Smith (Pa.) 105.

A county court has no authority on an appeal from an order of the probate court directing payment of a legacy, based on a petition filed in such court, to order the petitioner to give security for costs.—In re Welch's Will (Vt.) 250; Field v. Hubbard, Id.

Exceptions do not lie to the refusal of a ruling equivalent to asking for a nonsuit.—City of Auburn v. Union Water-Power Co. (Me.) 335.

An appeal will not be erased on the ground that the trial court was without jurisdiction.—Belden v. Sedgwick (Conn.) 417.

Decisions reviewable.

Where final judgment is rendered on demurrer to an alternative writ of mandamus error will lie.—Kenny v. Hudspeth (N. J. Err. & App.) 67.

Refusal to open a settled account to a certain date, with direction for an accounting from such date, *held* an interlocutory order, and not appealable.—Lauer v. Lauer Brewing Co. (Pa.) 87.

An order in supplementary proceedings prohibiting payment or transfer by or to a judgment debtor is appealable.—Barr v. Voorhees (N. J. Err. & App.) 134.

An order of orphans' court respecting removal of a guardian is appealable.—Macgill v. McEvoy (Md.) 218.

A refusal to enter judgment notwithstanding defendant's plea *held* not a final judgment.—Moale v. Smith (Md.) 370.

An order of the chancellor, on appeal from the determination of the receiver of an insolvent corporation, is final.—Ellison v. Grav (N. J. Err. & App.) 1018.

Reservation in lower court of grounds of review.

Objection not raised below cannot be considered on appeal.—Consolidated Traction Co. v. Behr (N. J. Err. & App.) 142; Garretson v. Appleton (N. J. Err. & App.) 150; Hayes v. Colchester Mills (Vt.) 269.

The exclusion of a question to a witness is not reversible error, unless an offer is made showing that the answer would disclose admissible testimony.—Cutler v. Skeels (Vt.) 228.

Objections to particular items of an account in suit cannot be first made on appeal.—Hartford School Dist. v. School Dist. No. 13 in Hartford (Vt.) 252.

It could not be first objected on appeal that judgment should have been rendered against the principal defendant, even if it went in favor of the defendant sureties.—Village of Chester v. Leonard (Conn.) 397.

Refusal to submit special interrogatories will not be reviewed where the record does not show that they were propounded before argument to the jury.—Caledonia Fire Ins. Co. of Scotland v. Traub (Md.) 782.

Misjoinder of plaintiffs cannot be first urged on appeal.—Kelley v. Kelley (Pa.) 830.

Record and proceedings not in record.

Question of the right of lien on goods in the hands of assignee of insolvency *held* not capable of being determined on the record.—In re Johnson (R. I.) 531.

An affidavit filed after a motion in arrest of judgment is no part of the record, and cannot be considered.—*Bull v. Mathews* (R. I.) 536.

Suggestions of error in record made by stenographer at trial will not be considered.—*Bering v. Lutz* (Pa.) 640.

In registration cases, if appeal is taken within five days, as required by Acts 1896, c. 202, bill of exceptions may be presented and signed in accordance with general practice regulating appeals.—*Ritter v. Etchison* (Md.) 795.

The exclusion of a document offered in evidence cannot be held error unless its contents are shown by the record.—*Cutler v. Skeels* (Vt.) 228.

An excepting party must present enough of the case to enable the court to determine that the ruling is erroneous.—*Munroe v. Whitehouse* (Me.) 866.

Review.

On appeal from probate to county court, the investigation must cover the ground covered in the lower court.—*In re Welch's Will* (Vt.) 250; *Field v. Hubbard*, Id.

When it will not be assumed that a fact not disclosed by the assured was material.—*Mascott v. First Nat. Fire Ins. Co.* (Vt.) 255.

Where an interlocutory decree directing an accounting is affirmed, questions as to the liability to account cannot be again considered.—*Rich v. Black* (Pa.) 401.

Rulings of the circuit court in opposition to confirmation of a referee's report or on motion to set the report aside are not open to review on error.—*City of Hoboken v. Laverty* (N. J. Sup.) 437.

On appeal from decree in proceedings to appraise an estate for collateral inheritance tax, the question as to when the tax is due is not involved.—*In re Handley's Estate* (Pa.) 587; *Appeal of Palmer*, Id.

Where the record does not show the grounds of motions made to strike pleadings, it will be presumed that the rulings thereon were correct.—*Shartzler v. Mountain Lake Park Ass'n of Garrett County* (Md.) 786.

Discretion given the court, on motion of defendant, to order other parties to the contract to be made defendants, is reviewable.—*National Exch. Bank v. Galvin* (R. I.) 811.

The burden is on an excepting party to show affirmatively that the ruling complained of is erroneous.—*Munroe v. Whitehouse* (Me.) 866.

The court may refuse to discharge the panel for the reason that one of the jurors and plaintiff had a conversation not referring to the case.—*Kelley v. Downing* (Vt.) 968.

Allowance of rule to show cause does not prevent assignment of errors on the record.—*Consolidated Traction Co. v. Whelan* (N. J. Err. & App.) 1106.

On appeal from probate court, the county court can amend declaration as the nature of the demand required.—*White's Estate v. White's Estate* (Vt.) 1114.

— Questions of fact, verdicts and findings.

Referee's findings of fact on conflicting evidence will not be disturbed.—*Hotchkiss v. Roehm* (Pa.) 119.

Findings of fact by the auditor, approved by the court below, are conclusive, unless clear mistake, misconduct, or manifest error be shown.—*In re De Wolff's Estate* (Pa.) 262; *Appeal of Innes*, Id.

Finding of scope of will on trial by court held a conclusion of law reviewable on appeal.—*McKeough's Estate v. McKeough* (Vt.) 275.

Exceptions do not lie to evidence which is either slightly corroborated by other evidence or

immaterial.—*Bacon v. Casco Bay Steamboat Co.* (Me.) 328.

Auditor's finding held as conclusive as a verdict.—*In re Dutton's Estate* (Pa.) 582; *Appeal of Beatty*, Id.

On a writ of error to reverse judgment of supreme court on proceedings to review a municipal assessment, findings of fact are conclusive.—*Vreeland v. City of Bayonne* (N. J. Err. & App.) 737.

Decision on commissioner's report will not be disturbed if sustainable on any inference of fact deducible from report.—*Russell v. Davis* (Vt.) 746.

A verdict will not be disturbed as excessive unless it clearly appears that it is so upon any view of the facts.—*Donnelly v. Booth Brothers & Hurricane Isle Granite Co.* (Me.) 874.

Pub. Acts 1895, c. 100, providing for statements by stenographers of the evidence, does not give the supreme court power to retry questions of fact.—*Thresher v. Dyer* (Conn.) 979.

Findings of fact by the court are not reviewable on error.—*City of Jersey City v. Tallman* (N. J. Err. & App.) 1026.

Where the evidence is conflicting, the finding of the trial court on the facts is conclusive.—*Ryan v. Chelsea Paper Manuf'g Co.* (Conn.) 1062.

Motion to the supreme court to have verdict set aside as against evidence, made after denial of like motion by trial court, will be granted only in a clear case.—*Chatfield v. Bunnell* (Conn.) 1074.

— Harmless error.

Immaterial evidence on question of damage held harmless.—*Bagley v. Mason* (Vt.) 237.

Where the court adopts defendant's construction of the contract, he cannot complain of error in admitting parol evidence to control its meaning.—*Alling v. Forbes* (Conn.) 390.

Error in sustaining a demurrer to a complaint for want of certain amendments is harmless, where the defense made out on the trial would have been a bar to a recovery under the complaint as it was originally.—*Village of Chester v. Leonard* (Conn.) 397.

When possible error in sustaining demurrer to certain paragraphs of a defense is harmless.—*Boyle v. McWilliams* (Conn.) 501.

Where a declaration states no cause of action, the fact that defendant filed a plea with his demurrer is harmless error.—*Reid v. Providence Journal Co.* (R. I.) 637.

Decision.

That an error complained of may have done harm to plaintiff in error is ground for reversal.—*Bell v. Samuels* (N. J. Sup.) 613.

Plaintiff having recovered judgment for full amount, held not necessary to grant a new trial because of erroneous dissolution of attachment, but the case remitted, with instructions to reverse order of dissolution as of the time of making it.—*Wood v. Watson* (R. I.) 1030.

APPEARANCE.

Where one pleaded and went to trial held that he could not claim that he was not duly brought in and bound as a party.—*Miller v. Lehigh County* (Pa.) 824.

APPLICATION.

For insurance, see "Insurance."

APPOINTMENT.

Of guardian, see "Guardian and Ward."

Of municipal officers, see "Municipal Corporations."

Of officers in general, see "Officers."

Of personal representatives, see "Executors and Administrators."
Of school officers, see "Schools and School Districts."

APPORTIONMENT.

Of annuity, see "Annuities."

APPRENTICES.

Capacity of infant to make contract, see "Infants."

ARBITRATION AND AWARD.

Specific performance of agreement to arbitrate, see "Specific Performance."

Arbitrators must make an effort to agree before calling in umpire.—*Christenson v. Carleton* (Vt.) 228.

Party *held* not to waive failure of arbitrators to try to agree by proceeding with rehearing.—*Christenson v. Carleton* (Vt.) 228.

Where one of two arbitrators, who are empowered to select a third, refuses to act in such selection except in accordance with the wishes of the party appointing him, there is a failure of the arbitration.—*Grosvenor v. Flint* (R. I.) 304.

Where the submission makes no provision for filling vacancies, a vacancy revokes the submission.—*Wolf v. Augustine* (Pa.) 574.

ARGUMENT OF COUNSEL.

See "Criminal Law"; "Trial."

ARMY AND NAVY.

See "Pensions."

ARREST.

See also, "Bail."

Motion in arrest of judgment, see "Judgment."

An officer arresting a person on a warrant may, the court not being in session, commit him to jail for safe-keeping.—*Kent v. Miles* (Vt.) 1115.

One against whom an indictment has been found may be arrested on a warrant issued in term time or in vacation.—*Kent v. Miles* (Vt.) 1115.

ASSAULT AND BATTERY.

Complaints of pain to attendant *held* admissible.—*Bagley v. Mason* (Vt.) 287.

Complaints to physicians are admissible though made in contemplation of suit.—*Bagley v. Mason* (Vt.) 287.

Evidence of another assault by defendant *held* admissible to show drunkenness.—*Bagley v. Mason* (Vt.) 287.

Evidence that plaintiff's injuries were aggravated by subsequent disease *held* admissible.—*Bagley v. Mason* (Vt.) 287.

Plaintiff may show extent and effect of defendant's drunkenness at the time of the assault.—*Bagley v. Mason* (Vt.) 287.

Plaintiff may show his wages and loss of time.—*Bagley v. Mason* (Vt.) 287.

ASSESSMENT.

For street improvements, see "Municipal Corporations."

Of taxes, see "Taxation."

ASSETS.

See "Marshaling Assets and Securities."

ASSIGNMENTS.

See, also, "Assignments for Benefit of Creditors."

Of dower, see "Dower."

Of mortgage, see "Mortgages."

A mortgage *held* to operate as an equitable assignment of an interest in a recognizance given in a partition suit.—*In re Dutton's Estate* (Pa.) 582; *Appeal of Beatty*, Id.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See, also, "Insolvency."

Estoppel of assignee to question validity of conveyance, see "Estoppel."

Liability of assignee to garnishment process, see "Garnishment."

Proceeds of sale by broker collected by assignee belong to consignor.—*Drovers' & Mechanics' Nat. Bank v. Roller* (Md.) 30.

Under Code, art. 81, § 47, and section 64, as amended by Acts 1892, c. 518, trustee for creditors of lessee *held* not required to pay taxes on leased premises out of funds realized from other parts of estate.—*Parlett v. Dugan* (Md.) 36.

A preference, within the meaning of Pub. St. c. 237, § 15, as amended by Pub. Laws 1882, c. 274, is merely voidable, and not void.—*Colt v. Sears Commercial Co.* (R. I.) 311.

Where a husband, as manager of wife's business, made an assignment of her property with her consent, *held*, that the trustee in insolvency was entitled to an equitable lien for services, subject to claims of attaching creditors.—*Belden v. Sedgwick* (Conn.) 417.

Creditor *held* estopped by participation in assignment to dispute its validity in respect to lands in other states.—*Kendall v. McClure Coke Co.* (Pa.) 823.

A creditor who became a party to a deed of assignment for creditors *held* to have thereby released the assignor.—*Merritt v. Bucknam* (Me.) 885.

A secret agreement between assignors and a creditor, made without the knowledge of other creditors, to induce the promisee to assent to the assignment, *held* in fraud of the others.—*Merritt v. Bucknam* (Me.) 885.

ASSOCIATIONS.

See "Corporations"; "Religious Societies."

ASSUMPSIT, ACTION OF.

See, also, "Money Received."

Joinder of count in trover, see "Action."

In action on written contract, the statement must be accompanied with a copy thereof.—*Acme Manuf'g Co. v. Reed* (Pa.) 552.

One to whom money is given to keep at interest, and pay the fund to another on reaching a certain age, *held* liable therefor on assumpsit.—*Parker v. Parker* (Vt.) 1112.

Where a note is surrendered in prospect of death on condition that interest should be paid the payee if she recovered and needed it, her estate can recover the interest which she needed after recovery, and the maker refused to pay.—*White's Estate v. White's Estate* (Vt.) 1114.

ASSUMPTION.

Of risk of employment, see "Master and Servant."

ATTACHMENT.

See, also, "Execution"; "Garnishment."

Effect of principal's discharge in insolvency on attachment bond, see "Insolvency."

One purchasing property at attachment sale, knowing that the title was not in the debtor, gets no title.—*Reed v. Starkey* (Vt.) 297.

A contingent interest in land is within Gen. Laws, c. 253, § 10, allowing attachment of interest in land.—*Wood v. Watson* (R. I.) 1030.

The only authority to dissolve an attachment on real estate is under Gen. Laws, c. 253, § 10.—*Wood v. Watson* (R. I.) 1030.

ATTORNEY AND CLIENT.

See, also, "District and Prosecuting Attorneys." Arguments of counsel, see "Criminal Law"; "Trial."

Powers of attorney, see "Powers."

Privileged communications between, see "Witnesses."

Liability of attorney acting for the borrower to the lender for negligence in failing to discover liens determined.—*Lawall v. Groman* (Pa.) 98.

An attorney undertaking to search the record, who overlooked prior liens, held liable to his client who loaned money on a mortgage of property.—*Lawall v. Groman* (Pa.) 98.

An attorney, disbarred because of conduct impeaching his moral character, will not be reinstated on petition stating that he had been sufficiently punished.—*In re Enright* (Vt.) 1046.

AWARD.

See "Arbitration and Award."

BAIL.

See, also, "Arrest."

Entry of nolle prosequi held not to discharge the bail.—*Weber v. State* (N. J. Err. & App.) 133.

BAILMENT.

See, also, "Banks and Banking"; "Carriers"; "Depositaries"; "Pledges."

A bailee is entitled to recover the full amount of the injury done to a subject of the bailment.—*Gillette v. Goodspeed* (Conn.) 973.

BALLOTS.

See "Elections."

BANKRUPTCY.

See "Assignments for Benefit of Creditors"; "Insolvency."

BANKS AND BANKING.

Liability of sureties on cashier's bond, see "Principal and Surety."

Knowledge of vice president of a bank of intended fraudulent use by him of moneys obtained on check of a corporation of which he was treasurer held not the knowledge of the bank.—*Gunster v. Scranton Illuminating Heat & Power Co.* (Pa.) 550.

A person appearing on the books of a national bank as owner of stock held subject to stock liability, though a trustee.—*Kerr v. Urie* (Md.) 789.

Where a subscriber for stock in a national bank transfers it to his wife, she is subject to stockholder's liability.—*Kerr v. Urie* (Md.) 789.

Evidence held insufficient to show that loan of note to bank was with intent to deceive the examiner.—*In re Tasker's Estate* (Pa.) 924.

BATTERY.

See "Assault and Battery."

BEQUESTS.

See "Wills."

BILL.

See "Equity."

BILLS AND NOTES.

Liability of married woman, on note, see "Husband and Wife." Right to set off unmatured note, see "Set-Off and Counterclaim."

Plea alleging lack of consideration for signing note held qualified by subsequent averments.—*Stevens v. Gibson* (Vt.) 244.

After facts are found, what constitutes diligence in presenting bank check for payment is a question of law.—*Gregg v. Beane* (Vt.) 248.

What constitutes due diligence in presenting check, when payee and bank are in different places.—*Gregg v. Beane* (Vt.) 248.

Payee of a note indorsing it after maturity held not to waive demand and notice.—*Landon v. Bryant* (Vt.) 297.

Complaint in action on note that plaintiff sacrificed collaterals for less than sufficient to pay the note held good on demurrer.—*Island Sav. Bank v. Galvin* (R. I.) 809.

It is no defense to an action against two defendants on a note signed by them individually as joint makers that they are partners, and that a receiver has been appointed for the firm.—*C. & C. Electric Co. v. St. Clair* (Pa.) 814.

The indorsement of credits on the back of a note before its delivery does not render it nonnegotiable.—*Farmers' Bank of Springville, N. Y., v. Shippey* (Pa.) 844.

Finding that note was not loaned to bank for accommodation held unsupported by evidence.—*In re Tasker's Estate* (Pa.) 924.

Where several persons in succession indorse a negotiable note payable to one person, the act of each imports a several and successive, and not a joint, obligation.—*Wolf v. Hostetter* (Pa.) 988.

A joint action cannot be brought against separate indorsers of a note.—*Wolf v. Hostetter* (Pa.) 988.

BONA FIDE PURCHASERS.

See "Vendor and Purchaser."

BONDS.

See, also, "Principal and Surety."

Liquor dealer's bond, see "Intoxicating Liquors." Of cities, see "Municipal Corporations." Of county, see "Counties."

Of executors and administrators, see "Executors and Administrators."

An instrument held a valid obligation, though in form a bond and without seal.—*First Nat. Bank v. Briggs' Assignees* (Vt.) 231.

BOROUGHES.

See "Municipal Corporations."

BOUNTIES.

A town cannot give a bounty to drafted men, in the absence of a statute.—*O'Connor v. Town of Waterbury* (Conn.) 499.

Drafted men *held* not entitled to bounties, under Acts 1895, c. 318.—*O'Connor v. Town of Waterbury* (Conn.) 499.

In action against a town for bounty, promises by state agent *held* inadmissible against the town.—*Bogue v. Town of Montville* (Conn.) 1078.

In action for bounty, evidence of rejection of a resolution to pay said bounty to re-enlisted veteran *held* admissible.—*Bogue v. Town of Montville* (Conn.) 1078.

Plaintiff, in action against a town for bounty, *held* not prejudiced by evidence that he received one from the state.—*Bogue v. Town of Montville* (Conn.) 1078.

Act 1895, providing for a liability for a bounty when one once existed, gives no right to a bounty where person had not before been entitled to one.—*Bogue v. Town of Montville* (Conn.) 1078.

BRIDGES.

Held, that the question of a town's negligence in action for injuries received at a bridge was for the jury.—*Lazelle v. Town of Newfane* (Vt.) 1045.

BROKERS.

Mere broker for sale of land cannot bind owner by representations or contract.—*Planer v. Equitable Life Assur. Soc. of the United States* (N. J. Ch.) 668.

Without consent of owner, mere broker for sale of land cannot bind the owner by granting possession or making repairs.—*Planer v. Equitable Life Assur. Soc. of the United States* (N. J. Ch.) 668.

A real-estate broker *held* not to have sufficient authority to bind his principal by a written contract of sale.—*Scull v. Brinton* (N. J. Err. & App.) 740.

BY-LAWS.

Of cities, see "Municipal Corporations."
Of corporation, see "Corporations."

CANCELLATION OF INSTRUMENTS.

Action to set aside chattel mortgage, see "Chattel Mortgages."

Evidence in a suit to cancel a lease because of false representations *held* insufficient.—*Ranstead v. Allen* (Md.) 15.

Evidence *held* to warrant the cancellation of a deed as obtained by fraud.—*Berger v. Bullock* (Md.) 368.

Devises suing to set aside a deed made by testator in consideration of an agreement to support him for life *held* guilty of laches, though they offered to pay the grantee for his services.—*Chase v. Chase* (R. I.) 804.

Bill to set aside a release for fraud *held* not to sufficiently charge the facts constituting the fraud.—*Corey v. Howard* (R. I.) 946.

CARRIERS.

See, also, "Ferries"; "Railroads"; "Street Railroads."

Validity of law regulating transportation of fish, see "Fish."

A carrier accepting goods directed to a point off its line *held* only liable for safe delivery to connecting carrier in the absence of express contract.—*Hoffman v. Cumberland Val. R. Co.* (Md.) 214.

A local station agent *held* to have no authority to extend liability of company beyond its line, unless expressly conferred, or implied from

the course of business.—*Hoffman v. Cumberland Val. R. Co.* (Md.) 214.

Carriage of passengers.

The fact that a passenger on a street car, on being notified that it is about to stop, goes to the door while it is in motion, does not show *per se* contributory negligence.—*Consolidated Traction Co. v. Thalheimer* (N. J. Err. & App.) 132.

A jerk of a street car throwing off a passenger who had arisen on notice from the conductor to alight justified the inference of negligence of the railroad company.—*Consolidated Traction Co. v. Thalheimer* (N. J. Err. & App.) 132.

Where a steamboat company, after it ceases to act as a common carrier, becomes a tenant of wharves over which its passengers come, it is liable only for a reasonable diligence.—*Bacon v. Casco Bay Steamboat Co.* (Me.) 328.

Passenger injured after alighting from side of train opposite depot platform *held* not entitled to recover.—*Flanagan v. Philadelphia, W. & B. R. Co.* (Pa.) 341.

Complaint by passenger, pushed down by other passengers in alighting from street car, *held* to state cause of action against the carrier.—*Baldwin v. Fair Haven & W. R. Co.* (Conn.) 418.

Rights of passengers, on being carried beyond station because a train did not stop there, on refusal to pay extra fare, determined.—*Stricker v. Pennsylvania R. Co.* (N. J. Err. & App.) 776.

Evidence *held* to require verdict for defendant where passenger fell from a moving street car.—*Jackson v. Philadelphia Traction Co.* (Pa.) 827.

Whether the conductor of a trolley car was guilty of negligence in letting a passenger off on the right of way, and directing him to walk back on the track, *held* a question for the jury.—*Young v. Camden, G. & W. Ry. Co.* (N. J. Err. & App.) 1013.

A verdict for plaintiff in an action against a street-railroad company for injuries received through its alleged starting of the car before plaintiff had alighted *held* supported by the evidence.—*Williams v. Camden & A. R. Co.* (N. J. Sup.) 1107.

CERTIORARI.

Where a municipal corporation set off from an older one attempts to interfere with the property of such older corporation, the remedy is by certiorari to set aside the ordinance.—*Inhabitants of Township of Bloomfield v. Borough of Glen Ridge* (N. J. Err. & App.) 63.

Held, that the court would not consider the admission of hearsay evidence, the purpose of the writ being merely to correct errors of law.—*O'Brien v. City of Pawtucket* (R. I.) 302.

Certiorari to review resolution of town council brought 18 months after the passage thereof *held* barred by laches.—*Noe v. Town Council of West Hoboken* (N. J. Sup.) 439.

Certiorari to review the laying out of a road will not be dismissed because of application for appointment of freeholders to review the action.—*Walker v. Winkler* (N. J. Sup.) 445.

A conviction by the city judge of Plainfield *held* reviewable by certiorari.—*Watson v. Treasurer of City of Plainfield* (N. J. Sup.) 615.

Title of an appointee to a public office which he has actually assumed cannot be tried by certiorari bringing into court the appointing body alone.—*Clayton v. Board of Chosen Freeholders* (N. J. Sup.) 725.

Certiorari is allowed only in the discretion of the court.—*Sowles v. Bailey* (Vt.) 751.

Certiorari will not lie where there was a remedy by appeal.—*Sowles v. Bailey* (Vt.) 751.

Under 2 St. § 1640, certiorari is limited for the review of final judgments or decrees.—*Sowles v. Bailey* (Vt.) 751.

Certiorari will not lie in favor of private prosecutors to review an ordinance, unless they have a personal or property interest specially affected.—*Tallon v. City of Hoboken* (N. J. Err. & App.) 895.

CHALLENGE.

To juror, see "Jury."

CHANCERY.

See "Equity."

CHANGE OF VENUE.

See "Venue."

CHARGE.

To jury in civil actions, see "Trial."
— in criminal prosecutions, see "Criminal Law."

CHARITIES.

A bequest for erection of a memorial arch in a public park held a charity, and a direction that the income of part of the estate be appropriated for its maintenance does not violate the statute against perpetuities.—*In re Smith's Estate* (Pa.) 114; *Appeal of Walker*, Id.

A bill to restrain members of a charitable corporation from partaking of an annual dinner dismissed.—*Woodbury v. Portland Marine Soc.* (Me.) 323.

Officers of a charitable corporation acting in good faith may decide for themselves as to persons entitled to relief when trivial amounts are involved.—*Woodbury v. Portland Marine Soc.* (Me.) 323.

Bequest in trust for worthy poor of a town held to sufficiently designate the class to be benefited, and the manner of their selection.—*In re Strong's Appeal* (Conn.) 395.

Bequest in trust for worthy poor of town held not invalidated by fact that it incidentally benefited the taxpayers.—*In re Strong's Appeal* (Conn.) 395.

Heirs could not take advantage of the fact that the charitable association to which their ancestor devised property already held the full amount of property permitted by its charter.—*Farrington v. Putnam* (Me.) 652.

A will held to create a valid trust for charitable uses.—*Nauman v. Weidman* (Pa.) 863.

CHATTEL MORTGAGES.

A description of property mortgaged held sufficient.—*Shum v. Claghorn* (Vt.) 236.

To obtain the setting aside of a chattel mortgage of household goods one must allege and prove that the goods were in the use of the family, as well as in their possession, under Act March 7, 1893.—*Green v. McCrane* (N. J. Ch.) 318.

A mortgage of chattels, in which the mortgagor owns an undivided half interest, is not void where the mortgage read as it did by mistake.—*Patterson v. Atkinson* (R. I.) 532.

CHECKS.

See "Bills and Notes."

CHILD.

See "Guardian and Ward"; "Infants"; "Parent and Child."

CHURCH.

See "Religious Societies."

CITIES.

See "Municipal Corporations."

CLAIM AND DELIVERY.

See "Replevin."

CLIENTS.

See "Attorney and Client."

COLLATERAL ATTACK.

On judgment, see "Judgment."

COLLATERAL INHERITANCE TAXES.

See "Taxation."

COLLECTION.

Of taxes, see "Taxation."

COLLISION.

Between railroad trains, see "Railroads."

COMMERCIAL PAPER.

See "Bills and Notes."

COMMON CARRIERS.

See "Carriers."

COMMON SCHOOLS.

See "Schools and School Districts."

COMPARATIVE NEGLIGENCE.

See "Negligence."

COMPENSATION.

For land taken for public use, see "Eminent Domain."

Of county officers, see "Counties."

Of district attorney, see "District and Prosecuting Attorneys."

Of officers in general, see "Officers."

Of servant, see "Master and Servant."

Of sheriff, see "Sheriffs and Constables."

Of trustees, see "Trusts."

COMPETENCY.

Of evidence, see "Evidence."

Of witness, see "Witnesses."

COMPLAINT.

See "Pleading."

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONNECTING LINES.

See "Carriers."

CONSIDERATION.

Of contract, see "Contracts"; "Fraudulent Conveyances."
Of promissory notes, see "Bills and Notes."

CONSOLIDATION.

Of corporations, see "Corporations"; "Monopolies."
Of school district, see "Schools and School Districts."

CONSPIRACY.

To interfere with servants, see "Master and Servant."

CONSTABLES.

See "Sheriffs and Constables."

CONSTITUTIONAL LAW.

Provisions relating to particular subjects, see "Fish"; "Taxation."

The legislature has power to reduce the number of judges of the court of common pleas.—*Kenny v. Hudspeth* (N. J. Err. & App.) 67.

Pub. Acts 1893, c. 216, providing for the destruction of trees infected with peach yellows, held not to deprive the owner of the trees of his property without due process of law.—*State v. Main* (Conn.) 80.

Pub. Acts 1893, c. 216, providing for the destruction of trees infected with "peach yellows," is a valid exercise of the police power.—*State v. Main* (Conn.) 80.

Laws 1894, c. 310, § 178, making possession of a lottery ticket an offense without regard to the person's knowledge of what it is, is within the police power.—*Ford v. State* (Md.) 172.

St. 1895, c. 79, limiting the liability of railroads for damages for fire to the excess over the insurance recovered, does not impair the obligations of contracts in applying to cases where the insurance was taken out before the act went into effect.—*Leavitt v. Canadian Pac. Ry. Co.* (Me.) 886.

St. 1895, c. 79, limiting the liability of railroads for damages by fire to the excess over the insurance recovered, does not deny to any person the equal protection of the laws.—*Leavitt v. Canadian Pac. Ry. Co.* (Me.) 886.

Pub. Acts 1893, c. 169, and Pub. Acts 1895, c. 283, providing that a court or a judge thereof on appeal shall approve the plan of construction of a railway company in the streets of a city, is unconstitutional, as requiring the court to exercise legislative powers.—*Appeal of Norwalk St. Ry. Co.* (Conn.) 1080.

A court, or a judge thereof, cannot exercise a power not judicial.—*Appeal of Norwalk St. Ry. Co.* (Conn.) 1080.

Under Const. art. 2, § 1, the general assembly cannot confer judicial power on a court or the judge thereof.—*Appeal of Norwalk St. Ry. Co.* (Conn.) 1080.

CONSTRUCTION.

Of contract, see "Contracts."
Of deed, see "Deeds."
Of statute, see "Statutes."
Of stipulation, see "Stipulation."
Of will, see "Wills."

CONTEMPT.

A street-railroad company held guilty of contempt in laying its tracks by virtue of a resolu-

tion of the board of public works pending a writ of certiorari to test the validity of an ordinance granting the same right.—*West Jersey Traction Co. v. Board of Public Works of City of Camden* (N. J. Sup.) 578.

CONTINUANCE.

In criminal cases, see "Criminal Law."

CONTRACTS.

See, also, "Arbitration and Award"; "Assignments"; "Assignments for Benefit of Creditors"; "Bailment"; "Bills and Notes"; "Bonds"; "Cancellation of Instruments"; "Chattel Mortgages"; "Deeds"; "Frauds, Statute of"; "Fraudulent Conveyances"; "Guaranty"; "Insurance"; "Interest"; "Landlord and Tenant"; "Master and Servant"; "Mortgages"; "Partnership"; "Payment"; "Pledges"; "Principal and Agent"; "Principal and Surety"; "Release"; "Sales"; "Specific Performance"; "Vendor and Purchaser."

Capacity of infants, see "Infants."

Gambling contracts, see "Gaming."

Impairment of obligation of, see "Constitutional Law."

Of corporation, see "Corporations."

Of county, see "Counties."

Of employment, see "Master and Servant."

Relating to pensions, see "Pensions."

A forged instrument cannot be ratified.—*Henry Christian Building & Loan Ass'n v. Walton* (Pa.) 261.

There can be no deduction as compensation to defendant on a recovery for substantial performance notwithstanding defects, where defendant makes no proof to found a claim for an allowance.—*Filbert v. City of Philadelphia* (Pa.) 545.

On bill to set aside contract because of fraud of a corporation and its officers, the corporation cannot defend by denying knowledge of fraud, and retain the money paid.—*Garrison v. Technic Electrical Works* (N. J. Ch.) 741.

One who contracts to erect a monument of a certain kind of granite cannot recover where he has used a different kind.—*New England Granite Works v. Bailey* (Vt.) 1043.

Requisites and validity.

A contract not to practice dentistry in the county in which one is employed, on leaving the employment, held not unreasonable.—*Tillinghast v. Boothby* (R. I.) 344.

A letter of an engineer recommending payment of amounts claimed to be due under a construction contract held not a sufficient estimate, within the contract.—*Village of Chester v. Leonard* (Conn.) 397.

Facts held not to show that an extension of time for paying a debt was the consideration for an assignment of an interest in the property as security.—*In re Dutton's Estate* (Pa.) 582; *Appeal of Beatty*, Id.

Where one of several considerations to a contract is illegal, its presence does not render the whole contract void.—*Fishell v. Gray* (N. J. Sup.) 606.

A contract to indemnify a common carrier against losses for injuries to passengers held not invalid, as against public policy.—*Trenton Pass. R. Co. v. Guarantors' Liability Indemnity Co.* (N. J. Sup.) 609.

An agreement to act as administrator without consideration is valid.—*Mott v. Fowler* (Md.) 717.

An agreement to act as administrator without compensation held supported by sufficient consideration.—*Mott v. Fowler* (Md.) 717.

Contracts between parties to chill the bidding at a judicial sale held contrary to public policy.—*De Baun v. Brand* (N. J. Sup.) 726.

Completed sale *held* not sufficient consideration for subsequent contract by seller not to engage in the same business.—*Cleaver v. Lenhart* (Pa.) 811.

Contract in partial restraint of trade without consideration is void.—*Cleaver v. Lenhart* (Pa.) 811.

Construction and operation.

Contract for sale of business construed, and *held* to entitle purchaser to proceeds of sale of goods on hand or moneys deposited for the same.—*McGowan v. Griffin* (Vt.) 298.

A provision in a construction contract *held* not to authorize changes in the mode of paying the contractor.—*Village of Chester v. Leonard* (Conn.) 397.

A contract with a city for the construction of a reservoir *held* not to require the contractor to construct a reservoir that would not leak, although in exact accordance with the plans and specifications.—*Filbert v. City of Philadelphia* (Pa.) 545.

A contract that plaintiff would, during each consecutive three months, procure new business to a specified amount, construed.—*United States Credit System Co. v. Rosenbaum* (N. J. Sup.) 595.

Contract not to erect addition in front of building construed, and *held* breached.—*Bigelow v. Cross* (Vt.) 989.

Actions.

Evidence *held* insufficient to show contract made as alleged in declaration.—*Schutz v. Ferguson* (Md.) 211.

Right of action for breach of contract on purchase of business determined.—*McGowan v. Griffin* (Vt.) 298.

The burden is on defendant to establish an agreement qualifying articles under which complainant seeks an accounting.—*Warwick v. Stockton* (N. J. Ch.) 458.

Claim that architect's approval is essential to recovery on building contract is waived by pleading nonperformance in defense of action for contract price.—*Healy v. Fallon* (Conn.) 495.

In an action for the price of a monument to be of a certain granite, plaintiff having shown that it was of a variety known to the trade as such, defendant can show that another variety was also known by the same name, and that it was the variety intended by the parties.—*New England Granite Works v. Bailey* (Vt.) 1043.

CONTRIBUTORY NEGLIGENCE.

See "Negligence."

CORPORATIONS.

See, also, "Banks and Banking"; "Carriers"; "Charities"; "Electricity"; "Ferries"; "Gas"; "Insurance"; "Monopolies"; "Municipal Corporations"; "Railroads"; "Religious Societies"; "Street Railroads."

Consolidation of, see "Monopolies."

Forfeiture of franchise by quo warranto, see "Quo Warranto."

Stockholders in banks, see "Banks and Banking."

On consolidation of street-railroad company under Pamph. Laws 1888, p. 74, the agreement of consolidation is not effected by private agreements between stockholders not contained in the act of consolidation.—*Trenton Pass. R. Co. v. Wilson* (N. J. Ch.) 476.

Contract for consolidation of corporations construed, and rights of parties to the agreement determined.—*Trenton Pass. R. Co. v. Wilson* (N. J. Ch.) 476.

A dividend of a mutual fire insurance company *held* valid.—*McKean v. Biddle* (Pa.) 528.

By-law *held* to authorize president to appoint a person to verify and present an account of the corporation's ratable estate for taxation.—*New York, N. H. & H. R. Co. v. Smith* (R. I.) 636.

Making of unprofitable contract *held* to pertain to internal management, so that stockholders' bill is cognizable only at corporation's domicile.—*Madden v. Penn Electric Light Co.* (Pa.) 817.

A nonresident corporation may sue on a contract made in the state, though it has not complied with Gen. Laws, c. 253, §§ 36, 41.—*Garratt Ford Co. v. Vermont Manuf'g Co.* (R. I.) 948.

By-laws of corporation construed, and *held*, that the voting at regular and special meetings must be by shares.—*Weinburgh v. Union Street-Railway Advertising Co.* (N. J. Ch.) 1026.

Members and stockholders.

A director of a corporation *held* estopped as a stockholder to question the title of other directors to their offices.—*Hall v. West Chester Pub. Co.* (Pa.) 106.

A stockholder sued in his corporate liability under Pub. Acts 1893, c. 140, cannot set off a debt due him from the corporation.—*Ball Electric Light Co. v. Child* (Conn.) 391.

Under Pub. Acts 1893, c. 140, relating to the liability of stockholders of telegraph, telephone, and electric companies, each stockholder of record at the time the debt is due is a guarantor to a specified extent, though he holds his stock as collateral.—*Ball Electric Light Co. v. Child* (Conn.) 391.

A certificate filed in order to organize the company is not the act of "an officer," within 1 Gen. St. p. 918.—*Thomson-Houston Electric Co. v. Murray* (N. J. Sup.) 443.

An action under Gen. St. p. 913, to make defendant stockholder liable for corporate debt, *held* to apply only to a false certificate by an officer.—*Thomson-Houston Electric Co. v. Murray* (N. J. Sup.) 443.

Under charter authorizing purchase of property by issue of stock, original holders *held* not entitled to new stock in proportion to former holdings, when issued to purchase property.—*Meredith v. New Jersey Zinc & Iron Co.* (N. J. Ch.) 539.

When corporation will not be restrained from purchasing property outside the state, on the ground of breach of contract between the stockholders.—*Meredith v. New Jersey Zinc & Iron Co.* (N. J. Ch.) 539.

Where a corporation deprives a stockholder of his right to take a proportionate part of issue of new stock, his remedy is at law for damages, if the corporation is financially responsible.—*Meredith v. New Jersey Zinc & Iron Co.* (N. J. Ch.) 539.

Where one sues a corporation as a member of a firm, the fact that he is a stockholder does not authorize him to assert his rights as such.—*Boyd v. American Carbon-Black Co.* (Pa.) 937.

Objections by stockholders to special meeting, as irregularly called, *held* waived.—*Weinburgh v. Union Street-Railway Advertising Co.* (N. J. Ch.) 1026.

Officers and agents.

A note of a corporation, authorized by its directors, is not invalid because of informality in the election of the directors, where they comprise all the stockholders.—*Hall v. West Chester Pub. Co.* (Pa.) 106.

A corporation *held* not liable for malicious prosecution by its agent where the corporation did not adopt or ratify the act.—*President, etc., of Baltimore & Y. Turnpike Road v. Green* (Md.) 642.

Corporate powers.

A corporation organized for the purpose of "manufacturing and supplying illuminating gas"

may deal in appliances for the consumption of gas, as well as for its manufacture and distribution.—*Malone v. Lancaster Gas Light & Fuel Co. (Pa.)* 932.

Though a corporation illegally entered into a partnership, it must account to the other partner, who has fulfilled his obligations.—*Boyd v. American Carbon-Black Co. (Pa.)* 937.

Where the sale of the entire corporate property was authorized by a vote of more than 1,100 out of a total of 1,350 shares, *held*, that the sale would not be enjoined.—*Peabody v. Westerly Waterworks (R. I.)* 807.

Insolvency.

The rights of creditors of a corporation as against a judgment entered on a judgment note, because of its insolvency when the note was executed, cannot be determined on an application to vacate the judgment.—*Hall v. West Chester Pub. Co. (Pa.)* 106.

Apprentice workmen who have allowed their wages to accumulate have no greater right to a preference than other workmen of an insolvent corporation.—*Mingin v. Alva Glass Manuf'g Co. (N. J. Ch.)* 450.

Preference given workmen of an insolvent corporation does not vest until the happening of the statutory requirements.—*Mingin v. Alva Glass Manuf'g Co. (N. J. Ch.)* 450.

Evidence *held* to show no cause for extending time for presenting claims against an insolvent corporation, though petitioners were nonresidents.—*Abraham v. Mercantile Trust & Deposit Co. (Md.)* 646.

COSTS.

Payment of as condition precedent to appeal, see "Appeal and Error."

Full costs are allowed on recovery of penalty by town for injury to highway, though recovery is less than \$5.—*Town of Barre v. Jerry (Vt.)* 230.

Where an appeal is taken for delay, damages will be awarded under Act May 25, 1874 (P. L. 227).—*Martin v. Rider (Pa.)* 403.

Under practice act (Gen. St. p. 2586, pl. 319), a foreign corporation recovering judgment for less than \$200 is entitled to costs.—*Goat & Sheep Skin Import Co. v. Paschall (N. J. Sup.)* 454.

Penalty for appeal for delay will not be imposed, where the court is convinced that it was taken in good faith.—*Wolf v. Philadelphia Traction Co. (Pa.)* 555.

COUNTERCLAIM.

See "Set-Off and Counterclaim."

COUNTIES.

See, also, "Highways"; "Municipal Corporations"; "Towns."

Taxation of property of county, see "Taxation."

A board of chosen freeholders, under Act May 16, 1894, § 2, cannot take from the director of the board the right to appoint a standing committee.—*Clayton v. Board of Chosen Freeholders (N. J. Sup.)* 725.

A soldier's monument is not a county building, within the act of April 19, 1895.—*Van Baman v. Gallagher (Pa.)* 832.

Where taxes and amounts due the county are in excess of its liability, including contract sued for, the letting of such contracts was not unconstitutional.—*Van Baman v. Gallagher (Pa.)* 832.

A treasurer of a county of over 150,000 inhabitants cannot appropriate to his own use fees for the performance of any official duty.—*Schuylkill County v. Pepper (Pa.)* 835.

Act of county commissioners in approving a bond given by railroad contractors *held* judicial, and hence final.—*Lowell v. Washington County R. Co. (Me.)* 869.

Where the county clerk certifying bills added an illegal fee thereto, and collected it, the county can recover the same.—*Troth v. Board of Chosen Freeholders of County of Camden (N. J. Err. & App.)* 1017.

Under P. L. 1874, p. 280, fees charged by the clerk of Camden county for services as clerk of the courts belong to the county.—*Troth v. Board of Chosen Freeholders of County of Camden (N. J. Err. & App.)* 1017.

Clerk of Camden county is not entitled to fees for reviewing, correcting, and certifying bills.—*Troth v. Board of Chosen Freeholders of County of Camden (N. J. Err. & App.)* 1017.

COURTS.

Review of decision of county commissioner, see "Counties."

Trial by court, see "Trial."

19 Laws, c. 655, § 5, granting an appeal from a justice's court to the superior court, is constitutional.—*Morrow v. State (Del. Err. & App.)* 43.

The supreme court does not have original jurisdiction of a petition for the reproduction of a lost deed.—*In re Nichols (Pa.)* 95.

The orphans' court *held* to have no jurisdiction to pass on the validity of releases given executor by distributees.—*Shafer v. Shafer (Md.)* 167.

A court of special sessions is a special tribunal, dependent for jurisdiction on the statutes.—*O'Keefe v. Moore (N. J. Sup.)* 453.

Common pleas division of supreme court *held* to have jurisdiction of indictment found by old court of common pleas, and transmitted to common pleas division after court of common pleas abolished.—*State v. Dalton (R. I.)* 673.

Pennsylvania courts have jurisdiction of question whether party is estopped to dispute the validity of a Pennsylvania assignment for the benefit of creditors under laws of other states.—*Kendall v. McClure Coke Co. (Pa.)* 823.

The commencement of suit in the county court on a claim due a decedent's estate *held* to oust probate jurisdiction.—*Kenny v. Howard (Vt.)* 1044.

In an action to compel defendant to transfer to plaintiff a certain patent, the fact that the complaint concluded with a claim for \$5,000 damages brought it within the jurisdiction of the superior court, though the complaint alleged that the patent was bought for \$300.—*Starr Cash & Package Car Co. v. Starr (Conn.)* 1057.

COVENANT, ACTION OF.

Survival of action, see "Abatement and Revival."

COVERTURE.

See "Husband and Wife."

CREDITORS.

See "Assignments for Benefit of Creditors"; "Insolvency."

CRIMINAL LAW.

See, also, "Indictment and Information"; "Witnesses."

Particular crimes, see "Abortion"; "Contempt"; "Disorderly House"; "Embezzlement"; "Gambling"; "Homicide"; "Intoxicating Liquors"; "Lotteries"; "Seduction."

Violation of act regulating druggists, see "Druggists."
 — of fishery laws, see "Fish."
 — of game laws, see "Game."
 — of liquor laws, see "Intoxicating Liquors."
 — of truancy law, see "Schools and School Districts."

Unless it appears that defendant was not conscious at the time of the crime that the act was morally wrong, he is responsible, even though he was compelled to its commission by an irresistible impulse.—*Genz v. State* (N. J. Err. & App.) 69.

Refusal of continuance on the ground that counsel did not have time to prepare for trial held not erroneous.—*State v. Lee* (Conn.) 75.

When construction of statute is for the court on prosecution for violating it.—*State v. Main* (Conn.) 80.

In a prosecution under a statute, its constitutionality is a question for the court.—*State v. Main* (Conn.) 80.

Under Const. c. 1, art. 5, the legislature can prescribe the form of complaint for violation of a police regulation.—*State v. McCaffrey* (Vt.) 234.

A new trial will not be granted on account of the absence of witnesses where it is doubtful that a different result would be arrived at in another trial.—*Badger v. State* (Vt.) 286.

A new trial will not be granted on account of the absence of witnesses where no continuance was asked.—*Badger v. State* (Vt.) 286.

Discretion of the trial court in refusing a new trial is not reviewable.—*Commonwealth v. Eisenhower* (Pa.) 521.

The fact that jurymen reported the evidence for a newspaper during trial held not ground for new trial.—*State v. Cottrell* (R. I.) 947.

Evidence.

Record of a public board cannot be impeached by oral evidence in a collateral proceeding.—*State v. Main* (Conn.) 80.

Exceptions of the statute affording matters of excuse only must be shown by defendant.—*State v. McCaffrey* (Vt.) 234.

Declarations by third persons as to weapon with which assault was made held inadmissible.—*State v. Badger* (Vt.) 293.

Defendant waives objection to swearing of witnesses in English without an interpreter, where he makes no objection until the state has closed its case.—*Commonwealth v. Valsalka* (Pa.) 405.

The city judge could not make a confession of guilt, made to him in private, the sole ground of defendant's conviction, by entering the same in the record.—*Watson v. Treasurer of City of Plainfield* (N. J. Sup.) 615.

The impression of defendant's boots in the sand held admissible to show his presence in a place where footprints of a peculiar character were seen.—*Johnson v. State* (N. J. Err. & App.) 949.

Trial.

A refusal to set aside a verdict of guilty because one of the jurors fell asleep for a moment held not error.—*Commonwealth v. Jongrass* (Pa.) 207.

Argument of state's attorney held not ground for reversal.—*State v. Warner* (Vt.) 246.

Where, on waiver of indictment and trial by jury, the accused consents only to a trial before three judges, he cannot be tried by one.—*O'Keefe v. Moore* (N. J. Sup.) 453.

Permitting private counsel to close the case for the state is not ground for reversal.—*Commonwealth v. Eisenhower* (Pa.) 521.

Where the accused testified in his own behalf, it was not error to recall him for further cross-

examination while the rebuttal testimony of the state was being offered.—*Commonwealth v. Eisenhower* (Pa.) 521.

Sufficiency of verdict indorsed on indictment determined.—*State v. Webber* (Me.) 877.

Verdict agreed on after keeper of jury had announced that they were discharged held properly received.—*State v. Cottrell* (R. I.) 947.

A mittimus reciting that defendant had been convicted of keeping intoxicating liquors with intent to sell held to sufficiently describe the offense.—*In re Thayer* (Vt.) 1042.

Instructions.

Failure to charge on a certain point cannot be reviewed where no exception is taken.—*State v. Warner* (Vt.) 246.

A charge that defendant must prove the alibi set up by a preponderance of evidence held erroneous.—*Sherlock v. State* (N. J. Sup.) 435.

A charge that, if the jury believe the evidence of the state, it is its duty to convict, held not improper if the jury is properly instructed as to reasonable doubt.—*Derby v. State* (N. J. Sup.) 614.

A refusal of the court to instruct the jury to acquit cannot be assigned as error.—*Bindernagle v. State* (N. J. Sup.) 619.

Appeal and error.

Where evidence illegally admitted could not have injuriously affected defendant it is no ground for reversal.—*Genz v. State* (N. J. Err. & App.) 69.

Refusal to allow defendant to examine each juror under oath will not be disturbed.—*State v. Lee* (Conn.) 75.

Under Pub. Acts 1893, c. 51, a new trial may be granted on appeal on the ground that the verdict is against the evidence.—*State v. Lee* (Conn.) 75.

On appeal a motion in arrest of sentence cannot be heard on affidavits without findings of fact of the trial court.—*State v. Warner* (Vt.) 246.

Objectionable remarks of counsel will not be considered on appeal, unless the attention of the trial court was called thereto at the time.—*Commonwealth v. Eisenhower* (Pa.) 521.

It is harmless to overrule a question where the court permits another question substantially the same to be asked.—*Clifford v. State* (N. J. Sup.) 1101.

CROSS-EXAMINATION.

See "Witnesses."

CROSSINGS.

Accidents at, see "Railroads."

DAMAGES.

For frivolous appeal, see "Costs."

For land taken for public use, see "Eminent Domain."

For particular injuries, see "Assault and Battery"; "Death"; "Libel and Slander"; "Malicious Prosecution."

In replevin, see "Replevin."

On condemnation of water rights, see "Waters and Water Courses."

What damages may be allowed for personal injuries determined.—*Ford v. Charles Warner Co.* (Del. Super.) 39.

When exemplary damages may be recovered for negligence of servant.—*Ford v. Charles Warner Co.* (Del. Super.) 39.

Evidence that plaintiff had curvature of the spine and defective eyesight held admissible with-

out an allegation in respect thereto.—*Manley v. Delaware & H. Canal Co.* (Vt.) 279.

Physical examination of plaintiff *held* properly refused when not asked until close of testimony.—*Bagley v. Mason* (Vt.) 237.

Actual damage, resulting from a voluntary act, is not justified by the fact that the damage was unintentional.—*Harris v. Eaton* (R. I.) 308.

Measure of damages determined where an administrator is substituted in an action for personal injuries on death of plaintiff.—*Maher v. Philadelphia Traction Co.* (Pa.) 571.

A verdict for \$300 for a broken arm and other injuries is not excessive.—*Hutchings v. Inhabitants of Sullivan* (Me.) 883.

DEATH.

Where a person removes from the state to establish a home in another country at a well-known place, if living when last heard from, the presumption of life continues.—*Francis v. Francis* (Pa.) 120.

A nonresident alien is not entitled to benefit of Act April 26, 1855, relating to death by wrongful act.—*Deni v. Pennsylvania R. Co.* (Pa.) 558.

Where three sisters perish in the same disaster, *held*, that the succession to their estates is to be determined as if death occurred to all at the same moment.—*In re Wilbor* (R. I.) 634.

In an action for death by wrongful act, *held* unnecessary to aver that there are any heirs.—*Budd v. Meriden Electric R. Co.* (Conn.) 683.

A verdict for \$3,800 for the death of a person *held* supported by the evidence.—*Williams v. Camden & A. R. Co.* (N. J. Sup.) 1107.

DEATH BY WRONGFUL ACT.

See "Death."

DECEDENTS.

See "Executors and Administrators"; "Wills." Testimony as to transactions with, see "Witnesses."

DECEIT.

See "Fraud."

DECLARATIONS.

As evidence, see "Criminal Law"; "Evidence."

DECREE.

See "Judgment."

DEDICATION.

The filing of a map on which certain land is shown as a public square will not operate as a dedication, where, by a contract previously recorded, the maker of the map had agreed to convey an interest in it to another.—*South Baltimore Harbor & Improvement Co. of Anne Arundel County v. Smith* (Md.) 27.

An invalid ordinance authorizing a railroad company to construct a track on a certain avenue *held* not an acceptance of the avenue as a street.—*Thompson v. Ocean City R. Co.* (N. J. Ch.) 129.

Clause in deed executed before dedication of street *held* not to limit grantee's rights in such street as an abutter.—*Elliott v. Jenkins* (Vt.) 272.

Dedication of street arising from implied covenant to grantee is revoked by a conveyance of the street to the same grantee.—*Clendenin v. Maryland Const. Co. of Baltimore City* (Md.) 709.

One who dedicates land as a highway may reserve to himself and his assigns the right to construct and to operate a railroad therein.—*Talman v. City of Hoboken* (N. J. Err. & App.) 895.

DEEDS.

See, also, "Chattel Mortgages"; "Easements"; "Estates"; "Fraudulent Conveyances"; "Mortgages"; "Vendor and Purchaser."

Cancellation of, see "Cancellation of Instruments."

Estoppel by deed, see "Estoppel."

Negligence of grantor of defective premises, see "Negligence."

Parol evidence to affect, see "Evidence."

A contract by which one party agrees to sell, and the other to buy, real estate on certain conditions, if properly executed, is entitled to record.—*South Baltimore Harbor & Improvement Co. of Anne Arundel County v. Smith* (Md.) 27.

A deed conveying L. street whenever another street is opened and L. street is closed, *held* to transfer all the estate the grantor had in the roadbed.—*Baldwin v. Trimble* (Md.) 178.

Condition of deed providing for support of grantor *held* not waived.—*Dunklee v. Hooper* (Vt.) 225.

Breach of conditions in a deed providing for future support *held* waived.—*Dunklee v. Hooper* (Vt.) 225.

Evidence *held* inadmissible to show that a breach of conditions was not waived.—*Dunklee v. Hooper* (Vt.) 225.

Deed construed, and *held* to contain a condition subsequent vesting title in the grantee until breach thereof.—*Shum v. Claghorn* (Vt.) 236.

Right of grantee, under a deed containing a condition subsequent to transfer before forfeiture for breach thereof, determined.—*Shum v. Claghorn* (Vt.) 236.

A deed of land for a public school, and for no other purpose, *held* not to create a condition subsequent with forfeiture, in case of use for no other purpose.—*Faith v. Bowles* (Md.) 711.

Presumption of delivery from recording is rebuttable.—*Fair Haven Marble & Marbleized Slate Co. v. Owens* (Vt.) 749.

The fact that the grantor removed to another house on the premises *held* not to show an abandonment of an agreement by the grantee to support the grantor for life.—*Chase v. Chase* (R. I.) 804.

An exception in a covenant against incumbrances by such rights of way, if any, as may exist, is not an admission of such rights.—*Botsford v. Wallace* (Conn.) 902.

Grantees in a deed providing for right of way in common with the grantor *held* to lose their right of way by excluding the grantor.—*Botsford v. Wallace* (Conn.) 902.

Deed construed, and *held* that grantor retained the right to mortgage the fee.—*Bouton v. Doty* (Conn.) 1064.

A reservation by the grantor of a fee, subject to a life estate, of the power to mortgage the fee, *held* valid.—*Bouton v. Doty* (Conn.) 1064.

A recital in a deed *held* not notice to the grantee of a prior unrecorded deed of part of the property.—*Paul v. Kerswell* (N. J. Sup.) 1102.

DE FACTO OFFICERS.

See "Officers."

DEFAULT.

Judgment by, see "Judgment."

DEFECTIVE APPLIANCES.

See "Master and Servant."

DEFECTIVE SIDEWALKS.

See "Municipal Corporations."

DEFECTIVE STREETS.

See "Municipal Corporations."

DEMURRER.

See "Equity"; "Pleading."

DEPOSITARIES.

Where depositary appropriated money in the course of business, and went into the hands of a receiver, *held*, that the owner was entitled to be repaid.—*York v. York Market Co.* (N. H.) 1038.

DESCENT AND DISTRIBUTION.

See, also, "Executors and Administrators"; "Wills."

Heirs of a deceased wife have as against her husband an equity to have stock pledged by her for payment of mortgage applied to satisfy the mortgage before recourse to the lands.—*Bacon v. Deviney* (N. J. Ch.) 144.

Accumulations of income from a trust fund lawfully retained until the beneficiary's death to meet contingencies *held* not to follow the trust fund, but to pass under the intestate law.—*In re Howell's Estate* (Pa.) 181; *Appeal of Campbell, Id.*

Acceptance of devise on condition to furnish a home for an uncle *held* to create a family relation, excluding implied contract to pay for personal services.—*In re Lackey's Estate* (Pa.) 813.

Where an heir dies after confirmation of sale of his ancestor's land by the court, but before deed, his interest descends as land.—*In re Schmid's Estate* (Pa.) 928; *In re Dunlap's Appeal, Id.*

DESCRIPTION.

In chattel mortgage, see "Chattel Mortgages."

DEVISES.

See "Wills."

To charities, see "Charities."

DIRECTING VERDICT.

See "Trial."

DISBARMENT.

Of attorney, see "Attorney and Client."

DISCHARGE.

Of insolvent, see "Insolvency."

Of surety, see "Principal and Surety."

DISCOVERY.

A bill for discovery of definitely ascertained sums dismissed on the ground that an adequate remedy exists at law.—*Thiefes v. Mason* (N. J. Ch.) 455.

When a case is made for relief and discovery, discovery will be compelled, though answer without oath is prayed.—*Manley v. Mickle* (N. J. Err. & App.) 738.

One who has no interest in property is not entitled to a discovery concerning a chattel mortgage thereon.—*Camp v. Ward* (Vt.) 747.

DISCRETION.

In allowance of certiorari, see "Certiorari."

Of trial court, see "Appeal and Error."

— in criminal cases, see "Criminal Law."

DISMISSAL AND NONSUIT.

Directing verdict at trial, see "Trial."

A discontinuance as to some of several joint defendants operates as a discontinuance as to all.—*Peninsular Lumber Co. v. Fehrenbach* (Del. Super.) 38.

When scire facias on lien will be quashed and statement of claims stricken from the record for want of prosecution.—*Peninsular Lumber Co. v. Fehrenbach* (Del. Super.) 38.

Where plaintiff fails to prove the cause of action alleged, a nonsuit is proper, in the absence of a motion to amend.—*Case v. Central R. Co. of New Jersey* (N. J. Err. & App.) 65.

DISORDERLY HOUSE.

Evidence of habitual illegal sales of intoxicating liquors *held* admissible on a common-law indictment for keeping a disorderly house.—*Derby v. State* (N. J. Sup.) 614.

Conduct of persons who are inmates of an alleged disorderly house and their language are admissible in evidence to establish the character of the house.—*Bindernagle v. State* (N. J. Sup.) 619.

While the court usually defines the facts necessary to constitute a disorderly house, whether the proof is sufficient is for the jury.—*Bindernagle v. State* (N. J. Sup.) 619.

DISSOLUTION.

Of attachment, see "Attachment."

DISTRICT AND PROSECUTING ATTORNEYS.

Act 1891 (P. L. 314), fixing the salary of assistant district attorneys in certain counties, *held* not to apply to an assistant district attorney created for Allegheny county by Act Feb. 6, 1867 (P. L. 140).—*Edwards v. Allegheny County* (Pa.) 337.

DIVORCE.

Evidence *held* insufficient to sustain a decree of divorce for desertion.—*Embley v. Embley* (N. J. Ch.) 46.

A decree in favor of a wife for separate maintenance on account of abandonment in a suit for absolute divorce *held* conclusive evidence of desertion.—*Smith v. Smith* (N. J. Ch.) 49.

Evidence in a suit for divorce for desertion *held* insufficient to show improper unwillingness on the part of the wife to return to the husband.—*Smith v. Smith* (N. J. Ch.) 49.

Bill by husband for adultery of wife denied because of condonation.—*Todd v. Todd* (N. J. Ch.) 766.

Two years' residence in the state, with intent to make it a domicile, *held* necessary for jurisdiction.—*Hooker v. Hooker* (N. J. Ch.) 773.

Proof of three or four separate acts of violence at different times, during a period of 20 months, *held* insufficient to sustain a decree for divorce on

the ground of extreme cruelty.—*Hewitt v. Hewitt* (N. J. Ch.) 1011.

The use of profane language, irrespective of its effect on the person addressed, does not constitute extreme cruelty.—*Hewitt v. Hewitt* (N. J. Ch.) 1011.

DOGS.

See "Animals."

DOMESTIC RELATIONS.

See "Guardian and Ward"; "Husband and Wife"; "Infants"; "Parent and Child."

DONATIONS.

See "Gifts."

DOWER.

Sale of dower land in action for partition, see "Partition."

Where dower is assigned and the right to appeal is waived the judgment is final on its entry.—*Hammond v. Hammond* (R. I.) 14.

A dowress before dower assigned cannot mortgage the premises.—*Ritt v. Dodge* (R. I.) 810.

DRUGGISTS.

To support a conviction under Act May 24, 1887, as amended by Act June 16, 1891, regulating druggists, it must appear that the store carried on by defendant was a retail store, and that defendant acted as manager.—*Commonwealth v. Zacharias* (Pa.) 185.

DUE PROCESS OF LAW.

See "Constitutional Law."

DYING DECLARATIONS.

See "Homicide."

EASEMENTS.

Easement of right of crossing over railroad tracks held to run with land.—*Rathbun v. New York, N. H. & H. R. Co.* (R. I.) 300.

A right of way held terminated by a conveyance.—*Johnson v. Grant* (R. I.) 707.

A city using a stream as an open sewer cannot acquire by prescription a right to neglect its duty to keep the stream open.—*Owens v. City of Lancaster* (Pa.) 858.

The owner of an easement is not bound to use it in the particular manner prescribed by the instrument creating it, provided he does not change or increase the servitude.—*Tallon v. City of Hoboken* (N. J. Err. & App.) 895.

Proof of user is not competent to show a way of necessity.—*Botsford v. Wallace* (Conn.) 902.

Grantee of a strip of land held not entitled to way of necessity.—*Botsford v. Wallace* (Conn.) 902.

Grantees in a deed providing also for a right of way held to acquire no such right after excluding the grantor and his successor by a deed from the grantor's widow.—*Botsford v. Wallace* (Conn.) 902.

Certain evidence held inadmissible to show a right of way.—*Botsford v. Wallace* (Conn.) 902.

EJECTMENT.

Where defendant files a plea for defense on equitable grounds, he must set out the facts which entitle him to such relief.—*Shartzler v. Mountain Lake Park Ass'n of Garrett County* (Md.) 786.

Warrant of resurvey held properly directed, where there was an issue as to whether the land in controversy was within the lines of a certain tract.—*Shartzler v. Mountain Lake Park Ass'n of Garrett County* (Md.) 786.

Plaintiff held not bound to prove actual ouster.—*Kelley v. Kelley* (Pa.) 830.

ELECTIONS.

Local option elections, see "Intoxicating Liquors."

Where no objection to a certificate of nomination is filed under the election act the clerk must treat it as valid.—*Hoos v. O'Donnell* (N. J. Sup.) 72.

Pasting on a ballot a sticker bearing the name of the office and the name of the candidate held invalid.—*In re Contested Election of Lawlor* (Pa.) 92.

Rule of marking ballots, under Act June 10, 1893, determined.—*In re Contested Election of Flynn* (Pa.) 523.

Voter held entitled to registration, though principal place of business was outside the state, and he occupied his Maryland home only a portion of each year.—*Ritter v. Etchison* (Md.) 795.

The name of one who has resided in a town more than six months, and has filed a certificate of his registration in another town, should be placed on the voting list by the board of canvassers.—*In re Voter's Certificate* (R. I.) 810.

The name should be placed on such list, not only for general elections, but also for elections of town officers.—*In re Voter's Certificate* (R. I.) 810.

A voter who removed from one ward into another, where he resided for over six months, held not entitled to vote in the former, though he had not registered in the latter from lack of opportunity.—*Rauth v. Ward* (Md.) 898.

ELECTRICITY.

Liability of electric company for injuries to servant, see "Master and Servant."

Right of mayor to prevent erection of poles, see "Municipal Corporations."

Street railroads operated by, see "Street Railroads."

Electric light companies cannot erect poles in the streets of a city without first obtaining from the city a particular designation of the streets in which the poles may be placed.—*Meyers v. Hudson County Electric Co.* (N. J. Sup.) 618.

Escape of electricity from a street railway to the injury of a horse is presumptive proof of negligence.—*Trenton Pass. Ry. Co., Consolidated, v. Cooper* (N. J. Err. & App.) 730; *Same v. Bennett*, *Id.*

EMBEZZLEMENT.

On trial of agent for fraudulent conversion of principal's money, it was error to charge that a refusal to pay over the unapplied money to the principal on lawful demand was a fraudulent conversion.—*Burnett v. State* (N. J. Sup.) 622.

An indictment for embezzlement is insufficient which charges that defendant received certain money in his public office, and does not charge that he fraudulently converted it to his own use.—*State v. Carlin* (Me.) 878.

EMINENT DOMAIN.

Public improvements in cities, see "Municipal Corporations."

Claim by company that no right to crossing existed held negated by award in condemnation

proceedings and the actual construction of crossings.—*Rathbun v. New York, N. H. & H. R. Co.* (R. I.) 800.

Proceedings to take property.

A petition for condemnation, which misstates the facts so that one statute applies to the facts as stated, and a different statute to the real facts, is erroneous.—*Glazier v. New Jersey & N. Y. R. Co.* (N. J. Sup.) 614.

On application by a railroad company for the appointment of appraisers of land taken, the fact of the necessity is shown by an authenticated copy of the vote of the applicant to take the land and a copy of the doings of the railroad commissioners thereunder.—*New York, N. H. & H. R. Co. v. Long* (Conn.) 1070.

On the hearing of an application for the appointment of commissioners to appraise land taken for railroad purposes, *held* error not to allow defendants to show that, in attempting to settle with the owners thereof, the agent of the railroad company stated that it was wanted for steamboat purposes.—*New York, N. H. & H. R. Co. v. Long* (Conn.) 1070.

The approval of the railroad commissioners of an application by a railroad company to condemn land, under Gen. St. § 3460, determines the question of the necessity and the extent of the taking.—*New York, N. H. & H. R. Co. v. Long* (Conn.) 1070.

It is immaterial that the expression of the corporate will which receives the approval of the railroad commissioners was formulated outside the state.—*New York, N. H. & H. R. Co. v. Long* (Conn.) 1070.

Compensation.

Injunction refused on a bill to restrain the operation of a street railroad, and plaintiff left to his remedy for damages.—*Heilman v. Lebanon & A. St. Ry. Co.* (Pa.) 119.

Measure of damages caused by raising grade of township road and maintaining a track thereon is the depreciation in value of an abutting owner's property.—*Thompson v. Citizens' Traction Co.* (Pa.) 205.

The benefits to be derived by the landowner, in consequence of a railroad, cannot be considered in awarding him compensation for the taking of his land by the railroad company.—*Glazier v. New Jersey & N. Y. R. Co.* (N. J. Sup.) 614.

General benefits cannot be set off against damages to property from construction of elevated road.—*Lake Roland El. Ry. Co. v. Frick* (Md.) 650.

The effect of construction of an elevated road on property cannot be shown by its effect on other property several blocks distant.—*Lake Roland El. Ry. Co. v. Frick* (Md.) 650.

In action to recover damages, opinion evidence as to damage done an adjoining lot cannot be contradicted by proof of amount received by the owners thereof.—*Lake Roland El. Ry. Co. v. Weir* (Md.) 714.

Injury to private property abutting on dedicated, but unaccepted, street, *held* not within ordinance providing special remedy to enforce collection of judgment for such injury, when caused by railroad company's appropriation of public street for right of way.—*McColgan v. Baltimore Belt R. Co.* (Md.) 716.

In proceedings against a county to assess damages for the making of a turnpike road free from tolls, it was proper, on the question of value, to show the physical condition of the road.—*West Chester & W. Plank-Road Co. v. Chester County* (Pa.) 905.

It was also proper to show the tax returns made by the officers of the company as to the value of its capital stock.—*West Chester & W. Plank-Road Co. v. Chester County* (Pa.) 905.

Where returns for different years, not successive, were offered, they were admissible without proving the returns for the intervening years.—*West Chester & W. Plank-Road Co. v. Chester County* (Pa.) 905.

Though the inquiry as to value extended over a period of 10 years, some of such returns were admissible without proving all of them for that period.—*West Chester & W. Plank-Road Co. v. Chester County* (Pa.) 905.

The circumstance that unless the then present length of the road was doubled within three years from trial, the franchise would be subject to forfeiture, was also an element affecting the value.—*West Chester & W. Plank-Road Co. v. Chester County* (Pa.) 905.

Measure of damages on condemnation of water rights determined.—*New London Water Board v. Perry* (Conn.) 1059.

EQUITY.

See, also, "Account"; "Cancellation of Instruments"; "Charities"; "Discovery"; "Divorce"; "Fraudulent Conveyances"; "Injunction"; "Marshaling Assets and Securities"; "Mortgages"; "Partition"; "Partnership"; "Receivers"; "Specific Performance"; "Trusts."

Equitable estoppel, see "Estoppel."

—relief against judgment, see "Judgment."

When holder of legal title sues in equity, defendant may assert equitable title in opposition.—*Elliott v. Jenkins* (Vt.) 272.

The chancery court is always open for the filing of a motion for appeal until the enrollment of the decree under V. S. § 915.—*Village of West Derby v. Newport Cemetery Ass'n* (Vt.) 239.

Code, art. 16, § 223, requiring evidence to remain in court 10 days, subject to exceptions before the hearing of the case, *held* not to apply.—*Chatterton v. Mason* (Md.) 960.

Jurisdiction.

A bill asserting title to certain land as against defendants who had been in undisturbed possession for years will not lie until the title is first adjudicated at law.—*Fredericks v. Huber* (Pa.) 90.

Equity *held* to have jurisdiction of a bill against a corporation which has transferred stock on the production of forged powers of attorney, to cancel transfer and require reissue.—*Pennsylvania Co. for Insurances on Lives & Granting Annuities v. Franklin Fire Ins. Co.* (Pa.) 191.

A court of equity has jurisdiction to fix the rent to become due for an ensuing period under a lease, where an arbitration as to the rental, provided for by the lease, has failed.—*Grosvenor v. Flint* (R. I.) 304.

Where the orphans' court could only grant a portion of the relief prayed for, equity will retain the bill.—*Terhune v. Sibbald* (N. J. Ch.) 454.

Where remedy by action at law would be inconvenient, it is inadequate so as to authorize suit in equity.—*Boyd v. American Carbon-Black Co.* (Pa.) 937.

Laches.

A bill in the nature of an action for deceit, brought six years after knowledge of the fraud, is barred by laches.—*Braddock Trust Co. v. Guarantee Trust & Safe-Deposit Co.* (Pa.) 101.

Mere lapse of time within the statutory limit does not constitute laches, where the condition of the parties remains the same.—*Chase v. Chase* (R. I.) 804.

Pleading.

A bill *held* not defective in failing to aver inadequate remedy at law.—*Borie v. Satterthwaite* (Pa.) 102.

A bill to declare borough contracts void for bad faith of the council and irregularity of the ordinance on which they were based could not be amended by alleging that the increase of the borough debt as a result of the contracts was illegal.—*Gallagher v. Borough of Olyphant* (Pa.) 258.

Ch. Rule 213 does not authorize a motion to strike out a demurrer.—*Stanbery v. Baker* (N. J. Ch.) 351.

Equity has power to strike out a frivolous demurrer on motion.—*Stanbery v. Baker* (N. J. Ch.) 351.

Where a demurrer to a bill is accompanied by affidavit, in good faith, it will not be stricken out as frivolous, unless complainant would be prejudiced by delay.—*Stanbery v. Baker* (N. J. Ch.) 351.

A bill, where it does not clearly appear whether it is intended to establish a trust or to secure specific performance, dismissed as without authority.—*Hopkins v. Hopkins* (Md.) 371.

Allegation that defendants removed a building held admitted by admission that it was removed, and failure to deny defendants' complicity therein.—*Tate v. Field* (N. J. Ch.) 440.

The defense of former adjudication may be raised by answer as well as by plea.—*Isham v. Cooper* (N. J. Ch.) 462.

On amendment of bill because of death of one of the complainants, respondent cannot set up defenses not contained in his original answer.—*Dyer v. Cranston Print Works Co.* (R. I.) 632.

When there is submission to answer, there must be full answer.—*Manley v. Mickle* (N. J. Err. & App.) 738.

A cross bill held maintainable as such.—*Manley v. Mickle* (N. J. Err. & App.) 738.

A bill held insufficient on demurrer in alleging that defendants procured false testimony or knew of the falsity.—*Camp v. Ward* (Vt.) 747.

One cannot by an amended bill take a position inconsistent with that of the original bill.—*Cockey v. Plempel* (Md.) 792.

Notice must be given defendant in the original bill to answer an amended bill introducing new matter.—*Cockey v. Plempel* (Md.) 792.

Laches need not be formally pleaded.—*Chase v. Chase* (R. I.) 804.

Where all complainants sought to recover in their right as taxpayers, and one sought to recover as a shareholder in a corporation, held that the bill was multifarious.—*Peabody v. Westerly Waterworks* (R. I.) 807.

ERROR.

See "Appeal and Error."

ESTATES.

See, also, "Remainders."

Creation of by will, see "Wills."

Estates limited over to persons not in esse are represented by the living owner of the first estate of inheritance.—*Doremus v. Dunham* (N. J. Err. & App.) 62.

ESTOPPEL.

To dispute validity of assignment, see "Assignments for Benefit of Creditors."

An estoppel to deny a recital in a bond held sufficiently pleaded by setting out the bond as an exhibit.—*Village of Chester v. Leonard* (Conn.) 397.

By deed.

A trustee diverting the legal estate by deed cannot deny the title so created.—*City of Perth Amboy v. Ramsay* (N. J. Sup.) 446.

One inducing a person to make a loan on a mortgage, a description of which he furnishes, held estopped to claim that part of land within the description is his own.—*East Greenwich Inst. for Savings v. Kenyon* (R. I.) 632.

A grantor held not estopped by covenant of warranty from enforcing an existing mortgage afterwards assigned to him.—*Hamill v. Inventors' Manuf'g Co.* (N. J. Ch.) 773.

A widow held not estopped by the covenants of a mortgage of her dower interest by Pub. St. c. 160, § 4.—*Ritt v. Dodge* (R. I.) 810.

Equitable estoppel.

Rule that, where one of two innocent persons must suffer a loss from the fraud of a third, the loss must be borne by the one whose negligence enabled the third person to commit the fraud, applied.—*Pennsylvania Co. for Insurances on Lives & Granting Annuities v. Franklin Fire Ins. Co.* (Pa.) 191.

Railroad company held estopped to deny the privilege of a crossing to the grantee of one for whom the crossing was constructed.—*Rathbun v. New York, N. H. & H. R. Co.* (R. I.) 300.

An assignee for creditors held estopped to claim that a transfer of bonds by his assignor was void as a fraudulent preference.—*Colt v. Sears Commercial Co.* (R. I.) 311.

An assignee held estopped by laches from questioning the validity of a pledge of bonds by his assignor.—*Colt v. Sears Commercial Co.* (R. I.) 311.

Voluntary payments by stockholders under an agreement to pay to the assignee of a corporation a certain sum for payment of its debts held not to estop them to deny the force of the agreement, it not having been signed by all the solvent members, as promised.—*Brady v. Elliot* (Pa.) 343.

Sureties on a contractor's bond held estopped to deny the authority of one of the parties to enter into the contract.—*Village of Chester v. Leonard* (Conn.) 397.

A corporation held estopped to charge that the assessment roll was void because it did not show that the assessment was limited to the kinds of personality specified by statute.—*Mowry v. Slatersville Mills* (R. I.) 538.

The act or omission of the party to be estopped must be the moving cause of the act of the party injured.—*Mott v. German Hospital* (N. J. Ch.) 757.

Parties to bill for sale of decedent's lands for purpose of partition held estopped, after sharing in the proceeds, to deny the validity of the sale.—*Shartzler v. Mountain Lake Park Ass'n of Garrett County* (Md.) 786.

EVIDENCE.

As to particular facts or issues, see "Contracts"; "Deeds"; "Limitation of Actions"; "Negligence"; "Partnership"; "Trusts"; "Wills."

In action against carriers, see "Carriers." — by and against husband and wife, see "Husband and Wife."

— for bounty, see "Bounties."

— for injury by animal, see "Animals."

In criminal cases, see "Abortion"; "Assault and Battery"; "Criminal Law"; "Disorderly House"; "Homicide."

In particular actions, see "Cancellation of Instruments"; "Divorce"; "Ejectment"; "Fraud"; "Libel and Slander"; "Malicious Prosecution"; "Seduction."

Newly-discovered evidence as ground for new trial, see "New Trial."

Proof of judgment, see "Judgment."

Transactions with decedent, see "Witnesses."

In an action for personal injuries, the burden of showing defendant's negligence and his own

care rests on plaintiff throughout the cause.—*Ashborne v. Town of Waterbury* (Conn.) 498.

Judicial notice.

Courts will take judicial notice of the tree disease termed "peach yellows."—*State v. Main* (Conn.) 80.

The court will take judicial notice that wine is intoxicating.—*Starace v. Rossi* (Vt.) 1109.

Relevancy and competency.

Statements made by one riding on a car which ran over a person who had fallen on the track, *held* admissible as part of the *res gestæ*.—*Coll v. Easton Transit Co.* (Pa.) 89.

Photographs, in order to be admissible, must be verified by proof that they are correct resemblances of the subject.—*Goldsboro v. Central R. Co. of New Jersey* (N. J. Sup.) 433.

A deed *held* inadmissible to show for what the property conveyed was sold.—*Lake Roland El. Ry. Co. v. Frick* (Md.) 650.

Evidence in contradiction of evidence of plaintiff improperly admitted is not subject to objection.—*Budd v. Meriden Electric R. Co.* (Conn.) 683.

Words spoken by a driver in the effort to control a runaway horse *held* admissible.—*Trenton Pass. Ry. Co., Consolidated, v. Cooper* (N. J. Err. & App.) 730; *Same v. Bennett*, *Id.*

Certain evidence *held* inadmissible in replevin for a horse.—*Kelley v. Downing* (Vt.) 968.

One who heard defendant's statements to another cannot state whether they made the same statements to him.—*Chatfield v. Bunnell* (Conn.) 1074.

Declarations and admissions.

In an action against a firm for personal injuries, declarations of one partner, having no personal knowledge of the accident, that plaintiff should be paid, are inadmissible against the firm.—*Folk v. Schaeffer* (Pa.) 104.

Declarations of a motorman of the car which ran over a person *held* admissible as part of the *res gestæ*.—*Coll v. Easton Transit Co.* (Pa.) 89.

Evidence *held* inadmissible as words accompanying an act and explanatory of the act.—*State v. Bradneck* (Conn.) 492.

Declarations of mother of person injured that she did not blame the motorman *held* inadmissible.—*Budd v. Meriden Electric R. Co.* (Conn.) 683.

Parol evidence.

In action on written contract, parol evidence to vary terms *held* inadmissible.—*Pictorial League v. Nelson* (Vt.) 247.

A writing *held* to require explanation by parol.—*Schwab v. Ginkinger* (Pa.) 125.

Parol evidence *held* inadmissible to vary the terms of the lease.—*Hobbs v. Batory* (Md.) 713.

Extrinsic evidence as to practical construction of deeds *held* inadmissible where there is no ambiguity in them.—*Botsford v. Wallace* (Conn.) 902.

Parol evidence *held* admissible to show whether the parties to non interest bearing note intended that it should bear interest during payee's life.—*Beaver v. Slear* (Pa.) 991.

Written contract, in the absence of fraud or mistake, cannot be varied by parol evidence.—*Ellison v. Gray* (N. J. Err. & App.) 1018.

Opinion evidence.

Deputy commissioner of trees known as "peach yellows" could be examined as an expert without qualifying.—*State v. Main* (Conn.) 80.

Evidence as to signature on check *held* not to justify its admission as a test paper.—*Fulham v. Rose* (Pa.) 197.

A question *held* not objectionable as calling for an opinion.—*Brown v. Town of Swanton* (Vt.) 280.

A witness may give his opinion as to how far dirt piled beside a gully will go towards filling the gully.—*Brown v. Town of Swanton* (Vt.) 280.

Question as to whether witness "believed" plaintiff to be in pain *held* properly excluded on the question of damages.—*Bagley v. Mason* (Vt.) 287.

Testimony of electric experts as to the management of an electric car *held* admissible.—*Laufer v. Bridgeport Traction Co.* (Conn.) 879.

EXAMINATION.

Of witness, see "Witnesses."

Physical examination in action for personal injuries, see "Damages."

EXCEPTIONS.

Reservation in lower court, see "Appeal and Error."

To instructions, see "Trial."

EXCEPTIONS, BILL OF.

See "Appeal and Error."

EXCESSIVE DAMAGES.

See "Damages."

EXECUTION.

That the clerk, in filing execution on a judgment, omitted the one cent damages, *held* no ground for setting execution aside.—*Starkey v. Waite* (Vt.) 292.

Under Gen. St. 1420, § 33, indemnification of sheriff claimant's remedy is by replevin or trover.—*Harris v. Krause* (N. J. Sup.) 439.

Under Act June 16, 1836, relating to executions against corporations, a sheriff may make demand at the principal office of the public corporation, wherever it may be within the state.—*Smith v. Altoona & P. Connecting R. Co.* (Pa.) 930.

Seizure of property on execution by individual creditors of owner *held* to give a superior right over one whose claim arose from contract with such owner and another as nominal partners.—*Himmelreich v. Shaffer* (Pa.) 1007.

Sale.

Sale set aside at suit of execution debtor and of a judgment debtor not protected by the sale because of collusion at the sale by the bidders.—*Lennon v. Heindel* (N. J. Ch.) 147.

Sale of land described in two parcels will not be set aside because sold as a whole.—*Lennon v. Heindel* (N. J. Ch.) 147.

That property sold for \$6,000 was worth \$9,000 is not ground to set aside a sale.—*Lennon v. Heindel* (N. J. Ch.) 147.

It is proper under Act April 7, 1870, to sell on a special *fi. fa.* land which is a component part of a corporation plant.—*Bell v. Wood* (Pa.) 201.

A purchaser at execution sale *held*, on redemption, entitled to reimbursement for repairing house on property.—*Cosgrove v. Merz* (R. I.) 704.

Amount paid at execution sale in satisfaction of judgment *held*, on redemption, should be paid one to whom the purchaser conveyed the property.—*Cosgrove v. Merz* (R. I.) 704.

Supplementary proceedings.

An interlocutory order in aid of an unsatisfied judgment forbidding payment by or to a

judgment debtor must be supported by allegations of a specific debt or trust proved by oath.—*Barr v. Voorhees* (N. J. Err. & App.) 134.

In proceedings in chancery in aid of an unsatisfied execution, an interlocutory order for discovery should specify the place for defendant's appearance.—*Barr v. Voorhees* (N. J. Err. & App.) 134.

EXECUTORS AND ADMINISTRATORS.

See, also, "Descent and Distribution"; "Wills."

Executors who failed to take refunding bonds from legatees, as required by Act Feb. 24, 1834, § 45, held personally liable to a creditor.—*In re Robins' Estate* (Pa.) 121; Appeal of Hunter, Id.; Appeal of Philadelphia Trust, Safe-Deposit & Insurance Co., Id.

A release in full to an executor held to operate as an estoppel in pais.—*Shafer v. Shafer* (Md.) 167.

Administration should not be granted on the estate of a wife dying leaving no issue and owing no debts.—*Wilkinson v. Robertson* (Md.) 208.

An executor may dispose of the property of the testator before probate of the will.—*Thiefes v. Mason* (N. J. Ch.) 455.

Costs are not recoverable against an administrator prosecuting in the right of his intestate.—*Bell v. Samuels* (N. J. Sup.) 613.

Executors may sue for injuries to real estate in the life of the testator.—*Lake Roland El. Ry. Co. v. Frick* (Md.) 650.

Bondsmen of executors held not liable for devastation by executor who acquires possession of the estate as trustee.—*Woolley v. Price* (Md.) 644.

Executors held not estopped from suing in the county court on notes due the estate, by reason of their having contested defendant's claim against the estate before the commissioners of the probate court, who acted without jurisdiction.—*Kenny v. Howard* (Vt.) 1044.

Appointment.

Widow, by renouncing rights to administration when it was thought her husband died intestate, held entitled to notice of grant of letters on discovery of will.—*Brodie v. Mitchell* (Md.) 160.

On the death or renunciation of an executor, the right of a residuary legatee to administer is superior to that of the next of kin, and on his death his right passes to his personal representatives.—*In re Booraem's Estate* (N. J. Prerog.) 727.

All else being equal, a son will be preferred to a daughter in administration of the estate.—*In re Hill's Estate* (N. J. Prerog.) 952.

Consent to appointment of administrator by next of kin held not shown by the evidence.—*In re Hill's Estate* (N. J. Prerog.) 952.

Pending appeal from an order granting administration, the court cannot discharge administrator and appoint another.—*In re Hill's Estate* (N. J. Prerog.) 952.

Allowance and payment of claims.

Claim by wife against estate of husband for money loaned to him held properly limited.—*In re Dice's Estate* (Pa.) 117.

Where a widow, as administratrix, petitioned for leave to sell the real estate to pay her claim, held, that the burden was on her to show the validity of the claim.—*In re Martin's Estate* (Pa.) 561.

Report of commission to examine claims against decedent is not rendered void by failure to file it within time limited.—*Providence Steam Carpet Beating Co. v. Hazard* (R. I.) 635.

A judgment against an executrix, who is also a devisee, held not a lien against the estate or that part of it devised.—*Mott v. German Hospital* (N. J. Ch.) 757.

Creditors of an insolvent estate may plead limitation against claim of another creditor.—*In re Claghorn's Estate* (Pa.) 918; Appeal of Keller, Id.

Estoppel of executor to plead limitations held not to prevent creditors from doing so.—*In re Claghorn's Estate* (Pa.) 921; Appeal of Commercial Nat. Bank, Id.

Fraud of testator and executor held to prevent running of limitations until discovery of facts.—*In re Claghorn's Estate* (Pa.) 921; Appeal of Commercial Nat. Bank, Id.

Part payment by executors does not interrupt running of limitations in favor of estate.—*In re Claghorn's Estate* (Pa.) 921; Appeal of Commercial Nat. Bank, Id.

Accounting and settlement.

It is error for the executors to join in one account their account of the settlement of the estate and the account of its distribution.—*In re Robins' Estate* (Pa.) 121; Appeal of Hunter, Id.; Appeal of Philadelphia Trust, Safe-Deposit & Insurance Co., Id.

After approval of an executor's account, held, that the burden was on petitioners to show errors therein.—*Shafer v. Shafer* (Md.) 167.

Liability of executor on sale of saloon fixtures of decedent to widow determined.—*In re Grimm's Estate* (Pa.) 403; Appeal of Monroe, Id.

An executor disposing of personality without proof of the will is responsible to the legatees, but not to the administrator c. t. a. of the first testator.—*Thiefes v. Mason* (N. J. Ch.) 455.

Administrator settling fiduciary account of his intestate is not concluded thereby that he has on hand the specific funds shown to be due.—*State v. Osborn* (Conn.) 491.

Executors held entitled to 5 per cent. commission under a direction in the will for compensation in addition to the "usual commission."—*In re Lilly's Estate* (Pa.) 557; Appeal of Schier, Id.

EXEMPLARY DAMAGES.

See "Damages."

EXEMPTIONS.

Conveyance of exempt property by insolvent, see "Insolvency."

From taxation, see "Taxation."

EXPERT EVIDENCE.

See "Evidence."

FEEES.

Of county officers, see "Counties."
Of sheriff, see "Sheriffs and Constables."

FELLOW SERVANTS.

See "Master and Servant."

FERRIES.

Failure of a ferryman to furnish chains or bars at the end of his boat held not negligent, where the ferry commissioners did not require him to do so.—*Gillette v. Goodspeed* (Conn.) 973.

FINDINGS.

By court, see "Trial."

FINES.

One who gave information which resulted in conviction, *held* entitled to one-half the fine as an informer, under Code, art. 27, § 176.—*Sanner v. State* (Md.) 165.

FIRE INSURANCE.

See "Insurance."

FIRES.

Liability for escape of fire, see "Negligence."
Set by locomotive, see "Railroads."

FISH.

See, also, "Game."

One who located oyster bed and planted oysters therein *held* to have reasonable time to remove, after exclusive rights vest in riparian owner under Acts 1894, c. 380, § 47.—*Powell v. Wilson* (Md.) 216.

Title by possession for 12 months of oyster-bed location under Acts 1894, c. 380, §§ 46, 47, *held* revoked by the creek on which the location is made becoming less than 100 yards wide at its mouth.—*Powell v. Wilson* (Md.) 216.

Right of locators of oyster beds under Acts 1894, c. 380, § 46, determined.—*Handy v. Maddox* (Md.) 222.

Sufficiency of notice of location of oyster bed under Acts 1894, c. 380, § 46, determined.—*Handy v. Maddox* (Md.) 222.

Rev. St. c. 40, § 54, relating to the transportation of fish, *held* constitutional.—*State v. Whitten* (Me.) 331.

The offense of transporting trout, except in the possession of the owner, *held* sufficiently set out in complaint.—*State v. Whitten* (Me.) 331.

Until the state grants exclusive use of its land under water, the right to fish upon it may be exercised by all citizens of the state.—*Polhemus v. Bateman* (N. J. Err. & App.) 1015.

FIXTURES.

Machinery in knitting mills *held* fixtures, as between the mortgagors and mortgagees.—*Appeal of Muehling* (Pa.) 527.

Machines adapted to defendant's business of wood-working, placed and fastened to its mill, *held* fixtures.—*Lee v. Hubschmidt Building & Wood-Working Co.* (N. J. Ch.) 769.

FORECLOSURE.

Of mortgage, see "Mortgages."

FRAUD.

Cancellation of instruments on ground of, see "Cancellation of Instruments."

In application for insurance, see "Insurance."
In the purchase of merchandise, see "Sales."

An action of deceit in the sale of land by defendant's agent will not lie where defendant had no knowledge of the fraud.—*Keefe v. Sholl* (Pa.) 116.

It was immaterial whether or not defendant ratified the transaction, since the action was founded on fraud, and defendant's knowledge thereof, and not on the contract.—*Keefe v. Sholl* (Pa.) 116.

Pages in a book from which a defendant made certain computations, which he falsely represented to be correct, are admissible in evidence in an action to recover for the fraud.—*McKindley v. Drew* (Vt.) 285.

In an action to recover for fraudulent representations to induce plaintiff to take a policy of life insurance it is competent for plaintiff to show his own ignorance of life insurance and defendant's familiarity with it.—*McKindley v. Drew* (Vt.) 285.

Evidence that a defendant charged with having made false representations in a transaction had many other similar transactions at about the same time is admissible as tending to impeach the accuracy of his recollection of the one in issue.—*McKindley v. Drew* (Vt.) 285.

Damages recoverable for false representations made to induce plaintiff to take life insurance, which he has repudiated, is the amount of the premiums he has paid, less the value of the insurance he has received.—*McKindley v. Drew* (Vt.) 285.

Representations of defendant, not made with intent to induce plaintiff to act, *held* not ground for action for deceit.—*Butterfield v. Barber* (R. I.) 532.

FRAUDS, STATUTE OF.

An agreement to sell land signed by the vendor *held* not within the statute.—*Borie v. Satterthwaite* (Pa.) 102.

Written agreement to pay the debt of another *held* sufficient under the statute.—*Rowell v. Dunwoodie* (Vt.) 227.

Sale of growing trees, within section 17 of the statute, *held* to have been validated by delivery and acceptance.—*Leonard v. Medford* (Md.) 365.

A sale of growing trees, to be presently cut and removed by the buyer, is not within the fourth section of the statute.—*Leonard v. Medford* (Md.) 365.

An oral agreement for support, in consideration of certain domestic services, *held* not within the statute.—*Eiserman v. Schneider* (N. J. Sup.) 623.

A real-estate agent agreed with plaintiff that, if he would buy certain lands, he would allow plaintiff his commission and reduce the price thereby. *Held*, the agreement was not within the statute of frauds.—*Spengeman v. Palestine Bldg. Ass'n* (N. J. Sup.) 723.

FRAUDULENT CONVEYANCES.

Instruction as to effect of purchase of land by husband in wife's name *held* proper.—*Mulley v. Shoemaker* (Pa.) 94.

In a suit to set aside a conveyance, the grantee is a necessary party.—*Terhune v. Sibbald* (N. J. Ch.) 454.

A mortgage given to secure future advances *held* valid as to advances subsequently made.—*In re Johnson* (R. I.) 531.

Delay of three months in filing a mortgage *held* not to render it fraudulent as to creditors.—*In re Johnson* (R. I.) 531.

A creditor need not have judgment before the debtor makes an assignment in order to attack for fraud judgments obtained before the assignment.—*In re Hogan's Estate* (Pa.) 548.

An assignment of an interest as legatee to pay certain debts *held* not fraudulent.—*Stockbridge v. Franklin Bank of Baltimore* (Md.) 645.

Services by members of family *held* insufficient consideration for transfer.—*Fair Haven Marble & Marbleized Slate Co. v. Owens* (Vt.) 749.

Indebtedness for advances on contract not provided for therein *held* to date only from time when they were made.—*Fair Haven Marble & Marbleized Slate Co. v. Owens* (Vt.) 749.

Extent of invalidity of conveyances without consideration, leaving grantor without means to pay his debts, in the absence of actual fraud.—

Fair Haven Marble & Marbleized Slate Co. v. Owens (Vt.) 749.

Debts against a grantor firm are proved to be in existence when deeds are made, where it is shown that the firm sold out its entire business on the day on which the deeds were executed.—**Chatterton v. Mason** (Md.) 960.

A transfer *held* in fraud of creditors, though it was for a valuable consideration.—**Chatterton v. Mason** (Md.) 960.

A personal decree against the grantee for the value of the goods, which he had disposed of, *held* error, under the pleadings.—**Chatterton v. Mason** (Md.) 960.

A grantee accounting with his grantor's creditors *held* not entitled to credit for money paid the grantor for counsel fees, nor for living expenses.—**Chatterton v. Mason** (Md.) 960.

A grantee *held* entitled to credit for payment of the claim of a creditor of the grantor, who had rightfully attached the property before the transfer.—**Chatterton v. Mason** (Md.) 960.

A grantee *held* entitled to credit with the pro rata share to which creditors of the grantor, who had been paid by the grantee, would be entitled if the value of the property had been distributed ratably.—**Chatterton v. Mason** (Md.) 960.

GAME.

See, also, "Fish."

An indictment for having game in one's possession *held* sufficient, as following the statute.—**Dickhaut v. State** (Md.) 21.

Code, art. 99, § 13, as amended, prohibiting the possession of game, does not prohibit possession of game lawfully killed in another state.—**Dickhaut v. State** (Md.) 21.

GAMING.

An indictment under V. S. § 5130, as an accessory to keeping a bucket shop in violation of section 5128, *held* insufficient, in failing to allege that the things complained of were done with a view to transactions in a bucket shop, prohibited by section 5128.—**State v. McMillan** (Vt.) 278.

An indictment for keeping a bucket shop *held* insufficient though it followed the language of the statute.—**State v. McMillan** (Vt.) 278.

GARNISHMENT.

See, also, "Attachment"; "Execution."

Agreed statement by trustee sought to be charged on trustee process made in lieu of disclosure *held* not to concede liability.—**Husted v. Stone** (Vt.) 253.

Testamentary trustee is not chargeable on trustee process where trust has not been terminated nor account stated.—**Husted v. Stone** (Vt.) 253.

Trustee summoned on trustee process cannot deduct amount of note indorsed by him for beneficiary.—**Husted v. Stone** (Vt.) 253.

City *held* not chargeable by trustee process in action against contractors alone when another person performed the contract jointly with them.—**McNeal Pipe & Foundry Co. v. Inman** (Vt.) 284.

A garnishee, under plea of *nulla bona*, may show assignment by defendant before the garnishment.—**Stockbridge v. Franklin Bank of Baltimore** (Md.) 645.

Funds in the hands of an assignee in insolvency cannot be reached by trustee process.—**Tucker v. Chick** (N. H.) 672; **Rochester Sav. Bank v. Same, Id.**; **Somersworth Nat. Bank v. Same, Id.**; **Hargraves v. Same, Id.**; **Somersworth Sav. Bank v. Same, Id.**

When actions of foreign attachment brought to charge an assignee in insolvency with funds in his hands will not be continued to await final settlement by the assignee in probate court.—**Tucker v. Chick** (N. H.) 672; **Rochester Sav. Bank v. Same, Id.**; **Somersworth Nat. Bank v. Same, Id.**; **Hargraves v. Same, Id.**; **Somersworth Sav. Bank v. Same, Id.**

Report of commissioner *held* to support an inference that the money with which the garnished indebtedness was bought had been set apart as the share of defendant's co-owner of a fund.—**Russell v. Davis** (Vt.) 746.

A plaintiff who had obtained judgment against the garnishee *held* not entitled to a fund subsequently transferred by the garnishee in trust for the debtor.—**Ohio Brass Co. v. Clark** (Md.) 899.

GAS.

The fact that a gas company does not examine its pipes on premises into which they run, *held* to raise no presumption of negligence.—**State v. Consolidated Gas Co. of Baltimore City** (Md.) 263.

GIFTS.

Between husband and wife, see "Husband and Wife."

Of pension, see "Pensions."

Rule prohibiting large gifts to persons occupying confidential relations with the donor, without explanatory evidence, *held* not to apply.—**Hummel v. Kistner** (Pa.) 815.

Evidence *held* to sustain a gift *causa mortis*.—**In re Wise's Estate** (Pa.) 936.

Evidence *held* to make a question for the jury as to the delivery of an assignment of insurance policies to donor's wife.—**Kulp v. March** (Pa.) 943.

Evidence *held* insufficient to show gift.—**In re Strickler's Estate** (Pa.) 999; **Appeal of Balmer, Id.**

GUARANTY.

Guaranty to pay note when due if principal debtors do not is absolute.—**Stevens v. Gibson** (Vt.) 244.

GUARDIAN AND WARD.

When guardian will not be removed for "mental or physical incapacity," under Code, art. 93, § 232.—**Macgill v. McEvoy** (Md.) 218.

When guardian will not be removed for selling property without leave.—**Macgill v. McEvoy** (Md.) 218.

Ward's claim against estate of deceased guardian stands on a par with that of the creditors, where the guardian mixed the ward's funds with his own.—**State v. Osborn** (Conn.) 491.

That the court of probate has received and recorded a release obtained by guardian from her ward does not conclude the ward from maintaining bill to set aside the release for fraud.—**O'Connor v. O'Connor** (R. I.) 634.

The probate court of a district in which a minor actually resided *held* to have jurisdiction to appoint a guardian for him, though his technical domicile is out of the state.—**Kelsey v. Green** (Conn.) 679.

HABEAS CORPUS.

It is no ground for discharge that the mittimus was defective, the judgment showing that the imprisonment is legal.—**In re Thayer** (Vt.) 1042.

HARMLESS ERROR.

See "Appeal and Error"; "Criminal Law."

HEIRS.

See "Descent and Distribution."

HIGHWAYS.

In cities, see "Municipal Corporations."

Equities of abutter in fee of street *held* superior to legal title.—*Elliott v. Jenkins* (Vt.) 272.

Establishment, alteration, and discontinuance.

The public is estopped to claim an easement in a road abandoned by a city for years, and closed to travel by permanent structures.—*Baldwin v. Trimble* (Md.) 170.

Witnesses other than the town clerk may testify that there is no record of the laying out of a certain road.—*Brown v. Town of Swanton* (Vt.) 280.

Where a highway laid out wholly on the land of one person is abandoned, other abutting owners are not interested, within Pub. St. c. 64, so as to require notice of proceedings.—*Dubois v. Sherry* (R. I.) 344.

Act June 13, 1836, § 6, requiring highways to be kept clear, does not authorize removal of log chute on land of abutting owner.—*Haines v. Barclay Tp.* (Pa.) 560.

A decree of the town council, providing for widening a certain highway, *held* sufficient, though the fact that it had been adjudged necessary did not appear in the record.—*Hunt v. Gorton* (R. I.) 706.

Act July 21, 1887, authorizing fire district to adopt Gen. Law, c. 78, relating to sidewalks and sewers, *held* not to transfer to commissioners of the district from selectmen of the town the authority to lay out new highway.—*Henry v. Town of Haverhill* (N. H.) 1039.

It is error for the county court to permit an amendment to a petition refused by a city to lay out a highway.—*Gilley v. City of Barre* (Vt.) 1111.

Injuries from defects.

A communication to the highway commissioner *held* admissible on the question of notice of a defect in the highway.—*Brown v. Town of Swanton* (Vt.) 280.

Evidence *held* admissible to show that the town had notice of a defect in a highway.—*Brown v. Town of Swanton* (Vt.) 280.

Evidence *held* relevant on the question whether a highway was defective.—*Brown v. Town of Swanton* (Vt.) 280.

Evidence that a certain road has been maintained by the town tends to show that it is a public highway.—*Brown v. Town of Swanton* (Vt.) 280.

Evidence that the horse deceased was driving stopped by the hind wheels of the wagon but a few inches past the gully, *held* evidence that the deceased exercised ordinary care.—*Brown v. Town of Swanton* (Vt.) 280.

It was a question for the jury whether defendant was negligent in having failed to inspect the defective road within four days prior to the accident.—*Brown v. Town of Swanton* (Vt.) 280.

The fact that the town had no reason to expect that the stoppage of water would render the road unsafe did not relieve it from liability for failure to exercise diligence after the road became unsafe.—*Brown v. Town of Swanton* (Vt.) 280.

The jury having viewed the alleged defect, *held*, that the evidence was admissible to show that the defect was the same at the time of the accident.—*Brown v. Town of Swanton* (Vt.) 280.

Where a defect in a highway was the direct result of a defect in a sluice of which the town

had long known, it was not necessary, to entitle plaintiff to recover, to show that the town knew of the resulting defect.—*Brown v. Town of Swanton* (Vt.) 280.

A township *held* not liable for injury to traveler from operation of log chute on private premises adjoining highway.—*Haines v. Barclay Tp.* (Pa.) 560.

Complaint in action against town for defects *held* to sufficiently aver notice thereof.—*Carroll v. Allen* (R. I.) 704.

Complaint in action for injuries on highway *held* not based on two distinct grounds.—*Carroll v. Allen* (R. I.) 704.

Plaintiff in an action for injuries received on a defective highway may establish the limits of the way in the mode prescribed by Rev. St. c. 18, § 95.—*Hutchings v. Inhabitants of Sullivan* (Me.) 883.

Notice of location of defect in a highway in defendant town *held* sufficient.—*Hutchings v. Inhabitants of Sullivan* (Me.) 883.

Where private parties construct a sidewalk within the limits of a highway, *held* that the town is liable for injuries caused by defects therein.—*Hutchings v. Inhabitants of Sullivan* (Me.) 883.

HOLIDAYS.

Code, art. 13, § 9, establishing February 22d as a legal holiday, does not make an act done on such day ineffective.—*Handy v. Maddox* (Md.) 222.

HOMICIDE.

Right to a poll of the jury *held* waived, where demand therefor was not made before the verdict was recorded.—*Hommer v. State* (Md.) 26.

A verdict may be received in the absence of defendant's counsel, if defendant is present.—*Hommer v. State* (Md.) 26.

It is error to submit to the jury the question as to a motive for the crime, when the only evidence tending to establish the fact relied on is incompetent.—*Kohl v. State* (N. J. Err. & App.) 73.

The fact that one wounded by defendant came to his death in the surgeon's hands did not excuse defendant from liability.—*Commonwealth v. Eisenhower* (Pa.) 521.

The presumption of improper influence arising from separation of jurors in a capital case is not conclusive.—*Commonwealth v. Eisenhower* (Pa.) 521.

Statements of deceased *held* admissible as dying declarations.—*State v. Dalton* (R. I.) 673.

To render a statement admissible as a dying declaration, it is only necessary that deceased had no expectation of surviving the injury.—*State v. Dalton* (R. I.) 673.

As between murder in the second degree and manslaughter, voluntary intoxication cannot be a legitimate subject of inquiry.—*Wilson v. State* (N. J. Err. & App.) 954.

If by intoxication defendant was incapable of forming a fixed intent to take life, his offense may be mitigated to murder in the second degree.—*Wilson v. State* (N. J. Err. & App.) 954.

If the faculties of accused were not so prostrated by intoxication as to render him incapable of forming an intent to kill, evidence of intoxication would not show that intent to kill did not exist.—*Wilson v. State* (N. J. Err. & App.) 954.

Intoxication is a mere circumstance to be considered in determining presence or absence of premeditation.—*Wilson v. State* (N. J. Err. & App.) 954.

Provocation by words *held* insufficient to reduce the killing to manslaughter, where a weapon was

used to produce the death.—*Clifford v. State* (N. J. Sup.) 1101.

HORSE RAILROADS.

See "Street Railroads."

HUSBAND AND WIFE.

See, also, "Divorce"; "Dower."

Fraudulent conveyances between husband and wife, see "Fraudulent Conveyances."

Liability of wife as stockholder, see "Banks and Banking."

Right of wife to recover interest on husband's note, see "Interest."

Under Const. art. 3, § 43, land held by husband and wife as tenants by entireties, cannot be subjected to a mortgage executed by the husband.—*McCubbin v. Stanford* (Md.) 214.

When husband is not liable for money loaned to wife to buy necessities.—*Marshall v. Perkins* (R. I.) 301.

Evidence held to justify a decree for separate maintenance.—*Enslin v. Enslin* (N. J. Ch.) 442.

The fact of a gift of money to a wife held insufficient to show that the husband appropriated it, and was liable as trustee, 30 years after the wife's death.—*Thresher v. Dyer* (Conn.) 979.

Disabilities of coverture.

A married woman cannot bind herself as surety, though her principal contracts the debt for the benefit of her estate.—*Wiltbank v. Tobler* (Pa.) 188.

An order by a married woman on an executor of an estate to pay her interest therein to another, not for the benefit of herself, her family, or her estate, held void.—*Appeal of Freeman* (Conn.) 420.

A note by a husband and wife, given to pay off an incumbrance on the husband's land, held valid as against the wife.—*Crevier v. Beberdick* (N. J. Sup.) 959.

The sole release of a married woman is sufficient to discharge a cause of action for personal injuries sustained by her.—*Cooney v. Lincoln* (R. I.) 1031.

A contract by a married woman with an attorney on her personal credit, affecting her interests in personal property attached, held valid.—*Thresher v. Barry* (Conn.) 1064.

Wife's separate estate.

Wife held not entitled to interest on a claim against the husband's estate for money loaned to him.—*In re Dice's Estate* (Pa.) 117.

Evidence held sufficient to show that deposits in savings bank in name of husband and wife were the property of the wife.—*Baker v. Hedrich* (Md.) 383.

A married woman may embark her separate money in business.—*Taylor v. Wands* (N. J. Err. & App.) 315.

Where a married woman employs her insolvent husband as agent to carry on her business, the profits and earnings will belong to her, though partly due to the business experience and energy of her husband.—*Taylor v. Wands* (N. J. Err. & App.) 315.

Where a married woman united with her two sons and her insolvent husband in the formation of a trading corporation, the husband having only one share allotted him without payment, held, the undivided earnings of the corporation represented by her stock belonged to her.—*Taylor v. Wands* (N. J. Err. & App.) 315.

A wife held to have no authority to constitute her husband her agent for delivery of a contract illegal in the state where the agency was attempted to be created.—*Appeal of Freeman* (Conn.) 420.

The fact that a husband was without funds, and that the wife had money, held not to require a conclusion that money invested by him in lands belonged to her.—*In re Martin's Estate* (Pa.) 561.

Where a wife employed her husband to devise mechanical inventions, held that the patents subsequently issuing to her, and the proceeds thereof, were her separate property, and could not be reached by his creditors.—*Talcott v. Arnold* (N. J. Err. & App.) 891.

Actions.

Wife held not entitled to sue for care and nursing of a sick boarder of her husband.—*Garretson v. Appleton* (N. J. Err. & App.) 150.

Complaint seeking to declare fraudulent a conveyance by plaintiff's husband on the ground that it will affect her right to support, held to state no cause of action.—*Ullrich v. Ullrich* (Conn.) 393.

The amount a husband was to pay his wife for property conveyed to him by her direction is recoverable in proceeding by her estate against his.—*Atkins' Estate v. Atkins' Estate* (Vt.) 746.

A married woman may sue to set aside a release given by her without joining her husband.—*Corey v. Howard* (R. I.) 946.

Where a declaration in an action by a husband and wife contains only a single count, and concludes to the damage of both plaintiffs in a single sum, a verdict awarding damages to both and judgment accordingly are not erroneous.—*Consolidated Traction Co. v. Whelan* (N. J. Err. & App.) 1106.

In actions by husband and wife for injuries to wife, where the husband had claims in his own right, he should present them by a separate count.—*Consolidated Traction Co. v. Whelan* (N. J. Err. & App.) 1106.

IMPEACHMENT.

Of witness, see "Witnesses."

IMPUTED NEGLIGENCE.

See "Negligence."

INDICTMENT AND INFORMATION.

See, also, "Criminal Law."

Omission of date at which offense against lottery act was committed held properly amended on the trial.—*Ketline v. State* (N. J. Sup.) 133.

A complaint which does not name the person against whom the offense charged was committed, nor allege that his name is unknown, is bad on demurrer.—*State v. Bruce* (Vt.) 238.

INDORSEMENT.

Of negotiable instruments, see "Bills and Notes."

INFANTS.

Assumption of risk by infant servant, see "Master and Servant."

Right to pauper settlement, see "Paupers."

Where guardians are appointed in different states for a minor in determining as to his custody, the interests of the minor should be considered.—*Kelsey v. Green* (Conn.) 679.

An infant can make a binding contract of apprenticeship.—*Pardey v. American Ship-Windlass Co.* (R. I.) 706.

INFORMATION.

See "Indictment and Information."

INFRINGEMENT.

Of trade-marks and trade-names, see "Trade-Marks and Trade-Names."

INHERITANCE.

See "Descent and Distribution."

INJUNCTION.

Against diverting water courses, see "Waters and Water Courses."

Against enforcement of judgment, see "Judgment."

A preliminary injunction granted on an ex parte affidavit and a part of the bill sworn to as an injunction affidavit held improperly granted, where the facts were denied by the answer.—*Fredericks v. Huber* (Pa.) 90.

On a bill to enjoin the construction of a railroad in front of complainant's lot, evidence held insufficient to show the existence of street on which the railroad was allowed.—*Thompson v. Ocean City R. Co.* (N. J. Ch.) 129.

Where rule to show cause was granted on a bill not sworn to as to all the facts, and without strictly legal evidence as to some of the facts, complainant cannot stand on them alone on return of the rule.—*Thompson v. Ocean City R. Co.* (N. J. Ch.) 129.

Where heirs of a deceased wife have a right to require personal pledge to secure a mortgage to be applied to the mortgage debt, her husband will be enjoined from obtaining a release of the pledge so that the mortgaged property may be made primarily liable.—*Bacon v. Devinney* (N. J. Ch.) 144.

In a suit by one partner to compel the other to make payments according to partnership articles and for dissolution and a receiver, defendant cannot be enjoined from withdrawing his own money from the bank.—*Gusdorff v. Schleisner* (Md.) 170.

A court having jurisdiction of parties may enjoin trespass on land in another state.—*Clad v. Paist* (Pa.) 194.

Riparian owner of a creek having exclusive rights therein under Acts 1894, c. 380, § 47, can enjoin the use of oyster beds located therein.—*Powell v. Wilson* (Md.) 216.

Equity will enjoin suits in other states, where there is an attempt to evade the operation of the laws of the state where both parties to the suit reside.—*Miller v. Gittings* (Md.) 372.

Injunction will not issue against stringing of wires 20 feet above the ground on poles already erected.—*Borough of Brigantine v. Holland Trust Co.* (N. J. Ch.) 438.

Water pipes laid under a street are not such an obstruction of the public easement as authorizes bill by municipality for their removal.—*Borough of Brigantine v. Holland Trust Co.* (N. J. Ch.) 438.

Taxpayer may enjoin contract by city which would involve illegal taxes, and need not wait until the tax is levied.—*Mooney v. Clark* (Conn.) 506.

Complaint for conspiracy held to show only past wrongful acts, and not to entitle complainants to an injunction.—*Manufacturers' Outlet Co. v. Longley* (R. I.) 535.

An injunction to prevent a railroad company from constructing its line over complainant's land before condemning same held improper, under the circumstances.—*Bray v. Ocean City R. Co.* (N. J. Ch.) 604; *Ocean City R. Co. v. Bray*, Id.

An injunction will not lie to restrain obstruction of a highway where no irreparable damage is

done.—*Town of Newcastle v. Haywood* (N. H.) 1040.

INNUENDO.

See "Libel and Slander."

INSOLVENCY.

See, also, "Assignments for Benefit of Creditors." Of corporation, see "Corporations."

A debtor in failing circumstances may secure certain creditors by chattel mortgage in preference to others, in the absence of fraud.—*Green v. McCrane* (N. J. Ch.) 318.

Where a debtor conveys exempt property to another, and it creates a fraudulent preference, the assignee may recover the property or its value.—*Wyman v. Gay* (Me.) 325.

A debtor's discharge does not affect an action against his sureties on an attachment bond in which judgment was rendered against him.—*White v. McCaughey* (R. I.) 350.

A debtor's discharge in insolvency proceedings, instituted after judgment against him in an attachment suit, releases him from liability on the attachment bond.—*White v. Murray* (R. I.) 350.

A default judgment entered against an insolvent within four months of filing a petition in insolvency held not in fraud of creditors.—*White v. Murray* (R. I.) 350.

A suit by foreign creditors who have not proved their claims is not stayed pending proceedings, under Gen. Laws, c. 274, § 50, until the debtor is adjudged insolvent.—*White v. McCaughey* (R. I.) 350.

Insolvency Act, § 52, providing that a discharge shall not alter the liability of a surety for the insolvent, applies to sureties on an attachment bond given by the insolvent.—*White v. Murray* (R. I.) 350.

Creditors may sue to set aside fraudulent sales of assignor without demand on assignee, when a party to the fraud.—*Terhune v. Sibbald* (N. J. Ch.) 454.

Creditors who have proven their claims may sue to set aside fraudulent sales by assignor and for removal of assignee.—*Terhune v. Sibbald* (N. J. Ch.) 454.

The mere taking of a mortgage for a valid debt, in the name of a third person, does not render it fraudulent as to creditors.—*Coates v. Wilson* (R. I.) 537.

Failure of creditors to prove their claim, and recommend assignee, does not prevent judge of probate from making the appointment on his own motion.—*Tucker v. Chick* (N. H.) 672; *Rochester Sav. Bank v. Same*, Id.; *Somersworth Nat. Bank v. Same*, Id.; *Hargraves v. Same*, Id.; *Somersworth Sav. Bank v. Same*, Id.

An insolvent debtor who has not kept books of account will not be discharged.—*Huston v. Goudy* (Me.) 881.

An insolvent debtor will be denied a discharge when guilty of a fraudulent preference.—*Huston v. Goudy* (Me.) 881.

A person who bought and sold lumber, bought clay, and made and sold bricks, and sold machines on commission, held a trader, within the insolvent law.—*Huston v. Goudy* (Me.) 881.

Under Gen. St. p. 1731, § 15, where a debtor fraudulently mortgaged his property, it is a bar to his discharge from imprisonment.—*Iliff v. Banghart* (N. J. Sup.) 894.

INSTRUCTIONS.

See "Criminal Law"; "Trial."

INSURANCE.

Action for fraud in issuance of policy, see "Fraud."

Gift of insurance policy, see "Gifts."

Pledge of policy, see "Pledges."

Payment of premiums *held* to relate back to the life of the policy.—*Lauer v. Gray* (N. J. Err. & App.) 53.

Construction of credit insurance policy, as to whether losses were adjustable under the original policy or a renewal.—*Lauer v. Gray* (N. J. Err. & App.) 53.

Retention of losses by a credit insurance company under an original policy *held* to constitute payment of premium for a renewal policy.—*Lauer v. Gray* (N. J. Err. & App.) 53.

Where a foreign insurance company served by leaving writ with insurance commissioner does not appear, and has not appointed such commissioner its attorney, as required by Gen. Laws, c. 182, § 3, the suit must be dismissed.—*Lubrano v. Imperial Council of the Order of United Friends* (R. I.) 345.

A policy insuring against accidental damage by fire or lightning covers loss by flood.—*Hey v. Guarantors' Liability Indemnity Co.* (Pa.) 402.

Rights of policy holder in a credit insurance company, after insolvency thereof, determined.—*Gray v. Reynolds* (N. J. Err. & App.) 461.

Rights of insured on transfer of membership by one life insurance company to another determined.—*National Mut. Ins. Co. v. Home Ben. Soc.* (Pa.) 519.

A special agreement, by which insurance premiums were paid in advance, *held* not to vary the written contract evidenced by the policy which subsequently issued and the receipts for such premiums.—*Real Estate, Title Insurance & Trust Co. v. Aetna Life Ins. Co.* (Pa.) 639.

Agents.

Omission of the agent to mention in the application prepared by him a material fact correctly stated to him by assured *held* not to defeat a recovery.—*Mullen v. Union Cent. Life Ins. Co.* (Pa.) 988.

Stipulation that an agent of insurer shall have power to waive provision or condition in policy *held* not to apply to requirements as to proofs of loss.—*Snyder v. Dwelling-House Ins. Co.* (N. J. Err. & App.) 1022.

Application.

Failure of insured to disclose that property insured against actual damage is on a river bank is not concealment which will bar recovery for loss from floods.—*Hey v. Guarantors' Liability Indemnity Co.* (Pa.) 402.

Misrepresentations of plaintiff's agent in procuring policy *held* to avoid it.—*Freedman v. Providence-Washington Ins. Co.* (Pa.) 909.

Conditions of policy.

Condition of a policy requiring the insured to furnish a copy of other policies on the property *held* substantially complied with.—*Scottish Union & National Ins. Co. v. Keene* (Md.) 33.

Provision in policy requiring ownership in fee by assured is complied with where joint ownership of the assured amounts to ownership in fee.—*Mascott v. First Nat. Fire Ins. Co.* (Vt.) 255.

When written portion of fire policy will permit the use of an article prohibited by the printed terms.—*Mascott v. First Nat. Fire Ins. Co.* (Vt.) 255.

Where a house destroyed by fire had been vacant and unoccupied for more than a year, and was in the outskirts of the city, *held* the policy was forfeited within the conditions of the contract.—*Jones v. Granite State Fire Ins. Co.* (Me.) 326.

Provisions in policy against use of kerosene *held* not to prohibit its use in a cook stove.—*Snyder v. Dwelling-House Ins. Co.* (N. J. Err. & App.) 1022.

Proofs of loss.

Absence of preliminary proofs of loss *held* waived.—*Caledonia Fire Ins. Co. of Scotland v. Traub* (Md.) 782.

Evidence *held* to show waiver of requirements as to proofs of loss.—*Snyder v. Dwelling-House Ins. Co.* (N. J. Err. & App.) 1022.

Actions.

Where the books showing the goods in a mercantile house when burned were also destroyed, other evidence to show the amount of the loss may be resorted to.—*Scottish Union & National Ins. Co. v. Keene* (Md.) 33.

Where a policy provides that it shall be void for the concealment by assured of a material fact, it is a question for the jury whether a certain fact was material.—*Mascott v. First Nat. Fire Ins. Co.* (Vt.) 255.

INTEREST.

Interest *held* allowable on recovery for building work, though plaintiff's claim was subject to unliquidated deductions.—*Healy v. Fallon* (Conn.) 495.

Right of pledgee to sell collateral, and hold proceeds and collect interest on the debt, determined.—*In re Wilhelm's Estate* (Pa.) 819.

Right of secured creditor on sale of real estate to take interest after confirmation of the sale on the debt determined.—*In re Wilhelm's Estate* (Pa.) 819.

Where a note was given by husband to wife for money borrowed for the purchase of a home, *held* that it was for the jury to say whether the note bore interest during the wife's life.—*Beaver v. Slear* (Pa.) 991.

INTERPRETERS.

Administration of oath by interpreter, see "Oath."

INTOXICATING LIQUORS.

Intoxication as defense in homicide cases, see "Homicide."

Burden of proving noncompliance with Act April 14, 1863, § 2, *held* to be on defendant.—*Phoenix Brewing Co. v. Rumbarger* (Pa.) 340.

Objection that brewing company suing on liquor dealer's bond had not complied with Act April 14, 1863, § 2, *held* without merit.—*Phoenix Brewing Co. v. Rumbarger* (Pa.) 340.

On a prosecution for a "second offense" against the liquor laws, *held*, that a defective statement of the first offense of which defendant was convicted was cured by verdict.—*State v. Ryan* (Conn.) 377.

The fact that an indictment for selling liquor without a license, and for keeping liquor with intent to so sell it, avers that the offenses were committed on the same day, *held* not to show that they arose out of the same transaction.—*State v. Ryan* (Conn.) 377.

To exempt one from indictment, under Crimes Act, § 61, the municipal ordinance must provide a penalty for the offense, and must embrace the class of persons who claim the benefit of its protection.—*Von Der Leith v. State* (N. J. Sup.) 436.

Transfer of license does not pass title until transferee complies with terms of Gen. Stat. 1888, § 3071.—*Gilday v. Warren* (Conn.) 494.

Under Pub. Acts 1895, p. 648, c. 308, double or marked ballots in license election cannot be rejected.—*Fessenden v. Bossa* (Conn.) 977.

An order for wine taken in Vermont by plaintiff's agent, and accepted by plaintiff in another state, *held* in part a contract made in Vermont, so as to prevent recovery for the price.—*Starace v. Rossi* (Vt.) 1109.

Where a contract for the sale of liquor is made partly in Vermont, and it is contrary to statute, there can be no recovery for the price, though it comes into the state in original packages.—*Starace v. Rossi* (Vt.) 1109.

Orders for beer *held* a contract made in Vermont, so that recovery of the purchase price cannot be had.—*Beverwyck Brewing Co. v. Oliver* (Vt.) 1110.

JOINDER.

Of causes, see "Action."

JUDGES.

Legislative control of, see "Constitutional Law."

JUDGMENT.

Appealable judgments, see "Appeal and Error."
In action for divorce, see "Divorce."
In replevin, see "Replevin."
On appeal, see "Appeal and Error."

An injunction against the enforcement of a default judgment will not be granted on grounds which could have been raised in the action at law.—*Twigg v. Hopkins* (Md.) 24; *Hopkins v. Twigg*, *Id.*

An application to strike off a judgment must be on the ground of irregularity appearing on the record.—*Hall v. West Chester Pub. Co.* (Pa.) 106.

A warrant of attorney in a lease *held* not to authorize a judgment against a subtenant who did not sign the lease.—*Stewart v. Jackson* (Pa.) 518.

Objection to joinder of counts in tort and on contract may be taken in arrest of judgment.—*Bull v. Mathews* (R. I.) 536.

Rule applied as to when a judgment at law will be set aside in equity.—*Camp v. Ward* (Vt.) 747.

On *scire facias* to revive judgment, payment before a previous revival cannot be shown.—*Trader v. Lawrence* (Pa.) 812.

Warrant of attorney to confess judgment against executors *held* to authorize only personal judgment.—*In re Claghorn's Estate* (Pa.) 918; *Appeal of Keller*, *Id.*

Disallowance of claim in judgment against executor personally *held* not a collateral attack on the judgment.—*In re Claghorn's Estate* (Pa.) 918; *Appeal of Keller*, *Id.*

A decree cannot be rendered against one not a party.—*Boyd v. American Carbon-Black Co.* (Pa.) 937.

A judgment is proved by a certified copy thereof.—*Chatterton v. Mason* (Md.) 960.

By default.

A rule to open a judgment by default *held* improperly denied.—*Helmsgaertner v. Stewart* (Pa.) 93.

Refusal to open a default judgment because defendant mistakenly believed that the writ was defective *held* proper.—*Jartman v. Pacific Fire Ins. Co.* (Conn.) 970.

Where default is taken in a suit on a contract by a foreign corporation, its capacity to make the contract is admitted.—*Starr Cash & Package Co. v. Starr* (Conn.) 1057.

Where on default the court permits plaintiff to amend after giving defendant opportunity to plead anew, it is not error, six months after such

amendment, to render judgment.—*La Barre v. City of Waterbury* (Conn.) 1068.

Operation and effect.

A judgment against a city for injuries received on a defective sidewalk *held* conclusive on the owner of the premises on which the sidewalk abuts.—*City of Pawtucket v. Bray* (R. I.) 1.

A judgment is not *res judicata* between the parties unless the issues in both cases are the same.—*Parks v. Libby* (Me.) 357.

The defense of former adjudication should be disposed of ordinarily as a preliminary question on motion for preliminary injunction.—*Isham v. Cooper* (N. J. Ch.) 462.

Complainant *held* to have had the benefit of an equitable defense in a prior action at law, so that a judgment in such action was conclusive.—*Isham v. Cooper* (N. J. Ch.) 462.

A judgment in a civil suit is not *res judicata* in a criminal prosecution arising out of the same facts.—*State v. Bradneek* (Conn.) 492.

Where a party might have attacked a decree pleaded in bar, and failed to do so, *held*, that he could not afterwards attack it.—*Royston v. Horner* (Md.) 718.

A mere possibility or expectation of a beneficiary in a trust estate *held* not subject to the lien of a judgment against him.—*In re Handy's Estate* (Pa.) 854; *Appeal of Larned*, *Id.*

JUDICIAL NOTICE.

See "Evidence."

JUDICIAL POWER.

See "Constitutional Law."

JUDICIAL SALES.

See "Attachment"; "Execution."
Contracts to chill bidding, see "Contracts."

JURISDICTION.

See "Courts."
In equity, see "Equity."

JURY.

Conduct of, in criminal cases, see "Criminal Law."
Right to poll jury in homicide cases, see "Homicide."

Pub. Acts 1893, c. 216, providing for the summary destruction of trees infected with peach yellows, *held* not to infringe the right of the owner of the trees to a jury trial.—*State v. Main* (Conn.) 80.

Where issues cannot be framed between the parties to an appeal from the probate court decisive of the questions involved, the parties are not entitled to a jury trial, but the court has discretionary power to order a reference.—*In re Welch's Will* (Vt.) 250; *Field v. Hubbard*, *Id.*

A juror regularly drawn *held* not disqualified because of error in writing his name in return of service of jury notices.—*Commonwealth v. Valsalka* (Pa.) 405.

Control of jury wheel on drawing jurors, and procedure thereafter, *held* in full compliance with Act April 10, 1867.—*Commonwealth v. Valsalka* (Pa.) 405.

It is no objection to an array that the jury commissioners, though having taken oath of office, had not filed it before drawing of jurors.—*Commonwealth v. Valsalka* (Pa.) 405.

Occupation of juror *held* sufficiently described, where he could be recognized thereby.—*Commonwealth v. Valsalka* (Pa.) 405.

On trial for murder, *held* proper to sustain challenge for cause to a juror who states that he has conscientious scruples as to capital punishment.—*Commonwealth v. Valsalka* (Pa.) 405.

One put on a list inaccurately *held* not thereby subject to challenge under Act March 18, 1874.—*Commonwealth v. Valsalka* (Pa.) 405.

In a criminal case, the court properly required "set-aside" jurors to be recalled in the order in which they had been set aside.—*Commonwealth v. Eisenhower* (Pa.) 521.

Exclusion of negroes from jury duty *held* not subject to review, where it does not appear that they were excluded because of their color.—*Johnson v. State* (N. J. Err. & App.) 949.

Failure of the sheriff to file a list of jurors summoned, as required by Revision, p. 526, § 9, does not invalidate the selection and return of such jurors.—*Johnson v. State* (N. J. Err. & App.) 949.

Juror who formed an opinion from reading the papers, but would not find the defendant guilty without evidence, *held* not subject to challenge by defendant.—*Wilson v. State* (N. J. Err. & App.) 954.

LACHES.

See "Equity."

LANDLORD AND TENANT.

Action to cancel lease, see "Cancellation of Instruments."

Liability of lessee for negligence, see "Negligence."

—lessor of railroad for injuries, see "Street Railroads."

Specific performance of lease, see "Specific Performance."

Lessees of laundry plant, consisting of realty and personalty, *held* liable to purchaser of realty under foreclosure, only to the value of the use of the land.—*Newton v. Speare Laundering Co.* (R. I.) 11.

The sending of a key to leased premises to the landlord *held* not a surrender of the lease and acceptance.—*Newton v. Speare Laundering Co.* (R. I.) 11.

Lease of "all that certain store, basement, and vault now in course of erection on that certain lot of land and premises * * * known as street number 35, N. street," *held* to demise the building only, and not the unoccupied part of the lot.—*Klie v. Von Broock* (N. J. Ch.) 469.

The cutting off of 12 inches from rear of lot in which the lessee's only right was to light and air derived from windows opening on it, *held* not a material diminution of lessee's right.—*Klie v. Von Broock* (N. J. Ch.) 469.

Partial destruction of party wall by lessee in cutting out an opening for a door *held* waste.—*Klie v. Von Broock* (N. J. Ch.) 469.

When landlord may require immediate restoration of premises to original condition, where lessee has committed waste.—*Klie v. Von Broock* (N. J. Ch.) 469.

Landlord *held* not liable for injuries by unguarded elevator shaft to one entering by tenant's invitation.—*Hanson v. Beckwith* (R. I.) 702.

Tenants for a year, continuing thereafter in possession with the landlord's consent, become tenants at the rent specified in original agreement.—*Hobbs v. Batory* (Md.) 713.

A notice of an increase of rent *held* waived by accepting from the tenant at will payment at the former rate.—*Murphy v. Little* (Vt.) 938.

Failure of water supply *held*, under the evidence, no defense in an action for rent.—*Lewis v. Clark* (Md.) 1035.

LAWS.

See "Statutes."

LEADING QUESTIONS.

See "Witnesses."

LEASES.

See "Landlord and Tenant."

LEGISLATIVE POWER.

See "Constitutional Law."

LEVY.

Of execution, see "Execution."

Of taxes, see "Taxation."

LIBEL AND SLANDER.

Evidence of particular instances of misconduct on the part of plaintiff in an action for libel is not admissible, in the absence of evidence that his general reputation was bad.—*Folwell v. Providence Journal Co.* (R. I.) 6.

Evidence that judgments were recovered in other actions for the publication of the same matter in other papers *held* inadmissible.—*Folwell v. Providence Journal Co.* (R. I.) 6.

Evidence that no investigation was made because the information came from a source previously found to be reliable, *held* admissible to mitigate damages.—*Folwell v. Providence Journal Co.* (R. I.) 6.

Evidence that the haste necessary to obtain timely publication of the matter prevented investigation as to its truth, *held* inadmissible to mitigate damages.—*Folwell v. Providence Journal Co.* (R. I.) 6.

Publication concerning a clergyman *held* not susceptible of the meaning that the vestrymen were in possession of facts damaging to his character.—*Porter v. Post Pub. Co.* (R. I.) 535.

A publication concerning a clergyman *held* not to support an innuendo that during his absence he had been found guilty of immoral conduct.—*Porter v. Post Pub. Co.* (R. I.) 535.

A demurrer to an entire count for libel must be overruled if any of the language is actionable.—*Porter v. Post Pub. Co.* (R. I.) 535.

One is not liable for publication of words not in their nature defamatory, though special damage results.—*Reid v. Providence Journal Co.* (R. I.) 637.

A publication reciting that three fires had occurred in plaintiff's building *held* not libelous.—*Reid v. Providence Journal Co.* (R. I.) 637.

Words imputing insolvency to one who buys and sells farm products *held* actionable without allegation of special damages.—*Darling v. Clement* (Vt.) 779.

Words charging stealing of lumber *held* actionable per se.—*Darling v. Clement* (Vt.) 779.

Imputations of intemperance, and that plaintiff allowed boys in his care to commit larceny, where he was a teacher, *held* actionable without allegation of special damages.—*Darling v. Clement* (Vt.) 779.

Charges of insolvency *held* not actionable by a school teacher, where no special damages are alleged.—*Darling v. Clement* (Vt.) 779.

A count in slander *held* bad for duplicity, where it declares on three sets of words, spoken

at different times on the same day to the same person.—*Darling v. Clement* (Vt.) 779.

On default, where the words are actionable per se, defendant cannot show on an inquisition of damages that they were privileged.—*Heyward v. Sanner* (Md.) 798.

Whether words in a newspaper article making no accusation in direct terms are libelous *held* a question for the jury.—*Tiepke v. Times Pub. Co.* (R. I.) 1031.

Where a publication is libelous, and alleged false, the defense that it is privileged cannot be raised by demurrer.—*Tiepke v. Times Pub. Co.* (R. I.) 1031.

An innuendo *held* bad on demurrer, as going beyond any suggestion legitimately drawn from the language used.—*Tiepke v. Times Pub. Co.* (R. I.) 1031.

LICENSES.

Of dogs, see "Animals."

To sell liquors, see "Intoxicating Liquors."

LIENS.

See "Mechanics' Liens."

Of judgment, see "Judgment."

Of mortgages, see "Mortgages."

Of seller, see "Sales."

LIFE ESTATES.

Creation by will, see "Wills."

LIFE INSURANCE.

See "Insurance."

LIMITATION OF ACTIONS.

See, also, "Adverse Possession."

Payment on mortgage by owner of equity of redemption of part of the land, *held* to remove bar of statute as to all.—*Longstreet v. Brown* (N. J. Ch.) 56.

The statute *held* to run in favor of legatees who had received their legacies without giving refunding bonds to the executors.—*In re Robins' Estate* (Pa.) 121; *Appeal of Hunter, Id.*; *Appeal of Philadelphia Trust, Safe-Deposit & Insurance Co., Id.*

Foreclosure of a deed of trust is barred where 20 years have elapsed from maturity of the notes secured.—*Baldwin v. Trimble* (Md.) 178.

Act April 13, 1859, declaring that no entry shall arrest the running of limitations unless ejectment be brought within a year, relates to an entry during the running of the statute.—*Hasson v. Klee* (Pa.) 184.

Evidence *held* sufficient to show payment on a note tolling the statute.—*Wright v. Jordan* (Pa.) 196.

In adjusting its accounts, a school district abolished by Act 1892 may lawfully pay a just debt barred by limitations.—*Hartford School Dist. v. School Dist. No. 13 in Hartford* (Vt.) 252.

Declarations of defendant *held* admissible to show absence from the state barring the running of the statutes.—*Burnham v. Courser* (Vt.) 288.

Where defendant pleads limitations, and plaintiff replies that he had no attachable property in the state, the burden of proving that he had such property is on defendant.—*Burnham v. Courser* (Vt.) 288.

Assumpsit on note payable in alternative *held* barred by limitations.—*Brown's Ex'r v. Hitchcock* (Vt.) 292.

Where a complaint alleges a new promise, advantage of the statute may be taken by demurrer.—*O'Connor v. Town of Waterbury* (Conn.) 499.

Party relying on qualified new promise must show fulfillment of the qualification.—*Keenan v. Keenan* (R. I.) 632.

Where defendant, in an action in the supreme court which does not abate, dies, and the executor does not appear, that he was not cited until more than three years after appointment *held* immaterial.—*Sprague v. Greene* (R. I.) 699.

LOCAL LAWS.

See "Statutes."

LOCAL OPTION.

See "Intoxicating Liquors."

LOGS AND LOGGING.

A boom company *held* liable for logs lost by reason of a radical defect in the method of construction.—*Holway v. Proprietors of Machias Boom* (Me.) 882.

In action to recover damages for the loss of logs by reason of defendant's defective boom, plaintiffs must show a want of care, either in the construction and repair, or in the management of the boom.—*Holway v. Proprietors of Machias Boom* (Me.) 882.

LOTTERIES.

Validity of act regulating, see "Constitutional Law."

Under Laws 1894, c. 310, § 178, the possession of a lottery ticket is punishable without regard to the person's knowledge of what the article is.—*Ford v. State* (Md.) 172.

MALICE.

See "Malicious Prosecution."

MALICIOUS PROSECUTION.

Liability of corporation, see "Corporations."

The evidence must show that the arrest was made maliciously and without probable cause.—*Stricker v. Pennsylvania R. Co.* (N. J. Err. & App.) 776.

Admissibility of evidence on issue of whether defendants had probable cause for believing that plaintiff stole money from them as agent.—*Chatfield v. Bunnell* (Conn.) 1074.

Testimony that plaintiff voluntarily surrendered and was not subjected to an arrest *held* admissible in mitigation of damages.—*Chatfield v. Bunnell* (Conn.) 1074.

MANDAMUS.

On demurrer sustained to the answer, the writ may issue without proof.—*Hooper v. New* (Md.) 424.

Mandamus will not lie to compel a court to allow an exception to an order, unless by the order defendant was prejudicially affected.—*In re Carle* (N. J. Sup.) 608.

MANSLAUGHTER.

See "Homicide."

MARRIED WOMEN.

See "Husband and Wife."

MARSHALING ASSETS AND SECURITIES.

A mortgagee is not chargeable with constructive notice of subsequently recorded judgments against the mortgagor, and his lien will not be postponed to such judgments because he released other property on which he had a lien without knowledge of the judgments.—*Annan v. Hays* (Md.) 20.

MASTER AND SERVANT.

See, also, "Principal and Agent."

Measure of damages for injury to third person, see "Damages."

Negligence of servant imputed to master, see "Negligence."

Services and compensation.

On the master's becoming insolvent, *held*, that the servant could not recover against the receiver on the unexpired contract of employment.—*United States Credit System Co. v. Rosenbaum* (N. J. Sup.) 595.

A plea that the servant suing for services was not authorized to transact the business in which he was engaged, and that it was unlawful to engage in such business, was a good plea.—*United States Credit System Co. v. Rosenbaum* (N. J. Sup.) 595.

Contract of employment construed, and rights of employé on termination thereof determined.—*Woodbridge v. Pratt & Whitney Co.* (Conn.) 688.

Master's liability for injuries to servant.

In an action for personal injuries, witnesses need not characterize the employment as dangerous, to render the master liable, where a mere description of it shows that fact.—*Hayes v. Colchester Mills* (Vt.) 269.

Held a question for the jury whether service required of a boy was beyond his capacity, and consequently outside his employment.—*Hayes v. Colchester Mills* (Vt.) 269.

Giving of proper instructions to a child employé does not relieve the master from liability for accidents if the work was not within the scope of his employment, and was such as ought not to have been required of a person of his capacity.—*Hayes v. Colchester Mills* (Vt.) 269.

Held a question for the jury whether a young employé directed to do a certain service should have been cautioned.—*Hayes v. Colchester Mills* (Vt.) 269.

Where no safer machine than the one in which an employé was injured is in general use, the master is not liable for injuries caused by absence of guardrails thereon.—*Keenan v. Waters* (Pa.) 342.

Whether an electric company exercised due care in providing poles reasonably safe for its workmen, and inspecting the same, *held* for the jury.—*Essex County Electric Co. v. Kelly* (N. J. Sup.) 619.

Duty to furnish clear track *held* to have been performed by giving proper orders.—*Healy v. New York, N. H. & H. R. Co.* (R. I.) 676.

A master *held* negligent in the selection of agents to perform his duties, and also in his failure to inspect appliances.—*Donnelly v. Booth Brothers & Hurricane Isle Granite Co.* (Me.) 874.

One injured by the breaking of a rope sustaining a platform on which he was at work *held* entitled to recover as for failure of the master to use necessary precautions for the servant's safety.—*Donnelly v. Booth Brothers & Hurricane Isle Granite Co.* (Me.) 874.

Whether a particular case falls within the duty of the master, or that of the servants, as

such, is a mixed question of law and fact.—*Donnelly v. Booth Brothers & Hurricane Isle Granite Co.* (Me.) 874.

An employer cannot escape liability for negligence by employing incompetent servants to discharge his duty.—*Donnelly v. Booth Brothers & Hurricane Isle Granite Co.* (Me.) 874.

An employé *held* injured by his own contributory negligence.—*Devlin v. Phoenix Iron Co.* (Pa.) 927.

Where defendant shows that plaintiff was injured by a defect not discoverable by inspection, he is not liable therefor.—*Read v. New York, N. H. & H. R. Co.* (R. I.) 947.

A railroad company *held* bound to inspect foreign cars as well as its own.—*Jones v. New York, N. H. & H. R. Co.* (R. I.) 1033.

Evidence *held* to sustain a verdict in favor of a brakeman injured in consequence of the looseness of a grab-iron on a freight car.—*Jones v. New York, N. H. & H. R. Co.* (R. I.) 1033.

Where plaintiff claimed that he was injured by reason of a certain defect in a car, *held*, that evidence was properly refused that when the car arrived at the shops, six days after the accident, such defect did not exist.—*Jones v. New York, N. H. & H. R. Co.* (R. I.) 1033.

Master *held* liable for injuries to servant by change in machinery which was made without his knowledge.—*Ryan v. Chelsea Paper Manufg Co.* (Conn.) 1062.

— Risks assumed by servant.

A minor employed on a dangerous machine, knowing the dangers, *held* to have assumed the risk.—*Dunn v. McNamee* (N. J. Err. & App.) 61.

The servant does not take the risk of carelessness of those employed by the master to discharge his duty.—*Donnelly v. Booth Brothers & Hurricane Isle Granite Co.* (Me.) 874.

— Fellow servants.

When master is liable for an improper order given by one servant to another.—*Hayes v. Colchester Mills* (Vt.) 269.

Where there is evidence that plaintiff's injury was caused by incompetency of a fellow servant, known to the master, a direction to find for the master was erroneous.—*Huntsinger v. Trexler* (Pa.) 574.

Engineer *held* a fellow servant of brakeman on another train.—*Healey v. New York, N. H. & H. R. Co.* (R. I.) 676.

An employer *held* not liable for injuries caused by negligence of fellow servant.—*Devlin v. Phoenix Iron Co.* (Pa.) 927.

Liability for injuries to third persons.

Master is responsible to third persons for injuries due to the negligence of servant while acting within his employment.—*Ford v. Charles Warner Co.* (Del. Super.) 39.

In directing the imprisonment of a person, *held*, that the servant did not act within the scope of his duties, so as to render the master liable for false imprisonment.—*Barabasz v. Kabat* (Md.) 720.

A master *held* liable for unnecessary force used by a servant in performing his duties.—*Barabasz v. Kabat* (Md.) 720.

Interference with the relation by third persons.

Letter *held* to contain intrinsic evidence that it was written after the recipient had contracted to render services to plaintiff, and was calculated to induce her to abandon such employment.—*Forbes v. Morse* (Vt.) 295.

Where it is shown that a course of persuasion has been entered upon to induce a servant to abandon her employment, evidence of opportunity for further persuasion is admissible.—*Forbes v. Morse* (Vt.) 295.

Persons have no right to take up time of employes in peacefully urging them not to work.—*O'Neil v. Behanna* (Pa.) 843.

Acts held to constitute intimidation of employes, though no physical violence was used.—*O'Neil v. Behanna* (Pa.) 843.

MATERIAL MEN.

See "Mechanics' Liens."

MEASURE OF DAMAGES.

See "Damages."

MECHANICS' LIENS.

One furnishing material to the owner of land after he had conveyed by unrecorded deed held entitled to a lien.—*Phillips v. Browne* (R. I.) 490.

Validity of lien is not affected by the fact that the certificate of lien was filed before any sum was due under the contract.—*Healy v. Fallon* (Conn.) 495.

A notice of claim of lien held not the commencement of proceedings to enforce the lien which started the running of the time for filing the petition.—*Goff v. Hosmer* (R. I.) 533.

After confession of judgment in ejectment by a landlord against his tenant, the property is not bound by judgment thereafter rendered on mechanic's lien for material furnished tenant.—*Seltzer v. Robbins* (Pa.) 567.

Right of purchaser at sale under mechanic's lien judgment of a tenant's assumed leasehold interest determined.—*Seltzer v. Robbins* (Pa.) 567.

MEMBERS.

Of corporation, see "Corporations."

MINORS.

See "Guardian and Ward"; "Infants"; "Parent and Child."

MISJOINDER OF CAUSES.

See "Action."

MISREPRESENTATION.

See "Fraud."

MONEY RECEIVED.

Plaintiff held entitled to an action against defendant on account of money had and received.—*Spengeman v. Palestine Bldg. Ass'n* (N. J. Sup.) 723.

MONOPOLIES.

Consolidation of rival concerns held not against public policy, as tending to create a monopoly.—*Meredith v. New Jersey Zinc & Iron Co.* (N. J. Ch.) 539.

MORTGAGES.

See, also, "Chattel Mortgages."

Effect as assignment, see "Assignments."

In fraud of creditors, see "Fraudulent Conveyances."

Right of doweress to mortgaged premises, see "Dower."

—of heirs to have personalty applied in satisfaction of mortgage, see "Descent and Distribution."

Subrogation to rights of mortgagee, see "Subrogation."

Mortgagee receiving price of portion sold by mortgagor and releasing the land held chargeable with price in reduction of the debt.—*Longstreet v. Brown* (N. J. Ch.) 56.

A foreclosure bill need not define the nature of the interests which defendants have in the mortgaged estate.—*Doremus v. Dunham* (N. J. Err. & App.) 62.

Where the mortgage note was assigned, and the transfer was not recorded, nor the mortgage assigned, held, that the assignee, prior to Act 1892, c. 392, did not lose his lien on release of the mortgage by the original mortgagee.—*Demuth v. Old Town Bank* (Md.) 266.

When equity will award damages for waste of mortgaged premises on a bill for foreclosure.—*Tate v. Field* (N. J. Ch.) 440.

Rights of mortgagee of railroad in possession under lease on accounting with lessor determined.—*Spring Brook Ry. Co. v. Lehigh Coal & Navigation Co.* (Pa.) 525.

Mortgage given to take the place of a prior mortgage held valid as between the parties and as against all not misled thereby.—*Coleman v. Reynolds* (Pa.) 543.

Purchaser at execution sale on judgment against R. held put on inquiry by the records as to whether mortgage from R. was not a purchase-money mortgage.—*Coleman v. Reynolds* (Pa.) 543.

A mortgage on the separate property of a married woman held valid, though executed in blank, and filled up by the mortgagee in the presence of the wife alone.—*In re Hogan's Estate* (Pa.) 548.

Record of an assignment of a mortgage held constructive notice to one subsequently taking an assignment.—*Mott v. German Hospital* (N. J. Ch.) 757.

In a foreclosure suit begun more than a year after the death of the mortgagor, held, that a proof of claim against the mortgagor's estate could not be set up as a lien.—*Mott v. German Hospital* (N. J. Ch.) 757.

Assignment of bond and mortgage held sufficient without manual delivery.—*Mott v. German Hospital* (N. J. Ch.) 757.

That a mortgagee did not exercise an option on failure to pay interest when due did not deprive him of the right to declare principal due on a subsequent default.—*Industrial Land Development Co. v. Post* (N. J. Err. & App.) 892.

Mortgage construed, and right of mortgagor to release of fractional part of the land on partial payment determined.—*Hall v. Home Bldg. Co.* (N. J. Ch.) 1019.

A mortgage given by the grantor in a deed under a reserved power to mortgage held within the meaning of such power.—*Bouton v. Doty* (Conn.) 1064.

Assignment of mortgage to wife of mortgagor held not to work a merger.—*Dyer v. Dean* (Vt.) 1113.

A first mortgage may be enforced by a donee as against second mortgagees.—*Dyer v. Dean* (Vt.) 1113.

MOTIONS.

In arrest of judgment, see "Judgment."

To set aside execution, see "Execution."

MULTIFARIOUSNESS.

See "Equity."

MUNICIPAL CORPORATIONS.

See, also, "Bridges"; "Counties"; "Paupers"; "Schools and School Districts"; "Street Railroads."

Liability to garnishment process, see "Garnishment."

Remedy to set aside ordinance, see "Certiorari."
Right of electric light company to erect poles, see "Electricity."

Where a municipality is divided, the old corporation retains title to all its property, unless provision is made to the contrary in the act.—*Inhabitants of Township of Bloomfield v. Borough of Glen Ridge* (N. J. Err. & App.) 63.

Ordinances and resolutions.

Evidence *held* insufficient to prove the existence of an ordinance.—*Thompson v. Ocean City R. Co.* (N. J. Ch.) 129.

Where a charter empowers a mayor to call meetings of the city council, a record showing that the council met "pursuant to the call of the mayor" is sufficient.—*City of Auburn v. Union Water-Power Co. (Me.)* 335.

An ordinance revising ordinances relating to intoxicating liquors *held* to repeal prior ordinances by implication.—*Von Der Leith v. State* (N. J. Sup.) 436.

Under a statute authorizing enforcement of ordinances by reasonable penalties, the precise penalty to be imposed cannot be left to the discretion of the court.—*Young & McShea Amusement Co. v. City of Atlantic City* (N. J. Sup.) 444.

A resolution purporting to give consent to a street-railway company to construct tracks on the street and use electricity as a motive power *held* ineffective.—*West Jersey Traction Co. v. Board of Public Works of City of Camden* (N. J. Sup.) 578.

An ordinance requiring abutting owners to pave a street could not be abrogated by declarations of members of a committee of the council to the effect that it would not be required.—*City of Chester v. Eyre* (Pa.) 837.

A resolution declaring turnouts of street railway unlawful, and directing legal measures to remove them, *held* valid.—*City of Cape May v. Cape May, D. B. & S. P. R. Co.* (N. J. Err. & App.) 892.

An ordinance providing for the impounding of dogs running at large, and killing the same within 24 hours thereafter if not redeemed, *held* not unreasonable.—*City of Hagerstown v. Witmer* (Md.) 965.

An ordinance prohibiting dogs from running at large may be passed under a general power to abate nuisances.—*City of Hagerstown v. Witmer* (Md.) 965.

An ordinance prohibiting the erection or use of "any awning, except the same be upon a suitable frame," *held* void for uncertainty, because "suitable" has no definite meaning in such connection.—*State v. Clarke* (Conn.) 975.

Officers.

Under Act April 6, 1889, relating to the government of cities, the approval of the mayor is not required to validate an appointment to office by a board.—*Erwin v. City of Jersey City* (N. J. Err. & App.) 732.

The appointment of police by the common council of Putnam, under the city charter, *held* not to require the same to be transmitted to the mayor for approval.—*State v. Longdon* (Conn.) 383.

Baltimore city council may appoint at expiration of a term, without official notice that there is a vacancy.—*Hooper v. New* (Md.) 424.

Charter construed, and authority to remove chief of police determined.—*State v. Kennedy* (Conn.) 503.

Charter construed, and *held* to create the office of chief of police.—*State v. Kennedy* (Conn.) 503.

Oath of office of chief of police *held* properly executed.—*State v. Kennedy* (Conn.) 503.

Validity of removal of chief of police determined.—*State v. Kennedy* (Conn.) 503.

Decision of aldermen discharging policeman for misconduct need not expressly find that the misconduct was of such a character as to disqualify him.—*O'Brien v. City of Pawtucket* (R. I.) 530.

Director of public works *held* authorized to make changes in a contract for the construction of a public work.—*Filbert v. City of Philadelphia* (Pa.) 545.

Under the charter of Jersey City, the board of finance and taxation may appoint an additional financial clerk beyond three in the city clerk's office.—*Browning v. O'Donnell* (N. J. Sup.) 613.

Control of streets.

Acts 1890, c. 370, *held* not to authorize mayor of Baltimore to prevent street-railway company from erecting trolley poles.—*Hooper v. Baltimore City Pass. Ry. Co. (Md.)* 359.

Abutting owner has right, as against the municipality, to run electric wires into his building from poles lawfully erected.—*Borough of Brigantine v. Holland Trust Co. (N. J. Ch.)* 438.

A street dedicated, but never accepted by the county, does not become property of the city by the extension of its jurisdiction over such streets as had been condemned or dedicated.—*City of Baltimore v. Broumel* (Md.) 648.

The power to regulate streets does not authorize the city to permit the construction of a railroad on its streets by a corporation organized under the general railroad law.—*Tallon v. City of Hoboken* (N. J. Err. & App.) 895.

Authority of a city to grant permission to lay railroad tracks in its streets *held* to apply to street railways only.—*Tallon v. City of Hoboken* (N. J. Err. & App.) 895.

Liability for torts.

In an action by a city against the owner of premises in front of which there was an opening in the sidewalk, to recover the amount of a judgment recovered against it for injuries, *held*, that the city was not required to show that the owner was negligent in the use of the sidewalk.—*City of Pawtucket v. Bray* (R. I.) 1.

Whether plaintiff going on a sidewalk knowing it was in a bad condition was guilty of contributory negligence *held* a question for the jury.—*Allen v. Borough of Du Bois* (Pa.) 195.

Question whether one who fell into a hole in a sidewalk was guilty of contributory negligence in not discovering the defect *held* for the jury.—*Bruch v. City of Philadelphia* (Pa.) 818.

A municipal corporation which used a stream as a sewer *held* liable in damages to lower owners for failure to keep the channel open, etc.—*Owens v. City of Lancaster* (Pa.) 858.

The city, as owner of the fee, is not in fault in permitting to remain a sidewalk constructed on its premises by the borough to which it succeeded.—*Hoyt v. City of Danbury* (Conn.) 1051.

Defendant *held* entitled to a finding, on the question of probable cause, as to whether it was the snow on the sidewalk that caused plaintiff to slip.—*Hoyt v. City of Danbury* (Conn.) 1051.

A traveler injured on a sidewalk *held* not entitled to recover because the plan of the walk was defective, since the adoption of a plan by a municipality is a governmental duty of a quasi judicial character.—*Hoyt v. City of Danbury* (Conn.) 1051.

Though a defect existed in the authority of a municipal officer who superintended the construction of a sidewalk, where the borough paid for and accepted the walk, and maintained it for years, *held*, that no defect in plan of its construction could be a neglect of repair, authorizing a recovery for injuries received on it.—*Hoyt v. City of Danbury* (Conn.) 1051.

Where plaintiff did not give notice that the defect that caused the accident resulted from snow on the walk, *held*, that defendant was entitled to a finding whether it was snow that caused the accident.—*Hoyt v. City of Danbury* (Conn.) 1061.

Where two portions of a walk were built on different planes, *held*, that it might be a proper method to connect them with steps provided with a railing.—*Hoyt v. City of Danbury* (Conn.) 1061.

Whether a person was guilty of negligence in not grasping the railing of steps connecting two portions of a sidewalk built on different planes *held* a question of fact.—*Hoyt v. City of Danbury* (Conn.) 1061.

Public improvements.

Bill to restrain a city from enforcing an assessment for grading a street *held* insufficient.—*City of Baltimore v. Coates* (Md.) 18.

Notice to abutters is not required on levying assessment the amount of which is fixed by legislation.—*English v. City of Wilmington* (Del. Err. & App.) 158.

Legislature may fix amount of assessment without notice to taxpayer.—*English v. City of Wilmington* (Del. Err. & App.) 158.

It is no objection to act assessing cost of sewer against all adjoining property at a fixed sum that it is based on estimate of cost.—*English v. City of Wilmington* (Del. Err. & App.) 158.

Act assessing all property adjoining sewer at a fixed sum on frontage and area is valid.—*English v. City of Wilmington* (Del. Err. & App.) 158.

Neither the general borough act of April 3, 1851, nor Act May 23, 1893, requires plans and specifications referred to in ordinances authorizing public works, nor the resolutions awarding contracts thereunder, to be recorded and advertised.—*Gallagher v. Borough of Olyphant* (Pa.) 258.

Damages for widening street *held* not to prevent a recovery for damages for a change of grade therein.—*Rodgers v. City of Philadelphia* (Pa.) 339.

Act June 22, 1895, requiring the city to pay part of cost of abolishing grade crossings, only changes the form of its assets, since such abolition is for its general welfare.—*Mooney v. Clark* (Conn.) 506.

Sufficiency of notice to landowners of proposed construction of a sidewalk by a borough, determined.—*Landis v. Borough of Vineland* (N. J. Sup.) 625.

Proceedings of a borough constructing a sidewalk at expense of adjoining landowners must show notice to the owners of the proposed improvement.—*Landis v. Borough of Vineland* (N. J. Sup.) 625.

Ordinance for construction of sidewalks by a borough at expense of adjoining landowners *held* void for want of notice to the owners.—*Landis v. Borough of Vineland* (N. J. Sup.) 625.

Assessments under Act 1887 (P. L. p. 231) and Act 1895 (P. L. p. 95) become liens only after connecting sewers are built, and draw interest only from the date of the confirmation of the assessment for the connecting sewer.—*Vreeland v. City of Bayonne* (N. J. Err. & App.) 737.

It was no objection to the purchase by a town of a waterworks plant, part of which was within another state, that the right granted to the company by such state to maintain that portion of its plant was merely a revocable license, special to the company.—*Peabody v. Westerly Waterworks* (R. I.) 807.

Waterworks constructed by company in which borough had stock *held* to have been constructed

by the borough so as to exclude other companies.—*Carlisle Gas & Water Co. v. Carlisle Water Co.* (Pa.) 821.

A claim of municipal lien *held* properly filed against an entire square for the paving of a street bounding one side of the square.—*City of Chester v. Eyre* (Pa.) 837.

A municipal lien for paving was valid though the paving was done without authority, where the council fully accepted it on completion.—*City of Chester v. Eyre* (Pa.) 837.

Notice should be given to all interested before the adoption of an ordinance adjudicating property rights.—*City of Cape May v. Cape May, D. B. & S. P. R. Co.* (N. J. Err. & App.) 892.

Procedure of committee appointed to report relative to laying out of a street *held* in compliance with a city charter.—*Walsh v. City of Ansonia* (Conn.) 1096.

Fiscal management and taxation.

Right of city, under Const. art. 9, § 8, which has reduced its debt below the limit authorized by law, to thereafter increase it, determined.—*Pepper v. City of Philadelphia* (Pa.) 579.

Act May 26, 1897, authorizing the town of Westerly to hire a certain sum to purchase waterworks, and to issue its notes and bonds therefor, *held* to authorize an increase of indebtedness beyond the limitation prescribed by law.—*Peabody v. Westerly Waterworks* (R. I.) 807.

MURDER.

See "Homicide."

NAVIGABLE WATERS.

Riparian owners' rights of fishery, see "Fish."

Individual landowners *held* not authorized to construct wharves in bed of stream in front of their premises, where the ownership of the bed of the stream was in the city by deed from the state.—*Murphy v. Bullock* (R. I.) 348.

Landowners *held* not to own by riparian right the bed of a stream in front of their premises, where there was a slight rise and fall of the tides.—*Murphy v. Bullock* (R. I.) 348.

Lands from which tides had been shut off by dams by a canal company *held* subject to public use by reason of occupation by canal.—*Murphy v. Bullock* (R. I.) 348.

NEGLIGENCE.

Action by husband for injuries to wife, see "Husband and Wife."

In care of bridge, see "Bridges."

Injuries from defects in highways, see "Highways."

In presenting check for payment, see "Bills and Notes."

Of attorney, see "Attorney and Client."

Of boom company, see "Logs and Logging."

Of carriers, see "Carriers."

Of cities, see "Municipal Corporations."

Of executors and administrators, see "Executors and Administrators."

Of ferryman, see "Ferries."

Of gas company, see "Gas."

Of landlord, see "Landlord and Tenant."

Of master, see "Master and Servant."

Of owner of tow-boat, see "Towage."

Of railroad company, see "Railroads."

Of street-railroad companies, see "Street Railroads."

Of trustees, see "Trusts."

When contributory negligence of plaintiff will not bar a recovery in case defendant's negligence is clearly shown.—*Ford v. Charles Warner Co.* (Del. Super.) 39.

Person burning slabs on his own premises is not liable for escape of fire, unless caused by negligence.—*Dolby v. Hearn* (Del. Super.) 45.

Declaration for damage to property "contiguous and next adjoining" other property includes connecting tracts adjoining at any point and land divided by the running of a public road through it.—*Dolby v. Hearn* (Del. Super.) 45.

Failure of a railroad company to guard a cut where the right of way was separated from the termination of the public highway by 15 feet owned by a third person held not negligence so as to render it liable to a person driving through the highway across such land into the cut.—*Daneck v. Pennsylvania R. Co.* (N. J. Err. & App.) 59.

The lessee of a building undergoing repairs held not liable for injuries received by an employé of the contractor.—*Reilly v. Shannon* (Pa.) 95.

Plaintiff need not affirmatively establish that she was not guilty of contributory negligence.—*Consolidated Traction Co. v. Behr* (N. J. Err. & App.) 142.

The negligence of a driver in the management of his team at the time of a collision with a street car held not imputable to person in his wagon.—*Consolidated Traction Co. v. Behr* (N. J. Err. & App.) 142.

Defendant held not liable for the act of his servant, under impending danger, in throwing a lighted gasoline lamp, which was thrown, caused to explode and injure plaintiff.—*Donahue v. Kelly* (Pa.) 186.

Defendant held not negligent in the use of gasoline in a lamp.—*Donahue v. Kelly* (Pa.) 186.

Evidence held insufficient to show that negligence of defendant gas company was cause of the death of plaintiff's intestate.—*State v. Consolidated Gas Co. of Baltimore City* (Md.) 263.

Person injured by falling into trench in street held guilty of contributory negligence.—*Lumis v. Philadelphia Traction Co.* (Pa.) 414.

Driver of restive horse held negligent in attempting to drive it over a railroad crossing.—*Boyle v. McWilliams* (Conn.) 501.

Questions of fact relating to negligence and contributory negligence are for the jury.—*New York & G. L. Ry. Co. v. New Jersey Electric Ry. Co.* (N. J. Sup.) 627.

A notice of personal injuries given to a corporation held not to limit plaintiff to the specifications of negligence therein mentioned.—*Budd v. Meriden Electric R. Co.* (Conn.) 683.

That the owner of a bridge across tide water has not complied with the license granted to build it will not prevent his recovering damages for an injury thereto if the omission was not the proximate cause of the injury.—*Inhabitants of Cumberland County v. Central Wharf Steam Towboat Co.* (Me.) 867.

Where it was in evidence that the child injured had escaped from the house, and attempted to cross the street, the fact that on other occasions she had been permitted to go on the street alone was inadmissible.—*Woeckner v. Erie Electric Motor Co.* (Pa.) 936.

A grantor of a defective structure held not liable to one injured after delivery of the deed and surrender of possession.—*Palmore v. Morris* (Pa.) 995.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEWLY-DISCOVERED EVIDENCE.

As ground for new trial, see "New Trial."

NEW TRIAL.

See, also, "Criminal Law."

Misconduct of parties promptly rebuked by the trial court is not ground for a new trial.—*Lake v. Weaver* (R. I.) 302.

Technical error which could not have affected in any material way the trial itself, or the result reached by the court, is not ground for a new trial.—*Boyle v. McWilliams* (Conn.) 501.

Newly-discovered evidence, tending merely to impeach or discredit, is no ground for new trial.—*Jones v. New York, N. H. & H. R. Co.* (R. I.) 1033.

A petition for new trial under Gen. Laws, c. 251, § 2, held not to present a case where a new trial "should be had," within such section, where there had already been two trials, both of which resulted against petitioner.—*Bristow v. Nichols* (R. I.) 1033.

A new trial will not be granted under Gen. Laws, c. 251, § 2, for want of a "full, fair, and impartial trial," merely because the court erred in its rulings.—*Bristow v. Nichols* (R. I.) 1033.

A new trial will not be granted because of newly-discovered evidence which it does not appear could not have been produced at the trial.—*Jones v. New York, N. H. & H. R. Co.* (R. I.) 1033.

NONSUIT.

See "Dismissal and Nonsuit."

NOTES.

See "Bills and Notes."

NOTICE.

Of lien claim, see "Mechanics' Liens."

NUISANCE.

Bill to restrain defendant from continuing to manufacture brick dismissed, as its use of its property was not unreasonable to plaintiff.—*Ladd v. Granite State Brick Co.* (N. H.) 1041.

OATH.

An oath administered by an interpreter under the direction of the court held valid, though not repeated by the clerk to the interpreter every time he is called on to administer it.—*Commonwealth v. Jongrass* (Pa.) 207.

OFFICERS.

See, also, "District and Prosecuting Attorneys"; "Receivers"; "Sheriffs and Constables"; "States."

Certiorari to try title to office, see "Certiorari." Of bank, see "Banks and Banking." Of charitable corporation, see "Charities." Of cities, see "Municipal Corporations." Of corporation, see "Corporations." Of county, see "Counties." Of schools, see "Schools and School Districts." Of states, see "States."

A de facto board which entered into a contract which it might have made if de jure might afterwards, on performing acts which rendered it de jure, ratify the contract.—*Village of Chester v. Leonard* (Conn.) 397.

One who becomes a public officer de facto without dishonesty may recover compensation for services rendered.—*Erwin v. City of Jersey City* (N. J. Err. & App.) 732.

Where a body having apparent authority to appoint to public office exercises it, and the ap-

pointee enters on and performs its duties, his official acts are valid, though there is a want of power to appoint him.—*Erwin v. City of Jersey City* (N. J. Err. & App.) 732.

OPINION EVIDENCE.

See "Evidence."

ORDERS.

Appealable orders, see "Appeal and Error."

ORDINANCES.

See "Municipal Corporations."

ORPHANS' COURTS.

See "Courts."

OYSTERS.

See "Fish."

PARENT AND CHILD.

See, also, "Guardian and Ward"; "Infants."

A parent in an action for injuries to a child cannot recover for attention paid the child by other members of the family which did not occasion him any extra expense.—*Woeckner v. Erie Electric Motor Co. (Pa.)* 936.

PAROL EVIDENCE.

See "Evidence."

PARTIES.

To action against firm, see "Partnership."

— on notes, see "Bills and Notes."

To suit to determine ownership of trust fund, see "Trusts."

It was too late, two years after defendant's default, on the eve of trial, to grant his request that another be cited in as co-defendant.—*Starr Cash & Package Co. v. Starr (Conn.)* 1057.

Judgment for plaintiff set aside for want of necessary parties defendant.—*Ueberroth v. Unangst (Pa.)* 935.

PARTITION.

A dower right may be sold in partition.—*Bradford v. Stone (R. I.)* 532.

Partition will not be delayed for an accounting in a pending suit of the amount of a possible lien in favor of one co-owner on the share of the other.—*Pomeroy v. Pomeroy (N. J. Err. & App.)* 754.

Under an order of sale of lands to which decedent was equitably entitled, *held*, that purchaser had the right to rely on the order as emanating from a competent jurisdiction.—*Shartzler v. Mountain Lake Park Ass'n of Garrett County (Md.)* 786.

PARTNERSHIP.

Priority of execution of individual creditors, see "Execution."

Where an executor who had wrongfully withdrawn funds repaid them with cash belonging to a firm of which he was a member, the estate, which had no knowledge that it was partnership money, was not liable to the firm.—*In re Lafferty's Estate (Pa.)* 113; Appeal of Linde, Id.

A demurrer to a bill *held* not to admit the construction placed on partnership agreement in the bill which was negative by the agreement.—*Gusdorff v. Schleisner (Md.)* 170.

37 A.—73

On breach of a covenant in articles under seal, one partner may sue the other in covenant.—*Gusdorff v. Schleisner (Md.)* 170.

A mortgage given by one partner of firm property to secure an individual debt *held valid*.—*Patterson v. Atkinson (R. I.)* 532.

In an action against an executrix for a debt, a motion that a surviving partner should be made defendant should be granted.—*National Exch. Bank v. Galvin (R. I.)* 811.

Joint agreement appointing an agent to carry on a business *held* not to create a partnership as between the parties.—*Krall v. Forney (Pa.)* 846.

Where partner sells to firm in his individual business, his remedy for the price is at law.—*Krall v. Forney (Pa.)* 846.

Members of an association *held* to have no community of interest, so as to constitute them partners.—*Midwood v. Executive Ass'n of Wholesale Grocers of New England (R. I.)* 946.

Action for accounting *held* to fail where cause of action stated in complaint was not proved, but it appeared that defendant was not a partner, his relation to plaintiffs being that of creditor.—*Moran v. Bentley (Conn.)* 1092.

PASSENGERS.

See "Carriers."

PATENTS.

Contract to divide all profits derived from the bicycle business equally includes profits from any branch of such business which the parties afterwards take up.—*Warwick v. Stockton (N. J. Ch.)* 458.

Defendant *held* liable for royalties for use of patent, though complainant assigned the patents to a third person.—*Warwick v. Stockton (N. J. Ch.)* 458.

Defendant *held* liable to account for royalties, though complainant refused to complete the formal record title of the patents.—*Warwick v. Stockton (N. J. Ch.)* 458.

Defendant *held* not entitled to avoid liability on contract to pay royalties on ground of invalidity of patent.—*Warwick v. Stockton (N. J. Ch.)* 458.

PAUPERS.

An order of removal from a borough in which a married woman had acquired no settlement, to the borough in which her husband lived, as a means of returning her to her home, *held* proper.—*Overseers of Poor of Borough of Tunkhannock v. Overseers of Poor of Borough of Montrose (Pa.)* 100.

Under V. S. § 3171, the liability of the town wherein a pauper last resided for three years is not affected by the fact that after such residence he resided outside the state.—*Town of Granville v. Town of Hancock (Vt.)* 294.

Liability of town for support of pauper residing in another town, under V. S. §§ 3171, 3172, determined.—*Town of Granville v. Town of Hancock (Vt.)* 294.

Minor remaining nine months in town *held* to become an inhabitant.—*Town of New Haven v. City of Bridgeport (Conn.)* 397.

Marriage of parents of bastard gives it a domicile in the town in which the father has his settlement.—*Town of Simsbury v. City of Hartford (Conn.)* 678.

PAWN.

See "Pledges."

PAYMENT.

As interrupting limitations, see "Limitation of Actions."

Of mortgage, see "Mortgages."
Of premiums, see "Insurance."

Burden of proof on plea of payment does not shift to plaintiff on introduction of a receipt.—*Terryberry v. Woods* (Vt.) 246.

PENALTIES.

Costs on recovery of, see "Costs."
For frivolous appeal, see "Costs."

PENSIONS.

A contract whereby a pensioner assigned his pension money to one who agreed to provide for him for life *held* not invalid under the pension law, limiting the fee for prosecuting pension claims.—*Schwab v. Ginkinger* (Pa.) 125.

A gift by a pensioner of his pension money *held* not invalidated by said law.—*Schwab v. Ginkinger* (Pa.) 125.

PERFORMANCE.

Of contract, see "Contracts."

PERPETUITIES.

Accumulation of income from charitable fund, see "Charities."

PERSONAL INJURIES.

See "Assault and Battery"; "Bridges"; "Carriers"; "Damages"; "Death"; "Ferries"; "Gas"; "Highways"; "Landlord and Tenant"; "Master and Servant"; "Municipal Corporations"; "Negligence"; "Railroads"; "Street Railroads."

Action by husband for injuries to wife, see "Husband and Wife."

Measure of damages, see "Damages."

PERSONAL REPRESENTATIVES.

See "Executors and Administrators."

PETITION.

See "Pleading."

PLEADING.

Estoppel, see "Estoppel."

In action against carriers, see "Carriers."
— against husband and wife, see "Husband and Wife."

— on notes, see "Bills and Notes."
— to abate nuisance, see "Nuisance."

In criminal cases, see "Criminal Law."

In equity, see "Equity."

In particular actions or proceedings, see "Account"; "Assault and Battery"; "Libel and Slander"; "Mandamus"; "Negligence"; "Seclusion."

Affidavit of defense *held* sufficient.—*New England Steam Brick Co. v. Dube* (R. I.) 14.

Notice of special defense, filed with general issue, is not subject to demurrer.—*Campbell v. Camp* (Vt.) 238.

In an action on written contract a further allegation of an additional understanding *held* surplusage, and failure to prove same an immaterial variance.—*Alling v. Forbes* (Conn.) 390.

A plea in avoidance of a fact that the plea does not admit, is bad.—*Willits Manuf'g Co. v. Board of Chosen Freeholders of Mercer County* (N. J. Sup.) 609.

Plea in abatement for defective service of writ *held* insufficient, where it does not point out the

circumstances making the service defective.—*Budd v. Meriden Electric R. Co.* (Conn.) 683.

That allegation entitling plaintiffs to the judgment was set up in amendment to the complaint, instead of supplemental complaint, *held* not to invalidate judgment.—*Woodbridge v. Pratt & Whitney Co.* (Conn.) 688.

Question on demurrer to petition *held* waived, the cause being heard on petition and answer.—*Dyer v. Dean* (Vt.) 1118.

Facts in answer must be taken as true, there being no denial by replication.—*Dyer v. Dean* (Vt.) 1118.

AMENDMENTS.

A statement in *assumpsit* against two defendants jointly was permitted to be amended on appeal by one defendant from a judgment against him alone, so as to aver that the sheriff's return as to the other defendant was *nihil habet*.—*C. & C. Electric Co. v. St. Clair* (Pa.) 814.

Amendment asked for during trial need not be allowed.—*Botaford v. Wallace* (Conn.) 902.

A court may permit a plaintiff to amend his complaint after default and hearing on damages.—*La Barre v. City of Waterbury* (Conn.) 1068.

Where, after default, plaintiff, over defendant's objections, seeks to prove that defendant had notice of the injury, required by the statute, the court can allow plaintiff to amend his complaint by alleging such notice.—*La Barre v. City of Waterbury* (Conn.) 1068.

Where the cause of action pleaded and the one proved are different, there cannot be an amendment of complaint to conform to proof without entitling defendant to a trial as to facts alleged in amended complaint.—*Moran v. Bentley* (Conn.) 1092.

PLEDGES.

See, also, "Bailment."

Right of pledgee to interest, see "Interest."

Surrender of policy by pledgee *held* unauthorized.—*Manton v. Robinson* (R. I.) 8.

Surrender of policy by second pledgee *held* not authorized by the fact that it was done to enable first pledgee to realize on his claim.—*Manton v. Robinson* (R. I.) 8.

POLICE.

See "Municipal Corporations."

POLICE POWER.

See "Constitutional Law."

POLICY.

See "Insurance."

POOR LAWS.

See "Paupers."

POSSESSION.

See "Adverse Possession."

POWERS.

Of corporation, see "Corporations."

A general power of attorney for sale of corporate stock does not authorize the attorney to sell the stock in payment of his debts.—*Wilson v. Wilson-Rogers* (Pa.) 117.

Return on demand of a written power under which an attorney was acting *held* a revocation thereof.—*Kelly v. Brennan* (N. J. Ch.) 137.

Where a will authorizes such executors as qualify and survive to sell land, all who qualify and survive must join in a contract of sale.—*Tariton v. Gilsey* (N. J. Ch.) 467.

PRACTICE.

See "Abatement and Revival"; "Appeal and Error"; "Appearance"; "Certiorari"; "Costs"; "Discovery"; "Dismissal and Nonsuit"; "Execution"; "Garnishment"; "Judgment"; "Jury"; "New Trial"; "Parties"; "Pleading"; "Stipulations"; "Trial"; "Venue"; "Witnesses."

PREFERENCES.

See "Assignments for Benefit of Creditors"; "Insolvency."

PREMIUMS.

See "Insurance."

PRESUMPTIONS.

Of color of title, see "Adverse Possession."
Of death, see "Death."

PRINCIPAL AND AGENT.

Agents of cities, see "Municipal Corporations."
— of corporation, see "Corporations."
— of insurance companies, see "Insurance."
Husband as agent for wife, see "Husband and Wife."

An agent is a competent witness as to his agency.—*Lawall v. Groman* (Pa.) 98.

Rescission of unauthorized contract of agent held too late.—*Hotchkiss v. Roehm* (Pa.) 119.

A contract by a principal for the sale of property, the subject-matter of agency, prevents a subsequent contract made by an agent the same day from having any force.—*Kelly v. Brennan* (N. J. Ch.) 137.

The fact that a trustee of an estate authorized his name to be written in certain instances to powers of attorney, held not to justify an inference that such authority was given in another instance.—*Pennsylvania Co. for Insurances on Lives & Granting Annuities v. Franklin Fire Ins. Co.* (Pa.) 191.

Acts of agent as to matters not within the scope of his authority held inadmissible against the principal.—*Parsons v. Tilley* (R. I.) 809.

PRINCIPAL AND SURETY.

See, also, "Bail"; "Bonds"; "Guaranty."

Liability of surety on administration bond, see "Executors and Administrators."

Sureties on the bond of a cashier of a national bank, who was annually re-elected, held not liable for defaults occurring after the first year.—*First Nat. Bank v. Briggs' Assignees* (Vt.) 231.

Extending credit to principal in bond for liquors to be furnished held not to release sureties.—*Phoenix Brewing Co. v. Rumbarger* (Pa.) 340.

Where a contract provided for monthly payments of a certain per cent. on estimates, held, that the sureties were released by payments in disregard of such provision.—*Village of Chester v. Leonard* (Conn.) 397.

Where a contractor abandoned the contract, and made the other party his agent to receive and disburse moneys, held, that sureties on the contractor's bond were released.—*Village of Chester v. Leonard* (Conn.) 397.

Violation of a provision in a building contract that payments would not be made, except on

written approval of an engineer, held to release sureties on the contractor's bond.—*Village of Chester v. Leonard* (Conn.) 397.

The fact that variations in a construction contract were made of public record, and might have been seen by sureties on the contractor's bond, held not to preclude the sureties from being released by the changes.—*Village of Chester v. Leonard* (Conn.) 397.

The fact that material variations in a construction contract might operate for the benefit of sureties on the contractor's bond held not to prevent them from being released.—*Village of Chester v. Leonard* (Conn.) 397.

Sureties on a contractor's bond held released by a waiver by the other contracting party of a condition of the contract that the contractor should give bond for keeping the works in repair.—*Village of Chester v. Leonard* (Conn.) 397.

Sureties on a contractor's bond held not released by the making of material changes in the plans of the work.—*Village of Chester v. Leonard* (Conn.) 397.

Sureties on a contractor's bond held not entitled to notice of changes which the contract provided might be made in the work.—*Village of Chester v. Leonard* (Conn.) 397.

It did not affect the liability of sureties on a contractor's bond that the other contracting party never formally accepted the bond.—*Village of Chester v. Leonard* (Conn.) 397.

Time is the essence of a guaranty to take back and pay the par value of stock on January 1, 1895.—*Cabot v. Kent* (R. I.) 945.

Sureties held estopped by their action to assert failure of the obligee to comply with conditions of the contract.—*National Bldg. & Sav. Ass'n v. Fink* (Pa.) 1009.

PRIVILEGED COMMUNICATIONS.

See "Libel and Slander"; "Witnesses."

PROBABLE CAUSE.

See "Malicious Prosecution."

PROBATE COURTS.

See "Courts."

Probate of wills, see "Wills."

PROCESS.

Service on insurance company, see "Insurance."

PROHIBITION.

Where a court issues a temporary injunction against a receiver without leave of court, under an erroneous belief that he had been appointed by a federal court, prohibition will not be granted.—*Sherwood v. New England Knitting Co.* (Conn.) 388.

PROOF.

Of loss, see "Insurance."

PROPERTY.

In animals, see "Animals."

PROXIMATE CAUSE.

See "Negligence."

PUBLIC IMPROVEMENTS.

See "Municipal Corporations."

PUBLIC POLICY.

See "Contracts."

PUBLIC ROADS.

See "Highways."

PUBLIC SCHOOLS.

See "Schools and School Districts."

QUO WARRANTO.

Defects in information *held* waived by a plea to the merits.—*State v. Kennedy* (Conn.) 503.

Failure of relator to file a replication *held* not an admission of allegations in the plea.—*State v. Kennedy* (Conn.) 503.

In quo warranto to try title to office, it may be shown that the record of the warden and burgesses was incorrect.—*State v. Kennedy* (Conn.) 503.

Quo warranto lies to forfeit the exclusiveness of a franchise, as well as to forfeit an entire franchise.—*Commonwealth v. Sturtevant* (Pa.) 916.

An information *held* sufficiently specific in alleging the facts requiring a forfeiture as against an objection first raised by motion in arrest.—*Commonwealth v. Sturtevant* (Pa.) 916.

Nor would such motion be sustained because the information did not allege that such acts were "willful."—*Commonwealth v. Sturtevant* (Pa.) 916.

RAILROADS.

See, also, "Carriers"; "Street Railroads."

Estoppel to deny privilege of crossing, see "Estoppel."

Injunction against construction of, see "Injunction."

Liability for injury to servant, see "Master and Servant."

Taxation of railroad companies, see "Taxation."

Act June 22, 1895, appointing special commission to act for city in agreeing with a railroad as to abolition of grade crossings, is a valid exercise of the legislative power in respect to such abolition.—*Mooney v. Clark* (Conn.) 506.

Location and construction.

The fact that a charter of an electric road does not give it power of eminent domain, so as to condemn land for an overhead crossing, does not show the crossing is not "reasonably practicable," within Act 1871.—*Delaware & H. Canal Co. v. Scranton & P. Traction Co.* (Pa.) 122; *Scranton & P. Traction Co. v. Delaware & H. Canal Co.*, *Id.*

The fact that an overhead crossing would cost \$8,000 does not show that it is not "reasonably practicable," within Act 1871, § 2.—*Delaware & H. Canal Co. v. Scranton & P. Traction Co.* (Pa.) 122; *Scranton & P. Traction Co. v. Delaware & H. Canal Co.*, *Id.*

Under Act March 22, 1895, the chancellor cannot compel a steam railroad at a crossing at grade by an electric railroad to operate a derailing switch in the line of the electric railroad.—*New York & L. B. R. Co. v. Atlantic Highlands, R. B. & L. B. Electric Ry. Co.* (N. J. Err. & App.) 736.

A corporation organized under the general railroad law has not ordinarily the right to occupy highways longitudinally.—*Tallon v. City of Hoboken* (N. J. Err. & App.) 895.

A change of location of a railroad *held* authorized by law.—*Lowell v. Washington County R. Co.* (Me.) 869.

A statute limiting the time within which the work of construction should commence *held* to

have been substantially complied with.—*Lowell v. Washington County R. Co.* (Me.) 869.

Change of location of a road *held* not to release a county from its liability as a subscriber.—*Lowell v. Washington County R. Co.* (Me.) 869.

Under the statute, *held* that the location of a road might be anywhere between the two termini.—*Lowell v. Washington County R. Co.* (Me.) 869.

Where, after a change of location, a subscriber renewed his subscription, *held* that he was not discharged from liability by such change.—*Lowell v. Washington County R. Co.* (Me.) 869.

Operation.

Where horses break out of a pasture, and stray on the track without fault of the railroad company, and are killed, the negligence of the owner will bar recovery.—*Case v. Central R. Co. of New Jersey* (N. J. Err. & App.) 65.

Evidence as to whether plaintiff could see or hear the approaching train that ran upon him *held* to take the question of his contributory negligence to the jury.—*Goldshoro v. Central R. Co. of New Jersey* (N. J. Sup.) 433.

Whether a passenger who, on being carried beyond his destination, walked back on the track, was guilty of contributory negligence, was for the jury.—*Young v. Camden, G. & W. Ry. Co.* (N. J. Err. & App.) 1013.

A traveler who, immediately after a train had passed in front of him on the first track, walked forward and upon the second track, where he was struck by another train, *held* guilty of contributory negligence.—*Pennsylvania R. Co. v. Pfuelb* (N. J. Sup.) 1100.

Accidents at crossings.

Evidence in an action for accident at a railroad crossing *held* to present a case for the jury on the questions of negligence and contributory negligence.—*Laib v. Pennsylvania R. Co.* (Pa.) 96.

A person is not bound as a matter of law to stop at a railroad crossing.—*Manley v. Delaware & H. Canal Co.* (Vt.) 279.

Evidence that no signals were given was admissible under an averment that defendant negligently managed its locomotive.—*Manley v. Delaware & H. Canal Co.* (Vt.) 279.

Though a railroad was negligent in guarding a crossing, *held*, that it could not be presumed that this was the cause of the death of one found on the track.—*Welsh v. Erie & W. V. R. Co.* (Pa.) 513.

Failure of deceased to look and listen *held*, under the circumstances, negligence per se.—*Gleim v. Harris* (Pa.) 515.

One killed at a crossing *held* guilty of contributory negligence.—*Hess v. Williamsport & N. B. R. Co.* (Pa.) 568.

One about to drive over a railroad crossing must stop and look and listen.—*Decker v. Lehigh Val. R. Co.* (Pa.) 570.

Though a steam railroad has a right of way at a crossing over an electric car, if failure to give signals causes collision, the railroad company cannot recover for the injuries arising therefrom.—*New York & G. L. Ry. Co. v. New Jersey Electric Ry. Co.* (N. J. Sup.) 627.

The same care is required to avoid collision by those operating an electric car in going over a railroad crossing as is required of one driving any ordinary vehicle.—*New York & G. L. Ry. Co. v. New Jersey Electric Ry. Co.* (N. J. Sup.) 627.

The fact that an electric company and a railroad company had an agreement as to crossing the railroad track *held* not to relieve the railroad company from giving statutory signals.—*New York & G. L. Ry. Co. v. New Jersey Electric Ry. Co.* (N. J. Sup.) 627.

Fact that train was late, or that there was a curve at that point, was not evidence of negligence in approaching crossing.—Northern Cent. Ry. Co. v. Medairy (Md.) 796.

Failure of company to voluntarily station flagman at crossing outside corporate limits of city held not negligence.—Northern Cent. Ry. Co. v. Medairy (Md.) 796.

In action for personal injuries, *held*, that the case should have been taken from the jury, the evidence showing no negligence of defendant.—Northern Cent. Ry. Co. v. Medairy (Md.) 796.

Where there was unobstructed view of approaching train, plaintiff's testimony that she looked and saw nothing *held* unworthy of consideration.—Northern Cent. Ry. Co. v. Medairy (Md.) 796.

Questions of negligence and contributory negligence *held* for the jury in an action for injuries received at a crossing.—Western Maryland R. Co. v. Kehoe (Md.) 799.

A person attempting to cross the tracks in the daytime, and struck by a train, *held* guilty of contributory negligence.—Baker v. Pennsylvania R. Co. (Pa.) 933.

A person injured at a railroad crossing, who fails to look for an approaching train, *held* guilty of contributory negligence.—Hartman v. Harris (Pa.) 942.

The fact that the flagman failed to lower the gates *held* not to excuse the contributory negligence of a traveler killed at the crossing.—Pennsylvania R. Co. v. Pfuell (N. J. Sup.) 1100.

— Fires.

Held not a question for the jury whether, on account of excessive drought, it was the duty of the railroad company to prevent escape of any fire from the smokestacks of their engines.—West Jersey R. Co. v. Abbott (N. J. Err. & App.) 1104.

Legislative regulations limiting the duty of railroad companies in respect to precautions to be taken against escape of fire *held* conclusive as to such duty.—West Jersey R. Co. v. Abbott (N. J. Err. & App.) 1104.

RATIFICATION.

Of contract, see "Contracts."

REASONABLE DOUBT.

See "Criminal Law."

RECEIVERS.

Of corporations, see "Corporations."

Of depositaries, see "Depositaries."

Where property in the hands of a receiver is subject to a lien for taxes, the court will provide for payment as a preferred claim.—Duryee v. United States Credit-System Co. (N. J. Ch.) 155.

A receiver cannot be appointed for a corporation where the effect would be to hinder the collection of valid claims.—Bell v. Wood (Pa.) 201.

RECONVENTION.

See "Set-Off and Counterclaim."

RECORDS.

Of mortgage, see "Mortgages."

On appeal, see "Appeal and Error."

RECOUPMENT.

See "Set-Off and Counterclaim."

RELEASE.

Of bail, see "Bail."

Of debtor, see "Assignments for Benefit of Creditors"; "Insolvency."

Of sureties, see "Principal and Surety."

A release under seal of some of the joint promisors *held* to discharge all.—Merritt v. Bucknam (Me.) 885.

RELIGIOUS SOCIETIES.

Gen. St. § 2092, providing that lay members of local corporation of Roman Catholic Church shall be appointed by the committee of the congregation, is mandatory.—State v. Getty (Conn.) 687.

REMAINDERS.

Remainder-men *held* not precluded by the existence of a life estate to file a bill to set aside a conveyance by testator.—Chase v. Chase (R. I.) 804.

Where one to whom a life estate had been devised remained in possession under a lease, *held* that the life estate did not preclude the remainder-men from suing to set aside a deed made by deceased.—Chase v. Chase (R. I.) 804.

REMOTE AND PROXIMATE CAUSE.

See "Negligence."

REMOVAL.

Of guardian, see "Guardian and Ward."

RENT.

See "Landlord and Tenant."

REPEAL.

Of statute, see "Statutes."

REPLEVIN.

"Not guilty" is the proper general issue in replevin.—Campbell v. Camp (Vt.) 238.

Under V. S. §§ 1471, 1481, a general judgment for plaintiff is a judgment for at least nominal damages.—Starkey v. Waite (Vt.) 292.

An assignee for benefit of creditors of a member of a firm to which plaintiff had sold machinery sued for *held* not entitled to defend in right of a judgment creditor not a party on the record.—Raymond v. Schoonover (Pa.) 524.

Defendant may be found to have wrongfully detained the property, though no demand was made, where he filed a general denial without a disclaimer.—McNamara v. Lyon (Conn.) 981.

Plaintiff may recover, though there is no express finding that he is entitled to immediate possession, where such right was in issue, and the issues were found in his favor.—McNamara v. Lyon (Conn.) 981.

REPLICATION.

See "Pleading."

REPLY.

See "Pleading."

RESCISSION.

Of contract of agent, see "Principal and Agent." Of contract of sale of land, see "Vendor and Purchaser."

RES GESTAE.

See "Evidence."

RES INTER ALIOS ACTA.

See "Evidence."

RES JUDICATA.

See "Judgment."

RESOLUTIONS.

Of city council, see "Municipal Corporations."

RESTRAINT OF TRADE.

See "Contracts."

RESULTING TRUSTS.

See "Trusts."

REVIEW.

See "Appeal and Error."

REVIVAL.

See "Abatement and Revival."

Of judgment, see "Judgment."

REVOCATION.

Of power of attorney, see "Powers."

RISKS OF EMPLOYMENT.

See "Master and Servant."

ROADS.

See "Highways."

SALES.

See, also, "Fraudulent Conveyances"; "Vendor and Purchaser."

One selling property conditionally does not waive his lien by attaching the property.—*Reed v. Starkey* (Vt.) 297.

Delivery sufficient to make an absolute sale valid against creditors *held* established by the evidence.—*Goodwin v. Goodwin* (Me.) 352.

Machinery sold with title to remain in the seller until payment, and attached to the realty, gives a judgment creditor no right of possession as against the seller.—*Raymond v. Schoonover* (Pa.) 524.

A sale *held* not fraudulent though the purchaser was insolvent and knew himself to be so, where he had a reasonable expectation of paying the price.—*Diggs v. Denny* (Md.) 1037.

Purchasers on credit, who have merely good reason to know that they are insolvent, are not to be visited with the consequences of actual knowledge of such fact.—*Diggs v. Denny* (Md.) 1037.

SCHOOLS AND SCHOOL DISTRICTS.

Payment of barred claims, see "Limitation of Actions."

Absence of director from two meetings, unless sick or out of the district, *held* to authorize school board to declare his seat vacant, and appoint another in his stead.—*Keating v. Jordan* (Pa.) 199.

Complaint against parent for failing to send child to school, as provided by statute, *held* sufficient.—*State v. McCaffrey* (Vt.) 234.

Sufficiency of evidence to sustain conviction for failing to send child to school for statutory period, determined.—*State v. McCaffrey* (Vt.) 234.

Code Loc. Laws, art. 4, § 30, authorizing mayor of Baltimore to appoint city officers, does not apply to appointment of school commissioners.—*Hooper v. New* (Md.) 424.

Baltimore City Code 1893, art. 1, § 46, prescribing when term of office shall be deemed fixed, does not bring school commissioners within the mayor's power of removal.—*Hooper v. Farnen* (Md.) 430.

Members of school board may bring mandamus in their collective capacity to obtain possession of archives of board.—*Hooper v. Farnen* (Md.) 430.

Possession of school-board archives by a subordinate of the board is possession by the board, in mandamus by a rival board to obtain them.—*Hooper v. Farnen* (Md.) 430.

Summary removal of Baltimore school commissioners by the mayor is not authorized by Code Pub. Loc. Laws, art. 4, § 31.—*Hooper v. Farnen* (Md.) 430.

School directors may not permit the use of school buildings for sectarian religious meetings, nor for the holding of public lyceums, nor for any purposes other than school purposes.—*Bender v. Streabich* (Pa.) 853.

Where two school districts, one of which had issued bonds, consolidated under Gen. St. p. 3055, property in what was formerly the district that did not issue the bonds was not subject to a tax for their payment.—*Sharp v. Froehlich* (N. J. Sup.) 1024.

There is no statute authorizing an order signed alone by a district clerk for levying a tax to meet original bonds issued by a school district not having a special charter.—*Sharp v. Froehlich* (N. J. Sup.) 1024.

A school district in the town of Barre on dissolution *held* liable to the town for school funds.—*Town of Barre v. School Dist No. 5 in Barre* (Vt.) 1111.

SEALS.

Necessity of, on bond, see "Bonds."

SEDUCTION.

Evidence *held* inadmissible to show negligence of plaintiff.—*Tourgee v. Rose* (R. I.) 9.

Where a bill of particulars is furnished with the complaint, evidence of similar acts at other times is inadmissible.—*Tourgee v. Rose* (R. I.) 9.

SEPARATE ESTATE.

Of married woman, see "Husband and Wife."

SET-OFF AND COUNTERCLAIM.

In a suit on a note defendant cannot set off notes indorsed by plaintiff which had not matured.—*Hotchkiess v. Roehm* (Pa.) 119.

Right of person to set off against the principal a debt of the agent determined.—*Munroe v. Whitehouse* (Me.) 866.

In an action by a firm against a corporation, the latter cannot set off money owed by a partner to the corporation as its treasurer.—*Jones v. Vinal Haven Steamboat Co.* (Me.) 879.

SHERIFFS AND CONSTABLES.

An officer against whom replevin is brought for property attached may avail himself of any title of the attaching creditor.—*Reed v. Starkey* (Vt.) 297.

Sheriff's fees on foreclosure determined.—Birbeck Investment, Savings & Loan Co. of America v. Gardner (N. J. Ch.) 767.

Mileage is taxable on each of the several writs served at the same time on the same defendant, there being a different plaintiff in each case.—Smith v. Altoona & P. Connecting R. Co. (Pa.) 930.

SIDEWALKS.

See "Municipal Corporations."

SLANDER.

See "Libel and Slander."

SOCIETIES.

See "Charities"; "Corporations"; "Religious Societies."

SPECIFIC PERFORMANCE.

Third parties, who intervened in a suit by a purchaser against his vendor for specific performance, *held* sufficiently protected by providing in the decree that the purchase money be applied to their claims.—Borie v. Satterthwaite (Pa.) 102.

An agreement to arbitrate will not be specifically enforced.—Grosvenor v. Flint (R. I.) 304.

Suit of landlord who had elected to purchase the building of lessee, and had given required notice to enforce provision of lease, *held* a suit for specific performance.—Duffy v. Kelly (N. J. Ch.) 597.

When conveyance will not be decreed with abatement from purchase price.—Planer v. Equitable Life Assur. Soc. of the United States (N. J. Ch.) 668.

A lessee cannot compel specific performance of the lease by the lessor when he has failed to comply with its terms.—Bamberger v. Johnson (Md.) 900.

SPIRITUOUS LIQUORS.

See "Intoxicating Liquors."

STATES.

A board of statehouse commissioners *held* to have power to enter into contracts in excess of the fund appropriated.—In re New Statehouse (R. I.) 2.

Commissioners intrusted with the expenditure of a fund created for the erection of a statehouse are not trustees.—In re New Statehouse (R. I.) 2.

The general assembly, in erecting a new statehouse, is not limited as to its cost by the amount of the fund arising from the sale of state bonds authorized by a vote of the people for the purpose.—In re New Statehouse (R. I.) 2.

Const. art. 4, § 13, regulating incurring of state debts, *held* to apply only to expenditures above income for current year.—In re Incurring of State Debts (R. I.) 14.

Executive officer cannot incur state debt except by acts authorized by law.—In re Incurring of State Debts (R. I.) 14.

The term "people," in Const. art. 4, § 13, requiring consent of people to incurring of state debts, includes all electors.—In re Incurring of State Debts (R. I.) 14.

STATUTE OF FRAUDS.

See "Frauds, Statute of."

STATUTE OF LIMITATIONS.

See "Limitation of Actions."

STATUTES.

Lien for taxes given by Act 1888, on personal property, *held* not repealed by Act May 16, 1889, § 4.—Duryee v. United States Credit-System Co. (N. J. Ch.) 155.

Act April 3, 1851, authorizing boroughs to open streets, *held* repealed by implication by Act May 22, 1895, in so far as it is in conflict therewith.—Dorrance v. Dorranceton Borough (Pa.) 200.

Act May 22, 1895, authorizing municipal corporations to lay out streets, *held* to contain but one subject, which is expressed in its title.—Dorrance v. Dorranceton Borough (Pa.) 200.

Pub. Acts 1895, c. 331, imposing new penalties for violations of the liquor law, does not affect prosecutions for offenses previously committed against that law.—State v. Ryan (Conn.) 377.

Act March 13, 1897, regulating the holding of municipal elections in certain cities, is a local act, and unconstitutional.—Hoos v. O'Donnell (N. J. Sup.) 447.

Act April 15, 1891, providing for appeals from the report of damages assessed by view, *held* unconstitutional, as not expressing the subject in the title.—In re Road in Otto Tp. (Pa.) 514; Appeal of McKean County Com'rs, Id.

Act April 15, 1851, declaring that actions for personal injuries shall not abate, has not been repealed.—Maher v. Philadelphia Traction Co. (Pa.) 571.

An act to provide for the regulation and incorporation of insurance companies *held* invalid, as not expressing the object in the title.—Schenck v. State (N. J. Sup.) 724.

Act March 14, 1895, shortening time for the filing of mechanic's lien, *held* not to apply to a case where the work was completed before its enactment.—Barnaby v. Bradley & Currier Co. (N. J. Err. & App.) 764.

Pub. Laws, c. 186, relating to appeals from a judgment of commissioners, is repealed by Gen. Laws, c. 215, § 6, providing for an appeal from a decree of the probate court confirming the report of commissioners.—Donnelly v. McNanly (R. I.) 810.

21 Jac. I., c. 1, relating to actions against public officers, is not a statute of Pennsylvania.—Gardner v. Keihl (Pa.) 829.

Where a statute extending the time for location of a railroad identifies the corporation by name, and recites the wrong chapter as being the act of incorporation, it applies to the company named.—Lowell v. Washington County R. Co. (Me.) 869.

St. 1895, c. 79, limiting the liability of railroads for damages by fire to the excess over the insurance recovered, applies to a case where the injury occurred after the act went into effect, though the contract of insurance was made before that time.—Leavitt v. Canadian Pac. Ry. Co. (Me.) 886.

A valid provision of a statute *held* so closely connected with an unconstitutional provision as to fall with the latter.—Johnson v. State (N. J. Err. & App.) 949.

Acts 1894, c. 533, relating to elections in the city of Annapolis, was not repealed by Act 1896, c. 202, relating to elections in the state.—Jones v. Munroe (Md.) 964.

STATUTES CONSTRUED.

ENGLISH.

29 Car. II. ch. 3, §§ 4, 17,	
18 Stat. 405, 408.....	365
21 Jac. I. ch. 12.....	829

UNITED STATES.

CONSTITUTION.

Art. 4, § 2.....	239
------------------	-----

STATUTES AT LARGE.

1887, March 3, ch. 373, §	
3, 24 Stat. 552.....	388
1890, Aug. 8, ch. 728, 26	
Stat. 313.....	1109

REVISED STATUTES.

§ 5152.....	789
-------------	-----

CONNECTICUT.

CONSTITUTION 1818.

Art. 2, § 1.....	1080
------------------	------

GENERAL STATUTES
1888.

Ch. 162, p. 604.....	973
§§ 458, 459.....	679
§ 559.....	1056
§ 617.....	491
§ 630.....	678
§§ 984, 987.....	1064
§ 1008.....	683
§ 1330.....	981
§ 1411.....	75
§ 1630.....	80
§ 2092.....	687
§ 2673.....	1051, 1068
§ 3071.....	494
§ 3087.....	377
§ 3288.....	397
§ 3460, 3464.....	1070
§ 3951, Amended by Laws	
1893, ch. 140.....	391

CITY CHARTERS.

Putnam. Laws 1895, p.	
256, § 29.....	383

LAWS.

1877, ch. 114.....	420
1893, ch. 51.....	75, 1075
1893, ch. 140.....	391
1893, ch. 169, § 13.....	379
1893, ch. 216.....	80
1895, p. 256, § 29. Put-	
nam City Charter.....	383
1895, p. 263, § 18.....	383
1895, p. 493, ch. 100.....	979
1895, p. 619, ch. 267, § 9.....	977
1895, p. 648, ch. 308, § 4.....	977
1895, ch. 159.....	1080
1895, ch. 283.....	1080
1895, ch. 286.....	1096
1895, ch. 318.....	490, 1078
1895, ch. 331.....	377
1895, June 22. Railroad	
Crossings.....	506

DELAWARE.

CONSTITUTION.

Art. 6, §§ 3, 4, 12, 15.....	43
------------------------------	----

LAWS.

1885, ch. 507.....	43
1891, p. 413.....	158
1893, ch. 655, § 5.....	43

MAINE.

REVISED STATUTES 1883.

Ch. 6, § 205. Amended by	
Laws 1895, ch. 70, § 11.	864
Ch. 18, § 95.....	883
Ch. 49, § 20.....	320
Ch. 51, § 64.....	886

LAWS.

1893, ch. 193.....	869
1895, ch. 70, § 11.....	864
1895, ch. 79.....	886
1895, ch. 91.....	869, 870

MARYLAND.

CONSTITUTION 1864.

Art. 8, § 3.....	424
------------------	-----

CONSTITUTION 1867.

Art. 3, § 43.....	214
Art. 4, § 8.....	782
Art. 8, § 2.....	425
Art. 11, § 8.....	424

CODE PUBLIC GENERAL
LAWS.

Art. 5, § 58.....	218
Art. 13, § 9.....	222
Art. 16, § 223.....	960
Art. 23, § 169.....	716
Art. 23, § 194.....	796
Art. 27, § 176.....	165
Art. 35, § 2.....	792
Art. 45, § 7.....	303
Art. 75, § 83.....	786
Art. 81, § 47.....	36
Art. 81, § 64. Amended by	
Laws 1892, ch. 518....	36
Art. 93, § 18.....	717
Art. 93, §§ 31, 33, 34.....	169
Art. 93, § 171. Amended	
by Laws 1892, ch. 100..	218
Art. 93, § 232. Amended	
by Laws 1890, ch. 425..	218
Art. 99, § 13. Amended by	
Laws 1894, ch. 404....	21

CODE PUBLIC LOCAL
LAWS.

Art. 4, § 30.....	425
Art. 4, § 31.....	430
Art. 22, pp. 1960, 1961, §§	
156, 1591. Hagerstown	
City Charter. Amended	
by Laws 1892, ch. 36...	898

BALTIMORE CITY CODE
1893.

Art. 1, § 46.....	430
-------------------	-----

CITY CHARTERS.

Hagerstown. Code Pub.	
Loc. Laws, art. 22, pp.	
1960, 1961, §§ 156, 159.	
Amended by Laws 1892,	
ch. 36.....	898

LAWS.

1831, ch. 205, § 3.....	27
1868, ch. 407, tit. 2, sub-	
ch. 7, § 1.....	425
1890, ch. 189.....	716
1890, ch. 271.....	350
1890, ch. 370.....	359
1890, ch. 425.....	218
1892, ch. 100.....	218
1892, chs. 210, 232.....	359
1892, ch. 392.....	266
1892, ch. 518.....	36
1892, ch. 571.....	208
1894, ch. 310, § 178....	172, 173
1894, ch. 380, § 46.....	216, 222, 223
1894, ch. 380, § 47.....	216
1894, ch. 404.....	21
1894, ch. 533.....	984
1895, ch. 36.....	898
1896, ch. 202, § 13.....	964
1896, ch. 202, § 23.....	795

NEW HAMPSHIRE.

GENERAL LAWS.

Ch. 46, § 14.....	1039
Ch. 67, § 1.....	1039
Ch. 78.....	1039

LAWS.

1887, ch. 204.....	1039
--------------------	------

NEW JERSEY.

CONSTITUTION.

Art. 4, § 7, cl. 4.....	724
-------------------------	-----

GENERAL STATUTES.

Volume 1.

Page 274.....	437
Page 389, §§ 88-94.....	134
Page 422.....	725
Page 918, § 56.....	443
Page 1100, § 272.....	622
Page 1101.....	614
Page 1128, pls. 42, 43....	133
Pages 1142, 1150, §§ 109,	
153.....	1017

Volume 2.

Page 1420, § 33.....	439
Page 1456.....	768
Page 1731.....	894
Page 2111.....	767
Page 2111, § 41.....	318
Page 2536, § 22.....	1108
Page 2571.....	435
Page 2586, pl. 319.....	454
Page 2671, §§ 18, 19....	776
Page 2717.....	736

Volume 3.

Page 3055.....	1024
Page 3231.....	578

REVISION.

Page 187, § 55.....	539
Page 318.....	49
Page 526, § 9.....	949
Page 668, § 3.....	764
Page 708, § 32.....	757

SUPPLEMENT REVISION.

Page 369, § 30.....	578
---------------------	-----

be changed.—Ridge Ave. Pass. Ry. Co. v. City of Philadelphia (Pa.) 910.

A city *held* not liable for delay and impediment caused to street railway by change of grade in the street.—Ridge Ave. Pass. Ry. Co. v. City of Philadelphia (Pa.) 910.

A turnpike company *held* liable to one driving a team thereon for negligence of a street railroad thereon, which it owns, though it has leased the road.—Hanson v. Philadelphia & W. C. Turnpike-Road Co. (Pa.) 943.

Regulation and operation.

Street-car company *held* authorized to allow a car to stand on a spur track for another to pass.—Ford v. Charles Warner Co. (Del. Super.) 39.

Whether plaintiff was guilty of negligence in attempting to cross in front of an electric car *held* a question for the jury.—Consolidated Traction Co. v. Glynn (N. J. Err. & App.) 66.

It was a question for the jury whether the motorman lost control of the car by reason of the dangerous rate of speed at which he was running.—Consolidated Traction Co. v. Glynn (N. J. Err. & App.) 66.

It is the duty of the motorman to keep his car under control, so as to avert collisions with persons crossing the track.—Consolidated Traction Co. v. Glynn (N. J. Err. & App.) 66.

Evidence *held* to justify conclusion that the motorman should have seen one who fell on the track in front of the car, and that he should have attempted to stop the car at once.—Coll v. Easton Transit Co. (Pa.) 89.

In an action to recover for injuries caused by collision with defendant's street car, evidence *held* insufficient.—Kane v. People's Pass. Ry. Co. (Pa.) 110.

It is not under all circumstances negligence per se not to look and listen before crossing a trolley track.—Consolidated Traction Co. v. Haight (N. J. Err. & App.) 135.

A trolley car overtaking a vehicle on the track should be brought, if necessary, to a standstill to avoid collision.—Consolidated Traction Co. v. Haight (N. J. Err. & App.) 135.

Obstructing the track of a street railway is not necessarily such contributory negligence as to relieve a trolley car from liability for an accident which it could have avoided.—Consolidated Traction Co. v. Haight (N. J. Err. & App.) 135.

In an action for injuries by collision, a request to charge that a person in a vehicle must take the same precaution in crossing the tracks of a street railway as required by pedestrians *held* properly refused.—Consolidated Traction Co. v. Behr (N. J. Err. & App.) 142.

In an action for injury by collision with an electric car, *held* the question whether the motorman exercised reasonable care was for the jury.—Consolidated Traction Co. v. Behr (N. J. Err. & App.) 142.

The question whether plaintiff's being asleep at the time of a collision with a street car was per se negligence *held* not raised when no request to that end was made at the trial.—Consolidated Traction Co. v. Behr (N. J. Err. & App.) 142.

A request that plaintiff injured by collision with a street car was guilty of contributory negligence if she failed to look and listen before driving on the track was properly refused.—Consolidated Traction Co. v. Behr (N. J. Err. & App.) 142.

Evidence *held* to show that a person injured in crossing the street was guilty of contributory negligence.—Nugent v. Philadelphia Traction Co. (Pa.) 206.

Pub. Acts 1893, c. 169, *held* not to fix any rate of speed for electric cars.—Laufer v. Bridgeport Traction Co. (Conn.) 379.

Rights of travelers and electric street railways determined.—Laufer v. Bridgeport Traction Co. (Conn.) 379.

A street railway *held* not liable for injuries to a horse springing on the track about 10 feet in front of a car.—McManigal v. South Side Pass. Ry. Co. (Pa.) 516.

Failure of motorman to sound the bell at a street crossing *held* not negligence.—Kline v. Electric Traction Co. (Pa.) 522.

Speed of electric car *held* insufficient to justify a finding of negligence.—Kline v. Electric Traction Co. (Pa.) 522.

Declaration for negligent collision with wagon *held* sufficient, though it did not state in what respect defendant was negligent.—Goldrick v. Union R. Co. (R. I.) 635.

Ordinance prohibiting any person from engaging in any game interfering with the use of the street *held* not to apply to a child of 21 months.—Budd v. Meriden Electric R. Co. (Conn.) 683.

It is a question for the jury whether the employees on a steam dummy were negligent in failing to stop when they saw that horses on the road were frightened at their approach.—Hanson v. Philadelphia & W. C. Turnpike-Road Co. (Pa.) 943.

A motorman whose car strikes a pedestrian on a trestle on the right of way of the railway company *held* to have been under no duty to look out for pedestrians on the trestle.—Young v. Camden, G. & W. Ry. Co. (N. J. Err. & App.) 1013.

STREETS.

See "Highways"; "Municipal Corporations."

SUBROGATION.

A tenant in common paying off a prior mortgage supposing that he was the owner *held* subrogated to the mortgage paid off.—Haverford Loan & Building Ass'n v. Dougherty (Pa.) 179.

An insurer who has paid a loss on property damaged by fire by a locomotive *held* entitled to subrogation to the insured's right against the railroad company.—Leavitt v. Canadian Pac. Ry. Co. (Me.) 886.

Where lands are conveyed by a parent to her son to secure her support, and he sells them, and applies the proceeds to the payment of a mortgage on his land, and fails to support the parent, *held* she was subrogated to the rights of the mortgage.—Bourne v. Bourne (Vt.) 1049.

SUPPLEMENTARY PROCEEDINGS.

See "Execution."

SUPREME COURTS.

See "Courts."

SURETYSHIP.

See "Principal and Surety."

SURRENDER.

Of leased premises, see "Landlord and Tenant."

TAXATION.

Assessment of benefits from public improvements, see "Municipal Corporations."
By towns, see "Towns."

Estoppel to question regularity of assessment, see "Estoppel."

Lien on personalty for taxes assessed is not lost by failure to make the tax a lien on land of the owner.—*Duryee v. United States Credit-System Co.* (N. J. Ch.) 155.

Acts 1892, No. 17, restricting right to deduct debts from taxable personalty to residents of Vermont, is unconstitutional.—*Sprague v. Fletcher* (Vt.) 239.

Where a dam and the land upon which it stands were in A., and the owners' business where the power was applied was in L., the dam was properly taxed in A., exclusive of the water power.—*Union Water-Power Co. v. City of Auburn* (Me.) 331.

Rev. St. c. 6, § 205, as amended by St. 1895, c. 70, § 11, requiring deposit of all taxes, interest, and costs before validity of a tax sale can be contested, is unconstitutional.—*Bennett v. Davis* (Me.) 864.

Persons and property taxable.

A water power is not taxable, except indirectly, in the valuation of mills with which it is used.—*Union Water-Power Co. v. City of Auburn* (Me.) 331.

Mortgagee held taxable on mortgage debt, where deduction was allowed the mortgagor therefor.—*Tomlinson v. Gano* (N. J. Sup.) 434.

It is from remainder-men alone that present payment of collateral inheritance tax on bequests or devises in remainder can be collected, under Act May 6, 1887, § 3.—*In re Cox's Estate* (Pa.) 517.

A railroad not the property of a railroad company, nor operated under franchise, is not subject to taxation by the state board of assessors.—*Monmouth Park Ass'n v. State Board of Assessors* (N. J. Sup.) 729.

Collateral inheritance tax on a legacy to pay expenses of persons at school must be borne by the estate.—*In re Handley's Estate* (Pa.) 587; Appeal of Palmer, Id.

Lands in another state, held not subject to collateral inheritance tax.—*In re Handley's Estate* (Pa.) 587; Appeal of Palmer, Id.

Property of a county held for public use outside the county held exempt from taxation.—*Board of Chosen Freeholders of County of Camden v. Collins* (N. J. Sup.) 623.

Freight yards of a railroad company held not exempt as property devoted to railroad uses.—*Delaware, L. & W. R. Co. v. City of Newark* (N. J. Sup.) 629.

The actual uses to which lands owned by a railroad company are devoted are the tests by which it is determined whether the property is exempt from local taxation.—*Delaware, L. & W. R. Co. v. City of Newark* (N. J. Sup.) 629.

Assessment and levy.

Failure to give addresses of some creditors for whose debts deduction is claimed held not to impair right to deduction on account of other debts.—*Sprague v. Fletcher* (Vt.) 239.

Inventory of bank stock as taxable, instead of exempt, held not to impair right to deduct amount of debts over exempt bank stock.—*Sprague v. Fletcher* (Vt.) 239.

An assessment of land as an entire tract, where it was returned in separate parcels, some of which were exempt, held invalid.—*Mowry v. Slatersville Mills* (R. I.) 538.

Invalidity of the assessment of real estate held not to render the entire assessment void.—*Mowry v. Slatersville Mills* (R. I.) 538.

Notice of appraisement for collateral inheritance tax must be given legtees.—*In re Handley's Estate* (Pa.) 587; Appeal of Palmer, Id.

A second appraisement of property omitted from the first appraisement for collateral inheritance tax is void.—*In re Moneypenny's Estate* (Pa.) 589; Appeal of Lockwood, Id.

Remedy of commonwealth on omission of property on appraisement for collateral inheritance tax is by appeal, and not second appraisement.—*In re Moneypenny's Estate* (Pa.) 589; Appeal of Lockwood, Id.

Collection.

Sale of bank stock under illegal tax held completed, so as to render collector liable, though stock was not transferred on bank books.—*Sprague v. Fletcher* (Vt.) 239.

Penalty for not paying collateral inheritance tax on part of testator's estate in another state should not be imposed, where the question of liability has not been settled.—*In re Miller's Estate* (Pa.) 1000; Appeal of Dorris, Id.

The existence of a single uncollected claim does not prevent the collection of collateral inheritance tax on the balance.—*In re Miller's Estate* (Pa.) 1000; Appeal of Dorris, Id.

Though no certificate of sale has been issued on a defective return, the owner of land sold under the warrant is entitled to have the return vacated.—*Landis v. Borough of Vineland* (N. J. Sup.) 1099.

Return of a warrant for sale for taxes by collector of borough, not accompanied with the notice of such sale for publication, held fatally defective.—*Landis v. Borough of Vineland* (N. J. Sup.) 1099.

TENANTS.

See "Landlord and Tenant."

TITLE.

Of acts, see "Statutes."

TORTS.

See "Arrest"; "Assault and Battery"; "Death"; "Fraud"; "Intoxicating Liquors"; "Libel and Slander"; "Malicious Prosecution"; "Negligence"; "Nuisance"; "Seduction"; "Trespass." Liability of cities, see "Municipal Corporations."

TOWAGE.

A master of a towboat towing a vessel is liable for injuries sustained by his negligence to a third person.—*Inhabitants of Cumberland County v. Central Wharf Steam Towboat Co.* (Me.) 867.

The owner of a towboat towing a vessel is as to third parties the active agent controlling the vessel it is undertaking to tow.—*Inhabitants of Cumberland County v. Central Wharf Steam Towboat Co.* (Me.) 867.

TOWNS.

Liability for injuries caused by defective bridges, see "Bridges."

— maintenance of pauper, see "Paupers."

— payment of bounty, see "Bounties."

Omission of vote at town meeting for voting taxes to designate the kind of property to be assessed held supplied by Pub. St. c. 43, § 1.—*Mowry v. Mowry* (R. I.) 306; Appleby v. Same, Id.

The failure of the vote for town taxes to designate the objects to which the taxes were to be applied held not to invalidate the taxes where they were designated in the warrant.—*Mowry v. Mowry* (R. I.) 306; Appleby v. Same, Id.

Town taxes in excess of the limit fixed by Pub. St. c. 34, § 18, held valid as to the portion within the limit.—*Mowry v. Mowry* (R. I.) 306; Appleby v. Same, Id.

Where a person, at his own expense, voluntarily opens a public road previously laid out, he is not entitled to reimbursement by the township in which it is located.—*Bradshaw v. Parker* (N. J. Sup.) 444.

Under Act April 16, 1896, it is the duty of a township committee to divide the assets and apportion the debts between the township and a borough organized before the passage of the act.—*Borough of Carlstadt v. Committee of Township of Bergen* (N. J. Sup.) 612.

Purchase of waterworks by a town would not be enjoined on the ground of inequality of benefits to be derived by the taxpayers, at the instance of taxpayers residing outside the fire district.—*Peabody v. Westerly Waterworks* (R. I.) 807.

TRADE-MARKS AND TRADE-NAMES.

Right to accounting, see "Account."

A decree for an accounting in a suit for infringement of a trade-mark can be made only when an injunction was or could have been granted in course of suit.—*Clark Thread Co. v. William Clark Co.* (N. J. Ch.) 599.

When an injunction will be granted for infringement of a trade-mark.—*Clark Thread Co. v. William Clark Co.* (N. J. Ch.) 599.

TRANSCRIPTS.

Of record on appeal, see "Appeal and Error."

TRESPASS.

Trespasses on public works are to be redressed by an action at law.—*Inhabitants of Township of Bloomfield v. Borough of Glen Ridge* (N. J. Err. & App.) 63.

Since Procedure Act May 25, 1887, has abolished distinctions between trespass and case, there may be a recovery in trespass against a county for damages for the raising of the grade of a highway in front of plaintiff's property in making approaches to a county bridge.—*Miller v. Lehigh County* (Pa.) 824.

On a suit for trespass for fishing on land conveyed by riparian commissioners under Act March 21, 1871, defendant can show that the grantee was not the owner of the ripa.—*Polhemus v. Bateman* (N. J. Err. & App.) 1015.

A conditional vendor *held* not entitled to recover for the illegal taking of the property by a third person, where the vendee has already recovered for the same taking.—*Lord v. Buchanan* (Vt.) 1048.

TRIAL.

See, also, "Dismissal and Nonsuit"; "Evidence"; "Judgment"; "Jury"; "New Trial"; "Witnesses."

In criminal cases, see "Criminal Law."

Exceptions to the exclusion of certain notes *held* to save any rights in respect to a recovery of the amount due thereon.—*Rowell v. Dunwoodie* (Vt.) 227.

Error cannot be predicated on an improper answer to a proper question.—*Cutler v. Skeels* (Vt.) 228.

Evidence *held* properly admitted in rebuttal.—*Brown v. Town of Swanton* (Vt.) 280.

Party has no right to have offers of proof made privately.—*Bagley v. Mason* (Vt.) 287.

Permitting the introduction of evidence after a case has been closed and the argument begun is within the discretion of the court.—*Lake v. Weaver* (R. I.) 302.

The mere calling for a paper does not make it obligatory on the party to put it in evidence.

—*Laufer v. Bridgeport Traction Co.* (Conn.) 379.

Evidence legal for some purpose cannot be excluded because the jury may use it for another.—*Trenton Pass. Ry. Co., Consolidated, v. Cooper* (N. J. Err. & App.) 730; *Same v. Bennett, Id.*

Objections to admission of evidence cannot be availed of on appeal, exceptions to master's report for that reason not having been filed.—*Bourne v. Bourne* (Vt.) 1049.

Taking case from jury.

A motion to direct a verdict for defendant must state the matter of law relied on as a ground therefor.—*Garretson v. Appleton* (N. J. Err. & App.) 150.

Directing verdict in garnishment on conflicting evidence, *held* error.—*Conshohocken Tube Co. v. Philadelphia & R. R. Co.* (Pa.) 180.

Where neither party desires to go to the jury, it is for the court to direct a verdict on the evidence.—*Mascott v. First Nat. Fire Ins. Co.* (Vt.) 255.

Where it was impossible to infer a liability of defendant at the close of all the testimony, a verdict for defendant was rightly directed, though at the close of plaintiff's testimony it had been possible to infer such liability.—*McCormack v. Standard Oil Co.* (N. J. Sup.) 617.

Conduct of trial.

It is error to permit counsel to state facts to a jury in argument of which there is no evidence.—*Cutler v. Skeels* (Vt.) 228.

Impropriety of question asked and withdrawn *held* rendered harmless by subsequent evidence of facts assumed by it.—*Bagley v. Mason* (Vt.) 287.

Remark of counsel on withdrawing question that jury could draw the inference *held* not ground for reversal.—*Bagley v. Mason* (Vt.) 287.

For an attorney in his argument to express regret that the court has excluded certain evidence, *held* error.—*In re Hine* (Conn.) 384.

Permitting plaintiff to read the affidavit of defense to the jury, when the same was not in evidence, *held* error.—*Mullen v. Union Cent. Life Ins. Co.* (Pa.) 988.

Instructions.

Instruction as to absence of proof that plaintiff's earning capacity had been reduced will not be given, the question as to such proof being one for the jury.—*Ford v. Charles Warner Co.* (Del. Super.) 39.

A judge, though requested, need not give abstract instructions not applicable to the facts.—*Consolidated Traction Co. v. Haight* (N. J. Err. & App.) 135.

A charge of what the law would be on an assumption that certain facts constitute the whole case *held* properly refused.—*Consolidated Traction Co. v. Behr* (N. J. Err. & App.) 142.

Statements by court in his charge, not based on evidence, *held* erroneous.—*Fullam v. Rose* (Pa.) 197.

A general exception to a portion of a charge together cannot be sustained when any part of it was correct.—*Cutler v. Skeels* (Vt.) 228.

Request to charge that servant assumed all risks "apparent, obvious, and comprehensible to him," *held* given in substance.—*Hayes v. Colchester Mills* (Vt.) 269.

An instruction as to the respective values of positive and negative evidence *held* insufficient.—*Hess v. Williamsport & N. B. R. Co.* (Pa.) 368.

A prayer denying plaintiff's right to recover, but submitting no proposition of law, *held* properly denied.—*Hobbs v. Batory* (Md.) 713.

Instructions *held* misleading.—*Barabass v. Kabat* (Md.) 720.

Refusal to submit indefinite interrogatories *held* not error.—Caledonia Fire Ins. Co. of Scotland v. Traub (Md.) 782.

Where the evidence as to an award was conflicting, instructions as to recovery, based both on its validity and invalidity, *held* not inconsistent.—Caledonia Fire Ins. Co. of Scotland v. Traub (Md.) 782.

Instructions *held* erroneous as invading the province of the jury under the evidence.—Western Maryland R. Co. v. Kehoe (Md.) 799.

Where exceptions to a charge consist of extracts, *held*, that the whole charge would be examined.—Donnelly v. Booth Brothers & Hurricane Isle Granite Co. (Me.) 874.

Where plaintiff's only witness is contradicted by several other witnesses and by the circumstances of the case, it was error not to call the jury's attention to his credibility.—Fineburg v. Second & Third Streets Pass. Ry. Co. (Pa.) 925.

Trial by court.

A determination *held* a conclusion of law, and not a finding of fact.—Hartford School Dist. v. School Dist. No. 13 in Hartford (Vt.) 252.

Finding as to scope of will *held* not finding of extrinsic fact.—McKeough's Estate v. McKeough (Vt.) 275.

Findings in respect to the execution of a release by plaintiff *held* inconsistent.—Healy v. New York, N. H. & H. R. Co. (R. I.) 676.

A finding that plaintiff fell, "probably because of snow upon said stone," *held* to import that snow was the probable cause of the accident.—Hoyt v. City of Danbury (Conn.) 1051.

A remark of the court in its findings that it did not find that plaintiff's fall was caused by snow on the walk was not equivalent to a finding that the fall was not caused by the snow.—Hoyt v. City of Danbury (Conn.) 1051.

Where the trier finds a probability so strong as to induce a reasonable belief as to the existence of a fact, *held*, that the parties are entitled to a finding that the fact exists.—Hoyt v. City of Danbury (Conn.) 1051.

TROVER AND CONVERSION.

Joinder of count in assumpsit, see "Action."

TRUANCY LAW.

See "Schools and School Districts."

TRUSTEE PROCESS.

See "Garnishment."

TRUSTS.

See, also, "Executors and Administrators"; "Guardian and Ward."

Charitable trusts, see "Charities."

Distribution of accumulation of income, see "Descent and Distribution."

Liability of trustee to garnishment, see "Garnishment."

No liens attach to general assets for trust funds used in payment of debts.—Drovers' & Mechanics' Nat. Bank v. Roller (Md.) 30.

Administrator of deceased beneficiary *held* a necessary party to suit to determine ownership of trust fund.—Read v. Bennett (N. J. Err. & App.) 75.

Evidence *held* insufficient to establish a resulting trust in land.—Fowler v. Webster (Pa.) 102.

Where a husband makes payment on building association stock standing in the name of his wife, a resulting trust in his favor does not arise.—Bacon v. Devinney (N. J. Ch.) 144.

Accumulations of income from a trust fund *held* not to vitiate Act April 18, 1853.—In re Howell's Estate (Pa.) 181; Appeal of Campbell, *Id.*

Testamentary trustee *held* negligent in investing trust funds on inadequate mortgage security.—Gilbert v. Kolb (Md.) 423.

Testamentary trustee has discretion in making investments, and is liable only for loss by negligence.—Gilbert v. Kolb (Md.) 423.

Authority of court, under Act April 18, 1853, to decree a lease for 50 years of land devised in trust determined.—In re Freeman's Estate (Pa.) 591.

Evidence *held* sufficient to show resulting trust in land.—Beringer v. Lutz (Pa.) 640.

On the death of a trustee, a successor appointed under Gen. Laws, c. 208, § 5, *held* to have power to sell for investment in the same manner as the original trustee.—Smith v. Hall (R. I.) 698.

Testamentary trust construed, and *held* to terminate as to a portion of the fund on the death of one of the beneficiaries.—Smith v. Hall (R. I.) 698.

Testamentary trustee to "immediately" distribute the estate on a certain event *held* to have power to thereafter convert the realty by sale.—Rhode Island Hospital Trust Co. v. Harris (R. I.) 701.

Where heirs authorized an executor to bid in for them land that they wished to substitute for their interests in personalty, *held* that the doctrine of election did not apply, and that the executor *held* in trust for the heirs, though some of them did not join in such arrangement.—Gumaer v. Barber (Pa.) 848.

Right of trustee to commission on principal of estate before termination of trust determined.—In re Thouron's Estate (Pa.) 861.

A conveyance by trustees for charitable uses *held* void, though in compromise of a suit involving the validity of the trust.—Nauman v. Weidman (Pa.) 863.

Creditors could acquire an inchoate lien by attaching a trust fund, and their claims may be paid in the order in which the attachments were laid, though they could not obtain a final judgment against the trustee.—Ohio Brass Co. v. Clark (Md.) 899.

An agreement by a debtor to insure his life in favor of a certain person, the surplus over a certain debt to be paid on his death to his wife, *held* to create a valid trust in favor of the wife enforceable in equity against the creditor and the beneficiary.—Steller v. Sell (N. J. Err. & App.) 1010.

TURNPIKES AND TOLL ROADS.

Liability for injuries as lessor of street railroad, see "Street Railroads."

VARIANCE.

Between pleading and proof, see "Pleading."

VENDOR AND PURCHASER.

See, also, "Deeds"; "Fraudulent Conveyances"; "Specific Performance."

Agreements within statute of frauds, see "Frauds, Statute of."

Adverse possession under claim of title *held* sufficient to give a marketable title.—Rother v. Trustees of Sharp St. Station of Methodist Episcopal Church in City of Baltimore (Md.) 24.

Refusal of purchaser to pay his notes on abandoning premises *held* insufficient to rescind the

contract without consent of the vendee.—*Niles v. Phinney* (Me.) 880.

Where a vendor takes notes for the price secured by a bond, he may waive forfeiture for breach of the bond, and sue on the notes.—*Niles v. Phinney* (Me.) 880.

The title of a bona fide purchaser is transmitted to his vendee, regardless of the latter's knowledge of the facts.—*Paul v. Kerswell* (N. J. Sup.) 1102.

VENUE.

Action for slander should be brought in the county where the parties reside and the cause of action arose.—*Kelly v. Haugh* (N. J. Sup.) 435.

Right to change of venue held waived by stipulation.—*Caledonia Fire Ins. Co. of Scotland v. Traub* (Md.) 782.

An action of trespass against the sheriff is transitory.—*Gardner v. Kehl* (Pa.) 829.

VERDICT.

See "Criminal Law"; "Homicide."

VICE PRINCIPALS.

See "Master and Servant."

VILLAGES.

See "Municipal Corporations."

VOTERS.

See "Elections."

WAIVER.

Of conditions in deed, see "Deeds."

— in policy, see "Insurance."

Of demand and notice, see "Bills and Notes."

Of proofs of loss, see "Insurance."

Of right to poll jury in homicide cases, see "Homicide."

Of vendor's lien, see "Sales."

WARDS.

See "Guardian and Ward."

WARRANT.

For arrest, see "Arrest."

WATERS AND WATER COURSES.

Taxation of water power, see "Taxation."

Bill to enjoin city from diverting sewage from a certain stream brought by riparian owners held not maintainable.—*Fisk v. City of Hartford* (Conn.) 983.

A deed from the state to a riparian owner of land under water construed, and held that, until the grantee reclaimed it, he acquired no exclusive right to it.—*Polhemus v. Bateman* (N. J. Err. & App.) 1015.

WAYS.

See "Easements"; "Highways."

WHARVES.

Right to construct wharves in navigable waters, see "Navigable Waters."

WIFE.

See "Husband and Wife."

WILLS.

Sec. also, "Descent and Distribution"; "Executors and Administrators."

Apportionment of annuity, see "Annuities." Charitable devises, see "Charities."

A conveyance by heirs held to give a title valid against an executor whose lien on the land for a debt due had expired by lapse of time.—*Battersby v. Castor* (Pa.) 572.

Mere ignorance by testatrix of the condition of her property will not invalidate her will.—*In re Livingston's Will* (N. J. Prerog.) 770.

Where testatrix was capable, and no fraud is shown, it is immaterial that the will as drawn varied from the instructions given.—*In re Livingston's Will* (N. J. Prerog.) 770.

Probate and contest.

Direction of issue as to testamentary capacity is necessary only where the court would set aside a verdict against proponents of the will.—*In re Harvey's Estate* (Pa.) 261; *Appeal of Daley*, Id.

Admissibility of evidence on contest of will determined.—*In re Hine* (Conn.) 384.

Construction.

Will construed, and held, a life tenant was not entitled to any of the principal, except as needed to supplement income in furnishing her comfortable support.—*In re La Bar's Estate* (Pa.) 111; *Appeal of Heller*, Id.

A devise to "my spinster or unmarried nieces" includes those nieces who are widows at testator's decease.—*In re Conway's Estate* (Pa.) 204; *Appeal of Campbell*, Id.

Will construed, and held that a renunciation of widow, and election to take against the will, was equivalent to her death, for purpose of distribution of testator's children.—*Randall v. Randall* (Md.) 209.

Devise of "my home place, where I now live," construed.—*McKeough's Estate v. McKeough* (Vt.) 275.

Will construed, and held, where the proceeds of realty to be sold were not sufficient to pay the legacies, the specific and not the residuary legatees were entitled to rents collected before the sale.—*Lyon v. Brown University* (R. I.) 308.

Will construed, and held to give the executor no power to sell land devised in trust.—*Porterfield v. Porterfield* (Md.) 358.

Bequest to executor held not given as compensation for his services as executor.—*Chassaing v. Durand* (Md.) 362.

Will construed, and held to give the executor discretionary powers as to the sale of the real estate.—*Seeds v. Burk* (Pa.) 511.

Will construed, and held to create an active special trust for a devisee, with limitation over.—*In re Fetherman's Estate* (Pa.) 516.

Will construed, and held, that a provision allowing a beneficiary to purchase an annuity was not destructive of the trust in her favor under the will.—*In re Lejee's Estate* (Pa.) 554; *Appeal of Pennsylvania Co. for Insurance on Lives & Granting Annuities*, Id.

A clause authorizing the executors to sell property held not to apply to property specifically devised.—*Wilkinson v. Chambers* (Pa.) 569.

Will construed, and rights in residuary estate determined.—*In re Hubert's Estate* (Pa.) 576; *Appeal of Widmeyer*, Id.

Executor held entitled to custody of fund devised to minor, as against the guardian.—*Chandler v. Mills* (N. J. Prerog.) 603.

Wills construed, and rights of devisees on death of legatees determined.—*In re Wilbor* (R. I.) 634.

Where a devisee promises the testator who is about to change his will that the devisees will

carry out his wish with regard to an intended bequest, the share of the one making the promise must contribute towards making good the intended bequest.—*Yearance v. Powell* (N. J. Err. & App.) 785.

Will construed and right of devisee determined.—*Kelley v. Kelley* (Pa.) 830.

The codicil revoking bequest in favor of testator's son held not to discharge an obligation of the son incurred between the making of the will and codicil, where the will discharged all obligations existing at the time.—*Walls v. Walls* (Pa.) 859.

Will construed, and held that, where property set aside by testator for payment of debts proved inadequate, personally given wife was liable for the debts.—*In re Thompson's Estate* (Pa.) 940.

Will construed, and held that a power of sale given to an executrix was absolute, and could be exercised after the death of the executrix by the administrator.—*Potts v. Breneman* (Pa.) 1002.

Will construed, and effect of codicil determined.—*Lyman v. Morse* (Vt.) 1047.

Under will giving testator's widow the use and income of residue till her remarriage or death, held, that she was entitled to possession, but might be required to give bond for safe keeping of personalty.—*Little v. Geer* (Conn.) 1058.

Under will giving testator's widow use of residue till remarriage or death, with privilege of using the principal if necessary for her proper maintenance, held, that reasonable expenditures were within her discretion, but waste might be restrained on complaint of remainder-man.—*Little v. Geer* (Conn.) 1056.

— Nature of estates or interests created.

Will construed, and held, that the remainder vested before the death of the life tenant, so that the interest of a remainder-man dying before the life tenant descended to his daughter.—*Hinkson v. Lees* (Pa.) 338.

A devise, there being no limitation over, held to create an estate in fee.—*Wilkinson v. Chambers* (Pa.) 569.

Will held to give an absolute, not a life, estate.—*Bentz v. Maryland Bible Soc.* (Md.) 708.

Under a devise in a will of the use of real estate during life, and one-half of any remainder to testator's daughter and her heirs forever, held, on the death of the wife the daughter took an estate for life, and the remainder passed in fee to her heirs.—*In re Kelso's Estate* (Vt.) 747.

Bequest held to give a life estate only.—*In re Noble's Estate* (Pa.) 852; Appeal of Smith, Id.

Will construed, and held to give testator's wife a life estate only.—*In re Schmid's Estate* (Pa.) 928; *In re Dunlap's Appeal*, Id.

Will construed, and held that the devise created an estate tail, enabling the devisee to pass the entire estate.—*Sheeley v. Neidhammer* (Pa.) 939.

A devise of testatrix's unimproved real estate held to pass land leased by her to tenants who built thereon.—*Coles v. Coles* (N. J. Ch.) 1025.

A devise of land derived by testator from a deceased son does not include land purchased at foreclosure of mortgages bequeathed to her by the son.—*Coles v. Coles* (N. J. Ch.) 1025.

Will giving to testator's wife use and income of residue of estate till her marriage or death, with privilege of disposing of the principal if found necessary for her maintenance and support, held to give her no absolute estate.—*Little v. Geer* (Conn.) 1056.

WITNESSES.

See, also, "Evidence."

It was proper to refuse to instruct that the failure to call one available as a witness showed

that testimony of others as to facts within the knowledge of the person not called was untrue.—*Brown v. Town of Swanton* (Vt.) 280.

Competency.

In an action by an administratrix to recover the proceeds of a check payable to deceased, held, that defendant was incompetent to testify to the contract with deceased under which he claimed the right to hold such proceeds.—*Schwab v. Ginkinger* (Pa.) 125.

Petitioner held competent to testify in an action against executors as to matters occurring in testator's lifetime.—*In re Dutton's Estate* (Pa.) 582; Appeal of Beatty, Id.

Where both parties appear in a representative capacity, each is qualified as a witness.—*Bell v. Samuels* (N. J. Sup.) 613.

In a murder case, the testimony of one who had previously been convicted of the same crime, and was serving a life sentence in the state prison therefor, was competent, its weight being for the jury.—*State v. Dalton* (R. I.) 673.

In proceeding on a claim by one estate against another, held, that the administrator of a third estate was a competent witness.—*Atkins' Estate v. Atkins' Estate* (Vt.) 746.

The administrator of the claimant estate was also a competent witness.—*Atkins' Estate v. Atkins' Estate* (Vt.) 746.

Under Code, art. 35, § 2, a party contracting with an agent can testify to conversations with such agent, his principal being dead.—*Warth v. Brafman* (Md.) 792.

Communication by client to attorney in presence of a third person held not privileged.—*Hummel v. Kistner* (Pa.) 815.

Witness held not incompetent, in a suit by an executor against a third person, because indebted to the estate.—*Walls v. Walls* (Pa.) 859.

Incompetency of legatee's husband to testify in suit of executor held removed by release surrendering all interest in the estate.—*Walls v. Walls* (Pa.) 859.

Examination.

Matters in reply to cross-examination held properly brought out on redirect.—*Brown v. Town of Swanton* (Vt.) 280.

Cross-examination of defendant as to his leaving the state held proper.—*Bagley v. Mason* (Vt.) 287.

Questions asked a witness on cross-examination held incompetent, either as bearing on the case or for the purpose of impeachment.—*Lake v. Weaver* (R. I.) 302.

Questions assuming facts to have been proved of which there is no evidence are erroneous.—*In re Hine* (Conn.) 384.

Before defendant has opened his case he cannot bring out evidence on the cross-examination of plaintiff's witness, which is not germane to the direct examination.—*Ashborne v. Town of Waterbury*, (Conn.) 498.

The admission of a leading question cannot be reviewed.—*Trenton Pass. Ry. Co., Consolidated, v. Cooper* (N. J. Err. & App.) 730; *Same v. Bennett*, Id.

Where plaintiff claimed to be a creditor of deceased, held that he could be cross-examined as to whether he had ever urged his claim against the estate.—*Mullen v. Union Cent. Life Ins. Co.* (Pa.) 988.

Propriety of cross-examination determined.—*Chatfield v. Bunnell* (Conn.) 1074.

Witness held entitled on redirect examination to explain statement made on cross-examination.—*Chatfield v. Bunnell* (Conn.) 1074.

Credibility and impeachment.

The state cannot introduce evidence to impeach a witness by contradicting statements

brought out as new matter on cross-examination.—*Kohl v. State* (N. J. Err. & App.) 73.

A witness may be cross-examined as to contradictory statements, and on his denial of them may be impeached by evidence thereof.—*Manley v. Delaware & H. Canal Co.* (Vt.) 279.

Where a defendant sued for fraudulent representations is a witness in his own behalf, it is competent to show his pecuniary interest in the transaction.—*McKindley v. Drew* (Vt.) 285.

Where, on cross-examination, a witness denied making statements, it was error to exclude evidence of such statements.—*State v. Bradneck* (Conn.) 492.

WRITS.

Particular writs, see "Attachment"; "Certiorari"; "Execution"; "Garnishment"; "Injunction"; "Mandamus"; "Prohibition"; "Quo Warranto"; "Replevin."

VOL. 89, MAINE REPORTS.

	Page		Page
Ames v. Coffin (36 A. 450).....	300	Inhabitants of Exeter v. Inhabitants of	
Atkins v. Field (36 A. 375).....	281	Stetson (36 A. 1045).....	531
Baldwin v. Emery (36 A. 994).....	496	Inhabitants of Friendship v. Inhabitants of	
Bangs v. Lewiston & A. Horse R. Co. (36		Bremen (35 A. 1018).....	79
A. 73).....	194	Inhabitants of St. George v. City of Rock-	
Bath Sav. Inst. v. Sagadahoc Nat. Bank (36		land (35 A. 1033).....	43
A. 996).....	500	Inhabitants of Wellington v. Small (36 A.	
Belcher v. Knowlton (35 A. 1019).....	93	107).....	154
Bennett v. Dyer (35 A. 1004).....	17	Insurance Com'r v. Provident Aid Soc. (36	
Berry v. Somerset Ry. (36 A. 904).....	552	A. 627).....	413
Brockway Manuf'g Co., In re (35 A. 1012)	121	Johnston v. Hussey (36 A. 993).....	488
Brooks v. Libby (36 A. 66).....	151	Judge of Probate v. Quimby (36 A. 1049)...	574
Bucksport, Inhabitants of, v. Buck (36 A.			
456).....	320	Knight v. Trim (36 A. 912).....	460
Buswell v. Fuller (36 A. 1059).....	600		
Cayford v. Brickett (35 A. 1018).....	77	La Fontain v. Hayhurst (36 A. 623).....	388
Charleston, Inhabitants of, v. Lawry (36 A.		Laughlin v. Reed (36 A. 131).....	226
1103).....	582	Leavitt v. Bangor & A. R. Co. (36 A. 998)	500
City of Lewiston v. Gagne (36 A. 629).....	395	Lebroke v. Damon (35 A. 1028).....	113
City of Rockland v. Farnsworth (36 A. 989)	481	Lewiston, City of, v. Gagne (36 A. 629)...	385
Clark v. Insurance Co. of North America (35			
A. 1008).....	26	Machias Boom, Proprietors of, v. Holway	
Coffin v. Bradbury (36 A. 988).....	476	(36 A. 378).....	236
Condon v. County Com'rs (36 A. 626).....	408	Maddocks v. Stevens (36 A. 398).....	326
Coombs v. Beede (36 A. 104).....	187	Maine Cent. R. Co. v. Bangor, O. & O. T.	
Cummings v. Kennebec Mut. Life Ins. Co.		Ry. Co. (36 A. 1050).....	511
(35 A. 1032).....	37	Maine Cent. R. Co. v. Waterville & F. Rail-	
Cushing, Inhabitants of, v. Inhabitants of		way & Light Co. (36 A. 453).....	377
Friendship (36 A. 1001).....	525	Maine Red Granite Co. v. York (35 A. 1014)	51
		Marshall v. Boardman (35 A. 1024).....	87
Danforth v. Briggs (36 A. 452).....	316	Marston v. Kennebec Mut. Life Ins. Co. (36	
Day v. Philbrook (36 A. 901).....	462	A. 389).....	226
Dinsmore v. Abbott (36 A. 621).....	373	Mason v. Belfast Hotel Co. (36 A. 622).....	371
Doe v. Roe (36 A. 1001).....	523	Mason v. Belfast Hotel Co. (36 A. 624).....	374
		Maxcy Manuf'g Co. v. Burnham (36 A.	
Eaton v. Atlas Acc. Ins. Co. (36 A. 1048)...	570	1003).....	559
Eaton v. Granite State Provident Ass'n (35		Milliken v. Randall (36 A. 75).....	291
A. 1015).....	58	Milliken v. Skillings (36 A. 77).....	126
Ellis v. City of Lewiston (35 A. 1016).....	60	Milliken v. Waldron (36 A. 630).....	344
Embden, Inhabitants of, v. Lisherness (36		Mitchell, Ex parte (35 A. 1012).....	121
A. 1101).....	578	Morgan v. Howland (36 A. 990).....	484
Emery, In re (36 A. 902).....	544	Morrison v. Clark (35 A. 1034).....	166
Exeter, Inhabitants of, v. Inhabitants of			
Stetson (36 A. 1045).....	531	Neal v. Smith (36 A. 1058).....	596
Feeney v. Spalding (35 A. 1027).....	111	Nelson v. Beck (36 A. 374).....	294
Field v. Lang (36 A. 984).....	454	Nelson v. Sanford Mills (36 A. 79).....	219
Flewelling v. Lewiston & A. Horse R. Co.			
(36 A. 1056).....	585	O'Rourke v. Lewiston Daily Sun Pub. Co.	
Flint v. Winter Harbor Land Co. (36 A.		(36 A. 398).....	310
634).....	420	Peabody v. Fraternal Acc. Ass'n (35 A.	
French v. Day (36 A. 909).....	441	1020).....	66
Friendship, Inhabitants of, v. Inhabitants		Penley, In re (36 A. 397).....	313
of Bremen (35 A. 1018).....	79	Plured v. Levasseur (36 A. 110).....	172
		Proprietors of Machias Boom v. Holway	
Getchell v. Inhabitants of Oakland (36 A.		(36 A. 378).....	236
627).....	426	Pulitzer v. Livingston (36 A. 635).....	329
Giberson v. Bangor & A. R. Co. (36 A. 400)	337	Quimby v. Lowell (36 A. 902).....	547
Goodwin v. Smith (36 A. 997).....	506		
Grant v. Albee (36 A. 397).....	299	Randall v. Tuell (36 A. 910).....	443
Griswold v. Lambert (36 A. 1046).....	534	Redman v. Hurley (36 A. 906).....	428
		Romick v. Wentworth (36 A. 622).....	362
Haggerty v. Hallowell Granite Co. (35 A.		Rockland, City of, v. Farnsworth (36 A.	
1029).....	118	989).....	481
Hammond v. Phillips (35 A. 1017).....	70		
Harrington v. Bean (36 A. 986).....	470	St. George, Inhabitants of, v. City of Rock-	
Hopkins v. Keazer (36 A. 615).....	347	land (35 A. 1033).....	43
Howe v. Klein (36 A. 620).....	376	Sherman v. Hall (36 A. 626).....	411
Hunter v. Pherson (35 A. 1031).....	71	State v. Carver (35 A. 1030).....	74
Hurley v. Hewett (35 A. 1026).....	100	State v. Darling (36 A. 632).....	409
		State v. Donovan (36 A. 982).....	448
Inhabitants of Bucksport v. Buck (36 A.		State v. Getchell (36 A. 396).....	326
456).....	320	State v. Gross (36 A. 1003).....	542
Inhabitants of Charleston v. Lawry (36 A.		State v. Huff (36 A. 1000).....	521
1103).....	582	State v. Lynch (36 A. 60).....	260
Inhabitants of Cushing v. Inhabitants of		State v. Martin (35 A. 1023).....	117
Friendship (36 A. 1001).....	525	State v. Miles (36 A. 70).....	142
Inhabitants of Embden v. Lisherness (36 A.		State v. Norton (36 A. 394).....	280
1101).....	578	State v. Parker (35 A. 1021).....	81

89 ME.—Continued.		Page		Page
State v. Sinnott (35 A. 1007).....	41	Wellington, Inhabitants of, v. Small (36 A. 107)	154	
Steinfeldt v. Jodrie (35 A. 1008).....	45	Wentworth v. Shibles (36 A. 108).....	167	
Stuart v. Redman (36 A. 905).....	435	Whitcomb v. Dutton (36 A. 67).....	212	
Thompson v. Robinson (35 A. 1002).....	46	Williams v. Maine State Relief Ass'n (36 A. 63).....	158	
Tracy v. Le Blanc (36 A. 399).....	304	Wilson v. Simmons (36 A. 380).....	242	
Waterman v. Cunningham (36 A. 395).....	295	Wing v. Ford (35 A. 1023).....	140	
Webber v. Proctor (36 A. 631).....	404	Winslow v. Reed (35 A. 1017).....	67	
Webber v. Stratton (36 A. 614).....	379	Wood v. Finson (36 A. 911).....	459	
		Woodman v. Woodman (35 A. 1037).....	128	

VOL. 84, MARYLAND REPORTS.

	Page		Page
Anderson v. Brown (35 A. 937).....	261	Leach v. Connor (36 A. 591).....	571
Baker v. Maryland Coal Co. (35 A. 10)....	19	Lynn v. State (35 A. 21).....	67
Ballantyne v. Rusk (36 A. 361).....	649	McCosker v. Banks (35 A. 935).....	292
Baltimore City v. Baltimore, C. & E. M. Pass. R. Co. (35 A. 17).....	1	Matthews v. Adams (35 A. 60).....	143
Baltimore City v. Schnitker (34 A. 1132)....	34	Mayor & City Council of Baltimore v. Baltimore, C. & E. M. Pass. R. Co. (35 A. 17).....	1
Baltimore Traction Co. v. Helms (36 A. 119).....	515	Mayor & City Council of Baltimore v. Schnitker (34 A. 1132).....	34
Barry v. Edlavitch (35 A. 170).....	95	Methodist Episcopal Church in East Baltimore Station v. Trustees of Jackson Square Evangelical Lutheran Church (35 A. 8).....	173
Blair v. Winston (35 A. 1101).....	356	Norberg v. Records (36 A. 116).....	568
Bloede Co. v. Bloede (34 A. 1127).....	129	Palmer v. Hughes (36 A. 431).....	652
Board of School Com'rs of Washington County v. Wagaman (35 A. 85).....	151	Park Tax Case (Mayor, etc., of Baltimore v. Baltimore, C. & E. M. Pass. R. Co., 35 A. 17).....	1
Bowen v. Tascoe (36 A. 436).....	497	Plunkett v. Davis Sewing Mach. Co. (36 A. 115).....	529
Bradford v. Street (35 A. 886).....	273	Pott v. Schmucker (36 A. 592).....	535
Buchanan v. Mechanics' Loan & Savings Institution (35 A. 1099).....	430	Price v. Philadelphia, W. & B. R. Co. (36 A. 263).....	506
City of Baltimore v. Baltimore, C. & E. M. Pass. R. Co. (35 A. 17).....	1	Rogers v. Bayley (35 A. 58).....	30
City of Baltimore v. Schnitker (34 A. 1132)....	34	Salfner v. State (35 A. 885).....	299
Columbian Iron Works & Dry Dock Co. v. Douglas (34 A. 1118).....	44	Schaub v. Griffin (36 A. 443).....	557
Connor v. Leach (36 A. 591).....	571	School Com'rs of Washington County v. Wagaman (35 A. 85).....	151
Connaughton v. Bernard (36 A. 265).....	577	Sharkey v. Lake Roland El. Ry. Co. (34 A. 1130).....	163
Consumers' Ice Co. v. Bixler (35 A. 1086)....	437	Smith v. Pattison (35 A. 963).....	341
Corbett v. Wolford (35 A. 1088).....	426	Smith v. Rasin (36 A. 261).....	642
Dashiell v. Griffith (35 A. 1094).....	363	Spencer v. Patten (35 A. 1097).....	414
Dorsey v. Habersack (35 A. 96).....	117	State v. Lake Roland El. Ry. Co. (34 A. 1130).....	163
Electric Light & Power Co. v. City of Frederick City (36 A. 362).....	599	State v. Second Nat. Bank (35 A. 889)....	325
Faust v. Twenty-Third German American Bldg. Ass'n (35 A. 890).....	186	State v. Smith (37 A. 1117).....	83
Frederick Electric Light & Power Co. v. City of Frederick City (36 A. 362).....	599	Steinberger v. Independent Loan & Savings Ass'n (36 A. 439).....	625
Gaither v. Tolson (36 A. 449).....	637	Storr v. James (35 A. 965).....	282
Graffin v. Robb (35 A. 971).....	451	Trustees of Methodist Episcopal Church in East Baltimore Station v. Trustees of Jackson Square Evangelical Lutheran Church (35 A. 8).....	173
Hambleton v. Rhind (36 A. 597).....	456	Trustees of Zion Church v. Hilken (35 A. 9).....	170
Hanna v. Young (35 A. 674).....	179	Victor G. Bloede Co. v. Bloede (34 A. 1127)....	129
Hardester v. Sharretts (34 A. 1122).....	146	Zeiler v. Central Ry. Co. (35 A. 932).....	304
Harper v. Clayton (35 A. 1083).....	346	Zion Church v. Hilken (35 A. 9).....	170
Harvard Pub. Co. of New York v. Benjamin (35 A. 930).....	333		
Hooper v. Creager (35 A. 967, 1103; 36 A. 359).....	195		
Hopkins v. Holland (35 A. 11).....	84		
Hughes v. Riggs (36 A. 269).....	502		
Kirk v. Garrett (35 A. 1089).....	383		
Lake v. Thomas (36 A. 437).....	608		

VOL. 54, NEW JERSEY EQUITY REPORTS.

	Page		Page
Bannister v. Miller (32 A. 1066).....	121	Lynde v. Lynde (35 A. 641).....	475
Beach v. Sterling Iron & Zinc Co. (33 A. 286).....	65	McMichael v. Webster (35 A. 663).....	478
Bellingham v. Palmer (33 A. 199).....	136	McTague v. Finnegan (35 A. 542).....	484
Benz v. Fabian (35 A. 760).....	615	Magee v. Bradley (35 A. 103).....	329
Bloomfield, Inhabitants of Township of, v. Borough of Glen Ridge (33 A. 925).....	276	Mallory v. Kirkpatrick (33 A. 205).....	50
Bloomfield, Inhabitants of Township of, v. Borough of Glen Ridge (33 A. 928).....	284	Manning v. Port Reading R. Co. (33 A. 902).....	46
Boice v. Conover (35 A. 402).....	531	Mayor, etc., of Borough of Rutherford v. Alyea (34 A. 1078).....	411
Brooks v. Kip (35 A. 658).....	462	Meyers v. Schumann (34 A. 1066).....	414
Brown v. Murray (35 A. 748).....	594	Middleton v. Middleton (35 A. 1065; 37 A. 1106).....	682
Buckley v. Perrine (34 A. 1054).....	285	Miller v. Bannister (37 A. 1117).....	709
Carey v. Monroe (35 A. 456).....	632	Mills v. Davison (35 A. 1072).....	659
Carr v. Hertz (33 A. 194).....	127	Molineaux v. Raynolds (35 A. 536).....	559
Consolidated Coal Co. v. Keystone Chemical Co. (35 A. 157).....	309	National Docks & N. J. J. C. Ry. Co. v. Pennsylvania R. Co. (33 A. 219).....	10
Coyne v. Sayre (36 A. 96).....	702	National Docks & N. J. J. C. Ry. Co. v. Pennsylvania R. Co. (33 A. 800).....	142
Cresse v. Security Land Inv. Co. (35 A. 540).....	447	National Docks & N. J. J. C. Ry. Co. v. Pennsylvania R. Co. (33 A. 936).....	167
Currie v. Lehigh Val. Terminal Ry. Co. (37 A. 1117).....	700	National Shoe & Leather Bank of City of New York v. August (33 A. 803).....	182
Dodson v. Severs (38 A. 28).....	305	Newark Coal Co. v. Spangler (34 A. 952).....	354
Drayton v. Drayton (38 A. 25).....	298	New Jersey Building, Loan & Investment Co. v. Bachelor (35 A. 745).....	600
Dunn v. Hastings (34 A. 256).....	503	Patterson v. Madden (36 A. 273).....	714
Duval v. Duval (35 A. 750).....	581	Pennsylvania R. Co. v. National Docks & N. J. J. C. Ry. Co. (35 A. 433).....	647
Fluck v. Lake (35 A. 643).....	638	Porter v. Bergen (34 A. 1067).....	405
Fulper v. Fulper (34 A. 1063).....	431	Potter v. Ashhurst (37 A. 1117).....	626
Green v. Stone (34 A. 1009).....	387	Powell v. Cash (34 A. 131).....	218
Greer v. Van Meter (33 A. 794).....	270	Price v. Forrest (35 A. 1075).....	680
Hare v. Headley (35 A. 445).....	545	Princeton Sav. Bank v. Martin (34 A. 1048).....	435
Harlem Co-operative Building & Loan Ass'n v. Freeburn (33 A. 514).....	37	Protection Building & Loan Ass'n v. Knowles (34 A. 1083).....	519
Hatch v. Van Dervoort (34 A. 938).....	511	Riley v. Allen (35 A. 654).....	495
Hertz v. Carr (37 A. 1117).....	700	Rooney v. Rooney (34 A. 682).....	231
Hutfield v. Debaud (34 A. 882).....	371	Ruckelshaus v. Borchertlin (34 A. 977).....	344
Hutchinson v. Van Voorhis (35 A. 371).....	439	Rural Homestead Co. v. Wildes (35 A. 896).....	608
Inhabitants of Township of Bloomfield v. Borough of Glen Ridge (33 A. 925).....	276	Rutherford, Mayor, etc., of Borough of, v. Alyea (34 A. 1078).....	411
Inhabitants of Township of Bloomfield v. Borough of Glen Ridge (33 A. 928).....	284	Skillman v. Wiegand (33 A. 929).....	198
Ivory v. Klein (35 A. 346).....	379	Smalley v. Smalley (35 A. 374).....	591
Jernee v. Jernee (35 A. 458).....	657	Smith v. Smith (32 A. 1009).....	1
Johnson v. Conover (35 A. 291).....	333	Stevens v. Bosch (33 A. 293).....	59
Kase v. Bennett (33 A. 248).....	97	Stimms v. Stimms (33 A. 468).....	17
Keim v. O'Reilly (34 A. 1073).....	418	Stockton v. North Jersey St. Ry. Co. (34 A. 688).....	283
Kidd v. Hurley (33 A. 1057).....	177	Stone v. Newell (35 A. 285).....	680
King v. Wilson (34 A. 394).....	247	Swain v. Edmunds (37 A. 1117).....	438
Koegel v. Egner (35 A. 394).....	623	Talcott v. Arnold (35 A. 532).....	570
Kountze v. Proprietors of Morris Aqueduct Co. (33 A. 817).....	40	Tallman v. Wallack (33 A. 1059).....	655
Lehigh Val. Terminal Ry. Co. v. Currie (33 A. 824).....	84	Travelers' Ins. Co. of Hartford v. Grant (33 A. 1060).....	298
Lindley v. Keim (34 A. 1073).....	418	Trout v. Lucas (35 A. 153).....	301
Lippincott v. Bechtold (34 A. 1079).....	407	Van Winkle v. Owen (34 A. 400).....	253
Lippincott v. Wikoff (33 A. 305).....	107	Wall v. Young (33 A. 526).....	24
Lovett v. Taylor (34 A. 896).....	311	Walton v. Walton (35 A. 289).....	697
		Warren v. Tynan (34 A. 1065).....	402

VOL. 58, NEW JERSEY LAW REPORTS.

Allison v. Public Road Board of Englewood Tp. (32 A. 688).....	140	Anspach v. Borough of Spring Lake (32 A. 77).....	136
American Saw Co. of New Jersey v. First Nat. Bank (34 A. 1).....	438	Attorney-General v. Borough of Angelsea (33 A. 971).....	372
American Transp. & Nav. Co., In re (32 A. 74).....	109	Baldwin v. Board of Freeholders of Middlesex (33 A. 197).....	285
Anderson v. City Council of City of Camden (33 A. 846).....	515	Banker v. Henderson (32 A. 700).....	24

58 N. J. LAW—Continued.

	Page.		Page
Barr v. City of New Brunswick (33 A. 477)	255	Francis v. City of Newark (33 A. 853)	522
Bell v. Atlantic City R. Co. (33 A. 211)	227	Furniture Co. v. Board of Education of Somerville (35 A. 397)	646
Benny v. O'Brien (32 A. 696)	36	Garretson v. Appleton (37 A. 150)	386
Benson v. Inhabitants of Bloomfield Tp. (33 A. 855)	491	Genz v. State (34 A. 816)	482
Berry v. Cramer (33 A. 201)	278	Gibbs v. Craig (33 A. 1052)	661
Biddle v. Borough of Riverton (33 A. 279)	289	Gleason v. Boehm (34 A. 886)	475
Boice v. Board of Chosen Freeholders of Essex County (33 A. 54)	141	Glen Ridge v. Stout (33 A. 858)	598
Booye v. Matthews (36 A. 1128)	697	Grossman v. Hancock (32 A. 689)	139
Borough of Glen Ridge v. Stout (33 A. 858)	598	Hackett v. New York, L. E. & W. R. Co. (32 A. 265)	4
Boylan v. Board of Police Com'rs of City of Newark (32 A. 78)	133	Harris v. New Jersey Cent. R. Co. (33 A. 799)	282
Brennan v. Watson (36 A. 1128)	696	Harris v. State (33 A. 844)	436
Brook v. Vannest (33 A. 382)	162	H. B. Clafin Co. v. Elliot Furniture Co. (34 A. 259)	379
Camden Horse R. Co. v. West Jersey Traction Co. (32 A. 72)	102	H. B. Clafin Co. v. Lewis-Porter Cabinet Co. (34 A. 259)	379
Camden & A. R. Co. v. City of Atlantic City (33 A. 198)	316	H. B. Clafin Co. v. Porter (34 A. 259)	379
Canda Manuf'g Co. v. Inhabitants of Wood- bridge Tp. (32 A. 61)	134	Hoboken Ferry Co. v. Feiszt (35 A. 290)	198
Cape May, D. B. & S. P. R. Co. v. City of Cape May (34 A. 397)	565	Hoboken Printing & Publishing Co. v. Kahn (33 A. 382, 1060)	359
Cavanaugh v. Board of Chosen Freeholders of Essex County (33 A. 943)	531	Hoffman v. Lowell (34 A. 750)	553
Chamberlain v. Board of Education of Cranbury Tp. (33 A. 923)	347	Holt v. State (32 A. 663)	11
Chambers v. Niagara Fire Ins. Co. (33 A. 283)	216	Homan v. Headley (34 A. 941)	485
City of Elizabeth v. Dunning (34 A. 752)	554	Hope v. Linden Park Blood Horse Ass'n (34 A. 1070)	627
City of Newark v. Inhabitants of Verona Tp. (33 A. 959)	595	Horan v. Board of Education of City of Orange (33 A. 944)	533
City of Newark v. Mt. Pleasant Cemetery Co. (33 A. 396)	168	Howland v. State (32 A. 257)	18
Clafin Co. v. Elliot Furniture Co. (34 A. 259)	379	Illingworth v. Rich (34 A. 757)	507
Clafin Co. v. Lewis-Porter Cabinet Co. (34 A. 259)	379	Inglis v. Schreiner (32 A. 131)	120
Clafin Co. v. Porter (34 A. 259)	379	Johnson v. Borough of Asbury Park (33 A. 850)	604
Clark v. State (34 A. 3)	383	Johnson v. Hoover (33 A. 217)	334
Clark Mill-End Spool Cotton Co. v. Shaffery (33 A. 284)	229	Kase v. Hartford Fire Ins. Co. (32 A. 1057)	34
Clark Thread Co. v. Bennett (33 A. 404)	404	Ketline v. State (37 A. 133)	462
Cohen v. Watson (33 A. 943)	499	King v. Holbrook (33 A. 965)	369
Collins v. Keller (34 A. 753)	429	Kling v. Kehoe (33 A. 946)	529
Collins v. Langan (32 A. 258)	6	Kountze v. Proprietors of Morris Aqueduct (33 A. 252)	303
Consolidated Traction Co. v. Chenowith (34 A. 817)	416	Kountze v. Proprietors of Morris Aqueduct (34 A. 1099)	695
Consolidated Traction Co. v. City of Eliza- beth (34 A. 146)	619	La Foucherie v. Knutzen (33 A. 203)	234
Consolidated Traction Co. v. Reeves (34 A. 128)	573	Lambert v. City of Rahway (34 A. 5)	578
Consolidated Traction Co. v. Scott (34 A. 1094)	682	Lane v. Ocean Grove Camp Meeting Ass'n (32 A. 695)	123
Consolidated Traction Co. v. Taborn (32 A. 685)	1	Leslie, In re (33 A. 954)	609
Consolidated Traction Co. v. Taborn (36 A. 1128)	408	Linn v. Davis (33 A. 129)	29
Cumberland Glass Manuf'g Co. v. State (33 A. 210)	224	Lynch v. Pott (32 A. 798)	253
Daily v. Board of Chosen Freeholders of Essex County (33 A. 739)	319	McCallum v. County Board of Assessors of Camden County (34 A. 755)	544
Davock v. Nealon (32 A. 675)	21	McDonald v. City of Newark (32 A. 384)	12
Day v. New York, S. & W. R. Co. (34 A. 1081)	677	McEwan v. Town of West Hoboken (34 A. 130)	512
De Gintner v. New Jersey Home for the Education & Care of Feeble-Minded Chil- dren (33 A. 968)	354	McLaughlin v. City of Newark (34 A. 13)	202
Delaware, L. & W. R. Co. v. Hardy (35 A. 1130)	205	McMahon v. O'Brien (33 A. 848)	548
Drinkhouse v. American Brick & Tile Co. (33 A. 950)	432	McNeal Pipe & Foundry Co. v. Lippincott (36 A. 1128)	407
Edgeworth v. Wood (33 A. 940)	463	Magowan v. Stevenson (32 A. 1057)	31
Elizabeth v. Dunning (34 A. 752)	554	Magowan v. Stevenson (36 A. 1128)	408
Emley v. Perrine (33 A. 951)	472	Maher v. McGrath (33 A. 945)	469
Erdman v. Moore (33 A. 958)	445	Marley v. State (33 A. 208)	207
Farrier v. City of Jersey City (33 A. 740)	262	Matthews v. Booye (34 A. 754)	593
Fath v. Thompson (33 A. 391)	180	Matthews v. Rankin (33 A. 1052)	584
Faughnan v. City of Elizabeth (33 A. 212)	309	Meador v. Cornell (33 A. 960)	375
Fort v. Howell (34 A. 751)	541	Mercantile Nat. Bank of New York v. Pe- quonnock Nat. Bank (33 A. 474)	300
Fowler v. Larrabee (33 A. 216)	314	Miller v. Board of Chosen Freeholders of Cumberland County (33 A. 948)	501
Fowler v. State (34 A. 682)	423	Miller v. Delaware, L. & W. R. Co. (33 A. 950)	428
		Monitor Lodge, No. 219, of Odd Fellows v. Golby (32 A. 689)	119
		Montclair Water Co. v. City of Jersey City (33 A. 740)	262
		Moore v. Johnson (34 A. 396)	586
		Moran v. City of Jersey City (35 A. 284)	144
		Moran v. City of Jersey City (35 A. 950)	653

58 N. J. LAW.—Continued.		Page		Page
Morris Canal & Banking Co. v. City of Jersey City (33 A. 740).....	262	Simpson v. Maybaum (33 A. 814).....	323	
Mowbray v. Allen (33 A. 199).....	315	Simpson v. Negley (36 A. 1129).....	406	
Myers v. Holborn (33 A. 389).....	193	Sinclair v. Town of West Hoboken (32 A. 65).....	129	
National State Bank v. Trustees of First Presbyterian Church (36 A. 1129).....	406	Singer Manuf'g Co. v. Heppenheimer (34 A. 1061).....	633	
Newark v. Inhabitants of Verona Tp. (33 A. 959).....	595	Slingerland v. East Jersey Water Co. (33 A. 843).....	411	
Newark v. Mt. Pleasant Cemetery Co. (33 A. 396).....	168	Smith v. Gouldy (34 A. 748).....	562	
Newark & S. O. R. Co. v. McCann (34 A. 1052).....	642	Smith v. Van Selver (33 A. 390).....	190	
New Jersey School & Church Furniture Co. v. Board of Education of Somerville (35 A. 397).....	646	Smith v. York Manuf'g Co. (33 A. 244).....	242	
New Jersey Traction Co. v. Gardner (31 A. 893).....	176	South Orange v. Whittingham (35 A. 407).....	655	
New Jersey Trust & Safe-Deposit Co. v. Camden Safe-Deposit & Trust Co. (33 A. 475).....	196	Springer v. Inhabitants of Logan Tp. (33 A. 952).....	588	
O'Brien v. Benny (33 A. 380).....	189	State Bank v. Trustees of First Presbyterian Church (36 A. 1129).....	406	
Ocean Castle, Knights of the Golden Eagle, v. Smith (33 A. 849).....	545	Stewart v. City of Hoboken (36 A. 1129).....	696	
Olphant v. Vannest (33 A. 382).....	162	Stites v. Board of Chosen Freeholders of Cumberland County (33 A. 737).....	340	
Orange Nat. Bank v. Williams (32 A. 745).....	45	Stockton v. City of Newark (32 A. 67).....	116	
Orenstine v. Schaffer (33 A. 285).....	344	Suburban Electric Co. v. Nugent (34 A. 1069).....	658	
Pennsylvania R. Co. v. Knight (33 A. 845).....	287	Sun Ins. Co. v. Greenville Building & Loan Ass'n (33 A. 962).....	367	
Pennsylvania R. Co. v. National Docks Co. (34 A. 753).....	425	Sutcliffe v. Humphreys (32 A. 706).....	42	
Pierce v. Camden, G. & W. Ry. Co. (35 A. 286).....	400	Sutcliffe v. Humphreys (36 A. 1129).....	409	
Poillon v. Borough of Rutherford (32 A. 688).....	113	Taliaferro v. Stevenson (33 A. 383).....	165	
Potts v. Evans (34 A. 4).....	384	Thatcher v. Allen (33 A. 284).....	240	
Prosser v. Behrens (33 A. 282).....	276	Thiel v. Bull's Ferry Land Co. (33 A. 281).....	212	
Provost v. Robinson (33 A. 204).....	222	Tims v. Spragg (33 A. 213).....	273	
Rahway Gaslight Co. v. City of Rahway (34 A. 3).....	510	Todd v. Bailey (32 A. 696).....	10	
Relistab v. Borough of Belmar (34 A. 885).....	489	Traction Co. v. City of Elizabeth (34 A. 146).....	619	
Riverton & Palmyra Water Co. v. Haig (33 A. 215).....	295	Traction Co. v. Scott (34 A. 1094).....	682	
Roberson v. City of Bayonne (33 A. 734).....	325	Trainer v. Wolff (33 A. 1051).....	381	
Rockaway & Hudson Co. v. City of Jersey City (33 A. 740).....	262	Treasurer of City of Elizabeth v. Dunning (34 A. 752).....	554	
Roebing v. Inhabitants of City of Trenton (32 A. 685).....	40	Trenton Pass. Ry. Co. v. Bennett (34 A. 815).....	556	
Roebing v. Trenton Pass. Ry. Co. (34 A. 1090).....	666	Trenton Pass. Ry. Co. v. Cooper (34 A. 815).....	556	
Rogers v. State (33 A. 283).....	220	Truax v. Pennsylvania R. Co. (33 A. 278).....	218	
Roop v. State (34 A. 749).....	479	Van Duyne v. Smith (36 A. 1129).....	405	
Roop v. State (34 A. 885).....	487	Vanduzer v. Lehigh & H. R. Ry. Co. (32 A. 376).....	8	
Roper v. State (33 A. 969).....	420	Van Reipen v. City of Jersey City (33 A. 740).....	262	
Rorke v. Walton (33 A. 52).....	150	Van Steenburgh v. Thornton (33 A. 380).....	160	
Rushworth v. Judges of Inferior Court of Common Pleas of Hudson County (32 A. 743).....	97	Village of South Orange v. Whittingham (35 A. 407).....	655	
Ryno v. State (33 A. 219).....	238	Vreeland v. City of Bayonne (32 A. 68).....	126	
Schafer v. Atlantic City (32 A. 133).....	131	Wain v. Wain (34 A. 1068).....	640	
Schalk v. Wrightson (32 A. 820).....	50	Water Co. v. Haig (33 A. 215).....	295	
Shangnuole v. Ohl (34 A. 755).....	557	Western Union Tel. Co. v. McMullen (33 A. 384).....	155	
Sheridan v. Foley (33 A. 484).....	230	West Jersey R. Co. v. Paulding (33 A. 381).....	178	
Shields v. City of Paterson (33 A. 947).....	550	West Jersey Traction Co. v. Board of Public Works of City of Camden (33 A. 966).....	362	
Shimer v. Inhabitants of Town of Phillipsburg (33 A. 852).....	506	West Jersey Traction Co. v. Board of Public Works of City of Camden (37 A. 578).....	536	
		West Jersey Traction Co. v. Shivers (33 A. 55).....	124	
		Wheliman v. City of Jersey City (33 A. 740).....	262	
		Wilkins v. Quarter Sessions of Camden County (34 A. 935).....	555	
		Wilson v. Morgan (34 A. 752).....	426	

VOL. 179, PENNSYLVANIA STATE REPORTS.

	Page		Page
Ackman v. Jaster (36 A. 324).....	463	Friend v. Oil Well Supply Co. (36 A. 219)...	290
Allegheny, City of, v. Federal St. & P. Val. Pass. Ry. Co. (36 A. 320).....	424	Fritz v. Menges (36 A. 213).....	122
Allegheny, City of, v. Pittsburgh, A. & M. Pass. R. Co. (36 A. 161).....	414	Furnace Co. v. Oil Well Supply Co. (36 A. 293)	643
Allegheny County v. Grier (36 A. 353)....	639	Gaertner v. Heyl (36 A. 146).....	391
Allison v. Powers (36 A. 333).....	531	Gallagher v. Davis (36 A. 319).....	504
Amberson Ave. (36 A. 354).....	634	Gas Co., Poterie, v. Poterie (36 A. 232)...	68
Aubler v. City of McKeesport (36 A. 212)...	321	German Protestant Orphans' Home's Appeal (36 A. 322).....	447
Balsh v. Liberty Nat. Bank (36 A. 337)...	430	Gilmore's Appeal (36 A. 343).....	610
Bank, First Nat., of Omaha v. Crosby (36 A. 155).....	63	Goorin v. Allegheny Traction Co. (36 A. 207)	327
Bank, Odd Fellows' Sav. of Pittsburg v. Miller (36 A. 324).....	412	Goorin v. Allegheny Traction Co. (36 A. 1129)	333
Bartley v. Phillips (36 A. 217).....	175	Hasel v. Beilstein (36 A. 336).....	560
Beechwood Ave. Sewer (36 A. 209).....	490	Hays v. Hays (36 A. 311).....	277
Beechwood Ave. Sewer (36 A. 210).....	494	Henderson v. Allegheny Heating Co. (36 A. 312)	513
Beechwood Ave. Sewer (36 A. 1130).....	498	Jackson's Appeal (36 A. 340).....	609
Beechwood Ave. Sewer (36 A. 1130).....	499	Jackson's Estate (36 A. 156).....	77
Beechwood Ave. Sewer (36 A. 1130).....	500	Jones' Estate (36 A. 175).....	36
Bennett v. McMillin (36 A. 188).....	146	Jones' Estate (36 A. 1129).....	46
Berlinger v. Lutz (37 A. 640).....	1	Kurzawski v. Schneider (36 A. 319).....	500
Birch's Appeal (36 A. 230).....	254	Lenkner v. Citizens' Traction Co. (36 A. 228)	486
Boehm v. Kress (36 A. 226).....	386	Lineberger v. Newkirk (36 A. 193).....	117
Braunschweiler v. Waits (36 A. 155).....	47	Luebbke's Estate (36 A. 322).....	447
Brymer v. Butler Water Co. (36 A. 249)...	331	McCallum v. Lockhart (36 A. 231).....	427
Burk v. Howley (36 A. 327).....	539	McGowan v. Bailey (36 A. 325).....	470
Chaffey v. Boggs (36 A. 241).....	301	McGowan v. Bailey (36 A. 1129).....	481
Chaffey v. Boggs (36 A. 1129).....	307	McMahan v. Sewickly Mut. Fire Ins. Co. (36 A. 174).....	52
Chalfant's Appeal (36 A. 350).....	591	Mann v. Wakefield (36 A. 244).....	398
Child's Appeal (36 A. 354).....	634	Marshall v. Mellon (36 A. 201).....	371
Citizens of Kittanning Tp., Petition of (36 A. 151).....	60	Mathews v. People's Natural Gas Co. (36 A. 216)	165
City of Allegheny v. Federal St. & P. Val. Pass. Ry. Co. (36 A. 320).....	424	Mead's Appeal (36 A. 1129).....	634
City of Allegheny v. Pittsburgh, A. & M. Pass. R. Co. (36 A. 161).....	414	Meyers' Estate (36 A. 230).....	157
City of Pittsburgh v. Maxwell (36 A. 158)...	553	Meyers' Estate (36 A. 1130).....	163
City of Pittsburgh's Appeal (36 A. 209).....	490	Miller v. McKeesport & W. Ry. Co. (36 A. 287)	350
City of Pittsburgh's Appeal (36 A. 210).....	494	Miller's Estate (36 A. 139).....	645
City of Pittsburgh's Appeal (36 A. 1130).....	498	Murphy v. Liberty Nat. Bank (36 A. 283)...	295
City of Pittsburgh's Appeal (36 A. 1130).....	499	Murphy v. Marshall (36 A. 294).....	516
City of Pittsburgh's Appeal (36 A. 1130).....	500	Neale v. Dempster (36 A. 338).....	509
City of Pittsburgh's Petition (36 A. 293)...	630	Nemier v. Riter (36 A. 335).....	557
City of Pittsburgh's Petition (36 A. 1129)...	634	Nimick's Estate (36 A. 350).....	591
Cleary v. Pittsburgh, A. & M. Traction Co. (36 A. 323).....	526	Odd Fellows' Sav. Bank of Pittsburg v. Miller (36 A. 324).....	412
Cookson v. Pittsburg & W. Ry. Co. (36 A. 194).....	184	Orphans' Home's Appeal (36 A. 322).....	447
Corcoran v. Mutual Life Ins. Co. (36 A. 203).....	132	O'Toole v. Post Printing & Publishing Co. (36 A. 288)	271
County of Allegheny v. Grier (36 A. 353)...	639	Packer v. Packer (36 A. 344).....	580
Danley v. Danley (36 A. 225).....	170	Pantall's Appeal (36 A. 175).....	30
Davidson v. Lake Shore & M. S. Ry. Co. (36 A. 291).....	227	Pantall's Appeal (36 A. 1129).....	46
Davis v. Huggins (36 A. 318).....	508	Pennsylvania R. Co. v. Turtle Creek Valley Electric Ry. Co. (36 A. 348).....	584
Dickson v. Hartman Manuf'g Co. (36 A. 246).....	343	Pittsburg, City of, v. Maxwell (36 A. 158)...	553
Dillon v. Allegheny County Light Co. (36 A. 164).....	482	Pittsburg City's Appeal (36 A. 209).....	490
Douglass Furnace Co. v. Oil Well Supply Co. (36 A. 293).....	643	Pittsburg City's Appeal (36 A. 210).....	494
Ferry Co. v. McKeesport & D. Bridge Co. (36 A. 186).....	466	Pittsburg City's Appeal (36 A. 1130).....	498
First Nat. Bank of Omaha v. Crosby (36 A. 155).....	63	Pittsburg City's Appeal (36 A. 1130).....	499
Flannery's Appeal (36 A. 1130).....	602	Pittsburg City's Appeal (36 A. 1130).....	500
Poster's Estate (36 A. 343).....	610	Pittsburg City's Petition (36 A. 293).....	630
Francis v. Franklin Tp. (36 A. 202).....	195		

179 PA. ST.—Continued.		Page		Page
Pittsburg City's Petition (36 A. 1129).....	634		Sprowls v. Morris Tp. (36 A. 242).....	219
Poterie Gas Co. v. Poterie (36 A. 232)....	68		Stepp v. Frampton (36 A. 177).....	284
Rathgebe v. Pennsylvania R. Co. (36 A. 160)	31		Stevenson's Appeal (36 A. 223).....	268
Reagle v. Reagle (36 A. 191).....	89		Straw v. Smith (36 A. 162).....	376
Reber v. Pittsburg & B. Traction Co. (36 A. 245)	339		Stringert v. Ross Tp. (36 A. 345).....	614
Riddle v. Armstrong (36 A. 226).....	263		Taylor v. Sattler (36 A. 323).....	451
Riverton Ferry Co. v. McKeesport & D. Bridge Co. (36 A. 186).....	466		Taylor's Estate (36 A. 230).....	254
Rogers' Estate (36 A. 1130).....	602		Teufel v. Rowan (36 A. 224).....	408
Rogers' Estate (36 A. 340).....	609		Thompson v. Sproul (36 A. 290).....	266
Ross' Appeal (36 A. 148).....	24		Toohey v. Equitable Gas Co. (36 A. 314) ..	437
Rowan v. Rowan (36 A. 1130).....	411		Voight v. Fisher (36 A. 1131).....	526
Sands v. Dwelling House Ins. Co. (36 A. 1130)	386		Voight v. Wallace (36 A. 315).....	520
Schlehl's Estate (36 A. 181).....	308		Walker, In re (36 A. 148).....	24
School Directors' Appeal (36 A. 151).....	60		Wall v. Royal Soc. of Good Fellows (36 A. 748)	355
Seeley v. Citizens' Traction Co. (36 A. 229) 334			Wallace v. Jameson (36 A. 145).....	94
Shrader v. United States Glass Co. (36 A. 330)	623		Wallace v. Jameson (36 A. 142).....	98
Slicker v. Schuchert (36 A. 205).....	401		Weixel v. Lennox (36 A. 229).....	457
Smith v. Hine (36 A. 222).....	203		Weixel v. Lennox (36 A. 248).....	459
Smith v. Reimer (36 A. 313).....	442		Wherry v. Wherry (36 A. 165).....	84
Smith v. Wachob (36 A. 221).....	266		White v. Wright (36 A. 154).....	75
Smith's Appeal (36 A. 134).....	14		Yost v. Dwelling House Ins. Co. (36 A. 317)	381
Smith's Appeal (36 A. 293).....	630		Zahn v. McMillin (37 A. 188).....	146
Smith's Estate (36 A. 223).....	208			

VOL. 180, PENNSYLVANIA STATE REPORTS.

Albert v. Uhrich (36 A. 745).....	288	De Turck v. Matz (36 A. 861).....	347
American Casualty Insurance & Security Co. of Baltimore City v. Arrott (36 A. 319)	1	Dice's Estate (37 A. 117).....	647
Bastian v. City of Philadelphia (36 A. 746) 227		Dimmick v. Delaware, L. & W. R. Co. (36 A. 866)	468
Berlin Iron Bridge Co. v. Bonta (36 A. 867)	448	Dixey v. Philadelphia Traction Co. (36 A. 924)	401
Bitting v. Maxatawny Tp. (36 A. 855).....	357	Dock v. Dock (36 A. 411).....	14
Boric v. Satterthwaite (37 A. 102).....	542	Dreifus' Appeal (36 A. 567).....	52
Braddock Trust Co. v. Guarantee Trust & Safe Deposit Co. (37 A. 101).....	529	Earle v. Arbogast (36 A. 923).....	409
Bradley v. Pierce (36 A. 740).....	262	Easby v. Easby (36 A. 923).....	420
Brashear v. Philadelphia Traction Co. (36 A. 914)	392	Eckels v. Smyser (36 A. 408).....	66
Bridge Co. v. Bonta (36 A. 867).....	448	Edelman v. Latshaw (36 A. 928).....	419
Bryant's Estate (36 A. 738).....	192	Eisenbrey's Estate (36 A. 569).....	125
Burns v. Smith (37 A. 105).....	606	Electric Co.'s Appeal (Gillespie v. Keating, 36 A. 641).....	150
Cahill's Estate (36 A. 563).....	131	Engel's Estate (36 A. 727).....	215
Campbell's Appeal (37 A. 181).....	515	Eppelsheimer's Appeal (36 A. 412).....	81
Cardin's Contested Election (37 A. 1118).....	570	Flaunery v. Jones (36 A. 856).....	338
Cassell's Estate (36 A. 744).....	252	Folk v. Schaeffer (37 A. 104).....	613
Chamberlain v. Maynes (36 A. 410).....	39	Ford v. Knipe (36 A. 729).....	210
Chester Traction Co. v. Philadelphia, W. & B. R. Co. (36 A. 916).....	432	Fowler v. Webster (37 A. 102).....	610
City of Philadelphia v. Gorgas (36 A. 868) ..	296	Frame v. Electric Traction Co. (36 A. 404) ..	49
Clark v. Clark (36 A. 747).....	186	Francis v. Francis (37 A. 120).....	644
Clinch Valley Coal & Iron Co. v. Willing (36 A. 737)	165	Fredericks v. Huber (37 A. 90).....	572
Coal & Iron Co. v. Willing (36 A. 737).....	165	Gillespie v. Keating (36 A. 641).....	150
Cochran v. Adams (36 A. 854).....	280	Gillespie v. Webster (36 A. 928).....	405
Coll v. Easton Transit Co. (37 A. 89).....	618	Gross v. Electric Traction Co. (36 A. 424) ..	99
Commonwealth v. Aiello (36 A. 1079).....	597	Hall v. West Chester Pub. Co. (37 A. 106) ..	561
Commonwealth v. City of Philadelphia (36 A. 404)	12	Halsey's Appeal (36 A. 422).....	57
Commonwealth v. Fletcher (36 A. 917).....	456	Harris v. Philadelphia Traction Co. (36 A. 727)	184
Commonwealth v. Muir (36 A. 413).....	47	Hartranft v. Fussell (37 A. 1118).....	552
Commonwealth v. Pittsburg Illuminating Co. (37 A. 107).....	578	Haverford Loan & Building Ass'n of Philadelphia v. Fire Ass'n (37 A. 179).....	522
Cone v. St. John (36 A. 415).....	25	Heilman v. Lebanon & A. St. Ry. Co. (37 A. 119)	627
Cox's Estate (36 A. 564).....	139	Heimgartner v. Stewart (37 A. 93).....	500
Coyle's Contested Election (37 A. 1118).....	571	Hemphill's Estate (36 A. 406).....	87
Crumley v. Lutz (36 A. 920).....	476	Hemphill's Estate (36 A. 409).....	95
Cumberland Val. R. Co. v. Harrisburg & M. Electric Ry. Co. (36 A. 321).....	12	Heron v. Phoenix Mut. Fire Ins. Co. (36 A. 740)	257
Danville, H. & W. B. R. Co. v. Rhodes (36 A. 648).....	157	Hopkins v. Catasauqua Manuf'g Co. (36 A. 735)	199
De Haven's Appeal (36 A. 564).....	139	Horner v. Warfield (36 A. 418).....	103
		Hovenden v. Pennsylvania R. Co. (36 A. 731)	244

180 PA. ST.—Continued.		Page	
Howell's Estate (37 A. 181).....	515	Ph	
Hunsworth's Appeal (36 A. 406).....	87	Ph	
Hunter's Appeal (37 A. 121).....	630	Ph	
Insurance Co.'s Appeal (36 A. 560).....	125	Pr	
Jagger v. People's St. Ry. Co. (36 A. 807)...	436	C	
Jones' Contested Election (37 A. 1118).....	571	1	
Keating v. McAdoo (36 A. 218).....	5	Re	
Kern v. Howell (36 A. 872).....	315	Re	
Krantz's Appeal (36 A. 570).....	127	Ro	
Krider v. City of Philadelphia (36 A. 405)...	78	4	
Kuhlman's Estate (36 A. 566).....	109	Ro	
Lafferty v. Corcoran (36 A. 860).....	309	Ro	
Laib v. Pennsylvania R. Co. (37 A. 96)...	503	I	
Lauer v. Lauer Brewing Co. (37 A. 87)...	503	Ru	
Laughlin v. Solomon (36 A. 704).....	177	8	
Law v. Billington (36 A. 402).....	84	Sc	
Lawall v. Groman (37 A. 98).....	532	7	
Lawlor's Contested Election (37 A. 92)....	566	Sc	
Leary v. Electric Traction Co. (36 A. 562)	136	7	
Leidy v. Quaker City Cold Storage Co. (36 A. 851)	323	Sc	
Leininger v. Summit Branch R. Co. (36 A. 738)	287	I	
McClain's Estate (36 A. 743).....	231	Sh	
McCrea's Estate (36 A. 412).....	81	Sh	
McDaniel & Harvey Co.'s Estate (36 A. 567)	52	Sid	
McGinn v. Benner (36 A. 925).....	396	Sn	
Mack v. Wright (36 A. 913).....	472	Sn	
McMurtrie v. Black (36 A. 405).....	64	Sto	
McMurtrie v. Black (36 A. 1130).....	66	Th	
Matlack v. Mutual Life Ins. Co. (36 A. 1082)	360	5	
Matlack v. Seventh Nat. Bank (36 A. 1082)	360	Th	
Moorhead's Estate (36 A. 647).....	119	Tr	
Moss v. Philadelphia Traction Co. (36 A. 865)	389	C	
Mulley v. Shoemaker (37 A. 94).....	585	Tr	
National Transit Co. v. United States Pipe Line Co. (36 A. 724).....	224	p	
Nichols' Petition, In re (37 A. 95).....	591	Un	
Northern Cent. Ry. Co. v. Harrisburg & M. Electric Ry. Co. (36 A. 321).....	11	C	
O'Connor v. Scranton Traction Co. (36 A. 866)	444	Vo	
Overseers of Poor of Tunkhannock Borough v. Overseers of Poor of Montrose Borough (37 A. 100).....	582	Wa	
Partridge v. Powell (36 A. 419).....	22	We	
Pennsylvania Co. for Insurance on Lives & Granting Annuities' Appeal (36 A. 549)	125	I	
Philadelphia, City of, v. Gorgas (36 A. 868)	296	Wh	

